

Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law

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In October 2011, one of us—Susan—sat in the offices of a Central American community organization in Los Angeles, observing a routine family visa preparation appointment between a member of the legal staff and Amalia Gomez Mendoza (pseudonym), a Salvadoran woman who appeared to be in her mid-fifties. Amalia, a naturalized U.S. citizen, was petitioning for her son, Marco (pseudonym), who lived in El Salvador. As she produced myriad documents—birth, death, divorce, and naturalization certificates, tax statements, employment records—for him to review, the staff member suddenly caught a discrepancy. According to the birth certificate, although Marco was born in the 1970s, his birth was not registered until 1993. The staff member indicated that from Immigration officials’ point of view, such a delay could suggest fraud, so officials might request additional proof of Amalia’s relationship with her son. Amalia reacted with some alarm, “Then what should we do?” “There isn’t anything we can do,” he responded, “We will have to see if that is how that is they react.”¹ Amalia explained that she had registered her son’s birth promptly, but that the municipal government building had burned down during the 1980–1992 Salvadoran Civil War, destroying the original record. Everyone, she said, had had to replace their

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1. Susan Coutin, Field Notes (Oct. 2011) (on file with author).

birth certificates after the war. Though the staff member had said that nothing could be done to counter the implication of fraud, he in fact located, translated, and submitted the text of a Salvadoran law authorizing the re-registry of births in 1992 and 1993, following the war.² Through the remainder of the appointment, Amalia nonetheless continued to worry that the re-registry of her child's birth, due to circumstances beyond her control, could be construed as fraudulent, thus jeopardizing the petition that she was preparing.

The following week, the three authors of this paper met with leaders of a Native American Tribal Nation at their headquarters in Southern California, just steps from a famous Spanish mission dating back to the 1600s. While the tribal genealogist and a few tribal elders pored over genealogical records on a table behind us, the tribal Chairman and archivist showed us to an old boiler room and broom closet that had been repurposed as a storage space, and which was now stacked to the rafters with cardboard boxes and filing cabinets. The boxes and cabinets, the Chairman explained, contained "the [Tribal] National Archive," those primary and secondary documents from over three hundred years of human history in the region, all of which had been compiled as part of the Tribe's now thirty-year effort to gain recognition from the federal government of their status as a Native Nation.

Turning and opening the first file cabinet drawer within reach to his left, the Chairman revealed row upon row of brown hanging file folders, each with a number and a corresponding name. Inside were photocopies of old public records, newspaper clippings, personal correspondence, even photocopies of eighteenth- and nineteenth-century baptismal records from the Mission, all of which helped to trace each member's descent from someone known to be an Indian living as a member of a historical Indian entity at some point prior to 1900. Such proof, he explained, is what tribes are required to provide under the relevant federal regulations.³ But while it is true that these regulations require that petitioners prove that they have existed as a distinct community with political authority over members since historical times into the present, and that petitioners have been consistently identified as an "Indian entity" since before 1900, none of these requirements seems to matter if the Tribal Nation cannot first establish that their "membership consists of individuals who descend from a historical Indian tribe," as is stated in 25 C.F.R. section 83.7(e).⁴ As he would later contend, "No tribe has ever been denied federal recognition who has been found to meet criteria

2. Diario Oficial (D.O.) Decree 205, D.O., Mar. 24, 1992, at 3–4 (El Sal.). This law's application was extended for six months in 1993 as part of a set of measures that were designed to facilitate the reinsertion of ex-FMLN combatants. These measures were part of a broader set of policies adopted to implement the peace accords. *See* Acuerdo Complementario del 22 de Diciembre de 1992, EL DIARIO DE HOY, <http://www.elsalvador.com/noticias/especiales/acuerdosdepaz2002/nota8.html> (last visited Jan. 21, 2013) (describing measures implementing the Salvadoran peace accords).

3. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. pt. 83 (2013).

4. *Id.* § 83.7.

(e).⁵ And yet, the Chairman also admitted, there have been plenty of times when the federal government seemed to change the rules just when tribal members had thought they had done everything they could to meet them. For example, one document that appeared in many of the files is a “Certificate of Degree of Indian Blood,” a document issued by the Department of Interior in the 1920s establishing the named party as having satisfied the necessary criteria for proving their Indian ancestry so that he or she could receive proceeds from various Indian Claims Commission settlements going on at the time.⁶ Such certificates, explained the Chairman, are not deemed valid and sufficient proof that the holder or his or her children or grandchildren are of Indian descent pursuant to 25 C.F.R. section 83.7(e). Apparently something more, or different, is needed. “It’s a pedigree, really,” the Chairman explained, with exasperation, “Like a dog. Can you think of any other race that has had to do this?”⁷

In these two examples, immigrant and indigenous people encounter federal authorities as entities that can discredit their records, treating evidence as suspect and claims as potentially fraudulent. As a U.S. citizen, Amalia has the right to petition for her son, but U.S. officials can decide whether or not to recognize her son’s relationship to her. Likewise, the Tribal Nation has the right to seek federal recognition, but the U.S. government, not the Tribe, sets—and changes—the standards that they must meet for that recognition. Both immigrant and indigenous groups occupy a space of exception vis-à-vis U.S. law: as “resident aliens” and “dependent nations” they are inside and outside at the same time. Their presence demands law—the petition, the recognition claim—even as this demand simultaneously seeks an exception to law in that officials have the discretion to decide what presence means, acting according to what has been termed “administrative grace”⁸ or the government’s “pleasure,”⁹ in a manner “not subject to be controlled by the judicial department.”¹⁰ Such discretion is the essence of plenary power through which both immigrants and indigenous people are governed. The plenary power doctrine, established in the 1880s through a series of Supreme Court decisions, thus writes exceptionality into law in a paradoxical way: the judiciary allows government action by exempting such action from judicial review. As a legal doctrine, plenary power is thus authorized by courts through the suspension of their own authority.¹¹

5. Justin Richland, Field Notes (Nov. 2011) (on file with author).

6. *Id.*

7. *Id.*

8. Compean, 24 I & N Dec. 710, 710 (A.G. 2009), *vacated*, 25 I & N Dec. 1 (A.G. 2009).

9. Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889).

10. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

11. This, perhaps, is an instance of the sovereign exception, what Agamben, Cormack, and others have called “the potentializing limits” of law. The court authorizes tacitly by announcing that it cannot judge. The court’s suspension of its own authority works to authorize the power of Congress. See GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 44–45 (Daniel Heller-Roazen trans., 1998); GIORGIO AGAMBEN, *The Messiah and the Sovereign: The Problem of Law in Walter Benjamin*, in *POTENTIALITIES: COLLECTED ESSAYS IN PHILOSOPHY* 160 (Daniel Heller-Roazen ed. &

In this Article, we examine the form and temporality of plenary power as applied to immigrants and indigenous peoples. To do so, we consider several of the founding cases through which plenary power was established, focusing on their annunciatory-yet-citational quality. Such cases are annunciatory in that, by proclaiming that the U.S. government has plenary power (i.e., full and complete power, free from judicial review, in certain substantive areas) the court in these cases enacts the very power that it announces. They are also citational in that the court does so in a manner that assumes such power always already exists. Moreover, the court announces this power through a denial of its own power, a denial that defers not only to the executive and legislative branches of U.S. government, but also to the future. This deference adopts the form of a citation to precedent, though the prior authority that is being cited to is nothing more than the “self-evidence” of plenary power as something inherent to sovereign nation-states more generally.

