

ARTICLES

**INHERENTLY OR EXCLUSIVELY FEDERAL: CONSTITUTIONAL
PREEMPTION AND THE RELATIONSHIP BETWEEN
PUBLIC LAW 280 AND FEDERALISM**

*Kyle S. Conway**

ABSTRACT

The basic principles of Indian-law jurisprudence often appear disconnected with basic principles of American constitutional law. Indian law, however, has a special significance to important issues of state and federal power. This Article seeks to build on the work of prior scholars who have sought to connect Indian law to American constitutional values.

Public Law 280 is a federal law that gives states control over certain aspects of Indian affairs that were traditionally within the scope of the federal government. This Article argues that Public Law 280 is unconstitutional under a doctrine of constitutional preemption. Constitutional preemption is grounded in the system of overlapping sovereignty that forms the structure of the Constitution and should be understood as prohibiting the federal government from delegating inherently and exclusively federal powers to the states. The power to manage Indian affairs is entrusted exclusively to the federal government, and Congress cannot constitutionally delegate it to the states.

The constitutional difficulties raised by Public Law 280 are particularly relevant in an era when issues of federalism are at the forefront of legal discussion. It is often accepted that courts may limit the federal government's authority to exercise powers reserved to the states, but we should also take seriously the idea that courts may limit the states' authority to exercise powers reserved to the federal government.

TABLE OF CONTENTS

INTRODUCTION..... 1324

I. BACKGROUND..... 1326

 A. Federal and State Authority over Indian Affairs Prior
 to the Passage of PL-280 1327

 B. Federal and State Authority over Indian Affairs After
 the Passage of PL-280..... 1329

 C. Legal Challenges to PL-280 1330

* University of Wisconsin Law School, J.D., 2008.

II. THE THEORETICAL BASIS FOR CONSTITUTIONAL PREEMPTION	1333
A. Defining Constitutional Preemption.....	1334
B. Constitutional Creation and Popular Sovereignty.....	1336
1. “Passive” and “Active” Sovereignty	1336
2. Dualism and the Federalist Conception of Sovereignty.....	1338
C. Why the Federalist Conception of Popular Sovereignty Supports Constitutional Preemption.....	1341
III. THE CONSTITUTIONAL PREEMPTION OF INDIAN AFFAIRS....	1345
A. The Framework for Constitutional Preemption.....	1345
1. The Federalist No. 32	1345
2. Judicial Approaches to Constitutional Preemption	1346
B. The Sources of Federal Power over Indian Affairs	1351
1. The Indian Commerce Clause	1351
2. The Treaty Power and Treaty Federalism.....	1356
C. Applying Constitutional Preemption to PL-280	1360
1. PL-280 as a “Withdrawal” of Federal Power.....	1361
2. PL-280 as a “Delegation” of Federal Power	1364
CONCLUSION.....	1368

INTRODUCTION

Perhaps no area of law raises more profound constitutional questions than federal Indian law. The nature of sovereignty,¹ sovereign immunity,² the legal status of states,³ the distribution of power between state, federal, and tribal governments,⁴ and the scope of indi-

¹ See *United States v. Lara*, 541 U.S. 193, 218–26 (2004) (Thomas, J., concurring) (discussing the tensions within Indian-law jurisprudence pertaining to the sovereign status of tribes).

² See *Turner v. United States*, 248 U.S. 354, 357–58 (1919) (explaining how the Creek Nation was a sovereign tribe and was “free from liability for injuries to persons or property due to mob violence or failure to keep the peace”).

³ See Frank W. DiCasteri, *Are All States Really Equal? The “Equal Footing” Doctrine and Indian Claims to Submerged Lands*, 1997 WIS. L. REV. 179, 179–80 (1997) (describing states’ argument that recognizing Indian tribes’ claims to specific lands will lead to some states having less territorial sovereignty than others).

⁴ See *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 165 (1973) (“This case requires us once again to reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations.”).

vidual civil rights⁵ are just a handful of the issues that permeate Indian-law jurisprudence. Yet, the major doctrines of Indian law often appear hermetically sealed off from familiar constitutional principles. Courts have struggled to ground federal Indian law in constitutional text.⁶ Common themes in Indian law such as plenary power, the ward-guardian relationship, treaty abrogation, and tribal sovereignty that exist “only at the sufferance of Congress”⁷ bear no apparent relationship to the core principles of constitutional law. Some scholars have tried to “reinterpret[] the sources of federal Indian law to be more consistent with our general political and ideological heritage.”⁸ This approach sheds light on how current Indian-law jurisprudence is inconsistent with our political traditions. In doing so, it also provides groundwork for more effective legal arguments by binding Indian law to basic principles of constitutional law.

Building on these scholars’ approach, this Article argues that Public Law 280 (“PL-280”) is an unconstitutional delegation of an inherently federal power to the states. PL-280, enacted into law in 1953, sought to assimilate Native Americans into state political systems by granting states extensive power over Indian tribes, including jurisdiction over crimes and civil disputes.⁹ Although PL-280 raises a number

5 See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (interpreting the scope of the Indian Civil Rights Act in the context of claims made against a tribe for discriminating based on sex and ancestry); *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (refusing to apply the requirements of the Fifth Amendment to Indian tribes).

6 The Supreme Court made this point with its rather understated acknowledgment that “[t]he source of federal authority over Indian matters has been the subject of some confusion.” *McClanahan*, 411 U.S. at 172 n.7. See also *Lara*, 541 U.S. at 215 (Thomas, J., concurring) (noting that precedent holding that Congress has the power to control the “the metes and bounds of tribal sovereignty” is not rooted in the Constitution (citation omitted)); David E. Wilkins, *The U.S. Supreme Court’s Explication of “Federal Plenary Power:” An Analysis of Case Law Affecting Tribal Sovereignty, 1886–1914*, 18 AM. INDIAN Q. 349, 349 (1994) (“A central feature of this dynamic dialogue [between American Indian tribes and the United States] is the incongruous relationship between the United States Congress’s exercise of plenary power and the tribes’ efforts to exercise their sovereign political rights.”).

7 *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

8 RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 275 (1980). See also Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115 (2002) (“This essay challenges the federal government and, most notably, the federal judiciary, to honor American legal traditions by abiding by the nation’s own founding principles with respect to the nation’s first people.”); Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 618 (1994) (applying constitutional principles of federalism to the federal-tribal relationship).

9 PL-280 was enacted as part of a general termination policy, during which Congress terminated many tribes as political and legal entities, causing them to lose not only their

of constitutional questions, this Article focuses on one narrow issue: whether the powers that PL-280 grants to states are so inherently federal that they cannot be exercised by the states constitutionally. The small body of case law addressing the constitutionality of PL-280 is premised on the idea that those powers are not inherently federal¹⁰—this Article argues that they are.

In arguing that PL-280 is unconstitutional, this Article also uses PL-280 to illustrate how Indian-law jurisprudence needs to be reconciled with our basic constitutional principles. This Article argues that the Constitution embodies a particular scheme of popular sovereignty and that federalism is an integral part of that scheme. PL-280 demonstrates how these principles are undermined when Congress delegates to states powers that the people placed in the federal government's exclusive control. Accordingly, just as judicial protection of federalism is appropriate when the federal government *exceeds* its constitutional authority; judicial protection of federalism is appropriate where the federal government inappropriately delegates its constitutional authority to the states.

Part I of this Article lays out some of the basic principles of Indian law prior to the passage of PL-280 and surveys the case law addressing the constitutionality of PL-280. Part II argues that the power to manage Indian affairs is constitutionally preempted and that states are precluded from exercising it even if expressly authorized to do so by Congress. Part III argues that because the power over Indian affairs is constitutionally preempted, PL-280 is also an unconstitutional delegation of federal authority. This Article concludes that PL-280 offers valuable insight into the relationship between Indian law and federalism.

I. BACKGROUND

The passage of PL-280 fundamentally changed the power relationships between states, tribes, and the federal government. This Part briefly highlights how this change developed. First, it discusses the general principles of Indian law to provide context for the passage of PL-280 in 1953. Second, it looks at the passage of PL-280 and exam-

sovereign status but also their federal trust relationship. See Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 150–54 (1977) (listing the tribes terminated in the middle of the twentieth century and discussing the effects of termination on those tribes).

¹⁰ See *infra* text accompanying notes 45–69.

ines how courts have interpreted, limited, and addressed the constitutionality of PL-280.

A. *Federal and State Authority over Indian Affairs Prior to the Passage of PL-280*

Indian law has traditionally been based on the principle that Indian tribes are “distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.”¹¹ Accordingly, tribes retain the inherent powers that naturally accompany their status as sovereigns.¹² Inherent sovereignty extends to aspects of the tribe’s internal affairs, but is limited by “the tribe’s dependent status.”¹³ Thus, courts have held that, although tribes are sovereigns, they have naturally lost some of their sovereignty by coming within the power of the United States.¹⁴

In accordance with these general principles of sovereignty, states have traditionally exercised little authority over tribal affairs. The seminal statement of this limitation on state authority is in *Worcester v. Georgia*,¹⁵ in which the Supreme Court overturned Georgia’s conviction of two citizens for residing on Cherokee lands without a license. The Court described the Cherokee tribe as “a distinct community . . . in which the laws of Georgia can have no force.”¹⁶

The traditional view set out in *Worcester* has since shifted. Today, courts generally view Indian law as a question of federal preemption, in which the degree of state power over on-reservation activity depends on whether federal law, including treaties and statutes, precludes state action.¹⁷ Following the modern idea of preemption, courts have relaxed their restrictions on state power over on-reservation activity. States may now prosecute non-Indians for crimes

11 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

12 *See Nat’l Farmers Credit Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985) (“The tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America.”).

13 *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 425 (1989).

14 *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983) (“Indian tribes have been implicitly divested of their sovereignty in certain respects by virtue of their dependent status.”).

15 31 U.S. (6 Pet.) 515 (1832).

16 *Id.* at 520.

17 *See McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973) (“The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.”).

committed against non-Indians on reservation lands.¹⁸ Similarly, states may place taxes on transactions occurring on reservation lands so long as the “legal incidence” of the tax does not fall on the tribe or its members.¹⁹ Further, courts have held that states have “inherent jurisdiction on reservations with regard to off-reservation violations of state law.”²⁰ But, while the basis for the rule has shifted, the general rule remains that states lack authority over tribal affairs unless authorized by federal statute.²¹

In contrast to the limited jurisdiction courts have allowed states to exercise over tribal affairs, courts have held that Congress has “plenary power” over Indian affairs.²² Thus, Indian sovereignty “exists only at the sufferance of Congress and is subject to complete defeasance.”²³ This principle was originally justified by the theory that the federal government has a guardian-ward relationship with the tribes.²⁴ More recently, the Supreme Court has justified it through a broad interpretation of the powers vested by the Constitution’s Indian Commerce Clause.²⁵

Congress has enacted legislation pursuant to its “plenary power” on numerous occasions. The Major Crimes Act, enacted in 1885, granted federal jurisdiction over certain crimes committed on Indian lands.²⁶ The Indian Reorganization Act, enacted in 1934, was designed to stop allotment of Indian lands and promote tribal self-government.²⁷ In 1968, Congress passed the Indian Civil Rights Act, which applied various constitutional limitations to tribal governments.²⁸ These laws have generally had the effect of either enabling federal authority over tribal affairs or expanding individual rights

18 See *New York ex rel. Ray v. Martin*, 326 U.S. 496, 498, 501 (1946) (holding that New York had the power to punish offenses by non-Indians against non-Indians for disturbing the peace and order).

19 *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458–59 (1995).

20 *Nevada v. Hicks*, 533 U.S. 353, 354 (2001).

21 See *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112 (2005) (explaining that state law plays a small role within a tribe’s territorial boundaries).

22 *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

23 *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

24 See *United States v. Kagama*, 118 U.S. 375, 383–84 (1886) (“From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises a duty of protection, and with it the power.”)

25 *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs . . .”).

26 18 U.S.C. § 1153 (2006).

27 25 U.S.C. §§ 461–479 (2006).

28 *Id.* §§ 1301–1303.

against the power of tribal governments. Perhaps the most expansive and important exercise of Congress's plenary power came in 1953 with the passage of PL-280.

B. Federal and State Authority over Indian Affairs After the Passage of PL-280

Enacted pursuant to its "plenary power," PL-280 granted a great deal of authority over tribal affairs to the states. This authority included jurisdiction over "offenses committed by or against Indians"²⁹ in Indian country and "civil causes of action between Indians or to which Indians are parties" occurring in Indian country.³⁰ Thus, criminal law enforcement, which had been primarily enforced by federal and tribal authorities, and civil adjudicative jurisdiction, which had been primarily administered by tribal authorities alone, came under the concurrent jurisdiction of both tribal and state authorities. PL-280 did require states to provide full faith and credit to tribal court judgments.³¹ While it was not the first authorization of state power over tribal affairs, PL-280 was the broadest and most far-reaching.³²

PL-280 was passed for a number of purposes. It was primarily part of an effort to terminate Indian tribes and assimilate Indian populations into state political systems.³³ It also served President Eisenhower's goal of cutting the budget by replacing the Bureau of Indian Affairs ("BIA") budget with state resources.³⁴ Finally, it was seen as an effort to curb perceived "lawlessness" on tribal lands by allowing a state police presence.³⁵

The grant of jurisdiction specifically applied to six states: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.³⁶ Other states were given the option of adopting such jurisdiction if they

²⁹ 18 U.S.C. § 1162(a).

