Who's in Charge of U.S. Indian Policy? Congress and the Supreme Court at Loggerheads Over American Indian Religious Freedom

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> Our interest in Indian self-government today is not the interest of sentimentalists or antiquarians. We have a vital concern with Indian self-government because the Indian is to America what the Jew was to the Russian Czars and Hitler's Germany. For us, the Indian tribe is the miner's canary and when it flutters and droops we know that the poison gasses of intolerance threaten all other minorities in our land. *And who of us is not a member of some minority?* (Cohen, 1949: 313-314).

A prophet is not respected in his own country (John 4: 44).

Introduction

The federal government's three branches--executive, legislative, judicial, and that unwieldy mass known simply as "the bureaucracy" have, during the last half-decade--1987-1991--produced a dizzying crop of laws, policies, proclamations, regulations, and court decisions which have served simultaneously to 1) reaffirm tribal sovereignty; 2) permit and encourage greater state interference within Indian Country; 3) enhance federal legislative authority over tribes; and 4) deny constitutional free-exercise religious protections both to individual Indians and to tribes.

On the legislative side, Congress has established the experimental Tribal Self-Governance Demonstration Project (102 St. 2285, 2296; as amended 105 St. 1278) which is a major step towards restoring the tribal right of self-determination, and is discussing the potentiality of reestablishing a more constitutionally-grounded policy with tribes--"New Federalism." This policy would resemble the bilateral agreement period between tribes and the U.S. which lasted from 1875 to 1914 (Senate Report, No. 101-216, 1989:16; see S.2512 "New Federalism for American Indian Act, April 25, 1990).

These legislative developments and policy discussions were preceded by two 1987 congressional resolutions, one joint, the other a Senate concurrent resolution, which reaffirmed the political nature of the tribal-federal relationship. First, Public Law 10-67 (101 St. 386), a joint resolution commemorating the bicentennial of the Northwest Ordinance of 1787, enacted July 10,1987, reaffirmed the Northwest Ordinance as one of the fundamental legal documents of the United States.

The original legislation, the articles of which were to "forever remain unalterable, unless by common consent" (1 St. 50 52) provided civil government for the Northwest Territory, and also included a declaration by the federal government and its people to "democratic principles, religious freedom, and individual rights" (101 St. 386). More importantly, the Ordinance enunciated the fundamental political premise--consent--upon which subsequent federal Indian policy was to be based:

> The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them... (1 St. 50, 52).

Two months after this establishment of policy, on September 16,1987, Senator Daniel Inouye (D., Hawaii), along with eighteen others introduced Senate Concurrent Resolution 76 which acknowledged 1) the Iroquois Confederacy and other tribes' democratic traditions and the role these nations played in the formation of the U.S. Constitution; 2) the "government-to-government" relationship between tribes and the federal government; 3) the federal government's continuing legal obligations to tribal nations in the areas of health, education, economic assistance, and cultural identity; and finally a statement reaffirming the recently commemorated Northwest Ordinance provision on the federal government's need to exercise the "utmost good faith" in upholding its treaties with tribal nations.

The year 1987 was also interesting because it signalled the start (it was a two-year study) of yet another (42 preceded this one) congressional investigation (Senate Report, 101-216,1989: 236-238) of the corruption, fraud, incompetence, and mismanagement lacing the Bureau of Indian Affairs (BIA) and other federal agencies that deal with tribes and individual Indians in several areas--economic development and Indian preference contracting, Indian child sexual abuse, Indian natural resource issues, Indian health, Indian housing, and tribal elite corruption. (The Senate's investigation will be discussed in more detail later in this article.)

Not surprisingly, the Special Committee on Investigations, co-chaired by Arizona's own sometimes beleaguered senatorial delegation, Messrs. DeConcini and McCain of the Senate Select Committee on Indian Affairs, which conducted the study, was not directed as part of their congressional mandate to investigate the impact of decisions handed down by their sister institution, the Supreme Court. The three branches of the federal government historically, though not always consistently, have operated from a similar set of intellectual, political, and cultural premises when it comes to developing, implementing, and evaluating programs and policies for America's indigenous peoples. This is not at all unusual considering that the three branches constitute the ruling national coalition of American politics. And the Supreme Court, like other political institutions, as Dahl noted, "is a member of such ruling coalitions, and as such its decisions are typically supportive of the policies emerging from other political institutions" (1957: 293).

In addition, and even more intriguing, the Special Committee did not feel called to ascertain the impact of various supreme court opinions on tribal rights largely because the judicial branch had not yet explicitly embarked on its imperialistic quest to disregard the rights of tribes and their citizens in several areas of law: non-member Indian criminal jurisdiction (*Duro v. Reina,* 58 USLW 4643 (1990)), double taxation (*Cotton Petroleum Corp. v. New Mexico,* 57 USLW 4445 (1989)), zoning regulations of Indian land (*Brendale v. Confederated Tribes and Bands of Yakima,* 109 S.Ct. 2994 (1989)), and most significantly, the free exercise of religion (*Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S. 439 (1988) and *Employment Division v. Smith,* 108 L.Ed 2d. 876 (1990)). On the contrary, the Court in 1987 handed down two opinions which were generally supportive of tribal rights regarding the expansive parameters of tribal court jurisdiction (*Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1986)) and the right of tribal governments to regulate gaming in Indian country free from state and local government interference (*California v. Cabazon,* 55 USLW 4225 (1987)).

Nineteen eighty-eight, however, signalled the advent of the political branches (Congress and Executive)[1] and the judicial branch heading in radically divergent directions in the several areas of law mentioned above, but most dangerously in the sensitive area of religious freedom for Indians. In *Lyng,* the Supreme Court in a majority opinion held that the constitution's free exercise clause did not prevent governmental destruction of the most sacred sites of three small tribes in northern California. The majority made this ruling in full realization that the activity of the U.S. Forest Service--construction of a six-mile road--would virtually destroy the Indian's ability to practice their religion.

Also, in April 1988, and just eight days after *Lyng,* the Supreme Court in *Employment Division v. Smith* (485 U.S. 660--also known as *Smith I*) granted certiorari and then remanded the case back to the Oregon Supreme Court for a determination as to whether the Oregon statute criminalizing peyote provided an exception for religious use. The Court suggested that "if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon" (p. 672).

Conversely, one day after *Smith I,* on April 28,1988, Congress enacted a Comprehensive Elementary and Secondary education law (102 St. 130), which contained a provision of largely symbolic significance: "The Congress," it was declared, "hereby repudiates and rejects House Concurrent Resolution 108 of the 83rd Congress and any policy of unilateral termination of federal relations with any Indian nation." The essence of unilateral termination, an aberrant and short-lived federal policy, was gutted in 1958 when Secretary of Interior Fred A. Seaton stated that termination acts would not be enacted without the full consent of the Indians concerned (quoted in Prucha, 1990: 240-241). It was later verbally discredited by Presidents Nixon in 1970 and Reagan in 1983 in their Indian policy statements. It had not, however, been officially rejected by the body which had created it.

