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The Cloaking of Justice: The Supreme Court's Role in the Application of Western Law to America's Indigenous Peoples

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By Dr. D.E. Wilkins

The debate over which legal Indigenous Peoples should govern Native American political power and property rights, or even whether they should be protected by law at all, caused conflicts challenging the autonomy of the legal system and led to changes of the original principles of Indian rights. The outcome of that conflict raises two questions of federal Indian law. One is whether its principles contributed to the survival of Native Americans in the United States; the other is whether the same legal principles are responsible for the perpetual inferiority of Native Americans in their own land. More starkly, the question is whether the law ought to be praised or cursed for what it has done to the Indian.[1] *(emphasis added)*

Introduction

Indian tribes may certainly be classed, along with African Americans, Asian Americans, and Hispanic Americans, as some of the most vulnerable of all racial and ethnic groups in the United States. For instance, Indians comprise less than one percent of the nation's population, slightly less than two million. Furthermore, most tribes are severely economically disadvantaged and have astounding levels of unemployment and poverty.[2] Tribes also enjoy and practice cultural traits which differ, often dramatically, from predominant American cultural values. Finally, because of the tremendous level of cultural and political differentiation (there are over 500 recognized tribal entities) Indian tribes have difficulty developing long-term political alliances.[3]

Tribes, in short, easily fall within the purview of the Court as "discrete and insular" groups which may require special protection from discrimination (U.S. vs. Carolene Products Company, 304 U.S. 144, 153, n.4 (1937). However, although tribal nations share minority characteristics (a subordinate group with less control or power than members of a dominant or majority group; racial or cultural characteristics that distinguish them from majority; membership is generally ascribed; a sense of group solidarity; and finally common experiences of unequal or discriminatory treatment)[4] with other minority groups, the differences distinguishing tribes from the other groups grossly exceed the similarities.

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[1] See Petra T. Shattuck and Jill Norgren, Partial Justice: Federal Indian Law in a Liberal Constitutional System. (New York: Berg Publishers, 1991).

[2] See, e.g., Stephen Cornell and Joseph Kalt, "Pathways from Poverty: Economic Development and Institution Building on American Indian Reservation," American Indian Culture and Research Journal, 14 (1990): 89-125.

[3] See, e.g., U.S. Government: American Indian Policy Review Commission, Final Report (Washington, DC: GPO):83-94; and Sharon O'Brien, American Indian Tribal Governments, (Norman, OK: University of Oklahoma Press, 1989):291.

[4] Vincent N. Parillo, Strangers to These Shores: Race And Ethnic Relations in the United States, 3rd ed. (NY: MacMillan Publishing Co., 1990):18-19.

First, and most obviously, tribes are indigenous or original to the United States while all other individuals and groups are immigrants. Second, the concept of "tribalism" or "tribal status" is unique to American Indian groups, unlike liberalism which celebrates individualism and individual rights.[5] Third, the concept of "expatriation" is uniquely relevant to tribes and their members because of their political status.[6]

The ensuing essay will describe and examine some of the political/legal "cloaking" tools generated by the U.S. Supreme Court and practiced by Congress which placed tribes in the particularly enigmatic position of being recognized sovereigns with rights that can be systematically quashed.

In sum, the coupling element for each of the above characteristics is the fact that many tribes still have and exercise a number of elements of inherent sovereignty. That is, tribes are also governments. This status was not delegated to the tribes by the U.S. or the states. It is original and inherent and has been recognized by European nations and the U.S. Government in hundreds of treaties or compacts, over three-hundred of which are still legally valid today. Thus, the tribal relationship to the United States is a political one, not a racial one, per se.

The noted legal scholar Felix S. Cohen succinctly put it this way: the tribes' legal status "is not a matter of race or birth but is a matter of contract or consent."[7] The Indians' legal status, then, derives from their recognized citizenship in a tribal nation, a status no other minority group can claim. While these are impressive political differences indeed, an important legal difference between Indians and other minority groups and their members lies in the Supreme Court's vast interpretive ability regarding the power of Congress and the executive branch with respect to tribes.[8] Of course, all minority groups have experienced the reality that the "law in action" does not necessarily reflect the "law on the books."[9] According to Bell, then, the persistence of racism, especially against Africans Americans, is fueled by what Arthur S. Miller said were the **two** Constitutions that operate in the U.S.: "One, the 'law on the books,' the actual, formal document, the highly acclaimed legacy of the Founding Fathers; the other, the 'law in action,' which consists of the informal understandings and conventions that actually determine social and governmental policy."[10]

Notwithstanding the accuracy of this legal reality for other minorities, Constitutional protections are still explicit, if not always enforced, for all other groups and their members, but not for Indian tribes and their citizens.[11] This is because all other groups, Asian Americans, African Americans, Hispanic Americans, and women now share a general citizenship status. And although individual Indians were unilaterally enfranchised in 1924 (43 St. 253) (and earlier via treaty provisions), they retain their tribal citizenship. Recognized Indians, in effect, have triple citizenship: tribal, federal, and state) and find that their treaty sanctioned tribal rights, their collective sovereign rights, their aboriginal lands, etc., may be unilaterally erased by congressional action or administrative decision. In fact, even after enactment of the Indian Civil Rights Act in 1968 (82 St. 73) this law only served to extend some Bill of Rights protections to tribal members "in their relationship with Indian governments. Nothing was authorized that would protect American Indian nations or individuals against the arbitrary actions of the federal government, protections that both states and individuals enjoy."[12]

"American Indians," Deloria recently observed, "still stand outside the protections of the Constitution as tribes and only have partial protection as individual citizens. While Indian lands have become part of the United States, Indian communities have neither been allowed to remain isolated as independent political entities nor have they been granted full status within the American political system. Consequently, American Indians have been forced to live within a political/legal no man's land from which there seems to be no possibility of extrication."[13]

The ensuing essay will describe and examine some of the political/legal "cloaking" tools generated by the U.S. Supreme Court and practiced by Congress which placed tribes in the particularly enigmatic position of being recognized sovereigns with rights that can be systematically quashed. This paper is divided into several interre-

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[5] See, e.g., Frances Svensson, "Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes," Political Studies 27 (Sept. 1979):421-439.

[6] See, Standing Bear vs. Crook, 25 Fed. Cas. No. 14891 (1879) and Nell Jessup Newton, "Federal Power Over Indians: Its Sources, Scope, and Limitations," University of Pennsylvania Law Review 132 (1984):287.

[7] Lucy Cohen, ed. The Legal Conscience: Selected Papers of Felix S. Cohen. (New Haven: Yale University Press, 1960):255.