³⁰ 28 U.S.C. § 1360(a) (2006).

³¹ 18 U.S.C. § 1162(c); 28 U.S.C. § 1360(c).

³² Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 697–700 (2006) (noting that prior to PL-280, Congress had placed some reservations in the Midwest and in New York under state jurisdiction, but that with the passage of PL-280 "Congress for the first time injected state criminal jurisdiction into Indian country on a large scale"). While the focus of this Article is on PL-280, the critiques of PL-280 may be applicable to any federal statute authorizing state jurisdiction over Indian affairs.

³³ *Id.* at 701–02 (noting that transferring reservation populations from federal to state jurisdiction would foster the cultural and political integration of Native people as individuals).

³⁴ *Id.*

³⁵ *Id.*

³⁶ 18 U.S.C. § 1162(a) (2006); 28 U.S.C. § 1360(a) (2006).

wished.³⁷ Tribes, on the other hand, were not given the option to consent, but rather, were compelled to accept state jurisdiction.³⁸ When signing PL-280, President Eisenhower expressed “grave doubts” over the lack of a consent provision.³⁹ Although the 1968 Indian Civil Rights Act added a provision requiring tribal consent before state jurisdiction could be granted, it was not applied retroactively.⁴⁰ Not surprisingly, no tribe has ever consented to state jurisdiction.⁴¹

C. Legal Challenges to PL-280

Predictably, several major legal challenges have been brought against PL-280. In *Washington v. Confederated Bands & Tribes of the Yakima Nation*, the Supreme Court upheld PL-280 against an equal protection challenge.⁴² In *Bryan v. Itasca County*, the Court held that PL-280 did not subordinate tribes “to the full panoply of civil regulatory powers, including taxation, of state and local governments.”⁴³ The Supreme Court, however, has never addressed whether Congress had the constitutional authority to enact PL-280. Only a handful of lower courts have ever even addressed this aspect of the constitutionality of PL-280, and none of them offers a particularly satisfactory analysis.⁴⁴

In *Anderson v. Britton*, the Oregon Supreme Court addressed an early challenge to PL-280.⁴⁵ A tribal member convicted in an Oregon

37 Goldberg & Champagne, *supra* note 32, at 701 n.24 (noting that currently four additional states—Florida, Idaho, Montana, and Washington—exercise some degree of jurisdiction under PL-280).

38 *Id.* at 703 (“One of the striking features of Public Law 280, however, is the fact that affected tribes did not consent to its adoption and implementation.”).

39 *Id.*; Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1406–07 (1997). Goldberg-Ambrose also presents some arguments similar to those contained in this Article, primarily that the lack of a consent provision is questionable in “a nation that grounds political legitimacy on ‘consent of the governed,’” and the fact that treaties did not contemplate state jurisdiction and, indeed, often could be understood to specifically exclude it. *Id.* at 1407.

40 Goldberg & Champagne, *supra* note 32, at 703–04.

41 *Id.* at 704.

42 439 U.S. 463 (1979). In this case, the Court upheld a Washington statute taking jurisdiction pursuant to PL-280, despite its discriminatory effect because “‘the unique legal status of Indian tribes under federal law’ permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutional offensive.” *Id.* at 500–01 (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

43 *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976).

44 See *Anderson v. Gladden*, 293 F.2d 463, 468 (9th Cir. 1961); *Agua Caliente Band of Mission Indians’ Tribal Council v. City of Palm Springs*, 347 F. Supp. 42 (C.D. Cal. 1972); *Anderson v. Britton*, 318 P.2d 291 (Or. 1957); *State v. Fanning*, 759 P.2d 937 (Idaho Ct. App. 1988).

45 *Britton*, 318 P.2d at 291.

state court of a murder committed on the Klamath Indian Reservation filed a writ of habeas corpus, arguing that Oregon did not have jurisdiction over his crime.⁴⁶ The court began its analysis from the presumption that Congress has “plenary power over Indian affairs.”⁴⁷ It reasoned that states naturally possess police power over Indians and Indian country, but this authority had been preempted by federal law.⁴⁸ Therefore, when Congress decided to “withdraw” from that field, the state naturally assumed that power, and there was no question of Congress’s authority to delegate.⁴⁹ Finally, the court rejected the plaintiff’s argument that the tribe had only agreed, via treaty, to submit to the laws of the United States, not to the laws of Oregon.⁵⁰ Thus, “[t]he treaty was not the source of federal power, but it was merely a means by which dormant, federal power was exercised.”⁵¹ On habeas review, the Ninth Circuit agreed with the Oregon Supreme Court’s analysis, explaining that Congress’s power over Indian affairs was “not so inherently or exclusively federal as to apply beyond the extent to which the federal government has preempted the field.”⁵²

Other courts examining the constitutionality of PL-280 have come to similar conclusions. In *Agua Caliente Band of Mission Indians’ Tribal Council v. City of Palm Springs*, the tribal council sued the city for a declaratory judgment that the city’s zoning laws were not applicable to tribal lands.⁵³ The federal district court rejected the tribe’s argument that PL-280 was an unconstitutional delegation of authority and noted that although Congressional power over Indians is “plenary” and “absolute,” it is not exclusive.⁵⁴ The court held that Congress was not only able to take jurisdiction under the power to regulate commerce with Indian tribes, but was also able to relinquish such power.⁵⁵ PL-

46 *Id.* at 293.

47 *Id.* at 298.

48 *Id.* at 300. The court reasoned that power over on-reservation activity is not inherently “federal” because (1) non-Indians on reservation are still subject to state laws and (2) Indians off reservation are subject to state laws. *Id.*

49 *Id.*

50 *Id.* at 301.

51 *Id.*

52 *Anderson v. Gladden*, 293 F.2d, 463, 468 (9th Cir. 1961).

53 347 F. Supp. 42 (C.D. Cal. 1972).

54 *Id.* at 52.

55 *Id.* at 53 (noting that Congress has preempted the field of regulation of Indian land until the day when “the Indian has developed culturally to a point where he can deal with and manage his own affairs”).

280, consequently, was “a withdrawal by Congress from its preemption in this field.”⁵⁶

In *Robinson v. Wolff*, another federal district court upheld the constitutionality of PL-280 in a habeas corpus proceeding.⁵⁷ The court reasoned that the Commerce Clause authorized Congress only to regulate commerce and that a statute prohibiting murder “could hardly be placed in the category of regulating commerce.”⁵⁸ Nonetheless, it held that such power was not “within the exclusive purview of the government of the United States” and that it was an acceptable exercise of state police power.⁵⁹ The court exercised great deference to Congress, holding that “the degree to which Congress should exercise its power over Indian affairs is a question, I think, for Congress and not for this court.”⁶⁰ The court also rejected the argument that tribes contemplated being subject only to the jurisdiction of federal courts and not the jurisdiction of state courts.⁶¹

Perhaps the most thoughtful discussion of the constitutionality of PL-280 came from the Idaho Court of Appeals in *State v. Fanning*.⁶² An Idaho court convicted a member of the Coeur d’Alene tribe of driving a motor vehicle while under the influence of alcohol.⁶³ She challenged her conviction in part on the ground that there was no constitutional provision supporting the exercise of power under PL-280.⁶⁴ The court observed that “[o]n first blush, Fanning’s argument has merit,” based on the lack of an enumerated congressional power over Indian criminal jurisdiction.⁶⁵ It then held, however, that, within the context of established “plenary power” over Indian affairs, no constitutional provision denied Congress “the power to regulate the operation of motor vehicles by Indians while in Indian country—or to pass such regulatory power to the states.”⁶⁶ It then acknowledged the theory from *Anderson* that “states possess inherent jurisdiction which lies dormant while federal jurisdiction exists but awakens when fed-

56 *Id.*

57 349 F. Supp. 514 (D. Neb. 1972).

58 *Id.* at 521.

59 *Id.* at 522.

60 *Id.*

61 *Id.* at 522–23.

62 759 P.2d 937 (Idaho Ct. App. 1988).

63 *Id.*

64 *Id.* at 938.

65 *Id.* at 939.

66 *Id.* at 940.

eral jurisdiction is withdrawn.”⁶⁷ The court expressly declined to “decide whether these theories are legally and historically sound.”⁶⁸

These cases loosely suggest two basic theories to support a broad Congressional delegation like that contained in PL-280. Under the first approach, Congress has the authority to “withdraw” from the regulation of Indian law, allowing inherent state authority to “awaken” and fill the void.⁶⁹ Under the second approach, like the one applied in *Fanning*, Congress has the authority to broadly delegate its power over Indian tribes to the states, even if those states would have lacked the power themselves.⁷⁰

This Article argues that neither of these approaches justifies the constitutionality of PL-280 because (1) states lack inherent authority over Indian tribes, and therefore such authority cannot “awaken” when Congress withdraws; and, (2) the power to manage Indian affairs is an inherently and exclusively federal power, and therefore Congress cannot delegate it to states. These conclusions first require an explanation for why certain powers are inherently or exclusively federal and why the Constitution prohibits the states from exercising those powers, even when specifically authorized by Congress to do so. This explanation lies in the principle of constitutional preemption.

II. THE THEORETICAL BASIS FOR CONSTITUTIONAL PREEMPTION

This Part sets out the theoretical basis for constitutional preemption, which will form the basis for the argument that Congress cannot delegate away the powers it delegated in PL-280. It begins by defining the concept of constitutional preemption. It then argues that constitutional preemption is inherent in the structure of the Constitution for two reasons. First, the act of constitutional creation is an act of popular sovereignty, in which the people divide sovereign authority and set out specific limits on the authority of their government agents. Second, by dividing sovereign authority between states and the federal government and vesting specific powers in the federal government, the people created limits on authority that cannot be

⁶⁷ *Id.* at 940 n.3.

⁶⁸ *Id.*

⁶⁹ This theory holds that “states possess inherent jurisdiction over Indians in Indian country, and that this authority lies dormant while federal jurisdiction exists but awakens when federal jurisdiction is withdrawn.” FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 6.09[1], at 538 (2005).

⁷⁰ *Id.* § 6.04[3][a], at 544 (“Courts typically characterize an exercise of federal power authorizing state jurisdiction over Indians in Indian country as a delegation of Congress’s otherwise preemptory authority over Indian nations to the states.”)

breached by acts of “normal politics”—as opposed to genuinely popular (constitution-creating) acts.

A. *Defining Constitutional Preemption*

Constitutional preemption falls at the intersection of two doctrines of constitutional law. The first is the familiar doctrine of preemption. As a basic principle, preemption holds that “valid federal law overrides otherwise valid state law in cases of conflict between the two.”⁷¹ The Preemption Doctrine is generally described as arising from the Supremacy Clause of the U.S. Constitution.⁷² Preemption may occur when Congress explicitly chooses to preempt state law⁷³ or where a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷⁴

A wide variety of powers are shared between the state and federal governments.⁷⁵ What about powers that are not shared? The Supremacy Clause defines both the Constitution and federal statutes as the supreme law of the land.⁷⁶ Therefore, the Constitution itself can preempt state law: a state may be “excluded from a field by express language of the Constitution.”⁷⁷ Accepting the uncontroversial principle that Congress cannot remove a constitutional limitation on the states, it follows that the Constitution might preempt a state law even if Congress has specifically authorized the states to act. This preemp-

⁷¹ Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770 (1994).

⁷² See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 234 (2000) (“As the Supreme Court and virtually all commentators have acknowledged, the Supremacy Clause is the reason that valid federal statutes trump state law.”). *But see* Gardbaum, *supra* note 71, at 768 (“[T]he most common and consequential error is the belief that Congress’s power of preemption is closely and essentially connected to the Supremacy Clause of the Constitution.”).

⁷³ See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (holding that federal law preempts state law “whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose”).

⁷⁴ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

⁷⁵ See Nelson, *supra* note 72, at 225 (“The powers of the federal government and the powers of the states overlap enormously As a result, nearly every federal statute addresses an area in which the states also have authority to legislate (or would have such authority if not for federal statutes).”). The growth of congressional activity in areas shared concurrently with the states has been a major contributing factor in the development of the Preemption Doctrine. See Joseph F. Zimmerman, *Preemption in the U.S. Federal System*, 23 PUBLIUS: J. FEDERALISM 1, 13 (1993) (examining the role of preemption in the unification of certain federal powers).

⁷⁶ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .”).

⁷⁷ JAMES T. O’REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION* 77 (2006).

tion can be thought of as “direct constitutional preemption,” but for simplicity, this Article will refer to it as “constitutional preemption.”⁷⁸

The second doctrine that constitutional preemption draws from is the Dormant Commerce Clause. Under the Dormant Commerce Clause, the Commerce Clause not only affirmatively grants power to Congress but “limits the power of the states to regulate interstate commercial activities.”⁷⁹ The Dormant Commerce Clause can be “waived” by express congressional action, justified by the idea that Congress can undertake “coordinated action” with the states.⁸⁰

Norman Williams’s conception of the Dormant Commerce Clause provides a framework for understanding constitutional preemption. Williams argues against the idea that Congress can “waive” Dormant Commerce Clause restrictions, reasoning that “Congress’s power to regulate interstate commerce is fully effective without adding to it the authority to approve unconstitutional state conduct.”⁸¹ He further rejects two other potential arguments: (1) that the Dormant Commerce Clause can be waived because it is merely a “weak” restraint on state action, unlike other restraints such as the First Amendment or the Equal Protection Clause; and, (2) that Congress has broad authority to authorize otherwise unconstitutional state action.⁸² Williams concludes that “the Constitution’s commitment to economic union and democratic accountability precludes Congress from validating state laws that would otherwise violate the Dormant Commerce Clause.”⁸³

Williams’s idea that the Dormant Commerce Clause cannot be waived illustrates the basic theory of constitutional preemption. Williams focuses on the Constitution’s “aversion to state economic protectionism”⁸⁴ to argue specifically for the exclusively federal nature of

78 The term “constitutional preemption” is not a term of art in the sense described here and therefore has not been used in a consistent manner. Some commentators have used it to describe “areas of federal preemption, created by force of the Constitution, in which the federal courts formulate rules of decision without guidance from statutory or constitutional standards.” Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1025 (1967). To distinguish it from basic preemption under the Supremacy Clause, some have termed the type of constitutional preemption described in this Article as “direct constitutional preemption.” O’REILLY, *supra* note 77.