Besides the belated expulsion of the termination resolution, the year witnessed amendments to several existing laws (Alaska Native Claims Settlement Act, 101 St. 1788; Indian Housing Act, 102 St. 676; Education Amendments Act, 102 St. 1603; Indian Financing Act, 102 St. 1763; Indian Self-Determination Amendments, 102 St. 2285; Indian Reorganization Act Amendments, 102 St. 2938; Navajo & Hopi Indian Relocation and Amendments Act, 102 St. 3929; and Indian Health Care Act Amendments, 102 St. 4784), the enactment of several laws to settle claims, or to expand, protect, or create Indian reservations (Land taken into trust for Pechanga Band of Luiseno Mission Indians, 102 St. 897; Land Claim of Coushatta Tribe of Louisiana, 102 St. 1097; Reservation for Confederated Tribe of Grande Ronde Community of Oregon, 102 St. 1594; and Quinault Reservation Expansion Act, 102 St. 3327), and finally, the enactment of new legislation on important issues in the areas of political recognition (Lac Vieux Band of Lake Superior Chippewa Indians, 102 St. 1577), economic development (Economic Development Plan for the Northwestern Shoshone, 102 St. 1575), gambling (Indian Gaming Regulatory Act, 102 St. 2467), and water rights (Colorado Ute Indian Water Rights Settlement Act, 102 St. 2973).

The congressional enactments cited above vary in importance and substance. Several of them, in fact, are merely minor modifications of preexisting legislation that have had negligible impact in improving either tribal socio-economic conditions or the structural relationship between tribes and the U.S. Other laws, meanwhile, are now considered by many Indians and tribal governments as nothing more than fresh and violative incursions into tribal sovereign rights (i.e., the Indian Gaming Act). Nevertheless, when compared with the Supreme Court's dynamic duo--Lyng and *Smith II*--it is overwhelmingly evident that the Congress at least is attempting to address and resolve certain issues of importance to tribes while the Supreme Court seems bent on shattering the always tenuous set of tribal sovereign rights as well as the constitutional rights American Indian individuals are ostensibly entitled to as federal and state citizens.[2]

The Problem

This article's principal question is: What explains the disparity between the way the Congress conceptualizes and deals with tribal sovereignty and the associated religious and cultural practices of tribes and tribal individuals, and the way the Supreme Court addresses and decides the same issues? This is an especially critical question because constitutionally Congress is the only branch empowered to treat with tribes who historically were dealt with at arm's length through treaties and agreements as separate sovereigns. For generations, (with some few exceptions) the courts relied on the political question doctrine and generally deferred to Congress in the handling of Indian related issues. And for just as many generations, but particularly after 1871 when Congress froze the treaty process (16 St. 544, 566), tribal people and other interested commentators have argued that this judicial deference to the legislature left tribes without legal redress for many issues (Coulter, 1977; Shattuck & Norgren, 1979; Newton, 1984): Today, however, the court, while still sometimes deferring to Congress, has begun to forcefully articulate its own policy position regarding tribal status and rights; policy statements which, at least insofar as aboriginal religious rights are concerned, have largely shredded those rights.

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Our major question necessarily generates a set of subsidiary questions which must also be addressed: What is the actual relationship between Congress and American Indian tribes and their citizens? Is Congress as supportive of tribal autonomy as it seems? If so, and since Congress is vested with the constitutional authority to develop policies relating to tribes, how do we explain the recent spate of Supreme Court decisions, particularly *Lyng* and *Smith,* which deny constitutional protections to American Indians and ignore congressionally generated (i.e., American Indian Religious Freedom Resolution, 92 St. 469,1978) legislative protections of tribal rights as well? Why, after nearly two centuries of generally consolidated (all three branches

working together) federal efforts to 1) obliterate tribalism by assimilation or termination, or 2) implement and sustain federal programs of paternalism which kept tribes locked in dependency relations, or 3) generate programs and policies which support tribal autonomy by recognizing Indian political and legal rights, and cultural distinctiveness, or 4) some interesting melange of multiple federal policies with cross-cutting objectives, is the Congress attempting to resuscitate the negotiated agreement process with tribes while the Court, on the contrary, is actively engaged in a systematic effort to withdraw or deny American Indians and tribal groups religious freedom?

Scholarly Findings And Expectations

Because of the profundity of the subject under examination, religious freedom, a wealth of scholarly literature has been generated on the topic. Within the last five years alone--1987-1991--some thirty-two law review articles were published dealing with the subject of Indian religious issues, excluding Deloria's works which will be treated separately (see Index to Legal Periodicals). The majority of these focus on interpretations and explanations of various supreme court cases involving the free exercise clause and Indian religion cases (e.g., Loftin, 1989; Wyatt, 1989; Collins, 1990; Gordon, 1991; Perry, 1991; Lawson and Morris, 1991; Echo-Hawk, 1991; Perry, 1991; and Rawlings, 1991). Other articles have focused on topics such as sacred lands (Brooks, 1990); repatriation of Indians remains (Ravesloot, 1990; Boyd, 1990; and Echo-Hawk, 1990); problems with application and enforcement of the American Indian Religious Freedom Resolution (Boyles, 1991); and general congressional policy fluctuations over time and their impact on tribal religious beliefs and practices (Martin, 1990).

Besides the scholarly literature, the federal government's various congressional committees and subcommittees and other federal administrators have also produced a large amount of documentation on the subject, both historically and currently. Table I depicts the major treaties, laws, and broader policies crafted by the United States in the last two hundred years which have directly affected the religious beliefs, practices, and sacred sites of Indians. Table II, more specifically portrays the most recent legislative efforts to either modify the existing religious freedom law (the 1978 American Indian Religious Freedom Resolution, 92 St. 469) or to overturn or legislatively circumvent those Supreme Court cases which have devastated Indian religious rights. Furthermore, the Senate Select Committee on Indian Affairs has held two separate hearings (Hearing 100-879 on S. 2250, May 18,1988) and (Hearing 101514 on S. 1124, Sept. 28,1989) on ways to "ensure that the management of federal lands does not undermine and frustrate traditional native American religious practices."

These studies and reports, both private and public, have facilitated a deeper awareness of the complex face of tribal and individual Indian efforts to practice aboriginal religion in the face of private, corporate, state, and federal agency pressure which often clashes with such practices. They have also illuminated the U.S. Constitution's highly problematic ability to protect even individual Indian religious beliefs and practices. Finally, they help explain why various federal court decisions have been handed down which adversely affect tribal religious practices. However, typically they inadequately treat the complexities and distinctive features of the broader tribal-federal relationship by failing to place the issue of religious freedom within a larger theoretical, historical, political, and philosophical context. Moreover, since the bulk of existing scholarship is authored, edited, or coordinated by non-Indians they inadequately portray the moral and cultural authority of articles, monographs, and books authored by tribal individuals.