[8] See Vine Deloria, Jr., A Better Day for Indians (NY: The Field Foundation, 1977):6.

[9] Roscoe Pound, "Law in Books and Law in Action," American Law Review 44 (1910):12, as quoted in Derrick Bell, Faces At the Bottom of the Well: The Permanence of Racism (NY: Basic Books, 1992):102.

[10] Bell, 1992:102, quoting from Arthur S. Miller, "Pretense and Our Two Constitutions," George Washington Law Review 54 (1986):375. Bell says that Miller develops his theory of dual constitution's in his recent book, The Secret Constitution and the Need for Constitutional Change (1987).

[11] See, e.g., Vine Deloria, Jr., "The Application of the Constitution to American Indians," in Oren Lyons and John Mohawk, eds. Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution (Santa Fe, NM: Clear Light Publishers, 1992):309.

[12] Deloria, "The Application," p. 309.

[13] Ibid., p. 282.

lated parts. First, I look broadly at the role performed by the Supreme Court in its explication of "the law" as applied to tribes. Second, I focus on the alleged "peculiarity" of the tribal situation and then critically examine the most important "cloaks" generated by the Supreme Court which have adversely affected tribal citizens. Finally, I address whether a decloaking of justice for tribes is possible.

The "Rule of Law" and Indian Tribes

Alexis de Tocqueville once astutely remarked that:

> *The Spaniards, by unparalleled atrocities which brand them (Indians) with indelible shame, did not succeed in exterminating the Indian race and could not even prevent them from sharing their rights; the United States Americans have obtained both these results with wonderful ease, quietly, legally, and philanthropically, without spilling blood and without violating a single one of the great principles of morality in the eyes of the world. It is impossible to destroy men with more respect to the laws of humanity.*[14]

This statement is pregnant with insight and substance. Most important is de Tocqueville's observation of how "law" was used by Americans to "legally" dispossess indigenous communities of much of their territory and to diminish many of their remaining civil, property, and sovereign rights. The United States was actually following well-established European traditions that accompanied engagements of non-European indigenous and tribal peoples. While Spain, France, Great Britain, Holland, and Sweden each interpreted and applied their presumed mandates in the New World "in radically divergent ways, each assumed that **law** was an appropriate instrument of empire in imposing its particular vision of truth on the American Indian."[15]

In reality, the actual data of federal Indian law is the documentary record of how the federal government dealt with the multitude of tribes over time.

Williams' argues that the colonizing nations of the western world have, since the Middle Ages, sought to impose their version of truth on all non-Western peoples. "The Western colonizing nations of Europe and the derivative settler-colonized states produced by their colonial expansion," says Williams, "have been sustained by a central idea: the West's religions, civilizations, and knowledge of non-Western peoples. This superiority, in turn, is the redemptive source of the West's presumed mandate to impose its vision of truth on non-Western peoples."[16]

The "rule of law" or the supremacy of law," provides that decisions sanctioned by the recognition of authorities "should be made by the application of known principles or laws without the intervention of discretion in their application."[17] But as Medcalf has shown, "Law has become a reified entity" in the United States.[18]This process of reification means that the emotional feelings and symbols of justice that "the law" and legal concepts should involve if they are to influence the basic humanity of people are often discarded; and idealized legal abstracts are treated as if they were the norm.[19]

In reality, the actual data of federal Indian law is the documentary record of how the federal government dealt with the multitude of tribes over time. This data is rooted in history, but it has been "clothed in a legal/political vocabulary to make it appear that the United States acted with a certain measure of justice" (Ibid.). This so-called "field" of law, however, is a "mythical creature" because it consists of "badly written, vaguely phrased and ill-considered federal statutes; hundreds of self-serving Solicitor's Opinions; and state, federal, and Supreme Court decisions which bear little relationship to rational thought and contain a fictional view of history ..." (p. 203).

The Supreme Role of the Supreme Court

Throughout its history, the Supreme Court has occupied a seminal role in elaborating upon the distinctive political and legal relationship between tribal nations (which are situated as both pre and extra-constitutional

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[14] Alexis de Tocqueville, Democracy in America (Mayer ed. 1969: 339).

[15] Robert A. Williams, Jr. The American Indian in Western Legal Thought: The Discourses of Conquest, (New York: Oxford University Press, 1990):6.

[16] Ibid.

[17] 5th edition, p. 1196.

[18] Linda Medcalf, Law and Identity: Lawyers, Native Americans, and Legal Practice, (Beverly Hills, CA: Sage Publications, Vol. 62, Sage Library of Social Research, 1978):15.

[19] Deloria, "Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law," 31 Arizona Law Review (1989):204.

policies alongside the federal government) and the political branches of the United States. Most tribes, contrary to de Tocqeville's prediction, were not physically exterminated. However, every tribe has had major chunks of their sovereignty, as well as specific political, legal, property, and civil rights abrogated or seriously diminished. In fact, some tribal nations have been legally terminated.

While states and their citizens have the Constitution to shield their rights from unwarranted intrusions by government, tribal nations are excluded from that protective cloak because they were not organized pursuant to the Constitution. Tribal rights, in essence, are treaty-defined or are subject to certain legal trust protections which the United States has for Indian tribes as a result of treaties, agreements, or other laws. There are, on the other hand, certain trustee responsibilities[20] which the U.S. voluntarily imposed on itself. Tribes, in effect, are extra-constitutional in status because of their original sovereignty. As the Supreme Court said in Talton vs. Mayes (163 U.S. 1896), the U.S. Constitution does not apply to the internal operations of a tribal government because there was nothing in the Constitution itself which made that document applicable to tribes. Consequently, each tribe retains the right to govern itself as its people see fit.

Constructively, this extra-constitutional status has benefited tribes in several key areas. First, constitutional limits on the power of the federal and state governments are inapplicable to tribal governments. For instance, tribes may enact voting laws and ordinances which are explicitly racially discriminatory against non-Indians.[21] Tribal governments may establish a religion. They are not required to convene juries in civil trials; nor in criminal matters to issue grand jury indictments or appoint counsel for indigent defendants.[22] As separate sovereigns, tribes also enjoy sovereign immunity from suit which all other sovereign governments enjoy.[23] Finally, tribal court decision are not generally subject to state or even federal judicial review.