79 Norman R. Williams, *Why Congress May Not “Overrule” the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 160 (2005).

80 *See id.* at 193 (explaining Dormant Commerce Clause waiver).

81 *Id.* at 202.

82 *See id.* at 203 (noting Williams’s rejection of two widely held beliefs concerning our government’s constitutional structure).

83 *Id.* at 238.

84 *Id.* at 198.

the Commerce Clause. This Article argues more broadly that any power that is “absolutely and totally repugnant to the existence of similar power in the States”⁸⁵ or requires national “harmony and uniformity”⁸⁶ is constitutionally preempted and therefore cannot be exercised by the states, even when expressly authorized by Congress.

B. Constitutional Creation and Popular Sovereignty

Sovereignty is the idea that there can be “but one final, indivisible, and incontestable supreme authority in every state to which all other authorities must be ultimately subordinate.”⁸⁷ Constitutional preemption is dependent on the sovereignty of the people. Popular sovereignty can be thought of as passive, in which the people authorize a legislature to exercise sovereignty in their place, or active, in which the people themselves directly govern. U.S. history encompasses both of these aspects of sovereignty: passive sovereignty during times of normal politics and, active sovereignty during times of constitutional creation.

1. “Passive” and “Active” Sovereignty

The modern idea that the people are the source of sovereignty is often traced back to pre-liberal theorists such as Jean Bodin and Thomas Hobbes.⁸⁸ But, the idea is perhaps most closely associated with John Locke, who posited a social contract in which participants protect their rights to life, liberty, and property by giving up their right to punish violators of the law of nature and agreeing to be subject to the will of the majority.⁸⁹ Under Locke’s social contract, sovereignty is “passive” in the sense that although people must continuously consent to government, they need not continuously partake in the act of self-government.⁹⁰ The legislature dictates the will of the major-

⁸⁵ *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 318 (1851).

⁸⁶ *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920).

⁸⁷ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 345 (1969).

⁸⁸ The conception of popular sovereignty and constitutionalism described in this Part is heavily built upon that set out by Keith Whittington. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 110–23 (1999) (arguing that, in order to further and more accurately and properly understand popular sovereignty and constitutionalism, we should renew our commitment to originalism).

⁸⁹ See JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* §§ 6, 13, at 5, 8 (J.W. Gough ed., Oxford Univ. Press 1948) (1690) (explicating the notion of a social contract and how government works to “restrain the partiality and violence of men”).

⁹⁰ See Joshua Miller, *The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty*, 16 *POL. THEORY* 99, 103–04 (1988) (discussing how Locke, like Hobbes, “described a social

ity and makes decisions about the fundamental law, bound by the law of nature.⁹¹ Locke laid the groundwork for the idea of parliamentary sovereignty that is associated with William Blackstone.⁹² Blackstone envisioned a supreme legislature that is unbound by any external form of fundamental law.⁹³ This vision lacked the American idea of an “unconstitutional” law because the Constitution was defined by the acts and practices of Parliament.⁹⁴

Blackstone’s “passive” sovereignty can be contrasted with more “active” models of sovereignty. These models draw a distinction between the people and the legislature. Locke himself argued that the people retained the right to disestablish the government if it was violating the law of nature and no longer serving the purposes for which it was instituted.⁹⁵ Other theorists, such as Rousseau, argued that sovereignty rested only in the people and was inalienable and indivisible.⁹⁶ Rousseau argued that this sovereignty manifested itself as a “general” will, expressed by a majority vote of an assembled people engaged in public deliberation for the common good without regard for private interest.⁹⁷ The idea of legislative supremacy contrasts with Rousseau’s vision of popular sovereignty: the role of the government was not to create fundamental law, but only to implement and execute fundamental law made by the people. Hence, Rousseau’s famous claim that the English people are “free only during the election of Members of Parliament; as soon as they are elected, it is enslaved, it is nothing.”⁹⁸

contract by which the people agreed to authorize the government to act in their names rather than to exercise direct power themselves”).

91 See LOCKE, *supra* note 89, § 135, at 68 (explaining that the law of nature and self-preservation “stands as an eternal rule to all men and legislators”).

92 Locke is the “modern” source in the sense that Blackstone “built his concept of parliamentary sovereignty on very old models,” particularly on that of Thomas Aquinas. STEPHEN HOLMES, *PASSIONS AND CONSTRAINTS: ON THE THEORY OF LIBERAL DEMOCRACY* 144 (1995).

93 See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *156 (arguing that Parliament “hath sovereign and uncontrollable [sic] authority . . . concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal”).

94 See WOOD, *supra* note 87, at 261 (describing the British system as one in which “there could be no distinction between the ‘constitution or frame of government’ and the ‘system of laws.’ All were one: every act of Parliament was in a sense a part of the constitution, and all law, customary and statutory, was thus constitutional.”).

95 See LOCKE, *supra* note 89, § 222, at 107–08 (explaining the justification for governmental disestablishment).

96 See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 57 (Victor Gourevitch ed., trans., Cambridge Univ. Press 1997) (1762) (explaining a theory of sovereignty under which sovereignty is inalienable and indivisible, and rests exclusively in the people).

97 See *id.* at 60.

98 *Id.* at 114.

2. Dualism and the Federalist Conception of Sovereignty

The American vision of sovereignty during revolutionary times rejected “passive” sovereignty.⁹⁹ The American Revolution was explicitly based on Locke’s idea that the people retained the right to throw off the chains of a tyrannical government.¹⁰⁰ The Constitution, however, forged a third route between “passive” sovereignty and Rousseau’s radical “active” sovereignty. Like Rousseau, the Federalists insisted that only the people could be sovereign;¹⁰¹ they departed from Rousseau by displacing “the people” from active self-government.¹⁰² They understood that it was not possible for the people to be constantly engaged in the kind of civic deliberation necessary for the people to act as sovereigns¹⁰³ and further recognized that self-interest and inattentiveness to public matters would generally reign over active deliberation and public-spiritedness.¹⁰⁴

99 See WOOD, *supra* note 87, at 261 (“It was precisely on this point [of the relationship of the legislature to the fundamental law] that the Americans came to differ with the English.”). See also HOLMES, *supra* note 92, at 144 (observing that the anti-constitutionalist approaches of Thomas Paine and Thomas Jefferson were consistent with the British view, except that “[t]hey located sovereignty in the people . . . and not in the government”).

100 See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it. . .”).

101 The Framers continually referred to the people as the source of sovereignty and emphasized that the political order derived from the people. See, e.g., THE FEDERALIST NO. 49 (James Madison) (“[T]he people are the only legitimate fountain of power . . .”). Thus, the Constitution was not a grant of sovereignty, but an authorization by the people to government officials to act on their behalf. See THE FEDERALIST NO. 78 (Alexander Hamilton) (explaining the agency relationship between the government and its citizens).

102 Joshua Miller describes this relationship as one in which the Federalists merely employed the rhetoric of popular sovereignty, but did not intend for the people to wield power. MILLER, *supra* note 90, at 106–07. Instead, the Federalists described a relationship in which “the people authorized the government to act in their name.” *Id.* at 107.

103 A second point is whether it is even desirable for the populace to engage in full-time, Rousseauan-style pursuit of the general will. See 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 230–31 (1991) (contending that the modern private citizen finds great satisfaction not from an extremely active political life, as the revolutionaries imagined, but from engaging in diverse pursuits like sports, business, and family life); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 173 (2003) (“[E]ither democracy cannot entail massive citizen participation or it is irrelevant to actual practice in modern politics.” (citation omitted)).

104 Madison presupposed that factions would be “united and actuated . . . [and] adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” THE FEDERALIST NO. 10 (James Madison). This, of course, paralleled Rousseau’s fear of factions and his argument:

[W]hen one of these associations is so large that it prevails over all the rest, the result you have is no longer a sum of small differences, but one single difference; then there is no longer a general will, and the opinion that prevails is nothing but a private opinion.

Because the act of constitutional creation is itself a manifestation of popular sovereignty that does not occur in the course of ordinary politics, the American system of sovereignty can be understood as “dualistic democracy.”¹⁰⁵ Under dualistic democracy, self-government vacillates between moments of “active” sovereignty and moments of “passive” sovereignty when the people are not present in the act of self-government. During those times when the people engage in deliberative popular sovereignty—what Bruce Ackerman calls “higher lawmaking”¹⁰⁶—they enshrine their decisions as a restraint on future political activity. The role of a court engaging in constitutional interpretation, according to Ackerman, is to preserve the decisions made by the people during the “constitutional moments” when they engage in an act of true popular sovereignty.¹⁰⁷

The people, of course, can produce only approximations of true popular sovereignty.¹⁰⁸ Nonetheless, dualism offers a helpful guide pointing us toward the idea of constitutional preemption by preventing us from improperly conflating the government and the people.¹⁰⁹ By doing so, it focuses upon the importance of constitutional constraints to preserve the decisions made by the people in moments of

ROUSSEAU, *supra* note 96, at 60.

105 Dualism contrasts the normal operation of government with sporadic acts of true, Rousseau-style popular sovereignty. In Bruce Ackerman’s terms, “[d]ecisions by the People occur rarely, and under special constitutional conditions.” ACKERMAN, *supra* note 103, at 6. They occur through a process of broad support of the people, proposals for constitutional reform, and “mobilized popular deliberation.” *Id.* at 266. Sheldon Wolin has described democracy in terms of “the *political*,” which expresses “moments of commonality when, through public deliberations, collective power is used to promote or protect the wellbeing of the collectivity.” Sheldon S. Wolin, *Fugitive Democracy*, 1 CONSTELLATIONS 11, 11 (1994). During times of “politics,” democracy does not exist at all. Democracy, instead, is “a political moment, perhaps the political moment, when the political is remembered.” *Id.* at 23. And while it is “periodically lost” and “doomed to succeed only temporarily,” it is “a recurrent possibility as long as the memory of the political survives.” *Id.*

106 ACKERMAN, *supra* note 103, at 6.

107 *See id.* at 9–10 (explaining that courts serve democracy by protecting the hard-won principles of a mobilized citizenry against erosion). *See also* WHITTINGTON, *supra* note 88, at 52 (arguing that fidelity to constitutional text is crucial because it represents our capacity to govern ourselves and make binding decisions about our future).

108 Thus, “[a] collectivity cannot formulate coherent purposes apart from all decision-making procedures. ‘The people’ cannot act as an amorphous blob.” HOLMES, *supra* note 92, at 167. The same is true of the creation of the Constitution: “[L]ike all other political institutions, constitution-making bodies are merely imperfect procedural representations of the people.” CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 33 n.54 (2001).

109 *See* WHITTINGTON, *supra* note 88, at 138 (noting that, because the popular sovereign is not active, “a government that claims the full authority of the people is claiming more authority than it rightfully possesses.”).

sovereignty.¹¹⁰ As this Article will later explain, this understanding is crucial to the context of PL-280 because federalism is a particularly important, popular constitutional constraint on both states and the federal government.

The very act of popular constitutional creation provides the strongest basis for an idea of constitutional preemption. The people always retain their sovereignty and authorize the government to act subject to certain limitations.¹¹¹ Federalism is a defining constitutional restraint in the American system. Traditionally, states are thought of as “residual” sovereigns that receive all the powers not delegated to the federal government. Accepting the federalist conception of popular sovereignty, this is only partly true: states are not restrained under the Constitution to enumerated powers,¹¹² but they are still only agents of the people. While states possess unenumerated powers, the Constitution can still act as a popular restraint on state action.

The relationship between popular sovereignty and federalism is central to the doctrine of constitutional preemption. This point is again best illustrated by Norman Williams’s argument that the Congress cannot authorize state action that is otherwise precluded by the Dormant Commerce Clause.¹¹³ Particularly relevant is Williams’s response to William Cohen’s broad argument that “Congress can consent to state laws where constitutional restrictions bind the states but not Congress.”¹¹⁴ Cohen argues that constitutional restraints that apply only to the states, as opposed to restraints that apply only to the federal government, “do not reduce the residuum of sovereignty possessed by the United States but merely allocate it among the federal government and the states.”¹¹⁵ Williams responds first that Supreme Court case law is inconsistent with the idea that Congress can waive

110 See *id.* at 137–38 (discussing the virtues of dualism).

111 Alexander Hamilton described the relationship of the people to the legislature as one of a principal to its agent. The Constitution bound the legislature because the legislature was constrained by the terms the people placed on it when they authorized it to act.

To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, [sic] but what they forbid.

THE FEDERALIST NO. 78 (Alexander Hamilton). According to Hamilton, the Constitution was thus the “fundamental law” derived directly from the people, and the role of the Court was to ascertain and apply that law. *Id.*

112 Madison’s argument contained the caveat that states retain residual power over “all other objects” not enumerated in the Constitution. THE FEDERALIST NO. 39 (James Madison).