One individual whose scholarship meets and exceeds these thresholds is Vine Deloria, Jr., a Standing Rock Sioux. From his early writing on religious issues (*God is Red,* 1973; *The Metaphysics of Modern Existence,* 1979) to his most recent work in the field ("A Simple Question of Humanity: The Moral Dimension of the Reburial Issue," 1989; "The Reflection and Revelation: Knowing Land, Places, and Ourselves," 1991; "Sacred Lands and Religious Freedom," 1991; "Worshipping the Golden Calf: Freedom of Religion is Scalia's America," 1991; and "Trouble in High Places: Erosion of American Indian Rights to Religious Freedom in the U.S.," 1992), Deloria has employed an eclectic and contextualistic style to write about an amazingly diverse set of topics and issues besides religion. He has, for example, published works in the areas of political science (political theory, American politics, Marxism), law, history, education, economics, philosophy, sociology, minority affairs, popular culture, and environmental affairs. Deloria has noted on several occasions the improbability of anyone developing comprehension about the cultural, legal, and political status of tribes in the United States without in depth reference and analysis of, at a minimum, history, economics, politics, and morality (1989b: 223).

In fact, in a recent article on the problems associated with the current practice and interpretation of

Table I:
Congressional Activity Regarding American Indian Religious Freedom

Major Treaties and Laws	Major Federal Indian Policies
Treaty between Kaskaskia Tribe of Illinois and U.S. in 1803--contained provision in which the U.S. agreed to pay for services of a Catholic priest (Kappler, 1903:50)	
	American Board of Commissioners for foreign missions establish first mission in Indian Country at Brainerd, Tennessee (1816). (Received financial support from the federal government.)
Civilization Fund Act, 3 St. 516-17 (Mar 3, 1819)	
[*Between 1819 and 1842, the U.S. provided $214,500 to missionary societies for the education of Indians*] Source: Schmeckebier, 1927:40.	
[*Numerous treaties, i.e., Treaty with the Omaha Tribe, 1854, and Treaty with the Shawnee* (Kappler, 1903:456, 460) *contained provisions whereby the U.S. gave the fee-simple title of sections of Indian land to various Christian denominations engaged in proselytizing and educating Indians.]*	
	President Grant's Peace Policy (assigned Indian agencies to Christian denominations) *Messages and Papers of the Presidents,* Vol. 7, pp. 109-110, (Dec. 5, 1870).
	Courts of Indian Offenses (Sec. of Interior, *Annual Report,* Nov. 1, 1883).
	Sectarian schools no longer to be funded by U.S., 30 St. 62, 79 (June 7, 1897) [Note: This was repealed March 30, 1968, 82 St. 71].
Rations to mission schools, 34 St. 326 (June 21, 1906).	
Patents of lands to missionary boards of religious organizations, 42 St. 995 (Sept. 21, 1922)	
	Comm. of Indian Affairs, John Collier, issues Circular No. 2970, "Indian Religious Freedom and Indian Culture," (1933) which stated that Indian religion would no longer be interfered with (Prucha, 1984; Vol. 2, pp. 951-952).
Indian Civil Rights Act, 82 St. 73, 77 (1968).	
	American Indian Religious Freedom Resolution, 92 St. 469 (Aug. 11, 1978).
Native American Graves Protection and Repatriation Act, 104 St. 3048 (Nov. 16, 1990).	

Indian law, Deloria says that "[t]he mythical, doctrinally determined history which is now entrenched in federal Indian law will be replaced with a more accurate history only with exceptional difficulty and hardship" (1989b: 223). In an earlier article which focused on the question of religion, Deloria more explicitly observed that:

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> On balance, the difficulty and of defining the rights or religious freedom for Indians appears to lie in accommodating the free exercise clause and the establishing clause so that Indians will have sufficient leeway to exercise their rights without falling under one of the traditional categories of prohibitions. We must learn how to phrase questions of Indian religious freedom so that we can begin to achieve the proper results. We must first raise fundamental questions regarding the nature of all Indian rights: social, political, economic, educational, and religious. We must ask how Indians received these rights, why they differ in degree and kind from the civil rights of other American citizens, and how they can be clarified and thereby protected and enforced" (1985: 238).

Mindful of Deloria's admonitions, we focus in the remainder of this article less on doctrinal analysis of individual Supreme Court cases, since their is ample literature on that, and more on establishing the larger theoretical, political, institutional, and practical dimensions of this subject so that the question of why indigenous people currently are denied constitutional protection of their right to practice their religion in a constitutional democracy can be explained. We begin, therefore, with a discussion of the tribal-congressional relationship.

Tribes As Extra-Constitutional Entities

Chief Justice John Marshall once posited that "the relation of the Indians to the United States [was] marked by peculiar and cardinal distinctions which exist nowhere else (*Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831). In penning this striking passage Marshall attempted to define, for the federal government, the novel political relationship in existence between Tribes and the United States. The case and Marshall's inventive passage are frequently cited even today by policy-makers, commentators, and scholars who wrestle with the idea of racially-based tribal nations, the majority of whom are completely land-locked by both state and federal jurisdictions. A majority of the tribes operate under their own constitutions and they continue to exercise a myriad of governmental powers, some of which may legally conflict with the United States Constitution.[3] Of more importance, Marshall's phraseology compels one to ask a deeper set of questions. Is the tribal-federal relationship as unique as Marshall asserted? If so, why? If not, why did he say it was? What, more precisely, urged Marshall initially, and succeeding generations of scholars, politicians, administrators, and jurists to conclude that "peculiar and cardinal distinctions" mark the tribal-federal relationship? What are some of these "peculiarities"? Is it the racial dimension; is it the distinctive governmental dimension of tribal life and

Table II
Recent and Current Bills Involving Indian Religious Questions

H.R. 1546:	Amend the American Indian Religious Freedom Act of 1978" (March 21, 1989)
H.R. 5377	"Protect Free Exercise of Religion" (July 26, 1990)
H.R. 2797	"Religious Freedom Restoration Act of 1991" (June 26, 1991)
H.R. 4040	"Religous Freedom Act of 1991" (Nov. 26, 1991)
S. 2250	"Improvement of the American Indian Religious Freedom Act" (March 31, 1988)
S. 1124	"The American Indian Religious Freedom Act Amendments of 1989" (June 6, 1989)
S. 1979	"Amendments to the American Indian Religious Freedom Act" (Nov. 21, 1989)
S. 1980	"Repatriation of Native American Group or Cultural Patrimony" (Nov. 21, 1989)
S. 110	"Amendments of American Indian Religious Freedom Act" (January 14, 1991)

the pre- and extra-constitutional connection tribes have to the federal government, evidenced by hundreds of treaties; is it the sheer volume of separate tribal groups and nations (over 500 at last count); or is it because over time the Supreme Court has generated a conflicting set of legal fictions and non-constitutional principles and doctrines (i.e., the "doctrine of discovery," "domestic-dependent" status, "dependency-wardship," etc.) that acknowledge tribes and their political and property rights as exiting outside the protection of either the federal constitution or international law?