Detrimentally, however, the tribes extra-constitutional status leaves them with virtually no enforceable rights which the United States is constitutionally obligated to protect. For instance, the Supreme Court in 1978 stated that tribal sovereignty exists "only at the sufferance of Congress."24 In the same term, the Court handed down Santa Clara Pueblo vs. Martinez (436 U.S. 49, 56) which held that Congress has "plenary authority to limit, modify, or eliminate the powers of local (Indian) self-government." Aboriginal lands held by tribes are similarly unprotected. The Supreme Court in a 1955 case, Tee-Hit-Ton vs. U.S. (348 U.S. 272, 285) stated that "the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment."

Tribes exist, therefore, in the problematic and highly tenuous position of being treaty-recognized and trust-acknowledged sovereigns, exempt from constitutional constraints and the U.S. Bill of Rights, yet simultaneously as subject nations with virtually no sovereign or property rights which the U.S. is constitutionally bound to respect. What follows is an explanation and description of the role of the Supreme Court in the creation and perpetuation of a number of unique legal cloaking principles: the doctrine of discovery, the political question doctrine, congressional plenary power; and a host of non-constitutional phrases and extra-legal factors like "trusteeship," "incorporation," "implicit divestiture," and tribes alleged "dependency-status." I shall examine the effect of these legal and extra-legal doctrines in legitimating often gross diminutions of tribal rights.25

Moreover, I broach here two larger sets of equally compelling questions which cannot be answered in such a short piece. They are mentioned, however, to generate much needed intellectual discourse. First, should western law and legal principles continue to be the determining paradigms for non-western–indigenous–peoples and their sovereign rights and resources, particularly if the indigenous peoples concerned have not been conquered, have not consented to such actions, or been politically or legally incorporated into the western model? An associated question: since tribal sovereignty is not spawned from the U.S. Constitution, and since tribes as separate polities have never had and still lack representation in Congress, how can congressional laws or constitutional doctrines limit the rights of tribes, especially without tribal consent?

The U.S. claims that the Constitution is the supreme law of the land, but also claims to recognize tribal sovereignty. According to Ball, "these claims–one to jurisdictional monopoly, the other to jurisdictional multiplicity–

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[20] I discuss this concept in some detail in the later part of the essay.

[21] See the Indian Civil Rights Act, 28 St. 77 (1968).

[22] Ibid.

[23] The tribal right of sovereign immunity was recently reaffirmed in Oklahoma Tax Commission vs. Sac and Fox Nation, 61 USLW 4470 (1993).

[24] U.S. vs. Wheeler, 435 U.S. 313, 323.

[25] There are, of course, a number of scholars who maintain that the Supreme Court is the most helpful branch of the government and the tribe's best hope of securing lasting justice. See, e.g., Grant Foreman, "The U.S. Courts and the Indian," The Overland Monthly, 61 (1913):573-579; Felix S. Cohen, "Indian Rights and the Federal Courts," Minnesota Law Review, 24 (January 1940):145-200; Charles F. Wilkinson, American Indians, Time, and the Law, (New Havin: Yale University Press, 1987); Robert Laurence, "Learning to Live with the Plenary Power of Congress Over the Indian Nations," Arizona Law Review, 30 (1988):413-437; and Richard B. Collins, "Indian Consent to American Government," *Arizona Law Review*, 31 (1989):365-387.

are irreconcilable. Two-hundred years have produced no resolution of the contradiction except at the expense of the tribes and the loss to non-Indians of the Indians' gift of their difference."[26] We must also ask why the U.S. Supreme Court is the exclusive center of dispute resolution when jurisdictional conflicts arise between tribes and the states or federal government. Finally, we must educate ourselves and the larger American audience about how tribes arrived at the status they currently have, why their rights differ in degree and kind from the rights of other American minorities and Americans in general, and explore how these rights can be clarified and protected.[27]

I need not reiterate, however, the enormity of the level of tribal destruction that ensued as a result of these close encounters of the European kind.

A "Peculiar" Political Relationship: The Cloaking Begins

The cardinal distinguishing feature of tribes, we have observed, are their reserved and inherent sovereign rights based on their separate, if unequal, political status. This was affirmed in hundreds of treaties and agreements, acknowledged in the Constitution's Commerce clause, recognized in thousands of pieces of federal legislation and expounded upon in hundreds of federal court opinions. The bilateral political relations that ensued between the various Indian tribes and the colonizing European nations, and later the fledgling United States, were considered essential by each of the foreign European and European-derived nation's in their quest for one or more of the following: trade goods, unconverted tribal souls, or geographic and political hegemony. Tribes, of course, also experienced important social, cultural, and economic transformations as a result of these cross-cultural and cross-political intractions. I need not reiterate, however, the enormity of the level of tribal destruction that ensued as a result of these close encounters of the European kind.[28]

By the time the U.S. had established itself as the dominant European-derived player from a host of competitors, the principal political tool used by the United States to relate to tribes was well-known and frequently used: bilateral treaties. These presidentially directed and Senate ratified documents, combined with the Congress's oversight of commercial relations between the two sets of powers based on the Commerce Clause, meant that the federal government had exclusive authority to deal with indigenous peoples. For instance, during the First Congress in 1789, four of the first thirteen statutes dealt primarily with Indian affairs. However, despite exclusive congressional authority in the development of Indian polity, it would be the Supreme Court which would define the political status of tribes from a federal standpoint.

John Marshall, the third chief justice, in several cases[29] in the first three decades of the nineteenth century, and his cohorts on the bench, were largely responsible for articulating the underpinning doctrines and legal cloaks that still largely form the boundaries of the tribal-federal-state relationship. These cases defined 1) tribal property rights (Johnson), 2) tribal political status in relation to the states (Worcester), and 3) tribal status in relation to the federal government (Cherokee Nation). Without going into the details of each case,[30] several important legal cloaks were developed by the Court that still cast a wide shadow of tribal status.

In Johnson vs. McIntosh (21 U.S. (8 Wheat) 543 (1823) the U.S., following the proven intellectual and rationalizing course travelled by other European nations, unilaterally asserted "legal" ownership of North American Indian lands on the basis of the "doctrine of discovery." Marshall underscored the significance of such a bizarre doctrine in an incredible concession:

> *However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes* ***the law of the land****, and cannot be questioned. So too, with respect to the concomitant principle, that the Indian*

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[26] Milner S. Ball, "Constitution, Court, Indian Tribes," American Bar Foundation Research Journal, 1 (Winter 1987):1.

[27] Vine Deloria, Jr., raised these last few questions in "The Distinctive Status of Indian Rights," in Peter Iverson, ed. The Plains Indians of the Twentieth Century, (Norman, OK: Univ. of Oklahoma Press, 1985):238.