113 See Williams, *supra* note 79, at 159.

114 *Id.* at 203 (quoting William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 406 (1983)).

115 Williams, *supra* note 79, at 204.

such federalism-based constitutional restraints.¹¹⁶ Second, he argues that Cohen's theory "invites the same centrifugal forces that the Constitution's allocation of powers was meant to forestall and undermines the principles of accountability underlying our political system."¹¹⁷ Third, he claims that the constitutional allocation of power between states and the federal government could not possibly permit Congress to change that allocation at will.¹¹⁸ Thus Cohen's theory, taken to its logical conclusion, would permit Congress to essentially "vote itself out of existence" or allow Congress to suspend the Constitution altogether.¹¹⁹

C. Why the Federalist Conception of Popular Sovereignty Supports Constitutional Preemption

The two models of sovereignty I have described—parliamentary sovereignty and popular sovereignty—are analogous to two contrasting visions of federalism: the idea of federalism as a compact among sovereign states and the idea of federalism as a compact among sovereign people. If the Constitution is a compact among the people, then a doctrine of constitutional preemption is necessary to preserve the division of power between the states and the federal government set out by the people.

The state-sovereignty model is, in a sense, the analog to the idea of parliamentary supremacy. Under this model, the federal government is merely the product of independent sovereigns joining together and ceding away measures of authority to a central government. These independent sovereigns, then, are free of any constitutional constraints save those in their state constitutions or those to which they agreed in the Federal Constitution. The popular sovereignty approach, on the other hand, is analogous to a more active model of sovereignty. Under this model, neither the states nor the federal government are sovereigns. They are agents of the people who receive their authority to act independently from a popular

116 *See id.* at 204–05 (explaining the Court's inconsistent jurisprudence on the waiver of federalism-based constitutional restraints). Williams points out that the Supreme Court has prohibited Congress from authorizing states to violate both the Contract Clause and the Privileges and Immunities Clause. *Id.* He cites, for example, the Court's holding that "Congress may not authorize the States to violate the Fourteenth Amendment." *Id.* at 208 (quoting *Saenz v. Roe*, 526 U.S. 489, 507 (1999)).

117 Williams, *supra* note 79, at 209.

118 *See id.* at 210 (explaining why the Constitution forbids Congress to freely alter this allocation).

119 *See id.* at 209–10 (discussing the dangers of accepting Cohen's theory).

sovereign that reserves its right to modify or alter the terms of their authority at its will. Thus, constraints on state power in the Federal Constitution are not constraints agreed to by the states as sovereigns, but constraints placed upon them by the sovereign people.

On the surface, the state-sovereignty model is compelling. Much of the Constitution suggests state sovereignty. The Tenth Amendment reserves rights not granted to the federal government to the states and the people.¹²⁰ The president is not elected by the people, but by electors from the states.¹²¹ Finally, the Senate serves to represent the states, not the people as a whole.¹²² Madison, arguing for the structure of the Senate in *The Federalist No. 62*, explicitly appealed to the idea of the Senate as “giving to the state governments such an agency in the formation of the federal government, as must secure the authority of the former.”¹²³ Similarly, according to Madison, the very nature of an enumerated federal government “leaves to the several States a residuary and inviolable sovereignty over all other objects.”¹²⁴

The state-sovereignty model supports what might be thought of as a “thin” doctrine of constitutional preemption. At its most basic level, federalism derives from the idea of a compact among sovereigns for mutual protection. Locke, for example, separated powers into the legislative, executive, and “federative.” The federative power managed the relationship between those governed by the compact with external forces that were not.¹²⁵ Even Montesquieu, an advocate of small republics, acknowledged the utility in a confederation for the

120 See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

121 See U.S. CONST. art. II, § 1 (explaining that democratically elected senators and representatives elect the President).

122 The passage of the Seventeenth Amendment, while shifting the election of senators from state legislatures to state voters, does not diminish the fact that the Senate still represents individual states, given the fact that states are still apportioned two seats regardless of population. See U.S. CONST. art. I, § 3 (describing how the senators were chosen by the legislature); U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the People thereof for six years; and each Senator shall have one Vote.”).

123 THE FEDERALIST NO. 62 (James Madison).

124 THE FEDERALIST NO. 39 (James Madison).

125 Locke draws the distinction between “the execution of the municipal laws of the society within itself” and “the management of the security and interest of the public without.” LOCKE, *supra* note 89, § 147. Under this distinction, the executive power is bound by positive legislation, while the federative power is bound only by the prudence of those who exercise it. *Id.*

common defense.¹²⁶ Madison argued that “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”¹²⁷

Thus, the state-sovereignty model suggests at least a degree of constitutional preemption to which the states are, by the nature of their agreement, precluded from engaging in foreign affairs that implicate the whole. This “thin” notion of constitutional preemption is suggested by the constitutional prohibition on states entering into treaties, alliances, or confederations or making compacts with one another without the consent of Congress.¹²⁸

Despite its appeal, the state-sovereignty model is not a compelling description of the republic. First, such a model is incompatible with the central legal and political arguments the Federalists posed to support ratification. The central theoretical obstacle to the Constitution was the anti-federalist claim that only one sovereign could rule and that the state governments were the only sovereigns in their territory.¹²⁹ Logically, “two sovereignties can not co-exist within the same limits” and placing them together would ultimately lead to “the eventual annihilation of the state sovereignties.”¹³⁰ The Federalists resolved this problem by taking the position that sovereignty could only rest in the hands of the people.¹³¹ They argued that both state and federal governments could exist in the same territory because neither was sovereign; they both were merely agents authorized to act by the sovereign people.¹³² And, because the sovereign people could authorize each government to act within its respective sphere, “[t]hey can no more clash than two parallel lines can meet.”¹³³ Thus, the gist of the federalist argument was that “[t]he state legislatures could there-

126 Montesquieu argued:

In an extensive republic the public good is sacrificed to a thousand private views; it is subordinate to exceptions, and depends on accidents. In a small one, the interest of the public is more obvious, better understood, and more within reach of every citizen; abuses have less extent, and of course, are less protected.

BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 120, at § 16 (Thomas Nugent trans., Hafner Pub. Co. 1949) (1748).

127 THE FEDERALIST NO. 42 (James Madison).

128 U.S. CONST. art. I, § 10.

129 Wood, *supra* note 87, at 527–29.

130 *Id.* at 529 (citation omitted).

131 *See supra* note 101.

132 *See* Wood, *supra* note 87, at 530–31 (describing how neither the state nor federal government could be sovereign because the people can distribute one portion to the state government and one portion to the federal government); Miller, *supra* note 90, at 106 (“The Federalists would have denied that they advocated any sovereignty in the United States except that of the people.”).

133 Wood, *supra* note 87, at 529.

fore never lose their sovereignty under the new Constitution, as the Antifederalists claimed, because they never possessed it.”¹³⁴

Most powerfully, the very illegality of the act of constitutional creation emphasized that it was a popular act, not a state act. Madison defended the decision not to follow the unanimous consent provision in the Articles of Confederation. He cited the Declaration of Independence for the proposition that the people have a right to “abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.”¹³⁵ The Convention, for Madison, was a group of “patriotic and respectable citizen[s]” taking action on behalf of a people who could not “spontaneously and universally . . . move in concert towards their object.”¹³⁶ If the Convention’s proposal were “submitted to the people themselves,” its “supreme authority” would “blot out all antecedent errors and irregularities.”¹³⁷ By conceding the illegality of the Convention, Madison enhanced the authority of the convention by “linking it to the institutional form that Publius’s contemporaries associated most intimately with We the People.”¹³⁸ In other words, the very reason the Constitution was legitimate was that it did not follow the requirements of the Articles of Confederation, but rather was created by the people themselves.

Because constitutional creation is an act of popular sovereignty, the people, through the act of constitutional creation, placed certain powers in the hands of the federal government and reserved others for state governments. Therefore, just as the federal government may not reach beyond its enumerated powers into inherently state powers, states cannot infringe on the realm of inherently federal powers. The “lines” of federalism were drawn by the people themselves, and because neither the states nor the federal government are sovereigns capable of exchanging their powers. Therefore, this limitation applies to delegations of power just as much as it applies to usurpations of power.

134 *Id.* at 531. *See also id.* at 530 (“More boldly and more fully than anyone else, [James] Wilson developed the argument that would eventually become the basis of all Federalist thinking.”). Wilson countered the anti-federalist appeal to state sovereignty with the argument that “sovereignty always stayed with the people-at-large,” who could only delegate it on limited terms to the government. *Id.*

135 THE FEDERALIST NO. 40 (James Madison).

136 *Id.*

137 *Id.* (emphasis omitted).

138 Ackerman, *supra* note 103, at 175. *See also* Whittington, *supra* note 88, at 125 (arguing that the device of a popular convention made “a sharp distinction between government and society and emphasized that ultimate political authority resided in the latter”).

III. THE CONSTITUTIONAL PREEMPTION OF INDIAN AFFAIRS

This Part argues that PL-280 is an unconstitutional delegation of inherently and exclusive federal powers to the states. First, this Part sets out a framework for determining whether a federal power is constitutionally preempted. Second, it looks at the source of federal powers over Indian affairs to conclude that this power is constitutionally preempted. Third, it describes how the doctrine of constitutional preemption should apply to PL-280 in particular.

A. *The Framework for Constitutional Preemption*

The first step in determining whether a state's exercise of a particular federal power is constitutionally preempted is to set out a standard for determining which powers are constitutionally preempted. Although this issue has arisen infrequently, the basic framework for constitutional preemption was set out by Alexander Hamilton in *The Federalist No. 32* and elaborated by the Supreme Court in several cases.

1. *The Federalist No. 32*

In *The Federalist No. 32*, Alexander Hamilton sought to reassure the states that the federal power to tax would not deprive states of their concurrent power to do so.¹³⁹ He argued that if the union were a complete consolidation, the states would retain only those powers provided by the “general will.”¹⁴⁰ Because the union amounted to only a partial consolidation, states would retain all rights of sovereignty except those “*exclusively* delegated to the United States.”¹⁴¹ Three categories of powers would be within the exclusive province of the federal government:

[1] where the Constitution in express terms granted an exclusive authority to the Union; [2] where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and [3] where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.¹⁴²

139 THE FEDERALIST NO. 32 (Alexander Hamilton) (“[I]ndividual States should possess an independent and uncontrolable [sic] authority to raise their own revenues for the supply of their own wants.”).

140 *Id.* at 217.

141 *Id.*

142 *Id.* (emphasis omitted).

By Hamilton's own terms, the "totally contradictory and repugnant" category was intentionally narrow, and it was necessary to distinguish it from those circumstances in which there were conflicts of policy but no "direct contradiction or repugnancy in point of constitutional authority."¹⁴³

Hamilton offered examples of exclusively federal powers. Legislation over the district to be the seat of government was, by express constitutional language, "exclusive."¹⁴⁴ The clause providing the power to lay imposts or duties on imports or exports explicitly prohibited states from exercising that power, subject to the caveat that states could do so with congressional consent.¹⁴⁵ Finally, the clause providing Congress the power "to establish an [sic] uniform rule of naturalization" was necessarily exclusively federal; otherwise, the rule would not be uniform.¹⁴⁶

The Federalist No. 32 offers a clear and simple framework for understanding the idea of constitutional preemption. It does not, however, resolve the question of whether Congress can constitutionally delegate its authority over an exclusively federal power to the states. Several Supreme Court decisions shed further light on this question.

2. *Judicial Approaches to Constitutional Preemption*

In *Cooley v. Board of Wardens*, the Supreme Court applied Hamilton's constitutional-preemption framework.¹⁴⁷ *Cooley* reviewed a Pennsylvania law regulating the piloting of ships into the Port of Philadelphia.¹⁴⁸ The Court, accepting that the regulation was within the scope of the Commerce Clause, pointed to a congressional act of 1789 stating that piloting "shall continue to be regulated in conformity with the existing laws of the States" until further congressional action.¹⁴⁹ The Court held:

If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power.¹⁵⁰

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.* at 218 (emphasis omitted).

147 *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1852).

148 *Id.* at 311–12.

149 *Id.* at 317.

150 *Id.* at 318.

The Court then considered “whether the grant of the commercial power to Congress did *per se* deprive the States of all power to regulate pilots.”¹⁵¹ It suggested two ways that this could occur: (1) if state power was expressly excluded by the text of the Constitution; or, (2) if the nature of the power was “absolutely and totally repugnant to the existence of similar power in the States.”¹⁵²

Ultimately, the Court held that the power to regulate pilots did not “admit only of one uniform system, or plan of regulation” and therefore was not exclusively in the hands of Congress.¹⁵³ This conclusion was supported by a tradition of state regulation in the area and the necessity of conforming policy to local needs based upon local knowledge.¹⁵⁴ As a parting comment, the Court suggested a strong form of Constitutional preemption: if the Commerce Clause did deprive states of their power to regulate pilots, “it may be doubted whether Congress could, with propriety, recognize them as laws and adopt them as its own acts.”¹⁵⁵

The power most clearly “repugnant to the existence of similar power in the States”¹⁵⁶ is the power over foreign affairs. The idea that foreign affairs are constitutionally preempted is essential to even the thinnest conception of federalism. In fact, the Supreme Court has used the language of constitutional preemption in cases involving foreign policy and international affairs. The Court has held: “The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with *full and exclusive responsibility* for the conduct of affairs with foreign sovereignties.”¹⁵⁷ This principle draws directly from the principles of federalism embodied in Locke’s federative power, Montesquieu’s description of the confederate republic, and Madison’s argument that, if federalism means anything, it means the central government possesses sole authority to speak for the units on matters of foreign policy.¹⁵⁸ It is also consistent with the

151 *Id.*

152 *Id.* Following the framework set out in *The Federalist No. 32*, the Court cited the power to legislate for the District of Columbia as an example of one such power. *Id.*

153 *Id.* at 319.