Actually, it can be, and often is, a strange and vacillating combination of all the above, with an emphasis, we would argue, on the Court's innovative ability to develop legal doctrines justifying, on the one hand, the imposition of federal authority over tribal lands and citizens; and on the other hand, creating a set of legal (some say moral, i.e., "trust doctrine") barriers designed to protect tribes from federal agencies, states, and private parties. Marshall, of course, because of his enormous intellectual talent, his belief in federal supremacy, his compassion for tribes, and the important element of timing, is the principal federal figure responsible for the current state of tribal-federal relations.

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A number of writers have critically analyzed Marshall's comments in *Cherokee Nation* and his other important Indian law decisions (Burke, 1969; Deloria, 1983; Ball, 1987; Wilkinson, 1987; and Williams, 1990).[4] Though differing, sometimes vehemently, in their interpretation of Marshall's doctrines, there is general concurrence that the gifted jurist blended his federalist convictions, a sense of moral obligation to Indians, and a pragmatic need to find a way to reconcile tribal status in the constitutional framework (Burke, 1969). And while scholars will continue to debate the status of tribal sovereignty as it emerged from the Marshall court era, one would be on firm historical and political ground to argue that tribes, in the words of dissenting Justice Thompson in the *Cherokee* case, were indeed "foreign" to the United States. Thompson said:

> It is their political condition that constitutes their foreign character, and in that sense must the term foreign, be understood as used in the constitution. It can have no relation to local, geographical, or territorial position. It cannot mean a country beyond sea. Mexico or Canada is certainly to be considered a foreign country, in reference t the United States. It is the political relation in which one government or country stands to another which constitutes its foreign to the other (p.55).

Thompson's dissent, it should be noted, played a significant role in Marshall's follow up decision, *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832) which affirmed the distinct and independent status of the Cherokees and the supremacy of federally-negotiated Indian treaties over state laws.

Why all this discussion about Marshall's early characterizations of tribes and their political relationship with the United States? First, to show that the utterances of Chief Justices are sometimes grounded in something other than constitutional or legal principles. And second, to show that while Marshall overtly manipulated the description of tribal status and the tribal-federal relationship, this did not bring tribes under the auspices of congressional power. Tribes were still perceived and treated as "foreign" by the Courts, the President, and the Congress.

Hence, when George Bush issued his Indian policy on June 14,1991 (Weekly Compilation of Presidential Documents, Vol. 27, No. 25: 783-784), which supported the "government-to-government" relationship between tribal nations and the United States, he was acknowledging the persistence of that same distinctively political relationship. Clearly, this relationship has experienced transformations and vacillations. Some of these include demographic (the gross decline of tribal populations contrasted by the steady rise of non-Indian populations) as well as political and legal changes, most of which were unilaterally inaugurated by the United States (see, for example, Ball, 1987). But notions of tribal cultural and political autonomy remain valid for many tribes, though for others it is more problematic (Prucha, 1985).

Descriptions of tribes as "governments" stem from their status as the original sovereigns of America with whom various European states and, later the United States, engaged in hundreds of legally binding treaties and agreements. Clearly, the tribes' sovereign status (though Bush refers to such status as "quasi-sovereign, domestic-dependent") continued throughout the Colonial period, the Confederation, the Northwest Ordinance, and the establishment of the Constitution.

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The U.S. Constitution mentions Indians three times: 1) twice Indians are excluded from official population tabulations for determining congressional representatives (Article 1, sec. 2, cl. 3 "...excluding Indians not taxed..." and the 14th Amendment, sec. 2, which also refers to "Indians not taxed"); and 2) Indians are expressly

referenced in the Commerce Clause (Article 1, sec. 8, cl. 3) which provides that Congress is empowered "To regulate commerce with foreign nations ... states ... and with the Indian tribes." The Commerce Clause is the only explicit source of power delegated to Congress. It is, moreover, a "power allocation among competing power users governed by the Constitution ... [but] it is not an ascription of power as between Congress and the tribes because the Indians were apparently not intended to be included and were in fact not included within the coverage of the Constitution" (Rottenberg, 1986: 411).

Theoretically, the Commerce Clause should not extend to Congress any greater power over tribes than it exercises over states, though in historical and contemporary practice such has not been the case.[5] For example, while the Supreme Court has held that "the sovereignty of the states is limited by the Constitution itself" (*Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 548 (1984)), states enjoy legal and constitutional protection against arbitrary federal action because of the doctrine of enumerated powers.

The question of enumeration represents one of the most problematic aspects of the political conflict between tribes and the U.S. In constitutional law matters not involving tribes, the Court has generally maintained, as it did in *Kansas v. Colorado,* 206 U.S. 46 (1907), that the U.S. "is a government of enumerated powers" (p. 88). The Court acknowledged, as it has on many occasions, that the Constitution, "is not to be construed technically and narrowly," but went on to say that "it is still true that no independent and unmentioned power passes to the National Government or can rightfully be exercised by the Congress" (*Ibid.*).

When Congress deals with tribes, however, additional variables are considered: e.g., the treaty, not constitutionally-defined political relationship, and the pre- and extra-constitutional status of tribes. These features enable the Court to sometimes utilize implicit and non-constitutionally derived doctrines to justify judicial or congressional actions (e.g., wardship, "discovery" principle, "implicit divestiture," etc.) that would not withstand legal scrutiny if applied to any other individual or group. (Cohen, 1972 ed.: 170).

The combined effect of these distinctive constitutional and non-constitutional features is illustrated by the statement that general congressional laws are inapplicable to Indian tribes, "if their application would affect the Indians adversely, unless congressional intent to include them is clear" (*Elk v. Wilkins,* 112 U.S. 94, 100 (1884); Cohen, 1972 ed.: 173). Moreover, there is solid historical and constitutional support for the doctrine that "Congress has no constitutional power over Indians except what is conferred by the Commerce Clause and other clauses of the Constitution" (Cohen, 1972 ed.: 90). More importantly, it must be remembered that the constitutional clauses already mentioned--commerce, enumeration, and treaty-making--plus the power of making war and peace **do not** explicitly grant the federal government the power to regulate Indians or Indian affairs. The Commerce Clause, the only explicit power, merely states that Congress will be the branch to treat with Indian tribes. A corollary to this principle of congressional enumeration, identified by Cohen, involved the power of the Commissioner of Indian Affairs who is authorized to oversee "the management of all Indian affairs [of the federal government]" but whose office over time came to be read as having the power of "the management of all the affairs of Indians" (Cohen, 1953: 352).

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Having elaborated on the extra-constitutional status of tribes, let us now briefly describe individual Indian status; for it is this unique conjunction of rights individual and collective--in part that fundamentally distinguish Indians from the rest of the American populace. Before 1924 nearly two-thirds of all Indians had received federal citizenship via treaty provisions or individual allotments. Following World War I, the federal government unilaterally extended the franchise to all other Indians (43 St. 253), though Commissioner Leupp asserted as late as 1905 that there was no "authority of law to naturalize Indians" (1905: 60). This extension of citizenship did not, however, enfranchise tribes, and it did not impair preexisting tribal rights. Hence, there was now a class of people, Indians, with dual, later triple citizenship (when the individual states extended the franchise to Indians) (Martin, 1990).