[28] See, e.g., Henry F. Dobyns, Their Numbers Become Thinned: Native American Population Dynamics in Eastern North America, (Knoxville, TN: Univ. of Tennessee Press, 1983); Russell Thornton, American Indian Holocaust and Survival: A Population History Since 1492, (Norman, OK: Univ. of Oklahoma Press, 1987); and Lenore A. Stiffarm and Phil Lane, Jr., "The Demography of Native North America: A Question of American Indian Survival," in M. Annette Jaimes, ed. The State of Native America: Genocide, Colonization, and Resistance, (Boston, MA: South End Press, 1992): 23-53.

[29] See, Fletcher vs. Peck (1810), Johnson vs. McIntosh (1823), Cherokee Nation vs. Georgia (1831), and Worcester vs. Georgia (1832).

[30] Because of their importance these cases, but especially the later three, have been written about by virtually every scholar who has immersed themselves in the baffling field of Indian law. Two solid accounts of these cases are, Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," Stanford Law Review 21 (Feb. 1968):500-531; and Jill L. Norgren and Petra T. Shattuck, "Limits of Legal Action: The Cherokee Cass, American Indian Culture and Research Journal 2 (1978):14-25.

inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.[31]

This case, Deloria has argued, needs to be read as complementing the Monroe Doctrine issued that same year. The Monroe Doctrine defined the United States role in the international community entailed a sealing off of the hemisphere from further European imperial incursions.[32] Hence, when the two doctrines are combined: discovery that the Monroe principles–Indian tribal properties had unilaterally became a matter of domestic policy. In effect, "Indian property was the subject of federal control, whereas Indian political existence remained outside the reach of the federal government–except where it chose to embark on a path of conquest and incorporate Indians within it."[33] And since the U.S. initiated no wars of conquest against tribes, no mechanism existed, nor has any been developed since, by which Indian tribes could be incorporated into the constitutional context.

In Cherokee Nation vs. Georgia (30 U.S. (5 Pet.) 1 (1831), the Cherokee Nation had filed an original motion for an injunction to restrain the State of Georgia from executing its laws in Cherokee territory which, the Cherokee maintained, "go directly to annihilate the Cherokees as a political society" and were in direct violation of "solemn treaties respectfully made and still in force" (p. 15). Marshall rendered the Court's fragmented and ambivalent opinion on March 18, 1831. While acknowledging that a more fascinating case "can scarcely be imagined" since it entailed a declining tribal people with whom the U.S. had made successive treaties " each of which contains a solemn guarantee of the residue (of tribal lands)," Marshall first noted that the Court had to ascertain whether it had jurisdiction to hear the case.

This was necessary because the Cherokees were suing as an original plaintiff, and under Article Three, section two of the Constitution which describes the extent of judicial power, the Court has jurisdiction to hear "controversies" between "a state or the citizens thereof, and foreign states, citizens, or subjects" (p. 15), or original jurisdiction in all cases in which a state is a party. The question before the Court was: Did the Cherokees constitute a foreign state in the sense of the constitution, since clearly they were not a state of the union?

Marshall and the majority wrestled with this and arrived at a unique compromise. The Chief Justice refused to accept either of the prevailing opinions at the time: tribes as either foreign nations, or as subject nations. Had he acknowledged them as "foreign nations," they would have been totally independent of any semblance of federal control. Had he Had he declared them "subject nations," on the other hand, they would have been at the mercy of the states. Instead, in one of the most cited statements of any Supreme Court opinion, he stated that as imposing as the argument was that the Cherokee people owed no allegiance to the United States because of their aggregate and pre-existing political status and treaty relations with the federal government, the majority was of the opinion that an Indian tribe or nation within the United States was not a foreign state and could not maintain an action in the Supreme Court.

Marshall rendered the Court's fragmented and ambivalent opinion on March 18, 1831.

"The condition of the Indians in relation to the United States," said Marshall, "is perhaps unlike that of any other people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term **foreign nation** is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."[34] But what precisely was so peculiar about the tribal-federal relationship? From Marshall's standpoint, in this particular case, the peculiarity stemmed from the geographic location of the tribes in proximity to the United States. As Marshall then said:

The Indian Territory is admitted to compose a part of the United States ... In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed

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[31] Ibid., p. 591-592.

[32] "Beyond the Pale: American Indians and the Constitution," in Jules Lobel ed. A Less Than Perfect Union, (NY: Monthly Review Press, 1988):251.

[33] Ibid., p. 251-251.

[34] p. 16.

[35] p. 17-18.

upon our own citizens ... (and) any attempt (by another European nation) to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.[35]

The non-foreign, yet non-constitutional status of tribal nations necessitated a new term: henceforth, tribes were denominated as "domestic-dependent nations" (p. 17). This dilution of tribal political status, again, not consented to by tribes, has had a lasting effect on intergovernmental relations. First, this characterization of tribes as domestic-dependent entities informed the world that tribes existed "comfortably within the protective reach of the United States **with respect to foreign nations**, but (that) Indians (were) not themselves part of the United States."[36] Also, since there was no category of "domestic-dependent nations," the result of the case was to affirm federal political power over tribes without describing any corresponding set of federal responsibilities Indian nations could expect the U.S. to meet. Second, since tribes were denied status as "foreign nations" they were effectively barred from benefits or venues accorded to other sovereigns under international law.

After having unilaterally characterized tribes as weakened sovereigns, yet sovereign enough to maintain a status above that of the constituent states, Marshall built upon the deceptive legal construct of "discovery." He said that tribes "occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases." Marshall was not finished, however. He then uttered several lines containing inaccurate adjectives that later formed the basis of additional "cloaks" that devastated tribal sovereignty. He alleged that tribes "are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian" (p. 17).

The following year, in Worcester vs. Georgia, 31 U.S. (6 Pet.) 515 (1832), the Supreme Court ruled that all of Georgia's laws adversely affecting the constitutionally-defined relationship between the Cherokee Nation and the federal government were "repugnant to the Constitution, laws, and treaties of the United States" (p. 561). Lifting text almost verbatim from Justice Thompson's dissent in Cherokee Nation on the international status of tribes and the politically "foreign" relationship between the U.S. and the Indians, Marshall said that Georgia's actions had interfered "forcibly with the relations' established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union. They are in direct hostility with treaties, repeated succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself" (p. 561-562).