In Part I, we analyze the nature of plenary power, its place within but also somewhat beyond the law, its function of granting “fullness” to the United States while at the same time requiring certain populations to routinely claim exceptionality. In Part II, we turn to founding case law, and in Part III, to the present circumstances that immigrant and indigenous populations encounter when confronting the United States’ plenary power over them. Looking not only at courts’ decisions, but also at record making and keeping, we suggest that the practices through which immigrants and the indigenous seek recognition from the U.S. government are also products of plenary power. The legacy of plenary power can thus be found in the *routine exceptionality* that is produced through mundane immigration and Bureau of Indian Affairs (BIA) procedures. By routine exceptionality, we mean the regular exercise of, and encounter with, a uniquely unfettered political power that groups like immigrants and indigenous peoples face by virtue of their status under specific regimes of U.S. law. Hence, like the founding cases, the federal agencies’ administrative practices—receiving evidence, maintaining records, generating decisions—give content to the forms of plenary power first announced in the suspension of court review of such official actions. The net effect is that officials are enabled to decide the status of immigrants and indigenous peoples, but via a calculation that remains almost entirely hidden but for the traces it leaves in statements about the value of particular kinds of proof for establishing those statuses. And though such official actions take on the veneer of legal form—in both the ideational sense of routine formula, but also in actual documents and texts—these practices also announce, point to, and give authority to that which is silent in the Constitution, that which is outside the four corners of the founding text. But ironically, rather than suggesting the extraconstitutional

trans., 1999) [hereinafter AGAMBEN, POTENTIALITIES]; GIORGIO AGAMBEN, STATE OF EXCEPTION 38–39 (Kevin Attell trans., 2005) [hereinafter AGAMBEN, STATE OF EXCEPTION]; BRADIN CORMACK, A POWER TO DO JUSTICE: JURISDICTION, ENGLISH LITERATURE, AND THE RISE OF COMMON LAW, 1509–1625, at 9 (2007).

authority of certain aspects of U.S. political power, these official actions actually fill in its gaps, revealing the moment of “full administrative power”¹² in which, to quote Walter Benjamin, “the separation of lawmaking and law-preserving violence is suspended.”¹³ The suspension of this separation produces an irresolution,¹⁴ a movement between rule and exception, law and the extralegal, sovereignty and dependency, absence and presence, promise and revocation. It is this irresolution, this back-and-forth movement, that is the essence of plenary power.

I. PLENARY POWER AND THE FULLNESS OF LAW

In this Part of our Article, we explore the origins and nature of plenary power as exercised in relation to immigrants and the indigenous, and we also examine the implications of our analysis for sociolegal theory. In particular, we suggest that binaries between law as characterized by “gaplessness” or “gaps” and as sometimes inert (“on-the-books”) and sometimes active (“in-action”) are unsustainable.¹⁵ In the case of plenary power, law “on-the-books” is “law-in-action,” a fusion that is enabled by the paradoxical move of granting legal authority to decide according to extralegal criteria such as pleasure, will, grace, judgment, political considerations, foreign policy, or national security. Our point is not that the decision made via plenary power necessarily condemns by rendering people deportable or dependent, nor that it permits a benevolence, an “administrative grace”¹⁶ through which the U.S. government generously or humanely deigns to recognize legal presence or nationhood. Rather, the ability to damn or be merciful speaks of the theological alchemy by which administrators

12. *Lone Wolf*, 187 U.S. at 568 (citing *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902)).

13. WALTER BENJAMIN, *Critique of Violence*, in REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277, 286 (Edmund Jephcott trans., 1978).

14. Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543, 562 (1988); cf. JAMES BOYD WHITE, *Telling Stories in the Law and in Ordinary Life: The Oresteia and “Noon Wine,”* in HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 168, 190 (1985). In his reading of Aeschylus’s *Oresteia* and the mythic cycle of revenge killing in the House of Atreus that eventually leads to the founding of Athenian law, White describes the world as “an utterly impossible world without law, in which no one can maintain a story of his or her life Every version is partial” *Id.* But with the invention of law, we see no easy resolution, says White, but rather an institution “where the different versions [of disputed events] can be placed in open comparison and competition, where the contraries can be comprehended within a larger whole.” *Id.* With the creation of law, and the force that comes with it, we may indeed be able to access a larger whole from which to view competing claims, but do we necessarily find from that perch a view that is more coherent or resolved?

15. See KITY CALAVITA, *INVITATION TO LAW & SOCIETY: AN INTRODUCTION TO THE STUDY OF REAL LAW* 94–115 (2010) (describing the gap between “law-on-the-books” and “law-in-action” with various examples); ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 95 (2007) (citing SUSAN U. PHILIPS, *IDEOLOGY IN THE LANGUAGE OF JUDGES: HOW JUDGES PRACTICE LAW, POLITICS, AND COURTROOM CONTROL* 28 (1998)) (referencing an “intertextual gap” between written and spoken law); Carroll Seron & Susan S. Silbey, *Profession, Science, and Culture: An Emergent Canon of Law and Society Research*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 30, 33–34 (Austin Sarat ed., 2004) (discussing the empirical study of “law-in-action”).

16. *Compean*, *supra* note 8.

work up the United States as a nation whose contours are figured through the auditing of its aliens, whether they are immigrants or indigenous, or as matter-of-fact nationals of external U.S. colonies or even, in another era, African American.¹⁷

In fact, this alchemy is blatant, as indicated by Justice Field writing the opinion in the *Chinese Exclusion Case (Chae Chan Ping v. United States)*, to which we return below: “[T]he United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.”¹⁸ As Justice Field states, exercising power in relation to the subjects or citizens of foreign countries maintains the absolute independence of the United States as one nation. The exercise of this power is thus the law, but also beyond the law. In *Lone Wolf v. Hitchcock*,¹⁹ the Supreme Court held that the U.S. Congress could unilaterally abrogate its treaty obligations to the Kiowa, Comanche, and Apache nations in Oklahoma, and the question of whether such abrogation violated the so-called “trust responsibility” that the federal government owed Native Nations was not a question available for legal review by the Supreme Court. In so doing, the Court would uphold the constitutionality of the Dawes Severalty Act of 1887,²⁰ otherwise known as the General Allotment Act, which authorized the allotment, privatization, and sale of reservation lands previously held in trust by the U.S. government for native nations, setting in motion a series of events that would result in the dispossession of nearly ninety million acres of tribal territory, or sixty percent of the land base once reserved for Native Nations, before its reversal in 1934.²¹

17. The plenary power doctrine was first developed to justify the exclusion of Chinese immigrants, but it then was routinely applied to American Indian nations and residents of external U.S. colonies such as Puerto Rico. See NATSU TAYLOR SAITO, *An Authority Unchallengeable and Complete: Plenary Power Over Immigrants, American Indians, and External U.S. Colonies*, in FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE 13 (2007). Moreover, long before the plenary power doctrine was established in such terms, African Americans, especially fugitive slaves, had also been made alien and subject to the implied power of Congress. *E.g.*, *Prigg v. Pennsylvania*, 41 U.S. 539, 622–25 (1842). For recent discussions of *Prigg*, see Sora Y. Han, *The Long Shadow of Racial Profiling*, 1 BRIT. J. AM. LEGAL STUD. 77, 96 (2012), which discusses how the Court created a structural framework to resolve the tension between federal and state laws regarding slaves. See also Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 428–29 (2011) (criticizing Justice Story’s opinion as “indefensible”); Sanford Levinson, *Is Dred Scott Really the Worst Opinion of All Time? Why Prigg Is Worse than Dred Scott (but Is Likely to Stay Out of the “Anticanon”)*, 125 HARV. L. REV. F. 23, 31 (2011) (noting that *Prigg* can be cited as “supporting plenary power by Congress whenever it believes it is facing a basic threat to the Republic”). For reasons of space, this Article will mainly focus on the routine exceptionality of the plenary power doctrine as applied to immigrants and indigenous peoples.

18. *Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889).

19. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903).

20. Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.) (repealed in part 1934).