154 *See id.* (“[L]egislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.”)

155 *Id.* at 321.

156 *Id.* at 318.

157 *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (emphasis added). The Court further explained: “Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be entirely free from local interference.” *Id.*

158 *See supra* notes 125–27.

Framers' view that the primary end of the federal government was collective safety and security.¹⁵⁹

Zschernig v. Miller demonstrates the broad scope of the Court's approach to the constitutional preemption of foreign affairs.¹⁶⁰ *Zschernig* concerned an Oregon law that placed limitations on the right of non-resident aliens to inherit property in Oregon.¹⁶¹ One of these limitations was that the foreign heirs must have the right to receive the proceeds "without confiscation."¹⁶² Determining whether confiscation occurred "led into minute inquiries concerning the actual administration of foreign law."¹⁶³ It would have required Oregon probate judges to make determinations regarding whether foreign citizens enjoyed the same rights as Oregon citizens.¹⁶⁴ According to the Court, its earlier precedent did not permit "[t]hat kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government."¹⁶⁵ The Court went on to emphasize the exclusive nature of federal control over foreign affairs:

The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, [the states] must bow to the superior federal policy Certainly a State could not deny admission to a traveler from East Germany nor bar its citizens from going there. If there are to be such restraints, they must be provided by the Federal Government. The present

159 The authors of *The Federalist* believed that "[t]he utility of such a Union, and therefore the chief ends it will serve, is that it will strengthen the American people against the dangers of 'foreign war' and secure them from the dangers of 'domestic convulsion.'" Martin Diamond, *Democracy and The Federalist: A Reconsideration of the Framers' Intent*, 53 AM. POL. SCI. REV. 52, 62 (1959). These themes are repeated throughout the first set of the Federalist Papers, entitled "The utility of the UNION to your political prosperity." THE FEDERALIST NO. 1 (Alexander Hamilton). John Jay argued that "[a]mong the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be first." THE FEDERALIST NO. 3 (John Jay). He went on to argue that in the case of war, the federal government "most favors the *safety* of the people." *Id.* Furthermore, Jay argued that, for a number of reasons, one federal government would be better equipped to avoid foreign wars than state governments. THE FEDERALIST NO. 4 (John Jay). The Federalists also frequently cited ancient Greek confederacies as examples of federal systems that ultimately failed due to weakness, disunity, and decentralization. CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* 104–10 (1994).

160 389 U.S. 429 (1968).

161 *Id.* at 430–31.

162 *Id.* at 431.

163 *Id.* at 435.

164 *Id.* at 440 (holding that the statute "seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own").

165 *Id.* at 436.

Oregon law . . . has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.¹⁶⁶

At least in the area of foreign affairs, the idea of constitutional preemption has been adopted by the Supreme Court. But, how does constitutional preemption apply to other powers? More importantly, how does it apply when Congress actually delegates its own power to the states?

This precise situation was addressed in *Knickerbocker Ice Co. v. Stewart*.¹⁶⁷ In *Knickerbocker*, the Supreme Court addressed the validity of a law that applied the workmen's compensation laws of the states to injuries that occurred within maritime and admiralty jurisdiction.¹⁶⁸ The Court held that the very nature of the Article I grant prevented Congress from delegating it:

The subject was intrusted [sic] to [Congress] to be dealt with according to its discretion—not for delegation to others [S]uch an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant.¹⁶⁹

According to the Court, if Congress could allow states to make their own laws regarding maritime employment, “there [would] at once arise the confusion and uncertainty which the Framers of the Constitution both foresaw and undertook to prevent.”¹⁷⁰

Nonetheless, nearly forty years later, the Court took a much more deferential approach to constitutional preemption. A situation relatively analogous to the situation of PL-280 arose in *United States v. Sharpnack*.¹⁷¹ *Sharpnack* involved the prosecution of a sex crime under the 1948 Assimilative Crimes Act.¹⁷² The Act applied state criminal law to crimes committed in federal enclave jurisdiction, even if those laws were passed subsequent to the passage of the Act.¹⁷³ The Court held that this did not constitute a delegation of power to the states, but was simply a matter of Congress adopting state law as its own.¹⁷⁴

¹⁶⁶ *Id.* at 440–41 (citations omitted).

¹⁶⁷ *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

¹⁶⁸ *Id.* at 150–51.

¹⁶⁹ *Id.* at 164.

¹⁷⁰ *Id.* at 166.

¹⁷¹ 355 U.S. 286 (1958).

¹⁷² *Id.* at 286–87.

¹⁷³ *Id.* at 287–88.

¹⁷⁴ *Id.* at 293–94 (“The basic legislative decision made by Congress is its decision to conform the laws in the enclaves to the local laws as to all offenses not punishable by any enactment of Congress.”).

Justice William Douglas dissented, laying out an argument that applies equally to the delegation in PL-280.¹⁷⁵ He argued that, although Congress can set up a scheme and leave it up to the states to fill in the details:

[I]t is Congress that must determine the policy, for that is the essence of lawmaking. Under the scheme now approved a State makes such federal law, applicable to the enclave, as it likes, and that law becomes federal law, for the violation of which the citizen is sent to prison.

Here it is a sex crime on which Congress has never legislated. Tomorrow it may be . . . a law that could never command a majority in the Congress or that in no sense reflected its will [The defendant] is entitled to the considered judgment of Congress whether the law applied to him fits the federal policy. That is what federal lawmaking is.¹⁷⁶

Justice Douglas argued that while the Act was more convenient for Congress, “convenience is not material to the constitutional problem.”¹⁷⁷ The law simply amounted to “a State, not the Congress,” exercising Article I legislative powers.¹⁷⁸

The majority in *Knickerbocker* and Douglas’s dissent in *Sharpnack* both framed the issue in terms of nondelegation rather than preemption, but read together with *Cooley*, they help to refine the framework set up by Hamilton. Hamilton’s third category of exclusively federal powers might be separated into (1) powers that most seriously demand the harmony and uniformity of national action, and (2) powers that deal with matters external to the union or necessary for to the regulation of its members.

How do we define these two categories of inherently federal powers? Matters of foreign policy would fall in this category, and *Knickerbocker* suggests that admiralty and maritime laws would as well. Beyond this, precedent offers little insight into which constitutional powers are so inherently federal as to meet this test. One might imagine other Article I powers falling in this category—naturalization, the coining of money, the regulation of federal courts—at least insofar as these powers do not overlap with state police powers.¹⁷⁹ Another power that more directly relates to the regulation of relations among states is the congressional power to consent to an interstate compact.¹⁸⁰ There is something uniquely federal about these powers

¹⁷⁵ *Id.* at 297 (Douglas, J., dissenting).

¹⁷⁶ *Id.* at 299.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See U.S. CONST. art. I, § 8.

¹⁸⁰ U.S. CONST. art. I, § 10 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another state . . .”).

that Congress could not constitutionally delegate them to the states. The next Subpart examines the power to manage Indian affairs and concludes that it is constitutionally preempted under the standards I have described.

B. The Sources of Federal Power over Indian Affairs

Building on the framework set out in *The Federalist No. 32* and further defined in *Cooley* and *Knickerbocker*, this Subpart argues that the power to manage Indian affairs is inherently and exclusively federal. This determination is based on the two most plausible sources of federal power: “internal” sources, namely the Indian Commerce Clause,¹⁸¹ and “external” sources, namely the Treaty Power¹⁸² and treaties themselves.

1. The Indian Commerce Clause

The Constitution makes only a few references to Indians or Indian tribes, so caution is necessary when attempting to locate an explicit constitutional source of federal power over Indian affairs. Of these explicit references, the most important provision has been the Indian Commerce Clause.¹⁸³

The Commerce Clause grants Congress the power “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”¹⁸⁴ Particularly helpful for our purposes is the Dormant Commerce Clause, implying “limitations on the exercise of state authority over the same subject.”¹⁸⁵ Although, as discussed earlier, this doctrine is often understood in terms of the Interstate Commerce Clause, Robert Clinton has put forth a powerful argument in

¹⁸¹ U.S. CONST. art. I, § 8, cl. 3.

¹⁸² U.S. CONST. art. II, § 2, cl. 2.

¹⁸³ In one sense, the most significant reference to Indians in the Constitution is in the Apportionment Clause. Both as originally written and as amended by the Fourteenth Amendment, this clause exempts “Indians not taxed” from being counted for the purposes of apportioning congressional seats. U.S. CONST. amend. XIV, § 2. On the one hand, the clause can be understood as a restraint on state power, insofar as it provides “that Indians not taxed by the state are not within the polity of the state, especially not subject to its jurisdiction.” Monette, *supra* note 8, at 630 n.83. On the other hand, given the integration of tribes into the federal system, the clause may “support the contention that the tribes are now as much within our system as without.” *Id.* This Article does not discuss the Apportionment Clause in depth because it is not a source of federal power, but merely a description of how to apportion taxes and representation.

¹⁸⁴ U.S. CONST. art. I, § 8, cl. 3.

¹⁸⁵ Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1060 (1995).

favor of a Dormant Indian Commerce Clause based on original understanding and historical practice.¹⁸⁶ Clinton offers a crucial insight into the principles that take us towards constitutional preemption.

The Indian Commerce Clause originated from the tensions between state and federal power that developed during the confederation period. Early drafts of the Articles of Confederation contained provisions seeking to nationalize authority over Indian affairs, and an initial proposal based on these drafts gave the national government “sole and exclusive” power in “managing all Affairs with the Indians.”¹⁸⁷ To accommodate states that insisted on managing their own affairs with the Indians, the ultimate provision contained the proviso “provided that the legislative right of any State within its own limits be not infringed or violated.”¹⁸⁸ The negotiation of federal treaties continued throughout the confederation period,¹⁸⁹ and the Northwest Ordinance of 1787, which created a government for western territories, contained broad protections for tribes and greatly centralized power to deal with them in the national government.¹⁹⁰ Nonetheless, the confederation period was plagued by tensions between the state and national governments that “had led the young nation to the brink of Indian warfare on several fronts.”¹⁹¹

The limited evidence of the Indian Commerce Clause’s passage suggests that its purpose was to centralize power to deal with tribes in the hands of the federal government. James Madison proposed an initial draft of what would become the Indian Commerce Clause based on his belief that the new constitution must contain a provision

186 *Id.* at 1058.

187 *Id.* at 1100.

188 *Id.* at 1103.

189 *Id.* at 1118 (providing background by describing how the confederate government reached treaty agreements with Indian tribes).

190 *Id.* at 1127 (stating that the ordinance contained provisions that “were clearly designed to prevent intrusions upon unceded land”). The most pertinent provision stated

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

An Ordinance for the Government of the Territory of the United States North West of the River Ohio, 1 Stat. 50 (1789). *See also* Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 933 (1995) (“[T]he Northwest Ordinance is a constitutional document because it authoritatively expresses a set of principles that have guided national political action.”).

191 COHEN, *supra* note 69, § 1.02[3], at 24.

to prevent state encroachments on federal authority.¹⁹² The effect of the Indian Commerce Clause was to remove the caveat in the Articles of Confederation protecting state authority to manage affairs with Indians. Paul Prucha has argued that the “lack of prolonged debate on the question was a sign of agreement within the convention that Indian affairs should be left in the hands of the federal government.”¹⁹³ Clinton, similarly, argues that the lack of debate shows that the convention was “curing rather than creating,” and that their efforts simply served to “ratify this dominant view, an action that required and consumed little debate.”¹⁹⁴

The view that the Indian Commerce Clause was designed to centralize power over Indian affairs is further supported by the arguments put forth in *The Federalist*. John Jay argued that the centralization of Indian affairs would prevent future turbulence of the kind experienced during the confederation period:

Not a single Indian war has yet been occasioned by aggressions of the present Federal Government, feeble as it is, but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants.¹⁹⁵

Similarly, Madison argued that, under the new Constitution, “[t]he regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory.”¹⁹⁶ First, it was unclear under the Articles when Indians were “deemed members of a State.”¹⁹⁷ Second, he argued that “how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.”¹⁹⁸ Thus, the Articles “inconsiderately endeavored to accomplish impossibilities.”¹⁹⁹

192 See Clinton, *supra* note 185, at 1152 (claiming that Madison “saw the problem as a matter of preventing state encroachment on the exercise of this national authority”).

193 PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 68 (1994).

194 See Clinton, *supra* note 185, at 1158.

195 THE FEDERALIST NO. 3 (John Jay).

196 THE FEDERALIST NO. 42 (James Madison).

197 *Id.*

198 *Id.*

199 *Id.*

In sum, Madison “sought to eliminate any and all claims to inherent state power over Indian affairs.”²⁰⁰ The incompatibility of overlapping state and tribal authority demands a uniformity of federal policy that regulation of interstate commerce does not.