Although Worcester is an important decision and is often hailed as the most persuasive and elaborate pronouncement of the federal government's trust responsibility to tribal nations and as a strong statement on tribal sovereignty, it should be kept in mind that tribes were not parties in this suit and that Marshall says nothing in the opinion to clarify the "domestic-dependent" phrase, nor does he say anything to reduce the assumed power of the federal government regarding tribal aboriginal lands. The decision can be more accurately understood as a "defense of federal power over state power,"[37] though some of the principles enunciated therein (federal supremacy; the viability of Indian treaties; a definition of "discovery" which asserts that it is merely an exclusive principle which grants Americans the preemptive right to purchase Indian land, not one which could annul the previous rights of those who had not agreed to it;[38] a definition of tribes as "nations" who are comparable in basic senses with other nations of the world)[39] have been effectively used by tribes as buffers against state, corporate, and private encroachments onto their sovereignty.

The Cloaking Continues: Judicial Deference, The Political Question Doctrine, and Plenary Power

The middle part of the nineteenth century – 1830s to the 1880s – were wildly tumultuous, often disastrous, and generally transformative years in the physical, economic, and political affairs between the United States and American Indian tribes. They began with the vicious and traumatic Indian Removal era, continued through the years of "Manifest Destiny," and culminated in the U.S. having to adopt new policies (beginning with Indian reservations, the transfer of Indian affairs from the War Department to the Interior, the cessation of Indian treaties,

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[36] Deloria, 1985:239.

[37] Newton, 1984:202

[38] Worcester, p. 544.

[39] Ibid., p. 559-560

and ultimately the allotment of tribal lands and the attempted Americanization, Christianization, and assimilation of Indians into Western society) to deal with the scores of previously unknown tribes that were now physically incorporated into the geographical boundaries of a greatly enlarged United States.[40]

Besides these congressional policies, the Supreme Court was an active participant in the development of legal constructs like the political question rule and congressional plenary power (read: virtually unlimited), and in its general polity-making stance of being exceedingly deferential to the political branches or in legitimating congressional laws. We shall look at these in the following order: judicial deference and the political question will be discussed together. We shall then briefly discuss the doctrine of plenary power.

As noted earlier, the Commerce and Treaty-Making clauses of the Constitution extend to the political branches of the federal government explicit and exclusive authority to regulate the federal government's affairs with Indian tribes. Because of this constitutional allocation of authority, the Supreme Court has generally deferred to the legislative and executive branches in the area of Indian affairs.[41] In fact, the power of judicial review over the substantive context of federal Indian policy was limited to the same extent as judicial power to review foreign affairs decisions was limited. "In analogy to legal concepts governing foreign relations, the federal government's power to make treaties with the Indians was considered a political question, beyond judicial cognizance.[42]

The political question rule, until 1980,[43] had been used by the Supreme Court as a rationale to exclude from review the following issues of importance to American Indian tribes: the status of Indian nations, the validity and operation of Indian treaties under international law and foreign constitutional law, the power of Congress to legislate over people and their territory, the historical claims of tribes against the United States, and the title to Indian lands.[44] The application of this doctrine to Indian affairs was an implicit categorization of Indian matters within the field of foreign relations for over one-hundred years **after** the U.S. Congress unilaterally stopped making treaties with tribes in 1871, ostensibly because tribes no longer constituted national entities. Ironically, while tribes were being subject to the same legal disabilities as foreign nations with regard to the application of the political question doctrine they were simultaneously denied the benefits that accompany foreign national status. And even though the political question doctrine has been effectively discarded, the cases not heard by the court or rejected outright because of the political question from the time the doctrine was first used in U.S. vs. Rogers (45 U.S. (4 How.) 567 (1846) to when it was officially put to rest in U.S. vs. Sioux Nation, (448 U.S. 371 (1980) entail an untold and practically immeasurable set of losses in a multitude of legal areas.

And although the political question doctrine is defunct, for now, the court still maintains an extremely deferential position to Congress in the field of Indian affairs. While this deference was understandable so long as tribes were dealt with as foreign nations and when challengers to federal supremacy, like states and individual whites, were often challenging federal authority, it is unclear why the Court still has failed to "define the extent of Congress's power over Indian affairs."[45] This failure to restrain Congress has encouraged further undue assertions of congressional power.

Finally, we arrive at the single most profound and unique doctrine in the field of Indian law: congressional plenary power as regards tribal nations. I have previously examined this doctrine in detail,[46] but for purposes of this paper want to restate my major findings on this term. From the beginning of the United States' dealings with tribes until the late 1860s it was a constitutional given that Congress, because of the Commerce Clause, had exclusive (read: plenary) authority over Indian affairs against competing states and private individuals who often challenged federal authority.

By the late 1860s, with the reservation policy in full swing and with tribal military power waning, Congress and the Bureau of Indian Affairs began to think of new policies that were designed to educate, indoctrinate, Christianize, and later individualize American Indians. A key prong in this policy to "Americanize" Indians was

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[40] Robert A. Trennert, Jr. Alternative to Extinction, (Philadelphia, PA: Temple University Press, 1975):vii.

[41] See e.g., Karl J. Kramer, "The Most Dangerous Branch: An Institutional Approach to Understanding the Role of the Judiciary in American Indian Jurisdictional Determination," Wisconsin Law Review 5-6 (1986):989-1038; Newton, 1984; Robert T. Coulter, "Legal Remedies Denied to Indian Nations Under U.S. Law," Civic Rights Digest, 0 (1978):30-37.

[42] Shattuck and Norgren, 1992:123:

[43] In U.S. vs. Sioux Nation, 448 U.S. 371, 413, the Supreme Court reputidated the political question doctrine which it had weakened three years earlier in Delaware Tribal Business Committee vs. Weeks, 430 U.S. 73 (1977). In Weeks, the Court said that it would scrutinize Indian legislation to "determine whether it violates the equal protection component of the Fifth Amendment.

[44] Coulter, 1978:32.

[45] Newton, 1984:236.

[46] See my forthcoming article, "The U.S. Supreme Court's Explication of 'Federal Plenary Power:' An Alysis of Case Law Affecting Tribal Sovereignty; 1886-1914," American Indian Quarterly (Fall 1993 or Spring 1994).

the imposition of western criminal jurisdiction over Indian Country and Indian parties. In 1885 Congress enacted the Major Crimes Act (23 St. 362, 385) which unilaterally declared that federal courts would now have jurisdiction over Indian or non-Indian parties committing any of seven major crimes in Indian Country. This was a major encroachment upon tribal sovereignty. The constitutionality of this law was tested in a decision the following year, U.S. vs. Kagama, 118 U.S. 375.