As federal citizens, Indians are ostensibly accorded the same constitutional safeguards and rights as other Americans. But national citizenship has not always proven an adequate shield of Indian political, civil, and especially, property rights. Why? To understand this we must analyze the Supreme Court case which most forcefully addressed, and in fact formalized the issue of multiple tribal citizenship. The major case is *U.S. v. Nice,* 241 U.S. 591 (1916). There, the Court held that an enfranchised Indian allottee was still subject to congressional power. Congress's power, said Chief Justice Van DeVanter, had both a constitutional (Commerce) and an extra-constitutional (tribal "dependency") base. Van DeVanter said that "citizenship is not incompatible with tribal existence or continued guardianship and so may be conferred without completely

emancipating the Indian or placing them beyond the reach of congressional regulations adopted for their protection" (p. 598).

In essence, and ironically, *Nice* served to seal the status of tribal Indians in perpetual legal and political limbo during an era when the federal government's primary policy goal remained detribalization, individualization, and assimilation. Henceforth, tribal members who had secured citizenship were simultaneously recognized as federal citizens **and** dependent peoples subject to overriding congressional authority. With this fascinating dichotomous status enshrined in federal law a logical question is: what exactly does federal citizenship really bestow upon tribal citizens? Ostensibly, it should mean that the federal government retains no more power to legislate Indian lives and property than it does the lives and property of any other citizen. In fact, however, the U.S. has asserted, at its discretion, plenary authority over the political affairs as well as the civil and property rights of not only tribes but individual Indians as well (Coulter, 1974,1979; Deloria, 1977,1985; Barsh and Henderson, 1980; Carter, 1976; Newton, 1984; and Ball, 1987).

Congressional Plenary Power--What Does it Really Mean?

In the preceding section we have analyzed a number of interesting topics, doctrines, and issues: triple citizenship, extra-constitutional status, exclusive federal (congressional) authority in the field of Indian affairs, and treaty-based tribal rights. In the ensuing section we look closely at one of the most intriguing doctrines in the field of political science, constitutional law, and Indian law and policy: **plenary power.** For this concept of plenary entails the soul of what is sometimes deemed a constitutional impasse with, on the one hand, the U.S. acknowledging the sovereignty of American Indian tribal governments, and, on the other hand, sometimes extending its allegedly politically superior position in relation to tribes.

There is considerable disagreement among scholars and federal lawmakers on whether plenary power--when defined as exclusive--is a necessary congressional power which only the Congress may exercise free of typical constitutional constraints because the Constitution cannot protect tribal rights because of their extra-constitutional status (Cohen, 1972 ed.; Deloria, 1985: Wilkinson, 1987); or whether plenary--when defined as unlimited and absolute--is an aberrant and non-democratic doctrine which Congress sometimes arbitrarily uses to oppress or even eradicate tribal or individual political, civil, or property rights (Krieger, 1933; Cohen, 1948; Deloria, 1977; Newton, 1984; Ball, 1987; Kronowitz, 1987). We will see that both definitions have been utilized, but will argue that in the last twenty years or so the political branches have more correctly relied on their **exclusive** power to deal with tribes.

First cited by the Supreme court in the seminal case, *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 197 (1824), plenary power has often been used by the federal courts in cases dealing with federal powers. It is a concept, however, which fosters confusion "because it conceals several issues which, for purposes of constitutional analysis must be kept clear and distinct" (Engdahl, 1976: 363). Engdahl incorrectly posits, however, that "no federal power is plenary in the full sense of the term, because as to all of them at least the prohibition of the Bill of Rights apply" (*Ibid.*). The U.S. Bill of Rights, as we noted earlier, are inapplicable to tribal governments because tribal nations were not created pursuant to the Constitution. While the Indian Civil Rights act (82 St. 77-80) applies certain portions of the constitutional Bill of Rights to tribal governments in regards to their activities over reservation residents, the Bill of Rights does not protect tribes or their members from congressional actions.

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The other more important factor promoting misunderstanding of the term plenary is because the concept "merge[s] several analytically distinct questions" (*Ibid.*). First, and especially important for our purposes, there is plenary meaning **exclusive.** This is the definition used most frequently when Congress enacts Indian-specific legislation, like the Indian Reorganization Act (48 St. 985), or when it enacts Indian Preference laws which withstand reverse discrimination suits (*Morton v. Mancari,* 417 U.S. 535 (1974)). This is an exclusively legislative power which the Congress may exercise in keeping with its policy of treating with tribes in a distinctively political manner or when deemed appropriate to provide a recognition of rights (i.e., American Indian Religious Freedom Resolution, 92 St. 469) that Indians have been deprived of because of their extra-constitutional standing. As Deloria astutely notes:

> There may indeed be some kind of establishment of religious freedom for American Indians. If so, it is because Congress has dealt with the question of the practice of Indian religions and felt it to be necessary to extend the protection of federal laws further in the case of Indians than the Constitution allows it to extend to ordinary citizens. In this instance Indians are not to be regarded

as 'supercitizens'; rather the practice of Indian religion is to be regarded as under the special protections of the federal government in the same way that Indian water rights, land titles, and self-government are protected. Congress has always dealt with Indians in a special manner; that is why Congress and the federal court's cherish and nourish the doctrine of plenary powers in the field of Indian affairs" (1985: 247).

Second, plenary is also defined as an exercise of federal power which may **preempt** state law. Again, the Congress's commerce power is an example, as is the treaty-making process, which precludes state involvement. Constitutional disclaimers that a majority of Western States had to include in their organic documents before they were admitted as states are also evidence of federal preemption.6 Finally, there is plenary meaning **unlimited or absolute** (Newton, 1984: 196, note 3). This third definition includes two subcategories: a) power which is not limited by other textual constitutional provisions; and b) power which is unlimited regarding congressional objectives (*Ibid.*). There is ample evidence in Indian law and policy of plenary power being applied to tribes by the federal government in all three ways.[7]

When the U.S. Congress is exercising plenary power as the exclusive voice of the federal government in its relations with tribes, and is acting with the consent of the tribal people, then it is exercising authority in a legitimate manner. Also, when Congress is acting in a plenary way to preempt state intrusion into Indian Country, absent tribal consent, then it is properly exercising an enumerated constitutional power. However, when congress is informed by the federal courts that it has "full, entire, complete, absolute, perfect, and unqualified" (*Mashunkashey v. Mashunkashey,* 134 P.2d 976 (1942)) authority over tribes and individual Indian citizens, something is fundamentally wrong. Canfield, writing in 1881, long before individual Indians were enfranchised, correctly observed that congressional power over tribes was absolute because tribes were distinct and independent, if "inferior" peoples, "strangers to our law, our customs, and our privileges." He went on to say that "[t]o suppose that the framers of the Constitution intended to secure to the Indians the rights and privileges which they valued as Englishmen is to misconceive the spirit of their age..." (p. 26-27). But by the time *Mashunkashey* was decided, in 1942, all Indians had been enfranchised and yet they were informed by the court that absolute power was a reality confronting them.