This understanding does not necessarily conflict with the general Dormant Commerce Clause rule that “Congress may choose to overrule the judicial invalidation of a particular state regulation by statutorily authorizing it.”²⁰¹ The prevailing arguments regarding the Dormant Indian Commerce Clause do not explicitly claim that it might limit the authority of the federal government to transfer its power to the states, although that certainly may be an implication.²⁰² Under a straightforward Dormant Commerce Clause theory, PL-280 would be a perfectly valid congressional authorization of state power.

What moves the Indian Commerce Clause from merely dormant to constitutionally preempted is that delegating power over Indian affairs to the states creates a problem of overlapping sovereignty that does not arise in normal Commerce Clause matters. This point is illustrated by the anti-federalist argument that sovereignty was indivisible and two sovereigns could reign over the same territory simultaneously.²⁰³ The Federalists maintained that such a problem would not arise under the Constitution because only the people were sovereign.²⁰⁴ The people could delegate authority to separate governments which would not pit the people against themselves any more than “two parallel lines [could] meet.”²⁰⁵ The specific structure of the Constitution—a supreme government of enumerated powers and governments possessing residual powers—offered a practical resolu-

²⁰⁰ Clinton, *supra* note 185, at 1245.

²⁰¹ Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 570 (1987).

²⁰² See Clinton, *supra* note 185, at 1057–58 (rejecting the argument that the Indian Commerce Clause “imposed no judicially enforceable restraints on the exercise of state power over persons or property in Indian country.”); Stephen M. Feldman, *Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law*, 64 OR. L. REV. 667, 669 (1986) (proposing a methodology for applying the Dormant Indian Commerce Clause in the context of state infringements upon tribal sovereignty); Richard D. Agnew, Note, *The Dormant Indian Commerce Clause: Up in Smoke?*, 25 AM. INDIAN L. REV. 353, 379 (2001) (“A Dormant Indian Commerce Clause would provide the federal government the ability to arm itself with a new and more rigorous standard of review to protect the Indians from state incursions while exercising its fiduciary responsibility with the tribes.”).

²⁰³ See Wood, *supra* note 87, at 527–28 (describing the anti-federalist argument that “two coordinate sovereignties would be a solecism in politics . . . it would be contrary to the nature of things that both should exist together—one or the other would necessarily triumph in the fullness of dominion”).

²⁰⁴ *Id.* at 530.

²⁰⁵ *Id.* at 529.

tion of these views by preventing two popularly-authorized sovereigns from colliding.

This overlapping sovereignty cannot be reconciled with the structure of the Constitution.²⁰⁶ A comparison of the Indian Commerce Clause to the Interstate Commerce Clause shows the problem with this situation. PL-280 is the Indian Commerce Clause analogy to a law passed under the Interstate Commerce Clause granting a state the authority to regulate railroad traffic in another state. These issues of sovereignty have perhaps never arisen in a Dormant Commerce Clause setting because it is patently obvious that the structure of the Constitution does not allow Congress to extend one state's jurisdiction into another state.

The Indian Commerce Clause presents a strong basis for the argument that power over Indian affairs is constitutionally preempted. But, it only provides a basis for constitutional preemption if it provides a satisfying basis for federal power in the first place. It is true that the Supreme Court has held that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."²⁰⁷ But, only a century earlier, the Court had found it to be a "very strained construction of this clause"²⁰⁸ to authorize the federal government to enact criminal laws governing on-reservation activity by tribal members. While the original understanding of the clause suggests a centralization of the authority to manage Indian affairs in the federal government, it also suggests that federal authority was limited to the authority to engage in the kinds of bilateral relationships akin to those governed in the Foreign Commerce Clause.²⁰⁹ More to the point, the idea that the clause might give Congress authority to govern Indians directly is in-

206 James Wilson argued that the people "can distribute one portion of power to the more contracted circle called State governments; they can also furnish another proportion to the government of the United States." *Id.* at 530–31. But, the Federalists claim that "[t]he two governments act in different manners, and for different purposes" contradicts the idea that two sovereigns—states and tribes—might exercise the same powers over the same territories. *Id.* at 529.

207 *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

208 *United States v. Kagama*, 118 U.S. 375, 378–79 (1886).

209 Clinton, *supra* note 8, at 131 ("Since the Commerce Clause governs commerce with foreign nations, with which the United States maintained diplomatic contact, the covered commerce, at least in that context, must be the United States' side of various bilateral exchanges with foreign nations, including not only trade with those nations . . .").

consistent “with the basic Lockean popular delegation notions that animated the drafting of the [Constitution].”²¹⁰

For these reasons, despite the importance of the Indian Commerce Clause, federal power over Indian affairs must be supplemented by another constitutional source. Richard Monette has argued, “[T]he ‘Indian Commerce Clause’ alone is not a source of Union power over the tribes. Such Union power requires the Treaty Clause and a treaty upon which to hang an inter-sovereign relationship.”²¹¹ To fully understand constitutional preemption in terms of the state-federal-tribal relationship, we must turn to the treaty power.

2. *The Treaty Power and Treaty Federalism*

The Treaty Clause offers a natural solution to the problems that result from reliance on the Indian Commerce Clause as the source of federal power over Indian tribes. This is not because the Treaty Clause by itself provides any source of federal authority over Indian tribes. Instead, it provides a mechanism for treaty federalism, a federal relationship created through treaties made by governments rather than through constitutions made by the people. Through treaty federalism, an independent sovereign cedes away some measure of its sovereignty to a central government, via treaty, in exchange for certain rights and responsibilities as a member unit in the federal relationship.

Theories of treaty federalism have sought to justify and define the scope of federal power over Indian tribes independent of the Constitution. Advocates of treaty federalism argue that Indian tribes have, through treaties, entered into a federal relationship with the federal government.²¹² Tribes exist on the same “plane” of sovereignty as states, although they do not play exactly the same role in the federal system as states do.²¹³ By entering into a federal relationship with the union, tribes gave up their status as international actors, but retained

210 *Id.* at 133. Clinton reaches this conclusion based on the straightforward logic that “Indians were not then citizens, not represented in the Constitutional convention, and not participants in the state ratification debates.” *Id.*

211 Monette, *supra* note 8, at 640.

212 *See* Barsh & Henderson, *supra* note 8, at 275 (describing the tribal federalism procedure requiring the consent of the tribal people and two-thirds of the Senate).

213 *See* Monette, *supra* note 8, at 619 (“[T]he relationship between the states and the tribes should reflect the relationship between two states as sovereigns within the same system, on the same plane, whose sovereign spheres do not overlap but influence each other through the federal political processes.”); *see also* Barsh & Henderson, *supra* note 8, at 270 (describing treaties as “political compacts irrevocably annexing tribes into the federal system in a status parallel to, but not identical with, that of the states”).

their residual powers, much like the states retained their residual powers as described in the Tenth Amendment.²¹⁴

Treaty federalism provides not only a powerful descriptive model for the federal-state-tribal relationship, but also a strong normative model, for several reasons. First, it resolves the crucial issue of “consent of the governed.”²¹⁵ The Constitution does not provide a satisfying expression of consent by Indian tribes because tribes did not participate in the constitutional convention or otherwise have a voice in the creation of the federal republic.²¹⁶ Although they are an imperfect expression of consent, treaties provide the vital link through which tribes have consented to the authority of the federal government.²¹⁷ Thus, treaty federalism reinforces the basic principles of popular sovereignty that date back to Bodin, Hobbes, Locke, and Rousseau, and were reinforced by the federalist vision of the Constitution.²¹⁸

Treaty federalism is also a useful normative model because it answers many of the pragmatic concerns that weaken stronger theories of tribal self-government. It recognizes that tribes have, to some de-

214 Monette argues that the Supreme Court’s application of Tenth Amendment principles to the state-federal relationship is directly analogous to its application of those principles to the tribal-federal relationship. Monette, *supra* note 8, at 634–37. Thus, “the source of sovereignty is the people or their local government unit, whether states or tribe; and the directional transfer of that sovereign authority is from those local governments or their people to the Union, not vice-versa.” *Id.* at 636–37. For Barsh and Henderson, the relevance of the Tenth Amendment is the idea that the people of the states retained their right to form (or re-form) local political structures, as long as they remain within the bounds of the Constitution. Barsh & Henderson, *supra* note 8, at 261–62. By analogy, if a treaty “did not relinquish the right to self-government by express terms, then the people of the tribe must retain the right, enjoyed previously, of changing the form of their government.” *Id.* at 262.

215 See Monette, *supra* note 8, at 632 (“[T]he treaty provides perhaps the best answer to one question which seems to plague scholars of Indian law Have American Indian people consented to American government? . . . In the treaties, tribes *authorized* or at least consented to the federative nature of the Union/tribe relationship.”).

216 See Clinton, *supra* note 8, at 133 (noting that the Indians were not citizens at the time of the Constitutional Convention, were not represented in the Convention, and were not participants in the state ratification debates); see also Monette, *supra* note 8, at 632 (arguing that treaty negotiations instead “served for tribes the function that the constitutional convention served for states”).

217 Barsh & Henderson, *supra* note 8, at 276 (describing how some tribes required a tribal consensus to enter into a treaty with the U.S. and how federal authority arose out of this consensus).

218 See *id.* at 278–79 (explaining how the will of tribe was essential for treaty federalism). Barsh and Henderson explicitly reject the idea that federal power over Indian tribes arose out of “conquest,” arguing that, treaty federalism “rests on principles more consonant with American government.” *Id.* at 279.

gree, entered into the fold of the federal system.²¹⁹ Russell Lawrence Barsh and James Youngblood Henderson, for example, advocate treaty federalism as an alternative “for the creative establishment of governments in circumstances where conventional statehood would be economically, socially or politically inappropriate, but where both sovereignties recognize the expedience of permanent union.”²²⁰ Although theoretically, treaty federalism is directly dependent on the terms of the treaties, a balancing of pragmatic concerns might suggest a uniform theory of treaty federalism that defines the rights and responsibilities of all tribes in relation to the federal government.²²¹ The treaty relationship, as a whole, forms a set of constitutional norms defining the union-tribe relationship on a similar basis to the union-state relationship. In doing so, the treaty clause preserves the constitutional structure of a government supreme over certain enumerated powers operating on mutual terms with a government that exercises residual powers: the theoretical structure used to resolve the anti-federalist concern about the unitary nature of sovereignty.

The federal-tribal relationship created by treaty federalism supports the doctrine of constitutional preemption and precludes states from exercising political power over Indian affairs for two reasons. First, it supports the proposition that federal power over Indian affairs is “absolutely and totally repugnant”²²² to a similar power in the states. It does so by emphasizing that federal power over Indian affairs arises from a structure external to the constitution itself. Treaties are delegations of power—with reciprocal duties of good faith—from tribal governments to the sovereign federal government, not from tribal members to the federal government.²²³ Tribes vested power in the federal government via their authority to make treaties as independent governments, not merely as part of “the people . . . composing the distinct and independent States” that formed

219 *Id.* at 274 (“Regardless of their original intent, [treaties] have resulted in a complete political and economic integration of tribes into the federal system. Separation is practically impossible.”).

220 *Id.* at 275.

221 Barsh and Henderson advocate a constitutional amendment affirming treaty federalism, suggesting “a standardization of tribal powers on the state model to avoid the prospect of endless judicial interpretations and tribe-by-tribe distinctions.” *Id.* at 280. They also argue that, because of the complete integration of tribes into the federal system, “it is all the more essential that their political rights be secured on a fixed and certain basis.” *Id.* at 275.

222 *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 318 (1851).

223 Monette, *supra* note 8, at 631–32.

the Constitution.²²⁴ The powers arising from treaty federalism do not flow from the popular sovereign that created the Constitution, but instead flow directly through the Treaty Clause, a uniquely federal mechanism for political agreement.²²⁵ As the Supreme Court has emphasized, the power to engage in foreign relations is exclusively federal.²²⁶ While tribes may no longer be “foreign” or “international” actors in the truest sense,²²⁷ the fact that the federal-tribal relationship came into being through treaties emphasizes the inherently federal nature of the power to manage Indian affairs.

Second, treaty federalism supports the constitutional preemption of Indian affairs by placing the focus of federal power on the treaty relationship itself. Treaties themselves sometimes contained terms explicitly precluding state inference with tribal affairs.²²⁸ But, explicit terms are even less important than the principles that drive the treaty process. A central principle is that treaties are “not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”²²⁹ Just as the nature of the Constitution would logically prohibit the federal government from giving one state political power over another state, the nature of treaty federalism logically prohibits the federal government from delegating away the power that treaties vested solely in it. This principle is consistent with the Lockean idea that consent-based government authority must remain

224 THE FEDERALIST NO. 39 (James Madison); see also Prucha, *supra* note 193, at 65 (“Consideration of the Indians as ‘nations’ not as members of the states seemed essential if congressional authority was to prevail over that of states . . .”).

225 Along with the Indian Commerce Clause, the Supreme Court has pointed to the treaty clause as a mechanism through which Congress has gained legislative power over Indian tribes. See *United States v. Lara*, 541 U.S. 193, 201 (2004) (“The treaty power does not literally authorize Congress to act legislatively But . . . treaties made pursuant to that power can authorize Congress to deal with matters with which otherwise Congress could not deal.” (citations and quotations omitted)).

226 See *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) (describing foreign and international affairs as “matters which the Constitution entrusts solely to the federal government”); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (holding that the federal government has “full and exclusive responsibility for the conduct of affairs with foreign sovereignties”). The Constitution also explicitly prohibits states from engaging in treaty-making. U.S. CONST. art. I, § 10.

227 See *Monette*, *supra* note 8, at 631 (noting that treaties with tribes represent an “international relationship between two independent sovereigns”).