Although the term "plenary" is absent from the decision, other language evidences the Court's unconditional deference to Congress' efforts to diminish tribal sovereignty. The Supreme Court in this case exercised what Deloria has termed "plenary interpretive power" to legitimize Congress's "exercise of plenary legislative authority."[47] Unable to locate a constitutional basis for its decision to allow federal imposition of criminal jurisdiction into Indian Country, the Court instead crafted an ingenious and bizarre two-pronged explanation: alleged Indian helplessness and federal ownership of land. First, Justice Miller transmuted John Marshall's analogy of Indians as "wards" to their federal "guardians," to a principle of law. Miller said: "These Indian tribes are wards of the nation. They are communities dependent on the United States." (p. 383-384).

Continuing, the Court said that federal power over these "weak" peoples was "necessary to their protection, as well as to the safety of those among whom they dwell." This power, the Court held, "must exist in that (U.S.) government, because it never existed anywhere else..." (p. 384). This case, the beginning of plenary power defined as "virtually absolute," was a stunning blow to tribes. Stunning because in addition to relying on extra-constitutional, it was a formal announcement that "henceforth there would be **no** constitutional limitation on the federal government in its dealings with Indian tribes."[48] Several additional questions must be raised. First, how could Congress legitimately apply its laws to tribal citizens and into Indian country which until that time had not been subject to congressional jurisdiction? Second, the fact that most Indians were excluded from the American political process because of their "alien" status and treaty-defined rights seemed largely irrelevant to the Court.[49]

The Supreme Court's unanimous and unabashed support of congressional plenary (read: nearly absolute) power in this case, followed by nearly three decades of additional cases supporting the same virtually omnipotent authority, were the Court's way of legitimating Congress' assimilation and allotment policy. While the Court finally said in 1914 in Perrin vs. U.S., 232 U.S. 478, that Congress had to act upon some "reasonable basis" in exercising plenary power, Justice van DeVanter "conceded" that Congress, because of its exclusive status as the branch denominated to deal with tribes, be "invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the Court" (p. 486).

In fact, the Supreme Court has invalidated provisions of only five of the thousands of congressional statutes which have involved Indian lands or rights.[50] However, not even one of these five invalidations involved Congress' power to dilute tribal sovereign rights. In other words, while the Supreme Court has on a few occasions declared acts of Congress invalid if they infringed previously recognized or congressionally created rights, the Court has never voided a single congressional act because it diminished or abrogated an inherent or aboriginal tribal right.

In sum, when Congress generates Indian-related legislation by relying on its constitutionally enumerated and exclusive authority to deal with tribes, it is exercising plenary authority in a viable manner. However, as with the Court's con tinuing deference to the political branches, although the Rehnquist Court has handed down a number of recent Indian law cases in an "imperial" manner,[51] the Supreme Court continues to characterize tribal sovereignty as existing "only at the sufferance of Congress."[52] The Court has also said that Congress has the "plenary authority to limit, modify or eliminate the powers of local self-government."[53] And with regards to tribal property, the Supreme Court has held that Congress has "paramount power over the property of the Indians."[54]

These contemporary cases harken back to the most devastating plenary power case, Lone Wolf vs. Hitchcock, 187 U.S. 553 (1903). This landmark case dealt specifically with whether Congress had the power to abrogate treaty-recognized tribal property without tribal consent. The Court's unanimous opinion represented a perfect, and

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[47] 1988:261.

[48] Deloria, 1988:261.

[49] Newton, 1984:215.

[50] See Jones vs. Meehan, 175 U.S. 1 (1899); Matter of Heff, 197 U.S. 488 (1905); Muskrat vs. United States, 219 U.S. 1911 (1911); Choate vs. Trapp, 224 U.S. 665 (1912); and Hodel vs. Irving, 481 U.S. 704 (1987).

[51] See Wilkins, "Who's In Charge of U.S. Indian Policy? Congress and the Supreme Court at Loggerheads Over American Indian Religious Freedom," Wicazo Sa: Review, 8 (Spring 1992):40-64.

[52] U.S. vs. Wheeler, 435 U.S. 313, 323 (1978).

[53] Santa Clara Pueblo vs. Martinez, 436 U.S. 49, 56 (1978).

[54] U.S. vs. Sioux Nation, 448 U.S. 371, 408 (1980).

for tribes, deadly synthesis of the plenary power (read: unlimited and absolute) concept, judicial deference, and the political question doctrine.

In ruling against Lone Wolf the Court unamiously developed an interesting set of rationalizations ...

The facts of the case are as follows: the Kiowa, Comanche, and Apache (KCA) tribes had signed a treaty with the United States in 1867 which promised that no future land transaction would be considered valid unless approved in a formally ratified agreement by three-fourths of the adult male members of the tribe. However, with the federal government's allotment polity in high gear by the late 1880s, it was inevitable that the KCA tribes would be pressured to cede additional lands. In the early 1889 Congress authorized a commission to deal with the tribes, hoping to force the Indians to allow the allotment of their lands. The remaining unallotted land, or "surplus" acreage, would then be opened up for white settlement.

The Jerome Commission met in 1892 with representatives of the KCA tribes and concluded an agreement for the allotment of their lands. However, the 1867 treaty requirement that three-fourths of all the adult males must sign any cession agreement was not met. Through various dubious methods, the Commission tried to increase the number of agreement signatories, but still failed to secure the requisite number. Nevertheless, the agreement was sent to Washington for ratification by Congress. Shortly thereafter, the KCA tribes began to memorialize Washington officials urging both houses and the Commissioner of Indian Affairs not to approve the agreement.

Lone Wolf, a Kiowa chief supported by the Indian Rights Association, filed a temporary injunction in the Supreme Court of the District of Columbia in 1901 to prevent the secretary of the interior from implementing the provisions of a federal law that had drastically altered and ratified the agreement, without tribal consent. Lone Wolf lost at the district level and on appeal to the Federal District Court. He then appealed to the U.S. Supreme Court. By this time, the claims of the KCA tribes had been refined to a Fifth Amendment claim: the only question the Court considered was whether the Act of June 6, 1900, which had ratified the earlier agreement, was constitutional. They refused, citing the political question doctrine, to consider the tribes assertion of "fraudulent misrepresentation" by government officials and they also would not consider the issue of the Senate's unilateral alteration of the original agreement between the tribes and the U.S.

In ruling against Lone Wolf the Court unanimously developed an interesting set of rationalizations, in part to protect the rights of the white squatters who had already descended upon the tribes' lands with prior presidential sanctioning via a proclamation in 1901, and to legitimate Congress' abrogation of treaty rights. The Court relied on the so-called "dependent" relationship which, when so defined, gives the U.S. a status as guardian and protector of tribes. Second, the Court cleverly created a fictitious national security question when it alleged that the U.S. "in a possible emergency" needed unlimited power to act. No specific "emergency" is ever described by the justices. In fact, the subject of ratification of the 1892 agreement had been an ongoing issue for nearly eleven years. Nevertheless, the combination of these two factors enabled the Court to fashion an opinion devoid of any constitutional phrases and which literally extended to Congress omnipotent authority over tribal treaty-based political and property rights.