21. Indian Reorganization Act of 1934, 25 U.S.C. § 461 (2012).

To explain its decision in *Lone Wolf*, the Court argued that it had no power to review Congress's actions toward Native Nations. As the Court explained, “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”²² *Lone Wolf* is thus a legal decision not to decide questions of the exercise of powers that “from the beginning”—at whatever point in the mists of sovereign time²³ this points to—somehow stand as prior to it. Declaring that the United States has plenary power in certain areas of law is an illocutionary legal act: it brings this power into being by calling it forth, and finding its limit there.

Indeed, efforts by the Supreme Court to locate the source of plenary power quickly take them past the Constitution, the source of their authority, and in search of some power that inheres in sovereignty itself. Thus in *United States v. Curtiss-Wright*,²⁴ Justice Sutherland writes that not all executive power comes from the Constitution: “The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.”²⁵

Other “external” powers vest in the federal government not because they are mentioned in the Constitution, but “as necessary concomitants of nationality.”²⁶ These powers include, as might be expected, the authority to declare war and sue for peace, to enter into diplomatic relations, and also, notably for this Article, “[t]he power to acquire territory by discovery and occupation . . . [and] the power to expel undesirable aliens”²⁷ Such powers are, for Sutherland, thus the very stuff of sovereignty, though ones that, because they pulse at its very core and foundation, are beyond and therefore not restricted by the laws of the states that deploy them. “Rulers come and go; governments end and forms of government change; but sovereignty survives Sovereignty is never held in suspense.”²⁸

While the scope of the powers conferred by sovereignty is not particularly surprising, especially today, in the wake of the post-9/11 U.S. interventions in the Middle East, the force of plenary power and the present absence of its juridical review are nonetheless troubling. Indeed, performing the limits of judicial power seems not only to announce the existence of plenary power, but also to help bring it into being in the first place. This statement is borne out by Sutherland’s opinion

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

23. See Justin B. Richland, *Sovereign Time, Storied Moments: The Temporalities of Law, Tradition, and Ethnography in Hopi Tribal Court*, 31 POLAR 8, 10 (2008) (describing “sovereign time” as a kind of “space-time” envelope characteristic of Euro-American legal discourses and practices, which have been imported into contemporary Hopi tribal law through its adoption of Anglo-American style courtroom practices).

24. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

25. *Id.* at 315–16.

26. *Id.* at 318.

27. *Id.* (citations omitted).

28. *Id.* at 316–17.

in *Curtiss-Wright*, and remains true today. Thus, while plenary power is something of a legal black box—legal analysis on the part of the Court typically ends with the determination that the authority in question is a political one beyond legal review—this box is neither empty nor inert. Rather, it has been given an outer shape by case law, filled with force, and given the authoritative name of plenary power without ever having to disclose its content.

We wonder then, whether bringing into view two of plenary power's subjects—immigrants and indigenous people—might make it possible to discern the workings of plenary power through a sidelong glance, like looking at an eclipse by the shadow it casts on a wall. Thus by exploring the manner in which indigenous and immigrant subjects prepare and produce documents in response to federal regulations like those described above, we have begun to detect its rather distorting effects—effects such as retroactively reconstituting facts, rendering time multidirectional, and the specters of fraud and betrayal haunting documentary claims even before they are made. It is in the black box of plenary power that “the national government may enjoy inherent, extraconstitutional sovereign powers” even as “[i]t is precisely the concept of a national government with limited powers, based on a written constitution, and subject to constitutional constraints and judicial review, that is supposed to distinguish the American democratic experiment from authoritarian forms of government.”²⁹ Clearly, the ability to use limited (judicial) powers to enable unlimited extraconstitutional (political) ones depends on defining the nation in relation to its territorially present “others.” “Immigrant” and “indigenous” people are only such when they are within U.S. territory, even as these designations mark them as outside—and, as we shall discuss, they can be treated as legally outside even as their presence is what gives the United States the authority to act over them. In the case of plenary power doctrine, this legal authorization of the sovereign will, law is characterized neither by gaps nor by gaplessness, but rather by embodiment in material, yet moving, form—a dance rather than a text.

By considering Native Americans and immigrants together, we return to groups that, historically, were interlinked in the creation of plenary powers, and we also refuse the current distinctions between “natives” and “foreigners” that underlie dominant groups' claims to have the right to regulate resident immigrants and Indians.³⁰ Historically, the genocide of Native Americans was cited as precedent for the ability to exclude or deport noncitizens.³¹ Thus, in 1882, as the

29. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 5 (2003).

30. As we note above, slaves and colonial subjects have also been key to the construction of plenary power. See *supra* note 17 and accompanying text.

31. Significantly, and in a similar fashion, an infamous slavery case was cited in another landmark case of plenary power doctrine. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV, was indeed cited by both the judges of the majority and the dissenting judges in the key insular case, *Downes v. Bidwell*, 182 U.S. 244, 250, 360 (1901), which recognized Congress' plenary power to acquire territory, but also denied that Puerto Rico was within the United States. In *Dred Scott*, Chief Justice Taney concluded that people of African

Chinese Exclusion Act was being debated, California Senator John F. Miller asserted,

One complete man, the product of free institutions and a high civilization, is worth more to the world than hundreds of barbarians. Upon what other theory can we justify the almost complete extermination of the Indian, the original possessor of all these States? I believe that one such man as Washington, or Newton, or Franklin, or Lincoln glorifies the Creator of the world and benefits mankind more than all the Chinese who have lived, and struggled, and died on the banks of the Hoang Ho.³²

More recently, as nativism in the United States has flourished,³³ the U.S. mainstream has defined itself at once as “settlers” only in contrast to a disappearing indigenous population, but more often as “native” in contrast to aliens arriving from beyond U.S. borders. Examining immigration and federal recognition claims together destabilizes such definitions, as the mainstream paradoxically becomes “settler” and “native.”

In sum, federal law regarding Indians and immigrants relies on the power that accrues to nation-states by positioning persons, places, and practices as exceptions, outside the norm, where rule can be suspended in favor of political will.³⁴ We turn now to the cases through which this power was established.

descent could not be citizens, 60 U.S. (19 How.) at 413, but he also rejected the notion of an unfettered Congressional power to conquer territory and govern it at its behest, *id.* at 447–48. In *Downes*, 182 U.S. at 274–77, Justice Brown distinguished *Dred Scott* and rejected the anti-imperialist vision of Justice Taney. He seemed, however, to share his racist vision of citizenship. See *Downes*, 182 U.S. at 279–80 (stating an implied denial of the right of the inhabitants of Puerto Rico to American citizenship, and suggesting that some peoples are foreign to American habits, traditions, and modes of life). According to Sanford Levinson, in the end, “[n]o one can read *Downes* without realizing the extent to which the ‘un-Americanness’ of the people in the new American territories is fundamental to the outcome.” Sanford Levinson, *Installing the Insular Cases into the Canon of Constitutional Law*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 121, 129–31 (Christina Duffy Burnett & Burke Marshall eds., 2001).

32. 13 CONG. REC. 1,487 (1882) (statement of Sen. Miller).

33. See LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* 3 (2008) (discussing nativism in the context of the “Latino Threat Narrative”); Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, in IMMIGRANTS OUT! THE NEW NATIVISM AND ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 13, 15 (Juan F. Perea ed., 1997) (describing recent nativists’ desire to keep the United States primarily white and European); George J. Sánchez, *Face the Nation: Race, Immigration, and the Rise of Nativism in Late Twentieth Century America*, 31 INT’L MIGRATION REV. 1009, 1009 (discussing the recent rise of a racial nativism that combines a new form of racism with traditional hostility towards immigrants); see generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925* (1963) (discussing nativism throughout the history of the United States).