In a constitutional democracy, defined as a system of governance that places formal limits on what government can do, even exclusive authority has some limits. Tribes, however, because of their extra-constitutional status, cannot rely upon express constitutional provisions, particularly those found in the Bill of Rights, to limit what the federal government or its constituent branches do. Unfortunately, because of the *Nice* case and the interpretations given that decision and others by the Rehnquist court, even individual Indians who should be entitled to constitutional protections as citizens, find that in the area of religious expression and belief the first amendment does not afford them the necessary protection to practice their religion or have access to sacred sites.

For purposes of this paper let us return our attention to the present situation where, as we argued earlier, it appears that the Congress because of its exclusive constitutional allocation of authority to treat with tribes, is arguably more supportive of tribal self-determination, congressional plenary power (when defined as unlimited) not withstanding.

A Return to Bilateral Relations

General legislative support[8] for tribal autonomy has been evident since a spate of federal activity and legislation in the 1970s[9] focused on the disavowal, though not official renunciation, of the termination policy. Termination was to be replaced by a more enlightened, though still flawed,[10] policy of tribal self-determination. A crucial dimension in Congress' quest to facilitate improved relations with tribes centered on the problems tribal people faced in attempting to access sacred sites, utilize sacred objects, and practice traditional religions, as a result of inconsistent and sometimes insensitive federal administrative policies and practices which hampered the Indians' religious rights.

The history of the federal government's ultimate goal of the destruction of American Indian cultural identity, especially aboriginal religions from the early treaty period through the 1920s is well documented (Prucha, 1979; Sewell, 1983; Barsh, 1986; Martin, 1991). Once tribal identity and all vestiges of culture had been eradicated, Judeo-Christian ethics, beliefs, and institutions, officially sanctioned and financially supported by federal tax dollars as well as Indian treaty funds, a clear violation of separation of church and state doctrine, were to be the vehicle through which

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this assimilation and Americanization were to take place. For much of this period, but beginning most systematically with Grant's Peace Policy in the late 1860s (see, for example, Prucha, 1976) various Christian denominations struggled mightily to impart their religion to tribal people. The freedom of religion that these groups exercised to full advantage, however, completely disregarded the religious views and rights of Indians. "By religious freedom," says Prucha, "they [Christians] meant liberty of action on the reservations for their own missionary activities. 'The Indians have a right, under the Constitution, as much as any other person in the Republic... to the full enjoyment of liberty of conscience; accordingly they have the right to choose whatever Christian belief they wish, without interference from the Government'" (Prucha, 1976: 57 quoting "Address of the Catholic Clergy..." 1874).

In fact, despite the extension of the federal franchise to a majority of Indians under the 1887 General Allotment Act (24 St. 388), with the remainder receiving citizenship in 1924 (43 St. 253), the fundamental question of constitutional protection for aboriginal tribal religions and the constitutional prohibition against an establishment of religion, in this case, Christianity among the tribes, were non-issues until the late 1970s (Deloria, 1985: 245).

Congress finally responded to the lobbying efforts of tribal people and non-Indian advocates of Indian rights by enacting the American Indian Religious Freedom Resolution (92 St. 469) in 1978. This joint resolution declared that henceforth, it would be the policy of the United States "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to, access to sales, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites" (*Ibid.*).

The fact of the resolution's enactment was a clear admission on the part of the Congress that American Indian religious rights had not been protected, in part because of the anomalous status of Indians as both citizens and subjects, as *Nice* had put it. Hence, Congress, exercising its plenary legislative authority (defined as exclusive) recognized a need to legislatively extend federal protection of religious rights to tribal individuals because the first amendment of the constitution failed to protect those rights (Deloria, 1985: 247).

By the end of the 1970s the flurry of congressional activity ended as a recession and Reagan's budget ax took over. Congress continued to enact sporadic legislation (i.e., Indian Land Consolidation Act of 1983 (96 St. 2519)) throughout the 1980s. However, a more significant development with potentially long range ramifications for tribes and the tribal-federal relationship began as a result of an investigative series which appeared in the *Arizona Republic* newspaper the week of October 4-11,1987. The series, entitled "Fraud in Indian Country: A Billion Dollar Betrayal," written by M.N. Trahant, Andy Hall, and Mark Shaffer, was a major investigation of the federal government's gross inability to meet the basic human needs of American Indians in the areas of health, natural resource protection and utilization, housing, protection from sexual deviants, and education. This despite expenditures of several billion dollars annually.

In fact, noted the reporters, federal Indian programs "are a shambles, plagued by fraud, incompetence, and deceit and strangled by a morass of red tape that has all but destroyed their effectiveness" *(Arizona Republic,* October 4,1987: 1). This series prompted the Senate Select Committee on Indian Affairs in 1987 to form a Special Committee on Investigations, co-chaired by Arizona's senators, Messrs. DeConcini and McCain. The Committee was charged to "uncover fraud, corruption and mismanagement in American Indian Affairs, no matter where or to whom it led." Their two-year investigation included the examination of over a million and a half documents, many of which were subpoenaed; interviews with 2,010 current and former governmental officials and employees, tribal officials, energy leaders, etc.; visits with more than seventy recognized tribes; and twenty days of public hearings. The hearing transcripts alone span eleven volumes, totalling nearly 3,500 pages.

This two-year investigation corroborated what the *Republic's* staffers had found in a short six-month period. While uncovering scandals and gross federal incompetence and corruption in a myriad of areas, the final report summarized the committee's findings in the following areas: corruption was rampant in the implementation of the Indian preference statute; numerous cases of Indian child sexual abuse by BIA employees were documented; gross mismanagement and theft of tribal resources was identified; poor quality and inadequately funded health care continued to be a major problem; there was ample documentation of substandard housing; and a significant amount of tribal elite corruption was uncovered. In answer to its own question of why so much corruption, fraud, and mismanagement still pervaded federal institutions which serve Indians, the committee asserted that the principal problem was an anachronistic congressional and administrative

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In order to terminate such paternalism, the Committee urged the rekindling of negotiated agreements. Termed "New Federalism," this policy would consist of bilateral agreements with tribes that while continuing to provide required federal funding, would also for the first time in over one hundred years, "allow tribal governments to stand free independent, responsible and accountable" (Senate Rep't. 101-216,1989: 16). These agreements, it is important to note, would be entirely consensual, and would not affect any prior rights or obligations a tribe may have as a result of "treaties, former agreements, or existing claims against the U.S." (p.17). They would also not modify the tribes' current legal status or their jurisdictional standing in relations to tribes. In essence, tribes could choose to enter new agreements with the federal government which would finally recognize the tribal right to assume direct responsibility for their own affairs.