The Court went so far as to say that "plenary authority over the tribal relations 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." (p. 565). The Court continued by noting:

> *The Power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should be so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the* ***power*** *to abrogate existed in Congress, and that in a contingency such power might be available of from considerations of governmental policy, particularly if consistent with perfect good faith towards and Indians (p. 566).*

Lone Wolf was a devastating blow to tribal sovereignty. Congressional plenary power unconstrained by the Constitution was interwoven with the political question doctrine and judicial deference to the legislature to form an almost impregnable shield which could not recognize the possibility that tribal interests and federal interests could conflict. However, when there was a conflict, then clearly the federal had to outweigh the tribal. In short, the Court's refusal to seriously examine congressional enactments violative of treaty property rights was a most oppressive blow, especially since the treaty route had been closed off in 1871 and since tribes remained outside the constitutional matrix.

A month after the decision Senator Matthew Quey (R., Pennsylvania) urged that 1,000 copies be printed and distributed for public consumption. Why? "It is a very remarkable decision. It is the Dred Scott decision No. 2, except that in this case the victim is red instead of black. It practically inculcates the doctrine that the red man has no rights which the white man is bound to respect, and, that no treaty or contract made with him is binding. Is not that about it?"[55]

Lone Wolf gives Congress more power than any conferred by the Constitution Congress, as we saw, is empowered to violate treaties with tribes and to exercise complete control over Indian land without basis or limit in law. The only faint restriction implied is the court's reliance on Kagama's statement that Indians are "helpless." More importantly, Lone Wolf is still considered good law. The late Thurgood Marshall in Solem vs. Bartlett, 465 U.S. 463, 470 note 11 (1984) indicated as such when he wrote: "At one time it was thought that Indian consent was needed to diminish a reservation, but in Lone Wolf vs. Hitchcock ... this Court decided that Congress could diminish reservations unilaterally."[56]

The Perpetuation of Legal Cloaks

The previously discussed "cloaks" have been reinforced and supplemented by additional Supreme Court generated legal devices which have been used to further reduce tribal sovereignty and perpetuate what Strickland termed the historical and continuing "genocide-at-law" of American Indian communities.[57] Two of the most important are 1) the federal "trust doctrine," (also known as the "trust responsibility," or "trusteeship"),[58] what Shattuck and Norgren termed "an illusion unsupported by legal authority" (p. 115), and 2) "incorporation," (which is symbiotically related to "implicit divestiture," or alleged tribal "dependent status").

Trust Doctrine

It is little disputed that the United States acts as a trustee for Indian land and other assets as a result of treaties, agreements, and other legal obligation. However, the trust doctrine that became a favorite cloaking device to dispossess Indians of lands, funds, resources, and rights, was, however, a radical transformation of the purported "guardianship-wardship" relationship that was first manufactured by the Supreme Court in the 1880s and perpetuated by Bureau of Indian Affairs officials during the next several decades. While alleged tribal "wardship" was never a legally accurate characterization of the tribal-federal relationship, it was a concept that remained functional until it gradually was transformed into "trusteeship." "The transformation," says Shattuck and Norgren, "reflected the continued, unflinching demand for tribal land coupled, at the end of the nineteenth century, with an intensified ethnocentrism within the United States with respect to Indian peoples and the increased willingness of the United States to assert power over Indian governments" (p. 115).

It is also vital to remember that while the U.S. frequently expressed this newly formed relationship in legal terms, it, like the term "wardship," has no legitimate legal basis. It is anchored in the federal government's self-imposed moral obligations to assist tribes throw off their alleged primitive ways and become christianized Americans. As the Supreme Court said in 1877 in Beecher vs. Wetherby, (95 U.S. (5 Otto) 517, 525), the United States "would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race." This type of morally-steeped phraseology is regnant in a host of supreme court decisions dating back to Justice Marshall's earliest exhortations and continuing into well into the 20th century. And since the "trust" is composed of moral obligations, it is not legally enforceable.

Nevertheless, Congress continues to describe the federal government's trust obligations to Indians;59 both the Reagan and Bush administrations regularly spoke of the government's "trust responsibility" to the tribes;60 and the BIA, acting as principal agent of the U.S. government, carries out most federal responsibilities for tribes including, but not limited to, the fulfillment of the "trust obligations to American Indian tribes."61

One of the most persistent and intractable conundrums, muddying the federal government's fulfillment of its legitimate responsibilities to tribes is that of the inherent conflict of interest in the political branches administration of its duties to tribes, on the one hand, and to the American people, on the other hand. As one federal court observed on the question of the nature of the congressional action to take tribal lands:

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[55] U.S. Congressional Record, 1903:2028.

[56] As quoted by Ball, "Constitution, Court ..." p. 54.

[57] Rennard Strickland, "Genocide-at-Law: An Historic and Contemporary View of the Native American Experience," University of Kansas Law Review, 34 (1986):713-755.

[58] See, e.g., Ball, 1987:61-66; and Shattuck and Norgren, 1992:115-121.

[59] See U.S. Senate. Final Report: A Report of the Special Committee on Investigations of the Select Committee on Indian Affairs, Senate Report 101-216, 101st Congress, 1st Session (1989).

[60] See, e.g., President Bush's "Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Government's," Weekly Compilation of Presidential Documents, June 14, 1991, (Wash, DC: GPO):783-784.

[61] See U.S. Department of Interior News Release, January 29, 1992 (Washington, DC).

> *It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over Indians and their property, as it thinks it is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.*[62]

Incorporation (Implicit divestiture, sovereignty which has been lost by tribes "by implication as a necessary result of their dependent status")

These are fairly recent and closely correlated legal constructs first enunciated in U.S. vs. Wheeler, 435 U.S. 313, 323 (1978), although they are actually derived from the extra-legal reasoning evident in the 1886 Kagama decision. In Wheeler, the Court began its discussion of tribal sovereignty by noting that "before the coming of the Europeans, the tribes were self-governing political communities" (p. 322-323). However, Justice Stewart, quoting from Kagama, then stated that "Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." He said: "Their **incorporation** within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised" (p. 323).

The so-called "implicit divestiture" of certain elements of tribal sovereignty, namely, 1) the tribes inability to freely sell their land to non-Indians without federal consent, 2) their handicapped right to enter contracts or agreements with foreign nations, and 3) their lack of criminal jurisdiction over non-Indians (p. 326), rested, according to the Court, "on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations" (Ibid.). However, as Ball has noted, "if an Indian nation is a nation, then its governmental powers cannot simply evanesce and reappear in the hands of another nation's government" (p. 21).