34. See AGAMBEN, *POTENTIALITIES*, *supra* note 11, at 160–76; AGAMBEN, *STATE OF EXCEPTION*, *supra* note 11, at 39.

II. ORIGINARY MOMENTS

The plenary power doctrine, especially in the realm of immigration law, has been described as a “constitutional oddity.”³⁵ In Part II, we consider two foundational cases decided by the Supreme Court in the 1880s: the *Chinese Exclusion Case (Chae Chan Ping v. United States)*³⁶, and *United States v. Kagama*.³⁷ In these cases, the Court carved out something of an exception: because regulating aliens who immigrated into U.S. territory and/or who made up domestic dependent Indian nations within U.S. borders is a matter of national sovereignty, Congress has “unfettered power” that is not subject to judicial review.³⁸ This power is justified sometimes by reference to the Constitution, but sometimes (as Justice Sutherland does in his opinion in *Curtiss-Wright*) to a power that pre-exists it, a political force inherent in sovereignty more generally, of which the U.S. government is only the most recent instantiation. As such, and like the immigrant and indigenous subjects to which it is applied, these cases constitute plenary power as a kind of present absence, citations to it in the Constitution point to something that is not there. As Augustine-Adams notes, the Justice who wrote the opinion in the *Chinese Exclusion Case* “linked the exercise of that sovereignty to the Constitution, but did so without specific textual support or citation . . .”³⁹ The cases that cite the plenary power of the United States in fact stand as its only real textual instantiation—the announcement is the *founding* of this doctrine, but also one that denies its role and authority in so doing. At the same time, these cases transcend the contexts of their own announcement of plenary power, in that they return to and reconstruct the supposed meaning of the Constitution, and U.S. power more generally, imbuing the Constitution with a quality that it did not have previously but that it is now found to always already have.

This janus-faced performativity—an efficacious discursive act that denies its own efficacy—unfolds repeatedly in the Supreme Court decisions that draw on the plenary power doctrine, particularly in articulations of federal power vis-à-vis immigrants and Native Americans.⁴⁰ Therefore, far from being a “constitutional oddity,”⁴¹ we argue, plenary power takes on something of a founding character

35. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255; see also Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 974–75 (discussing sovereignty theory as a unifying explanation for the plenary power doctrine).

36. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

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

38. Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 702 (2005).

39. *Id.* at 713.

40. See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987) (discussing the constitutional limits on the Congress’ plenary power); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 196 (1984) (referring to the “judiciary’s frequent invocation of federal plenary power over Indian affairs” as curious because “the Constitution does not explicitly . . . regulate Indian affairs”).

41. Legomsky, *supra* note 35, at 255.

insofar as it gives “fullness” to the United States and the laws by which it acts in relation to those “aliens” (indigenous and immigrant) whose presence within its borders troubles the imagined veneer of its uniform, territorially contiguous, “modular” sovereignty.⁴²

Chae Chan Ping v. United States, also known as the *Chinese Exclusion Case*, concerned the ability of the U.S. government to exclude Chae Chan Ping, a Chinese immigrant, even though he had been issued a reentry certificate, and even though U.S. treaties with China had recognized “the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents.”⁴³ Chae Chan Ping had immigrated to the United States from China in 1875, taking up residence in San Francisco. In 1882, the U.S. Congress passed the Chinese Exclusion Act, which forbid further immigration of Chinese laborers, but which allowed those who were already in the United States to obtain a certificate that would allow them to reenter the country after leaving.⁴⁴ Chae Chan Ping obtained such a certificate, and, in 1887, twelve years after first entering, returned to China for a visit. In September 1888, he set sail for the United States once again, but while he was en route, Congress enacted new legislation that revoked the reentry certificates that had been previously issued.⁴⁵ When he landed in San Francisco, he was detained by the Captain of his steamship, whereupon he in turn submitted a writ of habeas corpus, alleging that his detention was unlawful, and the law upon which it was based, the Chinese Exclusion Act, was itself an unconstitutional exercise of federal power. His complaint was heard and denied by the Circuit Court of the Northern District of California,⁴⁶ and then was appealed to the U.S. Supreme Court, which unanimously found his detention and exclusion to be lawful.⁴⁷

The Court’s reasoning in *Chae Chan Ping* demonstrates how plenary power’s originary moments appear to follow rather than to found. Thus, writing for the Court, Justice Field asserts:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over

42. See Thomas Biolsi, *Imagined Geographies: Sovereignty, Indigenous Space, and American Indian Struggle*, 32 AM. ETHNOLOGIST 239, 240 (2005) (discussing various types of indigenous space utilized by American Indians to challenge the “modular” sovereignty of the United States); see also FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 139–40 (2009) (discussing the *Lone Wolf* Court’s view of plenary power as a “clear highway” for “unilateral expansion of federal land acquisition and power in Indian affairs”). For an immigration example, see Susan Bibler Coutin, *Being En Route*, 107 AM. ANTHROPOLOGIST 195, 195 (2005), where she writes that “exclusion created territorial gaps—the space occupied by the person deemed to be legally outside of the United States. Thus, for territories to have integrity, territorial disruptions were required.”

43. Burlingame Treaty, U.S.-China, art. V, July 28, 1868, 16 Stat. 739, 740.

44. Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

45. Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (repealed 1943).

46. *In re Chae Chan Ping*, 36 F. 431 (1888).

47. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

its own territory to that extent is an incident of every independent nation. It is a part of its independence.⁴⁸

In this passage, Justice Field presents the government's power to exclude as an already established fact, grounded in sovereign independence and jurisdiction, rather than as a doctrine that is being created in the very moment that it is announced. And yet, as we argue, Justice Field's opinion constitutes just this kind of foundational announcement of the doctrine of plenary power over immigrants, precisely by denying that this is what it is doing. Such a founding is accomplished by the Court through a deferral of the Court's own authority, both by reference to a supposedly taken-for-granted notion of the sovereign power to exclude, and by the limits such power imposes on the Court's capacity to decide such matters as a question of law. To again quote Justice Field:

Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition [of Chinese laborers], and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination.⁴⁹

In place of judicial determination, Justice Field asserts, immigration will be regulated by "sovereign will,"⁵⁰ the government's "judgment,"⁵¹ and the "pleasure of congress."⁵² Substituting political will for legal judgment explicitly acknowledges that, though authorized through legal deference, plenary power is a naked form of power, apparently inherent in sovereignty. As Augustine-Adams notes, "The plenary power doctrine at least recognizes that the exclusion of noncitizens is an exercise of power, rather than justified by principle, constitutional or otherwise. The plenary power doctrine calls a spade a spade; the United States, and other countries, exclude noncitizens as a matter of power and privilege."⁵³ As an act of discretion, plenary power is set aside from constitutional law, making it extraconstitutional⁵⁴ and unenumerated.⁵⁵

But significantly, as it gains legal authority when it is found to have its source

48. *Id.* at 603–04.

49. *Id.* at 609.

50. *Id.* at 600.

51. *Id.* at 606.

52. *Id.* at 600.

53. Augustine-Adams, *supra* note 38, at 745; *see also* Newton, *supra* note 40, at 196 ("The judiciary's frequent invocation of federal plenary power over Indian affairs is curious since the Constitution does not explicitly grant the federal government a general power to regulate Indian affairs. One suspects, therefore, that, as in other areas of constitutional law, the terms 'plenary power' and 'political question' are not so much justifications for decisional outcomes as they are restatements of the Court's intent to defer to the other branches of government and, concomitantly, to abdicate any role in defining the unique status of Indian tribes in our constitutional system or accommodating their legitimate claims of tribal sovereignty and preservation of property.") (footnotes omitted).

54. *See* Augustine-Adams, *supra* note 38 at 712–13 (discussing the Supreme Court's justification of the plenary power as extraconstitutional); *see also* Cleveland, *supra* note 29, at 7 n.25 (examining extraconstitutionality as a possible basis for unenumerated governmental powers).