228 Perhaps the most famous example of this is the treaty discussed in *Worcester v. Georgia*, in which, as described by Chief Justice Marshall, the United States “acknowledge[d] the said Cherokee nation to be a sovereign nation, authorized [sic] to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America, in reference to acts done within their own territory.” 31 U.S. (6 Pet.) 515, 530 (1832).

229 *United States v. Winans*, 198 U.S. 371, 381 (1905).

in the hands of the entity to which the people grant such authority.²³⁰ Therefore, treaty federalism constitutionally preempts the exercise of state power over Indian affairs through the very logic of the treaty relationship. Because the Framers sought to remedy the turbulence that resulted when individual states dealt with Indian tribes,²³¹ placing the focus of federal power on the logic of the treaty relationship emphasizes the importance of “harmony and uniformity” in Indian law.

In these ways, treaty federalism squarely supports the idea that power over Indian affairs is inherently federal and constitutionally preempted. It provides both an accurate conception of the nature of the federal-tribal relationship and a legitimate basis for federal power grounded in constitutional norms of popular sovereignty and federalism. Treaty federalism grounds the federal power over Indian affairs in a source external to the Constitution itself: treaties that expressly and impliedly declined to authorize state power over Indian tribes. Because treaties so fundamentally define the relationship of tribes to the union, they have taken on a “constitutional” status even though they are not part of the Constitution itself.

C. *Applying Constitutional Preemption to PL-280*

In Part I, this Article noted that courts dealing with the constitutionality of PL-280 generally held that either, (1) Congress was entitled to “withdraw” from portions of the field of Indian affairs;²³² or, (2) Congress could validly delegate its authority over Indian affairs to the states.²³³ If the power over Indian affairs is an exclusively federal, and therefore constitutionally-preempted, power, neither of these approaches offers plausible constitutional justifications for PL-280.

²³⁰ See LOCKE, *supra* note 89, § 141 (“The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.”).

²³¹ James Madison, the architect of the Indian Commerce Clause, “desired explicitly to prevent state encroachments on the exclusive commitment of power to the federal government to regulate affairs with the Indian tribes.” Clinton, *supra* note 185, at 1155. Clinton argues that the Framers, and Madison in particular, responded to rifts between the states and the federal government that “had brought the nation to the brink of a general Indian war or, at least, serious frontier clashes” in several states. *Id.* at 1157; see also COHEN, *supra* note 69, § 1.02[3], at 24 (describing the tensions between states and tribes during the confederation period).

²³² See, e.g., *Anderson v. Britton*, 318 P.2d 291, 300 (Or. 1957) (“[T]he federal government may withdraw from the field and turn the subject matter back to the states, when it chooses to do so.”).

²³³ See, e.g., *State v. Fanning*, 759 P.2d 937, 940 n.3 (Idaho Ct. App. 1988) (acknowledging the theory “that states possess inherent jurisdiction which lies dormant while federal jurisdiction exists”).

1. *PL-280 as a “Withdrawal” of Federal Power*

Accepting that constitutional preemption prohibits a state from exercising inherently federal powers, it follows that Congress cannot merely “withdraw” from a field of authority and allow states to take over. Following from this principle to reach the conclusion that PL-280 is unconstitutional requires a more precise definition of “the power over Indian affairs.”

Treaty federalism, by itself, does not provide a clear answer regarding the precise scope of federal power over Indian tribes. Fortunately, it is unnecessary to determine this scope because a clear constitutional principle can be determined independent of the scope of federal power. This basic principle is that the Constitution precludes states from exercising any power *over* Indians in Indian country, regardless of how much power the Constitution permits the federal government to exercise.

That this principle is constitutionally sound can be illustrated by imagining the two extremes of the spectrum of federal power over tribes. At one extreme, the Constitution authorizes the federal government only to engage with Indian tribes as sovereign governments, and treaties preserve the relationship on an international plane. Under this view, the states obviously have no power over tribes, because tribes never came within the purview of the Constitution in the first place. Thus, the federal government may act pursuant to treaties, just as it might, for example, construct a military base in a foreign country with that country’s consent. But, such an agreement does not permit the federal government to place citizens of that country under the jurisdiction of a state; such a suggestion would be ludicrous—not because of constitutional preemption, but because the foreign country is not even within the political scope of the Constitution in the first place.

The second view, which has been adopted by the Supreme Court, is that Congress has “plenary power” over Indian tribes. This view is primarily grounded in the Indian Commerce Clause.²³⁴ Under this view, because Congress has power over every aspect of Indian affairs, every aspect of Indian affairs should be constitutionally preempted. This is true for several reasons. As a historical matter, the plenary-power doctrine arose directly from a perceived need to protect tribes

²³⁴ See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.”)

from dangers posed by states.²³⁵ But more importantly, the very notion of plenary power mandates the constitutional preemption of Indian affairs. After all, how can a power of the kind described in our Indian law jurisprudence—so “all-encompassing” that tribal sovereignty “exists only at the sufferance of Congress”²³⁶—not be repugnant to a similar power in the states? Naturally, if power over Indian affairs is constitutionally preempted and power over Indian affairs means power over *everything* pertaining to Indian affairs, then the power over everything pertaining to Indian affairs is constitutionally preempted.

Treaty federalism suggests that federal power falls somewhere between these two extremes. Federal power over tribes is dictated by the federal nature of the treaty relationship.²³⁷ The scope of federal power pursuant to a treaty does not affect the scope of *state* power over Indian tribes. Whatever power the federal government assumes under treaty federalism is constitutionally preempted; whatever power it did not assume did not come within the purview of the constitutional polity in the first place, and thereby, cannot be exercised by states. Thus, if the federal government does not have the power, then certainly states do not—a point supported by the Apportionment Clause’s exclusion of “Indians not taxed” from state representation, which can be seen as constitutional confirmation that Indians are outside the scope of state jurisdiction.²³⁸

Therefore, the Constitution precludes states from exercising any power *over* Indians in Indian country. This principle remains true regardless of how broadly one defines federal power over Indian affairs.

The word “over” is important because constitutional preemption should not lead to the conclusion that states are powerless in their relations with tribes. It simply means that the relationship of states to tribes is one of government-to-government. This principle places states and tribes on the same “plane” of sovereignty in our federal system.²³⁹ Just as states have the constitutional authority to engage in

²³⁵ See *United States v. Kagama*, 118 U.S. 375, 383–84 (1886) (describing how the states became the Indians’ deadliest enemies and that the federal government thus has a duty to protect the Indians from the states).

²³⁶ *United States v. Wheeler*, 435 U.S. 313, 319, 323 (1978).

²³⁷ See *supra* text accompanying notes 212–31.

²³⁸ See U.S. CONST. art. I, § 2; U.S. CONST. amend. XIV, § 2 (amending art. I, § 2); Monette, *supra* note 8, at 630 n.83 (explaining that the significance of the Apportionment Clause’s “Indians not taxed” provision is its “imperative construction that Indians not taxed by the state are not within the polity of the state, especially not subject to its jurisdiction”).

²³⁹ See Monette, *supra* note 8, at 619 (arguing that two sovereigns on such a plane would “influence each other through the federal political processes”).

discussion and agreement with each other, constitutional preemption does not necessarily preclude states and tribes from engaging one another.

In this sense, applying constitutional preemption to PL-280 performs a simple task: it gives constitutional status to the consent principle that forms the basis for popular sovereignty.²⁴⁰ One might, as suggested by President Eisenhower, view it as morally wrong that tribes are placed under the authority of states without their consent,²⁴¹ but the only apparent mechanism for correcting this situation is a political one. Congress, imposing an after-the-fact consent requirement into PL-280, appears to have acknowledged the moral problem with permitting states to exercise power over Indians in Indian country without tribal consent.²⁴² Through constitutional preemption, the consent requirement can be protected by judicial review, rather than a political mechanism.

PL-280 is unconstitutional because it grants states an exclusively federal authority over Indians in Indian country. But, it would not necessarily be unconstitutional to the extent that it allowed tribes to consent to state authority. Under treaty federalism, the federal government is permitted to authorize a government-to-government relationship akin to interstate compacts.

Furthermore, the principle that the Constitution prohibits state power over Indians in Indian country is a reflection of the specific powers delegated in PL-280. The principle does not apply to Indians within state jurisdiction; similarly, it would not prohibit a state from, for example, taxing income earned by non-Indians on Indian lands. The boundaries of the general rule might be less clear where a strong state interest conflicts with the interests of tribal self-government. The Preemption Doctrine as currently applied in Indian law would have to be reformulated; courts would have to ask not only whether state power is preempted by relevant statutes and treaties, but whether it is preempted by the Constitution itself.²⁴³ The shift would be

²⁴⁰ See Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 386 (1989) (describing the importance of the principle of “consent of the governed” in Indian law jurisprudence).

²⁴¹ Goldberg-Ambrose, *supra* note 38, at 1406–07 (“President Eisenhower indicated that the lack of such a provision left him with grave doubts.” (internal citations omitted)).

²⁴² *Id.* (describing how moral outrage led to Congress finally amending PL-280 to require tribal consent).

²⁴³ Thus, constitutional preemption might be thought of as an extension of the holding in *McClanahan*, which held that Indian sovereignty “provides a backdrop against which the applicable treaties and federal statutes must be read.” *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973). Instead of the approach in *McClanahan*, this Article

subtle but important. While it may be difficult to apply constitutional preemption in hard cases, PL-280 is a legislative act that would be clearly unconstitutional.

2. PL-280 as a “Delegation” of Federal Power

The constitutional preemption doctrine this Article has described and the Nondelegation Doctrine are closely intertwined—recall that *Knickerbocker* and *Sharpnack* both hinged on the Nondelegation Doctrine.²⁴⁴ The difference between the two is whether states have the authority to *receive* the power in question and whether Congress has the authority to *delegate* the power in question. Thus, even if PL-280 is a delegation, it is invalidated by the doctrine of constitutional preemption. The principles of the Nondelegation Doctrine, however, help reinforce the conclusion that PL-280 is unconstitutional.

The basis for the idea that the legislature cannot delegate legislative power to another body again arises from Locke, who argued: “The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have.”²⁴⁵ Locke based this argument on the fact that the participants to the social compact only agreed to “submit to rules, and be governed by laws made by such men, and in such forms.”²⁴⁶ Thus, the people grant the legislature only the power to make laws, and not to make legislators.²⁴⁷

Locke’s point here was merely the result of his original justifications for the social compact. If the legislature can delegate its authority away to other entities, then it would undermine the purpose of entering into a social compact.²⁴⁸ When a person enters into the social compact, he or she gives up the right to protect his or her own prop-

presents a stronger notion of preemption, which goes a step beyond treaties and statutes to the Constitution itself. Although this Article does not endorse McClanahan’s rejection of “platonic notions of Indian sovereignty,” *id.*, the idea of preemption plays a part in defining the legal boundaries of state, federal, and tribal authority.

²⁴⁴ See *infra* text accompanying notes 167–78.

²⁴⁵ LOCKE, *supra* note 89, § 142, at 72.

²⁴⁶ *Id.* § 141, at 71.

²⁴⁷ *Id.* (explaining that the people are bound only by laws “enacted by those whom they have chosen and authorized to make laws for them” and not by other men).

²⁴⁸ In other words, the very purpose of the social compact is to form “a community . . . with a power to act as one body.” *Id.* § 96, at 48. If the sovereign begins delegating its powers back to members of the community, the result is simply a return to the state of nature.

erty on the condition that all others are giving it up as well.²⁴⁹ If the legislature gives that power back to one person, or to all of them, the most basic terms of the social contract have been violated.

Although Locke's insistence that the sovereign makes laws and not legislators has been applied in cases to support the argument that the legislative branch cannot confer authority upon the executive branch,²⁵⁰ it is equally applicable where the legislature delegates authority upon a state legislature. Popular sovereignty underpins constitutional preemption: the citizens of the states, by entering the union, authorized Congress to regulate commerce with Indian tribes and authorized the president to make treaties.²⁵¹ It is hard to imagine what theory permits Congress the authority to grant these powers to the states.²⁵² Like the participants in Locke's social compact, the people of the United States vested in Congress sole legislative power over certain matters.²⁵³ Granting state legislators the authority to apply criminal and civil laws against a new group of people²⁵⁴ certainly falls more under the category of making legislators than of making laws.²⁵⁵

Like federalism, which can be seen as a vertical separation of powers, a horizontal separation of powers is rooted in the Constitution.²⁵⁶

249 *Id.* § 97, at 49 (explaining that in forming a government, each man leaves the state of nature to fend for himself and puts himself under an obligation to submit for the determination of the majority).

250 *See, e.g.* *Mistretta v. United States*, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting) (explaining that there is *no* acceptable delegation of legislative power); *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring) (“[T]his Court expressly recognized the existence of and the necessity for limits on Congress’ ability to delegate its authority to representatives of the Executive Branch.”). *But see* *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., dissenting) (using Locke to argue against deriving legislative intent from committee activity).

251 U.S. CONST. art. I, § 8, cl. 3 (giving Congress power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); U.S. CONST. art. II, § 2, cl. 2 (describing how the president has the power “to make Treaties”).

252 Congress has, on occasion, delegated power to the states that would otherwise be precluded by the Dormant Commerce Clause. However, those laws can be seen as an act of Congress “relinquishing” its authority over an area of concurrent jurisdiction, whereas PL-280 constitutes a positive grant of authority to states that the states otherwise would not have had.