Chairman Sidney Yates (D., Ill.), of the House Interior and Related Agencies Appropriations Subcommittee called an oversight hearing in late November 1987 to address the charges made by the *Republic's* reporters. Secretary of Interior Hodel and Assistant Secretary for Indian Affairs Ross Swimmer sought to address the newspaper's allegations. "In obvious frustration and perhaps to direct Chairman Yates' displeasure, Swimmer suggested that the BIA moneys should be turned over to the Tribes to let them manage their own affairs. After Chairman Yates met with Tribal representatives on the Swimmer proposal... ten tribes, including our four Tribes, Quinault, Lummi, Jamestown S'Klallam, and Hoopa, volunteered to test the proposal" (Joint Testimony, Hearing on H.R. 3394, Oct. 3,1991). Thus was set in motion a potentially revolutionary set of events, although the Department of Interior and the BIA attempted, without prior consultation with the volunteer tribes, to thwart the process by proposing an amendment to the 1975 Indian Self-Determination Act which would have resulted in a transfer of resources but with minor effect on the existing BIA bureaucracy. More significantly, this proposal included language that would have waived the federal government's trust responsibility for programs assumed by participating tribes. The tribes effectively counter-attacked this measure and had it stricken before final enactment of the 1988 Self-Determination Amendments (*Ibid.*, p. 2).

By December of 1987, Congress (which also had to act in a capacity to force the BIA to desist from its subverting tactics), a recalcitrant BIA and tribal leaders had reached agreement in principle on the establishment of the Tribal Self-Governance Demonstration Project (TSGDP, n.d.: 10). Originally designed to allow ten tribes[11] (with another ten to be selected from a pool of tribal applicants) the opportunity to create their own budgets to address tribally-determined priorities, the project was enacted as part of the Appropriation Act of 1988 and later supplemented and clarified as Title III of the 1988 Amendments to the Indian Self-Determination and Education Assistance Act (102 St. 2285, 2296). In the words of a Lummi leader:

> The Tribal Self-Governance Demonstration Project is our opportunity to open doors that may lead to a new Indian affairs agenda--one in which tribes will reestablish the formal government-to-government relationship between tribal governments and the U.S. government, a relationship that is inherent and intended in the treaties between our governments. This project will also release the 135-year federal bureaucratic hold on tribes so we can determine and manage our own governmental affairs and responsibilities ("Shaping Our Own Future," n.d.: 3).

The TSGDP is considered "the most advanced expression of the policy of Indian Self-Determination" ("Shaping Our Own Future," n.d.: 6). Intended to reaffirm the political relationship between tribes and the U.S. based on the doctrine of consent, these experimental tribes have the opportunity to redesign programs, reallocate funds, and plan and deliver services appropriate to their citizens. More broadly, the Project tribes are empowered to actively promote economic, political, and social self-sufficiency through the transfer of federal funds which formerly flowed to the BIA, but which will now go directly to the tribes, once the tribe has negotiated an annual written funding agreement with the Secretary of Interior ("Shaping Our Own Future," 1991: 2-3).

The timing of this policy experiment, beginning as it did a year before the Senate's Final Report on the regnant corruption and incompetence lacing the BIA and virtually every federal agency which administers programs for Indians, indicates that the political branches of the federal government, at least, in this instance, are operating proactively and not defensively. Originally a five-year policy experiment to involve twenty tribes and slated to end in 1993, it was recently extended by legislation on December 4,1991 (105 St. 1278). The extension involves time (an additional three years) and tribes (from 20 to 30). The extension was requested by tribes and agreed to by Congress to allow more time for an evaluation of the program on a wider cross-section of tribes.

Predicting either the direction or substance of Indian policy is impossible. And it is far too early to tell what will come of the idea of "New Federalism" or the TSGDP. However, unlike the 1975 Self-Determination Act which was stymied by inadequate funds, old alliances involving BIA staff at the local and area level and certain tribal officials, and, most importantly, the fact that it actually returned very little direct governmental power to tribes, the current process of self-governance, because of direct tribal involvement, including more experienced tribal leaders, plus the procedural and substantive safeguards included in contracted agreements, has significantly greater potential to return tribal-federal relations to a level closely resembling the position outlined in the original Northwest Ordinance of 1787.

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The task will not be easy, particularly when the tribes are confronted by a bloated and inefficient BIA bureaucracy that is more interested in preserving its institutional existence than in supporting tribal self-determination. The tribes involved in the TSGDP are committed, however, to the program. It is also evident that the Congress is generally supportive as is the Bush Administration, notwithstanding the occasional, if predictable, actions of certain Interior Department personnel.

We move our attention now to the federal courts, particularly the activities and inactivities of the supreme court which is heading off into its own direction, congressional plenary (exclusive) authority, New Federalism, and Tribal Self-Governance notwithstanding.

Judicial Supremacy in Decision-Making

A survey conducted by the *Los Angeles Times* in the summer of 1991 revealed some interesting results regarding overall public sentiment on the Supreme Court. The findings indicate that the American public holds a generally favorable view of the court (53 percent favorable, 23 percent unfavorable, 24 percent haven't heard enough); believes that the Court is ideologically situated about where it should be and is neither too liberal nor too conservative (50 percent say it is "just about right," 26 percent say it is "too conservative," 15 percent say it is too liberal, and 9 percent are not sure); and says that the Court's present position in the American system of separation of powers is just about right (63 percent say the Court has just the "right amount of power," 12 percent say it is "not powerful enough," 21 percent say that it is "too powerful," while 4 percent are not sure) (*The Ladd Report,* 1991: 24-26).

With regard to recent Supreme Court decisions, the *Times* study shows clearly, but not surprisingly, that while the public is not very knowledgeable about details of the Court's activity, they have vacillating opinions depending on the issue involved. This survey, however, did not pose a question about the Court's recent Indian cases. But one could hazard a guess that had they queried the general public on cases like *Duro, Cotton Petroleum, Smith II,* and *Lyng,* the response would have been virtual silence, since tribal issues are even more peripheral than everyday political and social topics. As Deloria notes in a recent article, even more surprising than the opinion of Justice Scalia in *Smith II* and O'Conner in *Lyng,* has been "the absence of any sense of outrage from American Christians" (1991c: 23).

Had the pollsters interviewed American Indians, on the other hand, both as to their overall perception of the Court as well as their attitudes about specific cases, the results, more than likely, would have been far less flattering. In fact, contrary to Washburn's contention in a 1984 article that "there is no question that the religious rights of American Indians, after hundreds of years of assault, are more fully protected than ever before" (p. 53), virtually all the data emanating from the federal courts, even before 1984 (see Table III) show that just the opposite is transpiring--the religious rights of American Indians, although explicitly recognized by the Congress in the 1978 Religious Freedom Resolution, have been devastated by federal court activity. The majority of the cases, not coincidentally, have been decided since the Religious Freedom policy directive.

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Table III entails the major federal court cases involving questions related to Indian religious freedom. Note that only *Native American Church v. Navajo Tribal Council* (1959) is a substantial victory for the tribes. This case, however, did not involve a federal, state, or private activity in direct conflict with the rights of American Indians to protect their religion or access to sacred sites. Instead, it was an important case affirming the inapplicability of the constitutional first amendment to tribal governments.