55. Henkin, *supra* note 40, at 856.

in that power which precedes law, the doctrine of plenary authority nonetheless has the effect of returning to and reconstruing social facts in accordance with the political present and future it brings into being. Thus, although Chae Chan Ping resided in the United States for some twelve years, harmlessly as far as anyone knows, the decision in the *Chinese Exclusion Case* defined him and other Chinese laborers as foreign and as aggressors.⁵⁶ Justice Field emphasizes that the Chinese “remained strangers in the land”⁵⁷ and that “[t]hose laborers are not citizens of the United States; they are aliens.”⁵⁸ As foreign subjects of another sovereign, the Chinese, Justice Field reasoned, threatened to “overrun”⁵⁹ the United States, posing a “great danger”⁶⁰ due to the “vast hordes”⁶¹ and “crowded millions”⁶² who aggressed through “encroachment.”⁶³ Indeed, though all that Chae Chan Ping had done was to visit China and then return, his reentry, in fact his mere presence, was deemed akin to an act of war:

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing.⁶⁴

Temporally, the Court’s claim that Congress could determine that Chinese laborers’ presence in the United States was something just short of military hostilities also gave Congress the ability to reconfigure the facts of Chae Chan Ping’s and other Chinese laborers’ lives. Although the validity of his reentry certificate was not challenged, Justice Field cited widespread fraud as having given the government a legitimate rationale for first limiting and then revoking the evidence—the reentry certificate—that would have permitted Chae Chan Ping to reenter the country. Perhaps the greatest factual revision of all was naming this case the Chinese “exclusion” case, when as Cleveland notes, Chae Chan Ping was being expelled.⁶⁵

Though much of the scholarship on Chinese Exclusion examines, as we have here, the rationales underlying plenary power, we wish to focus attention as well on an aspect of the case that is usually not discussed, namely, the reentry certificate that Chae Chan Ping had in his possession. What, precisely, was this

56. Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 45 (2010).

57. *Chae Chan Ping*, 130 U.S. at 595.

58. *Id.* at 603.

59. *Id.* at 595.

60. *Id.*

61. *Id.* at 606.

62. *Id.* at 595.

63. *Id.* at 606.

64. *Id.*

65. Cleveland, *supra* note 29, at 127.

document before it was revoked? Proof of identity? A promise? A contract? A record of prior presence? Though it may have been all of these things, we suggest that its most important feature was actually its intangibility. In other words, though Chae Chan Ping presumably carried his certificate as a material object with him while he left and returned to the United States, the document itself was imbued with a potentiality: despite whatever words appeared on its surface, it might or might not be regarded as valid and, at the “pleasure” of the U.S. government, it might or might not permit him to reenter the country. Though perhaps marked by official stamps, the reentry certificate was indefinite, its features hiding another document that resided within: the potential revocation that would eventually emerge, with the 1888 Chinese Exclusion Act amendment and with the steamship Captain’s decision to detain Chae Chan Ping. Much like Native Americans’ land, of which Congress dispossessed them through the Dawes Severalty Act of 1887, though only as a “mere change in the form of investment,”⁶⁶ the reentry that the document promised vanished through a mere redefinition of territorial presence.

In fact, the revocability of his reentry document was prefigured by the Chinese Exclusion Act itself, long before Chae Chan Ping left U.S. shores. Although this act is known primarily for its racist exclusion of Chinese, in which “the opinion of the Government of the United States” about the danger posed by “the coming of Chinese laborers” is deemed sufficient to ban a whole class of persons,⁶⁷ in fact, much of the Act’s text is taken up with mundane administrative details regarding how to adequately document the Chinese laborers who were already here. For example, section 4, which is the longest of the Act’s 15 sections, states:

That for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of this act, and in order to furnish them with the proper evidence of their right to go from and come to the United States of their free will and accord, as provided by the treaty between the United States and China dated November seventeenth, eighteen hundred and eighty, the collector of customs of the district from which any such Chinese laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such Chinese laborers and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry-books to be kept for that purpose, in which shall be stated the name, age, occupation, last

66. Joseph William Singer, *Lone Wolf, or How to Take Property by Calling It a “Mere Change in the Form of Investment,”* 38 TULSA L. REV. 37, 39 (2002) (quoting *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980)); see also Scaperlanda, *supra* note 35, at 988–89 (discussing the ways that the U.S. government can retract the “hospitality” that it offers immigrants).

67. Chinese Exclusion Act of 1882, ch. 126, pmbll., 22 Stat. 58, 58 (repealed 1943).

place of residence, physical marks of peculiarities, and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the custom-house; and every such Chinese laborer so departing from the United States shall be entitled to, and shall receive, free of any charge or cost upon application therefor, from the collector or his deputy, at the time such list is taken, a certificate, signed by the collector or his deputy and attested by his seal of office, in such form as the Secretary of the Treasury shall prescribe, which certificate shall contain a statement of the name, age, occupation, last place of residence, personal description, and facts of identification of the Chinese laborer to whom the certificate is issued, corresponding with the said list and registry in all particulars. In case any Chinese laborer after having received such certificate shall leave such vessel before her departure he shall deliver his certificate to the master of the vessel, and if such Chinese laborer shall fail to return to such vessel before her departure from port the certificate shall be delivered by the master to the collector of customs for cancellation. The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter; and upon delivery of such certificate by such Chinese laborer to the collector of customs at the time of re-entry in the United States said collector shall cause the same to be filed in the custom-house and duly canceled.⁶⁸

By conforming to the latest in identification technology,⁶⁹ creating a registry against which certificates could be checked, and establishing penalties for fraud, the Act anticipates its own violation, thus creating the possibility for the very shadow documents that rendered Chae Chan Ping's compliance with the Act's terms both insubstantial and legally indefensible. Compliance meant assuming a particular stance regarding the U.S. government, as a racialized and foreign "other" who sought to invoke the U.S. government's "pleasure" to allow the Chinese laborers already in the country to remain. Such a stance may have appeared fraudulent to many Chinese. Sarah Cleveland notes that after the Geary Act of 1892⁷⁰ required Chinese residents to carry a certificate of residence at all times, "a massive campaign of civil disobedience within the Chinese community" ensued.⁷¹

Similar processes played out in relation to American Indian Tribes and the capacity of the United States to make and change laws that governed not only the

68. *Id.* § 4.

69. See SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION 121–27 (2001) (describing the various identification procedures used to issue "return certificates" to Chinese nationals).

70. Geary Act, ch. 60, 27 Stat. 25, 25–26 (1892) (repealed 1943).

71. Cleveland, *supra* note 29, at 138 (citing Ellen D. Katz, *The Six Companies and the Geary Act: A Case Study in Nineteenth-Century Civil Disobedience and Civil Rights Litigation*, 8 W. LEGAL HIST. 227, 253–63 (1995)).

nation-to-nation relations between the two, but even the policing of relations between indigenous members of the same tribal nation, on tribally-held territory. Indeed, this is the central legal question before the Supreme Court in *United States v. Kagama*,⁷² in which the Court was asked to decide the legality of the arrest and detention by federal authorities of an Indian who was accused of killing another member of his tribe on the Hoopa Valley Reservation at the confluence of the Trinity and Klamath Rivers in the far northwestern corner of California. Federal authority to hear this case was claimed under the recently passed Major Crimes Act of 1885, in which Congress extended federal adjudicatory jurisdiction over certain named crimes⁷³ when committed by one tribal member against another in “Indian Country,” a legal term of art that includes Indian reservations like the Hoopa Valley Reservation.⁷⁴

Passed just two years before the Dawes Act of 1887, the Major Crimes Act marked the first major intrusion into the internal sovereignty of tribal nations, an arena that, until that time, had generally been presumed to be in the exclusive jurisdiction of the tribes themselves, particularly those that resided on reservations. Indeed, the law itself was hastily passed as a legislative fix to an 1883 Supreme Court decision, *Ex parte Crow Dog*,⁷⁵ involving similar facts of intertribal murder on the Brule Sioux Indian Reservation in the Dakota Territory, but in which the Supreme Court held that the federal authorities lacked the authority to take jurisdiction over the case.