253 U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

254 *See* 18 U.S.C. § 1162 (2006) (granting state law relating to criminal offenses “the same force and effect within such Indian country as they have elsewhere in the State”); 28 U.S.C. § 1360 (2006) (granting state law relating to civil disputes “the same force and effect within such Indian country as they have elsewhere in the State”).

255 LOCKE, *supra* note 89, § 141, at 71.

256 *See* THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very defini-

Much of the relevant case law on the issue of delegation arises from questions of separation of powers between the branches of the federal government, not questions of federalism.²⁵⁷ But, both vertical and horizontal separations of powers serve the same essential purpose,²⁵⁸ so there is no reason to think that an unconstitutional congressional delegation of power made to an administrative agency would be constitutional if it were made to a state legislature. Therefore, it is helpful to examine jurisprudence on the issue of Congress's ability to delegate power to the executive. To which entity Congress is delegating power is not as relevant as the fact that Congress delegated away its exclusive powers at all.²⁵⁹

The Nondelegation Doctrine is based on the concept that the Constitution vests "a particular kind and quantity of power in a specific institution."²⁶⁰ *A.L.A. Schechter Poultry Corp. v. United States* dealt with a law authorizing trade associations to develop "codes of fair competition" that would take effect upon approval of the president.²⁶¹ Holding the law unconstitutional, the Court reasoned that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."²⁶² The Court recognized, however, that Congress needed some flexibility in allowing others to handle the details that it was incapable of managing.²⁶³ When review-

tion of tyranny."); *see also* *Buckley v. Valeo*, 424 U.S. 1, 124 (1975) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.").

257 *See* *Clinton v. City of New York*, 524 U.S. 417, 448 (1998) (holding that the presidential line-item veto violates the separation-of-powers doctrine); *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 957-59 (1983) (explaining that a statutory House of Representatives veto power violates the separation of powers doctrine).

258 Madison, for example, argued:

Whilst all authority in [the federal republic] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority.

THE FEDERALIST NO. 51 (James Madison).

259 *See, e.g.,* *United States v. Sharpnack*, 355 U.S. 286, 298 (1958) (Douglas, J., dissenting) ("The vice in the *Schechter* case was not that the President was the one who received the delegated authority, but that the Congress had abdicated the lawmaking function. The result should be the same whether the lawmaking authority, constituted by Congress, is the President or a State.").

260 Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 337 (2002).

261 295 U.S. 495, 523, 529 (1935).

262 *Id.* at 529.

263 *Id.* at 530 ("[T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits . . .").

ing such a delegation, the courts “cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.”²⁶⁴ In the end, the delegation of power in *Schechter* was simply too broad: “Instead of prescribing rules of conduct, it authorize[d] the making of codes to prescribe them.”²⁶⁵

The Nondelegation Doctrine, thus, requires that Congress lay down “an intelligible principle to which the person or body authorized to [act] is directed to conform.”²⁶⁶ Essentially, if Congress “legislate[s] and indicate[s]” its will, it can then give another body the “power to fill up the details.”²⁶⁷

While the Nondelegation Doctrine itself might provide a convincing argument against PL-280, it is more important to us insofar as it presents another perspective on why constitutional preemption so clearly applies. Recall that the court in *Sharpnack* upheld the Assimilative Crimes Act on the grounds that Congress could prospectively “adopt” state law as its own.²⁶⁸ Suppose that PL-280 did not grant states wholesale jurisdiction over Indian tribes, but rather acted only to incorporate state law as federal law. Such a law could be squared with *Sharpnack* in two ways. First, it could be distinguished on the grounds that the power over federal enclaves simply is not exclusively federal. But, such an argument seems tenuous, and there is no reason to think that it is any more exclusively federal than the federal power over Indian affairs. Second, it might be that *Sharpnack* was wrongly decided; the doctrine of constitutional preemption, as this Article has outlined it, would likely preclude state legislation over inherently federal powers, even if the law did not grant wholesale jurisdiction.

PL-280 cannot be justified under *Sharpnack* because the justification in *Sharpnack* that Congress can “adopt” state law does not apply when Congress grants wholesale jurisdiction over a matter. Giving states legislative jurisdiction, and thus “adopting” state law as federal law, is fundamentally different than giving states both executive and judicial power. Even if Congress could prospectively adopt state law,

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 541. This distinction, of course, is analogous to Locke’s distinction between “making laws” and “constituting the legislative.” See LOCKE, *supra* note 89, § 141, at 71.

²⁶⁶ *Clinton v. City of New York*, 524 U.S. 417, 484 (1998) (Breyer, J., dissenting) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)) (emphasis omitted).

²⁶⁷ *United States v. Grimaud*, 220 U.S. 506, 517, 521 (1911) (“[T]he authority to make administrative rules is not a delegation of legislative power . . .”).

²⁶⁸ See *United States v. Sharpnack*, 355 U.S. 286, 293–94 (1958) (“Rather than being a delegation by Congress of its legislative authority to the States, it is a deliberate continuing adoption by Congress . . .”).

it could not conceivably “adopt” the decision of every state prosecutor, judge, and law enforcement agent that acts pursuant to the powers granted in PL-280. Such an idea is not only absurd as a practical matter; it is premised on the idea that Congress can make legislative, executive, and judicial decisions over matters involving Indian affairs. Therefore, the Nondelegation Doctrine is helpful not because PL-280 should be conceived of as an unconstitutional delegation, but because the doctrine illustrates how PL-280 is something much more problematic than an unconstitutional delegation. It is a wholesale grant of federal power to the states in a manner that is inconsistent with principles of federalism and popular sovereignty.

CONCLUSION

This Article has outlined an argument against the constitutionality of PL-280. PL-280 is only one piece of the Indian law puzzle, but it clearly demonstrates the need to reinterpret federal Indian law with our principles of constitutionalism and popular sovereignty. Doing so will strengthen the quality and integrity of both Indian law and constitutional law. In conclusion, PL-280 offers two key lessons. First, it sheds light on the nature of sovereignty and emphasizes that Indian law will remain in a state of confusion until we come up with a clear federalism-based solution to the question of Indian sovereignty. Second, it emphasizes the need to continually enforce the boundaries of American federalism as a means of preserving the sovereignty of the American people.

Federal Indian law has turned the concept of sovereignty upside-down. Justice Clarence Thomas best expressed the problem caused by our current system of Indian-law jurisprudence. In *United States v. Lara*, Supreme Court upheld a federal law that affirmed tribal authority to prosecute Indians who were not members of that tribe.²⁶⁹ The Court based its reasoning, in part, on the idea of Congressional plenary power.²⁷⁰ Justice Thomas concurred but attacked the very notion of this type of plenary power.²⁷¹ He argued that “the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously.”²⁷² In other words, the

269 541 U.S. 193, 196 (2004).

270 *Id.* at 200.

271 *Id.* at 215 (Thomas, J., concurring) (“I cannot agree with the Court . . . that the Constitution grants to Congress plenary power to calibrate the ‘metes and bounds of tribal sovereignty.’” (internal citation omitted)).

272 *Id.*

idea that Congress has unlimited power over tribes is inconsistent with the idea of sovereignty.²⁷³ Thomas went on to argue that “[t]he Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty.”²⁷⁴ Until the Court analyzes questions of Congressional power over tribes “honestly and rigorously, the confusion that [Thomas] identified will continue to haunt our cases.”²⁷⁵

Justice Thomas is correct: the position that tribes possess inherent sovereignty is simply inconsistent with the position that Congress can exercise plenary power over them. PL-280 clearly embodies the problems of our current system. With the passage of PL-280, Congress passed on the financial and administrative burden of dealing with Indian tribes to states.²⁷⁶ In doing so, it significantly blurred the lines between state, tribal, and federal power. This has required serious Supreme Court interpretation on several major occasions, and even those decisions have proven unsatisfactory to clarify the scope of the law.²⁷⁷ It is time to clear up some of this confusion by critically considering the constitutional validity of PL-280 and taking the necessary action to bring it in line with principles of popular sovereignty.

History has recognized the termination policy on which PL-280 was built as a mistake,²⁷⁸ and the dominant strain of thinking now

273 *Id.* at 218 (“It is quite arguably the essence of sovereignty not to exist merely at the whim of an external government.”).

274 *Id.* at 224.

275 *Id.* at 226.

276 Goldberg & Champagne, *supra* note 32, at 704 (“A notable feature of [PL-280] is the absence of any federal funding support for the states’ new law enforcement and criminal justice duties.”).

277 *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (applying the distinction between criminal and regulatory laws to determine whether Indian gaming is permissible); *Bryan v. Itasca County*, 426 U.S. 373, 390 (1976) (holding that PL-280 did not confer taxing jurisdiction over tribes); Emma Garrison, *Baffling Distinctions Between Criminal and Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty*, 8 J. GENDER RACE & JUST. 449, 481 (2004) (concluding that that the criminal/regulatory distinction is largely meaningless and unpredictable and that efforts should be made to clarify and repeal PL-280).

278 *See* Michael C. Walch, *Terminating The Indian Termination Policy*, 35 STAN. L. REV. 1181, 1190–92 (1983) (describing the abandonment of the termination policy). Walch notes: “Official repudiation of the termination policy came in 1969, when President Nixon called for Indian policy of ‘self-determination without termination.’ According to Nixon, forced termination was ‘wrong,’ and the goal of Indian policy had to be ‘to strengthen the Indian’s sense of autonomy without threatening his sense of community.’” *Id.* at 1191 (internal citation omitted). Although Nixon signaled the official end to termination, departures from it had begun with the Kennedy Administration, and President Lyndon Johnson had also specifically called for an end to termination. *See* Raymond V. Butler, *The Bureau of Indian Affairs: Activities Since 1945*, 436 ANNALS AM. ACAD. POL. & SOC. SCI.

runs in favor of tribal self-government.²⁷⁹ The basic contradiction described by Justice Thomas lies at the heart of the problem, and PL-280 is only the most egregious embodiment of that problem. Barsh and Henderson have offered what may be the best solution in the form of a constitutional amendment to clarify the state-tribal-federal relationship.²⁸⁰ We may need a “constitutional moment” to offer considered judgment of the American people on a question that has presented a constitutional quagmire for over a century. This constitutional solution should affirm the status of tribes as units in a federal system, complete with the constitutional protection of their authority. It should clarify that states and tribes are co-equal governments and offer a mechanism for agreements between the two to further cooperative interests. However, it should also encompass all viewpoints and critically ask the hard questions about state and tribal sovereignty, including what role tribes and tribal members should have in state governments that may have little power over tribes and tribal members.²⁸¹

PL-280 is not only a reflection of the confused theoretical basis of federal Indian law; it is also a reflection of the struggle to preserve the boundaries of a federal system. The term “federalism” is often associated with the promotion of state sovereignty, no doubt in reaction to the fact that the last century of politics has been defined by the growth of federal power. But federalism is a two-sided coin. Although this Article has advocated certain limitations on state power, a reasonably applied doctrine of constitutional preemption will have the long-term effect of strengthening the federal system. A judicial system unwilling to take seriously the constitutional constraints on state power built into our federal system is unlikely to take seriously the reciprocal constraints on federal power. The complete deference the Court has shown to Congress on Indian law matters—even where Congress has chosen to delegate away its own power—negatively af-

50, 54–57 (1978); *see also* *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968) (holding that the Termination Act did not extinguish treaty rights).

279 *See* Walch, *supra* note 280, at 1191 (“[F]ederal Indian policy since [Nixon’s] time has followed President Nixon’s call to emphasize the role of tribal governments and the right of Indians to choose their own destiny.”).

280 Barsh and Henderson advocate a constitutional resolution that will “clarify the reserved territorial powers of tribes, rejecting the authority of Congress to arrogate power unilaterally over tribes without denying [the] tribe’s authority to delegate additional powers to Congress.” Barsh & Henderson, *supra* note 8, at 280.

281 In the constitutional amendment proposed by Barsh and Henderson, for example, they advocate withdrawing the right of Indians to vote in the state political process, arguing that “no community already largely assimilated into a state or financial dependant on it will lightly trade its existing franchise for political autonomy.” *Id.* at 282.

fects the health of a federal system that depends on a judiciary willing to make difficult judgments about the boundaries of state and federal power. Therefore, although the Framers primarily feared the *aggrandizement* of congressional power,²⁸² the reckless *delegation* of congressional power may be just as dangerous or constitutionally illegitimate²⁸³ because the boundaries of the federal system were put in place by the sovereign American people, not to be altered by normal political activity.

The primary purpose of this Article has been to set out the theoretical basis for a doctrine of constitutional preemption and apply that doctrine to PL-280. In doing so, this Article has argued that PL-280 illustrates the need to reinterpret federal Indian law in light of American constitutional principles of federalism and popular sovereignty. Recognizing the unconstitutionality of PL-280 would be a step toward clarifying the confused nature of sovereignty that defines federal Indian law, but it would also help strengthen and preserve our commitment to American federalism.

282 Madison argued: "In republican government, the legislative authority, necessarily, predominates." THE FEDERALIST NO. 51 (James Madison). David Epstein describes the federalist argument: "Precisely because the legislature seems closest to the people, it is most dangerous to the people; it sees its closeness as 'influence' which it can use in the service of its own enterprising ambition." DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 132 (1984).

283 Norman Williams succinctly argued, with regard to the Dormant Commerce Clause, "[i]f Congress wishes to foster state protectionism, it must do so directly. In only that way can we rest assured that the responsibility for such action will be laid at Congress's door." Williams, *supra* note 79, at 238.