The key is discerning what "implicit divestiture" means and exactly what "incorporation within the territory of the U.S." entails, for this is central to the court's argument as to how tribes lost certain degrees of sovereignty. Ball, once again, gives a splendid analysis of this doctrine, and after having analyzed each of the cases cited by Justice Stewart finds that "I can discover no incorporating event or series of events" which have incorporated tribes, besides the actual fact of their geographic incorporation, into the American polity (p. 37). More interestingly, Ball critically examines the court's statement that because tribes came "under the territorial sovereignty of the U.S." this also implied a loss of sovereignty. But as he says:

> *I am uncertain what that means. The underlying image appears to be that emigrants escaping to our shores, foreigners coming under the territorial sovereignty of a previously established power. Since it was the European emigrants who came under the territorial sovereignty of the Native American nations, the image is fundamentally confused. The phrase 'upon incorporation' invents a history that inverts the facts as well as John Marshall's theories (Ibid.).*

Regardless, it is a legal concept that continues to create havoc on tribes in their efforts to be self-determining.[63]

Conclusion: Is A Decloaking Possible?

As indicated at the outset of this essay, these legal cloaking devices, both the historical and contemporary, have occasionally worked to protect Indian tribes and their resources and rights from private, state, and sometimes even federal confiscation or diminishment. This is a result, Shattuck and Norgren have argued, of "the two-tier structure of federal Indian law."[64] The first tier, or the higher level, involved the Supreme Court's articulation of principles which described the exceptional nature of the tribal-federal relationship. It was exceptional because it was exempt from ordinary constitutional standards and procedures. The reification of the doctrines of plenary congressional power, the political question, and judicial deference, meant that Indian affairs operated in an extra- constitutional

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[62] Three Tribes of Fort Berthold Reservation vs. United States, 182 Ct. Cls. 543, 553 (1968) as quoted in Deloria, 1988:266.

[63] See, Duro vs. Reina, 110 S. Ct. 2053 (1990) in which the court had to answer the question whether a tribe's sovereignty "in their dependent status" included the power of criminal jurisdiction over non-member Indians. The Court held that tribes lacked such jurisdiction, in part because they had been "implicitly divested" of it. Fortunately for tribes and their efforts to administer justice in Indian country, Congress enacted a statute in 1991 (105 St. 646) which restored this power to tribal courts.

[64] 1991:190.

framework.[65] Simultaneously, the development and transmogrification of the "trust" theory gave the U.S. virtually unlimited authority over Indians and their rights and properties.

On the second level or lower tier, the Court occasionally imposed a set of legal "standards or regularity, calculability, and due process consistent with liberal principles of formal legal rationality."[66] On this level the administration and enforcement of federal policies were subject to strict judicial scrutiny. Hence, canons of treaty interpretation (e.g., treaties should be construed as Indians understood them), insistence that congressional abrogation be based on explicit statements, and certain constitutional safeguards of individual Indian property rights, etc., were developed which often secured hard fought victories for tribes or individuals.[67] However, these victories were often protected only if they were phrased in terms of federal prerogatives, so that the federal exercise of power is shielded from states.[68]

The Supreme Court's two most recent Indian law decisions dramatically confirm the two-tiered nature of the law. Regarding the second tier, on May 17, 1993, in Oklahoma Tax Commission vs. Sac & Fox Nation, 61 USLW 4470, the Court unanimously upheld tribal sovereign immunity and voided the state's efforts to tax tribal members. "Absent explicit congressional direction to the contrary," said O'Connor, "it must be presumed that a State does not have jurisdiction to tax tribal members who live and work in Indian Country" (p. 4474).

By contrast, a month later the Supreme Court by a 7-2 majority, rendered another in a long line of first tier cases that does not bode well for the continuation of tribal treaty rights or retained inherent sovereignty. In South Dakota vs. Bourland, 61 USLW 4632, Justice Clarence Thomas, writing for the majority, said that the Cheyenne River Sioux tribe "implicitly" had their 1868 treaty rights abrogated and had thereby lost the power to regulate non-Indian hunting and fishing on Indian lands when Congress enacted a later law which called for a taking of tribal land for the construction of a dam. "Congress," said Thomas, "has the power to abrogate Indians' treaty rights ... though we **usually** insist that Congress clearly express its interest to do so" (p. 4634).

It is an oversimplification to say as Falkowski recently has (1992) that "Indian law is race law." There is, however, ample evidence to support his more historically and culturally accurate assertion that from the earliest period of contact between indigenous people and peoples of the western world that there were "two systems of law – one applying to "civilized" peoples, and the other applying to the so-called "backward races"[69] Over the last one-hundred years or so, the dynamics of cross-cultural and cross-political relations have complicated the relationship between tribes and the United States.

Indian law, that ill-defined entity which broadly stated includes a potpourri of western and indigenous actors and personalities, historical and current events, ad hoc federal Indian policies and tribal responses, a myriad of regulations on all levels (federal, state, tribal, and even municipal), and an inconsistent assortment of case law, also on multiple levels, has been drenched with the unpredictability of history. The historical past, in fact, both haunts and enlivens the contemporary field of tribal-federal political/legal relations. It is haunted by paternalistic, sometimes racist, non-Indian attitudes, the outmoded theory of Social Darwinism, persistent challenges to the national government's exclusive power to regulate Indian affairs, and threats to national security by other nation-states. It is, on the other hand, illuminated by the democratic (both indigenous and American) ideals of consent, concern for justice and humanity, and tolerance of diversity.

In this internationally sanctioned year of closer scrutiny of indigenous peoples, the various nation-states of the world have an opportunity to begin the process of rectifying many of the persistent disparities in political/legal power that still dominate indigenous-non-indigenous relations. The United States could begin by disavowing the use of plenary power (read: virtually absolute), and by repudiating the doctrine of discovery. It could facilitate vastly improved intergovernmental relations by returning to the basic political principles outlined in the Northwest Ordinance of 1787 which stated that "the utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent ..."[70] Until these and other developments become reality tribes will remain locked in a grossly inequitable politically dependent relationship transformed unilaterally by the federal government without tribal consent.

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[65] Ibid

[66] Ibid., p. 191.

[67] Ibid.

[68] Deloria, 1988:264.

[69] James E. Falkowski, Indian Law/Race Law: A Five Hundred-Year History (New York: Praeger, 1992).