As a brief decision “not known for its coherence or clarity,”⁷⁶ it is not surprising that the statement of the facts in Justice Samuel Miller’s 1886 opinion in *United States v. Kagama*⁷⁷ are perhaps more interesting for what they don’t reveal than for what they do. All we are told of the facts is that “in two counts . . . Kagama, *alias* Pactah Billy, an Indian, murdered Iyouse, *alias* Ike, another Indian, at Humboldt County, in the state of California, within the limits of the Hoopa Valley reservation . . .”⁷⁸ Never mentioned is the fact that, according to ethnohistorian Sydney Haring, neither Kagama nor Iyose were actually members

72. *United States v. Kagama*, 118 U.S. 375, 376 (1886).

73. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2012)). The original act, passed as a legislative rider to the Indian Appropriations Bill of 1885, named seven crimes over which the federal courts could take jurisdiction: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. *Id.*

74. 18 U.S.C. § 1151(a) (2012) (defining Indian Country as, among other things, “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation”).

75. *Ex parte Crow Dog*, 109 U.S. 556 (1883).

76. KENNETH BOBROFF ET AL., COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.01(4) (Nell Jessup Newton et al. eds., 2005); see also Sidney L. Haring, *The Distorted History that Gave Rise to the “So Called” Plenary Power Doctrine: The Story of United States v. Kagama*, in INDIAN LAW STORIES 149, 149 (Carole Goldberg et al. eds., 2011) (citing Newton, *supra* note 40, at 197) (characterizing the case as based on history that is no longer applicable).

77. *Kagama*, 118 U.S. at 376.

78. *Id.*

of the Hupa tribe—both were Yurok, a distinct people with an entirely different language—nor were they living on the Hoopa Valley Reservation.⁷⁹ It turns out the two were neighbors, whose homesteads existed on a narrow valley on a lower branch of the Klamath River just north of the Reservation.⁸⁰ Thus even the killing itself, which took place at Iyose’s homestead, was not on Reservation land.

Given these errors in fact, it seems plain to Harring that federal jurisdiction in general, and the Major Crimes Act in particular, should not have been extended to this case, and “the Supreme Court could not have issued the *Kagama* decision at all.”⁸¹ The errors themselves seem to be traceable to a number of misrepresentations of both *Kagama*’s and Iyose’s places of residence, and their identities, in several different federal records, including censuses taken by the Hoopa Valley Indian Agent between 1880 and 1891, as well as some official correspondence between the Indian Agent, Major Charles Porter, and then Superintendent of Indian Affairs, Hiram Price, a man most famous, or infamous, for his pushing forward with the allotment and assimilation policies of the Dawes Act.

In many of the federal records regarding the Hoopa Valley Reservation, and its Agent Porter, the name Pactah Billy appears as sometimes residing on the Hoopa Reservation, sometimes off, and always of a more indeterminate tribal affiliation, being described as a Klamath Indian, that is, an Indian living along the Klamath River.⁸² In much the same way then that the social facts of Chae Chan Ping’s residence certificate before and after the 1888 Amendment to the Chinese Exclusion Act change, the residency records and even tribal affiliation of Pactah Billy seem to flicker, first in and then out, of the relevant federal jurisdiction.

Equally important, however, is the extent to which, like in Justice Field’s opinion in the *Chinese Exclusion Case*, none of these factual inconsistencies seem to matter to the Court in its ultimate resolution of the question regarding the U.S. government’s power to regulate intratribal affairs. As Harring notes, the rapidity with which the *Kagama* case makes its way through the federal courts—from arrest in June 1885 to Miller’s opinion in May 1886—seems to suggest the extent to which the case was singled out by federal prosecutors to be a test case for determining the validity of the newly minted Major Crimes Act, legislation that the Supreme Court all but directed be pursued by Congress in the language of *Ex Parte Crow Dog*.⁸³ This context gives the outcome in the *Kagama* case the sense of a kind of *fait accompli*. As Harring writes, “[f]ederal courts have often created doctrines through case law that . . . [have] nothing to do with the Indian people

79. Harring, *supra* note 76, at 152 (discussing the tribal languages and tribal identifications of the parties to the case).

80. *Id.* at 153–54.

81. *Id.* at 152.

82. *Id.* at 152–53.

83. *Id.* at 173 (citing *Ex parte Crow Dog*, 109 U.S. 556, 568–69 (1883)).

involved. *Kagama* fits perfectly into this pattern: the actual case had nothing to do with the doctrine.”⁸⁴

Little wonder then that Miller’s opinion moves quickly from its brief one-sentence description of the facts straight to the question of the legitimacy of the Major Crimes Act, and the federal jurisdiction over *Kagama* claimed in its name. And here Miller is at least more emphatic, if not more clear, in what he sees as the source of Congress’ authority to pass such laws. In particular, he is careful to point out that this authority does not come, as had been argued by the attorney from the United States, from the constitutional doctrine known as the Indian Commerce Clause, which gives Congress power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”⁸⁵ He writes,

This clause is relied on in the argument in the present case . . . [b]ut we think it would be a very strained construction of this clause that a system of criminal laws for Indians . . . was authorized by the grant of power to regulate commerce with the Indian tribes.⁸⁶

And with that, Miller acknowledges, if only to set to one side, the constitutional source of Congressional authority over Indian affairs, which had heretofore been the most common source for understanding the federal government’s exclusive authority in determining the government-to-government relationship with Indian tribes.⁸⁷ Instead, and making explicit reference to the fact that “these Indians are within the geographical limits of the United States,” Miller concludes that:

[T]his power of congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the constitution . . . as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else.⁸⁸

And so, much as in the *Chae Chan Ping* decision three years hence, plenary power over Indians is announced/founded in the alchemy of a case law decision that locates a power beyond its ken, in a murky doctrine of sovereign power that is grounded in itself, if only because it “can be found nowhere else.”⁸⁹

Legal scholars differ about whether to regard *Chae Chan Ping*, or *Kagama*, as a “constitutional fossil,”⁹⁰ a relic of a prior era, “exist[ing] in a time warp”⁹¹ or as an

84. *Id.* at 151.

85. U.S. CONST. art. I, § 8, cl. 3.

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

87. As well, prior to the *Chinese Exclusion Case*, the Commerce Clause was cited as the basis for regulating immigration. See Lindsay, *supra* note 56, at 28, (noting that immigration was then understood as the business of bringing foreigners into the United States and was therefore seen as a matter of commerce).

88. *Kagama*, 118 U.S. at 379–80 (citing *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

89. *Id.*

90. Henkin, *supra* note 40, at 862.

91. Scaperlanda, *supra* note 35, at 975.

integral part of the U.S. legal system, one that is “very much alive and well.”⁹² We suspect that both are right, that these cases were products of a particular historical era⁹³ but that at the same time, plenary power also enables federal law regarding Indians and immigrants. To suggest how this is the case, we turn now to the contemporary period, and to the legal claims staked by the Native American Tribal Nation and by Central Americans.

III. ROUTINE EXCEPTIONALITY, OR HIDING IN PLAIN SIGHT

Insofar as, in the United States, alien subjects create a gap in law’s reach across the nation, we suggest that it is precisely in the documents that shape their lives and that are deployed in petitions for federal recognition that the ambiguous, odd, undetermined quality of plenary power’s force can be best discerned. Indians and immigrants who seek recognition occupy a moment and space before plenary power acts. They are therefore shaped by a future that reaches into their present, reconstituting the facts of their lives even as they are lived. In this sense, they are constituted in key ways by a future that they do not control even as their efforts to reach this future compel them to produce evidence, to document their present and past existence, to become particular sorts of characters, and to insist on the validity of realities that ought to be taken as self-evident; that a tribe is a tribe, that a resident is a resident, that a relation is kin. Their insistence on trying to prove the obvious, however, is easily misconstrued as fraud—and not only out of biases that regard immigrants and the indigenous as particularly devious, due to being “special interests” or “illegals.” In addition, assertions of a transcendent sovereignty that survives changes of ruler and regime may cover a fear that in fact the nation is not sovereign, that it can be manipulated by immigrant or indigenous people who are suspected of deploying fraudulent documents. To be defrauded is perhaps the antithesis of the sovereign who rules by will, therefore, detecting fraud must be one of the sovereign’s key capacities. Haunted by the specter of fraud that lies beyond law—like the plenary power that is grounded in the silence of the Constitution⁹⁴—the documents held and produced by the nation’s immigrant and indigenous others become intangible. They, much like the textual basis for plenary power, may not entirely be there, specters that flicker at the edges of the state’s gaze, visible only through a sidelong glance.

Our analysis focuses on the experiences of Central Americans, who

92. Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-Going Abuses of Human Rights*, 10 *ASIAN L.J.* 13, 13 (2003).

93. Lindsay, *supra* note 56, at 32–33. Lindsay “argue[s] that immigration exceptionalism is the product of a deep antagonism between the nation’s republican political-economic principles and the unprecedented social and economic dislocations wrought by the industrialization of the northern economy.” *Id.* at 6. His explanation: “[B]oth the cultural and legal origins of modern immigration exceptionalism lie in a highly contingent, historically novel association between foreign pauper labor and foreign aggression that, for contemporaries, warranted categorically defining all laws touching on immigration as matters of national self-preservation.” *Id.* at 32–33.

94. For a discussion of the U.S. Constitution’s silence regarding race in the context of *Prigg v. Pennsylvania*, see Han, *supra* note 17, at 89–97.

immigrated to the United States in large numbers during Central American civil wars of the 1980s and 1990s, and who have been awarded a variety of temporary statuses, only some of which lead to citizenship⁹⁵; and on a Southern California tribal nation whose recent denial of federal recognition is currently on petition for reconsideration after the Secretary of the Interior determined that some evidence had been overlooked and, in December 2013, recommended that the Department of Interior reconsider the case.⁹⁶ There are striking parallels in the legal histories of these groups. During the 1980s, one of the few ways for Salvadorans and Guatemalans to avoid deportation was to apply for political asylum, yet their applications were denied at rates of approximately ninety-seven percent and ninety-nine percent respectively.⁹⁷ In response, various nonprofit, religious, and legal advocacy organizations formed coalitions to press the cause at all levels of city, state, and federal government. Through several landmark political and legal developments, including passage of the Immigration Reform and Control Act (IRCA) in 1986,⁹⁸ a legal settlement in the *American Baptist Churches v. Thornburgh* case,⁹⁹ and the award of Temporary Protected Status in 1990 (due to the civil war)¹⁰⁰ and again in 2001 (following the Salvadoran earthquakes),¹⁰¹ a new regulatory regime was established. This regime simultaneously allowed some to gain legal permanent residency, kept others in “temporary statuses” that Cecilia Menjívar has described as a “liminal legality”¹⁰² and put in place stricter controls for those who remained undocumented. In this context, “papers” have taken on new, yet unpredictable, significance.

In 1982, around the same time that large-scale migration from Central America began, the tribal nation of which we write filed their first letter of intent with the BIA’s Branch of Acknowledgement and Research (BAR), initiating their effort to become a “federally recognized tribal nation” pursuant to the Indian

95. CECILIA MENJÍVAR, FRAGMENTED TIES: SALVADORAN IMMIGRANT NETWORKS IN AMERICA 80–89 (2000) (describing the U.S. government’s reactions to Salvadoran immigrants).

96. Brian Park, *Dept. of Interior to Reconsider Federal Recognition for Juaneño Tribe*, CAPISTRANO DISPATCH (Dec. 13, 2013), <http://www.thecapistranodispatch.com/dept-of-interior-to-reconsider-federal-recognition-for-juaneño-tribe/>.

97. JAMES SILK, U.S. COMM. FOR REFUGEES, DESPITE A GENEROUS SPIRIT: DENYING ASYLUM IN THE UNITED STATES 9 (Virginia Hamilton ed., 1986).

98. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

99. *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991); Carolyn Patty Blum, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers*, 3 INT’L J. REFUGEE L. 347, 353–55 (1991).

100. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, 5030–38 (1990).

101. IMMIGRATION & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, QUESTIONS & ANSWERS: TEMPORARY PROTECTED STATUS (TPS) FOR EL SALVADORANS (2001), available at http://www.uscis.gov/files/pressrelease/TPSQ_030201.pdf.

102. Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 AM. J. SOC. 999 (2006) (examining the effects of legal statutes on the lives of immigrants); see also Alison Mountz et al., *Lives in Limbo: Temporary Protected Status and Immigrant Identities*, 2 GLOBAL NETWORKS 335, 337, 341–46 (2002) (discussing Salvadorans who applied for asylum in the United States but were granted Temporary Protected Status).

Reorganization Act of 1934.¹⁰³ In so doing, they hoped to establish a government-to-government relationship with the United States.¹⁰⁴ Despite providing several hundred volumes of evidence of the presence of the tribal nation in historical records from 1780 to the present, as well as providing a detailed description of their current social, cultural, and political makeup as a distinct Indian group, their petition was cited by the BAR in 1990 as having “significant deficiencies.”¹⁰⁵ Members of the tribal leadership decided at that time to prepare a response, which was filed through the same bureaucratic process in 1993. The Tribe would wait another fourteen years for a reply, during which time the BAR was restructured, reorganized, and renamed the Office of Federal Acknowledgement (OFA), after a Government Accounting Office in 2001 found serious “weaknesses in the recognition processes.”¹⁰⁶ And, as we write this, yet another round of proposed revisions to the Federal Acknowledgement Process is being undertaken by the BIA.¹⁰⁷

Legal exceptionality thus shapes the experiences of these and other immigrant and indigenous groups. Across the nation, including especially in the Southwest, the status of Native American tribes and their members as “exceptional” has been viewed so completely through the lens of high-stakes gaming opportunities that tribal people are more likely to find themselves tarred with the label “special interests” than “savages.”¹⁰⁸ Defined this way, Indians’ claims to federal recognition as tribal nations are suspected of being grounded more in a desire for private gain than public good. At the same time, state

103. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–479 (2012).

104. See RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT 18 (2005) (discussing how tribes could form a government-to-government relationship under the Indian Reorganization Act); BRUCE GRANVILLE MILLER, INVISIBLE INDIGENES: THE POLITICS OF NONRECOGNITION 70 (2003) (briefly describing the haphazard federal tribal recognition process); MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGEMENT PROCESS 3 (2004) (describing the effects of federal tribal acknowledgment); Les W. Field, *Complicities and Collaborations: Anthropologists and the “Unacknowledged Tribes” of California*, 40 CURRENT ANTHROPOLOGY 193, 201 (1999) (affirming the sovereignty that federal recognition provides to tribes).

105. Letter from Hazel E. Elbert, Bureau of Acknowledgement and Recognition, Bureau of Indian Affairs, to Belardes (Jan. 25, 1990) (on file with author).

106. U.S. GEN. ACCOUNTING OFFICE, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 2 (2001), available at <http://www.gao.gov/new.items/d0249.pdf>.

107. In June 2013, the BIA announced “a comment period, tribal consultation sessions, and public comment sessions on a preliminary discussion draft of potential revisions to improve the Federal acknowledgment process.” Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 78 Fed. Reg. 38,617, 38,617 (proposed June 27, 2013) (to be codified at 25 C.F.R. pt. 83).

108. KEVIN BRUYNEEL, THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS 4, 9, 187 (2007); JESSICA R. CATTIELINO, HIGH STAKES: FLORIDA SEMINOLE GAMING AND SOVEREIGNTY 164 (2008); see also EVE DARIAN-SMITH, NEW CAPITALISTS: LAW, POLITICS, AND IDENTITY SURROUNDING CASINO GAMING ON NATIVE AMERICAN LAND 33–34, 92 (2004) (juxtaposing the romanticized notion of Indians as noble savages with their capacity to operate as modern people).

legislation like Arizona S.B. 1070¹⁰⁹ and the recent Alabama law¹¹⁰ take aim at policing the presence of immigrant populations in a manner previously understood as the sole purview of the federal government.¹¹¹ Here, as well, immigrants are cast as seeking unfair advantage of public benefits that allegedly come at the expense of the citizenry. Exceptionality is at the heart of the “securitization” of U.S. immigration law as evidenced by the post-9/11 reorganization of the Immigration and Naturalization Service into the Department of Homeland Security and efforts to deport “criminal aliens,”¹¹² while tribal economic development projects, including gaming operations, are required to add internal anti-money laundering protocols to comply with Title III of the U.S.A. Patriot Act.¹¹³

To conclude, we return to the vignettes with which we began, indicating how efforts to seek federal recognition reveal the contours of plenary power and its routine application. The Southern California Tribal Nation’s frustration with the shifting genealogical standard to which they are held is grounded in their experience of justice as arbitrary, as following something other than a “rule.” When in 2007, the OFA finally did make a preliminary finding on their claim, it once again found the Tribal Nation’s petition lacking in proof sufficient to establish a legitimate claim for federal recognition. After amending and supplementing their petition, in Spring 2011, the OFA made its final determination that the Tribe had failed to meet all the required criteria set out in 25 C.F.R. section 83.7, especially criteria (e), proving that its “membership consists of individuals who descend from a historical Indian tribe.”¹¹⁴ As was detailed in their final report, and published in the Federal Register, only fifty-three percent of the 455 living tribal members had established their descent from a known historical Indian tribe.¹¹⁵ In the Tribe’s appeal of the decision to the Interior

109. Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450.

110. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, ch. 535, 2011 Ala. Laws 535.

111. See Scott H. Decker et al., *On the Frontier of Local Law Enforcement: Local Police and Federal Immigration Law*, in IMMIGRATION, CRIME AND JUSTICE 261, 263 (William F. McDonald ed., 2009) (arguing that varied state and local responses to unauthorized immigration are the result of a lack of clear policy guidance and models); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 611–17 (2008) (discussing the rise and fall of federal exclusivity over immigration law); Monica W. Varsanyi, *Rescaling the “Alien,” Rescaling Personhood: Neoliberalism, Immigration, and the State*, 98 ANNALS ASS’N AM. GEOGRAPHERS 877, 877–78 (2008) (asserting the devolution of federal plenary power over immigration).

112. Susan Bibler Coutin, *Legal Exclusion and Dislocated Subjectivities: The Deportation of Salvadoran Youth from the United States*, in THE CONTESTED POLITICS OF MOBILITY: BORDERZONES AND IRREGULARITY 169, 170 (Vicki Squire ed., 2011); Nathalie Peutz & Nicholas De Genova, *Introduction to THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* 1, 27 n.1 (Nicholas De Genova & Nathalie Peutz eds., 2010).

113. International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 296.

114. 25 C.F.R. § 83.7 (2013).

115. 76 Fed. Reg. 54, 15,335–36 (Mar. 21, 2011). Though this report is a matter of public

Board of Indian Appeals (IBIA), among its chief complaints was the erroneous exclusion of an entire lineage of tribal members from the descent reckoning. When accurately accounted for, the Tribe's appeal brief explained, the percentage of tribal members with proof of descent from a historical Indian tribe would return to nearly eighty-five percent. Significantly, in Fall 2011, the OFA acknowledged this error, but nonetheless stood by its final determination. In so doing, the OFA argued in its reply brief that even with the correction, the Tribe still did not meet the requirements of criteria (e), presumably (though the reply doesn't make this explicit) on an interpretation of the statutory provision that "petitioner's membership consist of individuals who descend from a historical Indian tribe," as requiring that all members (and not just a majority) have proof of such descent. This conclusion was reached despite the fact that in private meetings the OFA staff researchers had commended the Tribal Nation's petition and its supporting evidence as the most comprehensive they had seen in the history of the office. This commendation raises the question: Was the same interpretation of criteria (e) applied to the seventeen tribes that have been federally recognized by this or related processes since 1978? And of course, as per the Tribal Chairman himself, this requirement has not been applied to the other 548 federally recognized tribes whose tribal rolls have never been submitted to such vetting because their juridico-political existence has been established by other means.

Though it remains to be seen whether and how these matters will be resolved, the effects of criteria (e) have already been felt by the Tribe and its membership. In 2008, the Chairman and the rest of the Tribal Council of the Tribe made news when they ousted certain members from their numbers. Though the ousted individuals contend that their removal has more to do with internecine politics and the undue influence of the Catholic Church, among other factors, tribal leaders contend that the issue is one of simple genealogy. This claim is made despite the fact that certain members of the ousted group had evidence that they or their parents or grandparents were, at least at one time, recognized by the federal government as Indian for its purposes, specifically in the form of the aforementioned Certificate of Degree of Indian Blood issued in the 1920s and valid still to this day, although the OFA itself has cast doubt on such certificates' sufficiency for meeting criteria (e). Also notable is that the ousted group also includes a past Chairman of the Tribe and other relatives of the Chairman responsible for starting the acknowledgement process back in the early 1980s.

Likewise, Amalia Gomez Mendoza's effort to petition for her son Marco must contend with the U.S. government's discretion to define her relationship with her son as fraudulent, as something other than kin. The suspicion of fraud potentially redefines the 1993 document registering her son's birth as either trickery (perhaps she obtained an official document by pretending that she had a

record, in the name of preserving a measure of anonymity of the tribe with which we are working on this project, we decline to provide the title of the report itself as doing so would reveal the tribe's identity.

son) or as falsified (perhaps the document is not official after all, but then, if one were to obtain a false document, would not one use a more reasonable registry date?). The point is that Amalia does not know how her document will be interpreted in the future, but this uncertainty introduces an irresolution in the present: between son and not-son, truth and falsehood, fraud and claim, resident and alien, and sovereign and non-sovereign nation. To resolve the irresolution, Amalia (with the help of her legal service provider) produces more documents: the text of a Salvadoran law regarding the reissuance of birth certificates, a certified translation of this law, and a word-for-word translation of the birth certificate in question. Likewise, the Tribal Nation amasses more genealogical records. Both Amalia and the Tribe attempt to push the future, to secure the desirable decision, even as in doing so, their documents disappear: the Certificates of Degree of Indian Blood somehow fail to establish Indianness, the birth certificate may not be proof of filiation, Chae Chan Ping's reentry certificate is revocable, and Kagama's and Iyouse's records of tribal affiliations vanish. And in this disappearance, the nation as full or complete, as sovereign, appears in all its glory. The ruling texts of law—its certificates, records, and case opinions—fill in the spaces left by the suspension of law-as-rule in favor of law-as-grace. These spaces are occupied by the undocumented and by Indians whose existence troubles the trope of “discovery” as justification for the acquisition of Indian land and of “sovereignty” for the importation or exclusion of migrant labor. Thus law acts, in the moment of its own abeyance, through the far-from-inert records that magically authorize its founding.