What explains the other ten cases, nine of which were handed down in the years subsequent to Congress' policy directive on the issue? Why is the Court acting in a way that directly clashes with congressional goals and intent, particularly in regard to religious freedom for Indians? And why is it that for the Indians, both individually and as tribes, despite the federal and state citizenship status tribal individuals have, the

Table III:
Federal Court Activity Regarding American Indian Religious Freedom

Quick Bear vs. Leupp, 210 U.S. 50 (1908): Treaty funds; First Amendment-Establishment (Tribe: Lakota)

Holding: Federal statute prohibiting appropriations to sectarian schools only applied to gratuitous appropriations and public moneys, not Indian treaty funds, which were paid by the government to fulfill treaty provisions.

Native American Church vs. Navajo Tribal Council, 272 F. 2d 131 (1959): Applicability of First Amendment to Tribal Nations; peyote (Tribe: Navajo)

Holding: First Amendment does not restrict actions of tribal governments on question of religious freedom.

Sequoyah vs. Tennessee Valley Authority, 620 F. 2d 1159 (6th Cir., 1980), cert. denied, 449 U.S. 953 (1980): First Amendment-Free Exercise; sacred Indian sites--Chota, TN (Tribe: Cherokee)

Holding: Cherokees' interest in protecting land was not sufficiently "religious" to invoke First Amendment protection.

Badoni vs. Higginson, 638 F. 2d 172 (10th Cir., 1980), cert. denied, 452 U.S. 954 (1981): First Amendment--Free Exercise; sacred Indian sites on "public" lands--Rainbow Bridge, AZ (Tribe: Navajo)

Holding: Navajo religious use of Rainbow Bridge, however indispensable to Navajo life, could not outweigh the economic benefits (electricity and tourism) generated by the Glen Canyon Dam.

Fools Crow vs. Gullet, 541 F. Supp. 785 (D.S.D. 1982), aff'd., 706 F. 2d 856 (9th Cir., 1983), cert. denied, 464 U.S. 977 (1984): First Amendment--Free Exercise; sacred Indian sites on "public" lands--Bear Butte, SD (Tribes: Lakota, Cheyenne and others)

Holding: Tourism and other development do not pose a "substantial burden" to the Indians' free exercise of religion. Promotion of tourism is a "compelling" state interest.

Wilson vs. Block, 708 F. 2d 735 (D.C. Cir., 1983), cert. denied, 464 U.S. 956 (1984): First Amendment--Free Exercise and Establishment; sacred Indian sites on "public" lands--San Francisco Peaks, AZ (Tribes: Navajo and Hopi)

Holding: U.S. Forest Service may expand ski resort area on federal land despite Indian arguments that the expansion would desolate the area and violate their religious rights.

Inupiat Community of the Arctic Slope vs. U.S., 548 F. Supp. 182 (D. Alaska 1982), aff'd., 746 F. 2d 570 (9th Cir., 1985), cert. denied, 474 U.S. 820 (1985): First Amendment--Free Exercise; sacred area--Arctic Sea (Tribe: Inupiat)

Holding: Federal government may grant petroleum leases despite Inupiat assertions of religious use and aboriginal title.

Bowen vs. Roy, 476 U.S. 693 (1986): First Amendment--Free Exercise; administrative policy (Tribe: Abenaki)

Holding: Free exercise does not require the government to conduct its internal affairs (requiring an Indian child to have a Social Security number) in ways that comported with the religious beliefs of citizens.

Lyng vs. Northwest Indian Cemetery Protection Association, 485 U.S. 439 (1988): First Amendment--Free Exercise; sacred Indian sites--Chimney Rock area of northern California (Tribes: Yurok, Karok and Tolowa)

Holding: Denied free exercise challenge to federal highway project that will destroy Indian religious sites.

U.S. vs. Means, 858 F. 2d 404 (8th Cir., 1988): First Amendment--Free Exercise; public lands--Black Hills, SD (Tribe: Lakota)

Holding: U.S. Forest Service did not violate Free Exercise clause in denying Sioux Indians a special permit to use 800 acres of national forest as a religious, cultural and educational community.

Employment Division vs. Smith, 1105 Ct. 1595, 108 L. ed. 2d 876 (1990): First Amendment--Free Exercise; peyote; state criminal law (Tribe: Klamath)

Holding: The Free Exercise clause permits the state to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use.

constitution's first amendment protections do not apply in any fundamental way? These are the questions we attempt to answer in this last section of the article.

Before setting out our explanations it behooves us, first, to assert our position that the Court is a policy-making institution. Next, we must describe what this assertion means, since it is often made without explanation. Dahl once observed that "as a political institution the Court is highly unusual, not least because Americans are not quite willing to accept the fact that it is a political institution, and not quite capable of denying it" (1957: 278). Clearly, the Court is not an ordinary political institution, however. It is, first of all, a court of law. Second, there is an obvious interrelationship between law and politics. Finally, the Court can best be understood in terms of the interaction between and merger of two traditions which are identified as the "legal subculture" and the "democratic subculture" (Richardson and Vines, 1970). The precise spot on the continuum where the Court settles to render a decision is usually determined by several factors: the issue before the court; the court's composition (who is sitting on the bench); and the court's ideological complexion. Viewing the Court as having a political dimension and studying it from a political perspective facilitates a sharper understanding of it for several reasons: 1) it helps define the Court's contribution to the determination of public policy decisions; 2) it enables us to formulate a more accurate picture of the Court vis-a-vis other governmental institutions; and 3) it enables us to describe and understand the recruitment of judicial candidates and the Court's decision-making process in terms similar to the ones used to describe say, the recruitment of political candidates and how and why they vote as they do (Grossman and Wells, 1988: 3-4).

Three Theories of Judicial Decision-Making

Scholarly views regarding the Court's stance in national policy-making are disparate, but can generally be grouped in one of three categories: the court as **legitimator**, as **initiator**, or as an **imperial** entity. First, let us look at the **legitimacy** perspective. Briefly, Dahl (1957) and Funston (1975) have corroborating views that the Supreme Court has not, generally speaking, substituted its policy goals for those of law-making majorities, and that even when the Court has sought to do that, it has not been very successful. The main task of the court, according to Dahl, is to confer legitimacy on the fundamental policies of the dominant alliance. A court is, of course, an active participant in the ruling national coalition which dominates U.S. politics, but it fails to perform the task of protecting fundamental minority rights against majority demands that is often attributed to it. Why? Because as a member of the ruling coalition, its decisions are typically supportive of the policies emerging from the political branches. Theorists of this school do acknowledge that the Court is more than an agent, acting solely to confer legitimacy on the political branches decisions. But for Dahl, the court is cautious and will avoid blatant opposition to the dominant alliance for fear of losing its legitimacy.

This theory has been challenged by scholars like Casper (1976) and Choper (1980) who recognize in the Court's litigative record a more active role which holds that the judicial arm has more staunchly, albeit in sporadic fashion, defended basic liberties and minority rights by exercising its authority to act as an **initiator** of public policy if necessary. While the political branches have at times been more sensitive to certain personal liberties than the Court, the usual pattern is the opposite. On issues such as slavery, public financial assistance to sectarian schools, individual liberty and the conflict of internal security, and the political and socio-economic rights of racial minorities, "[C]ongress has recognized that political expediency often renders it impotent to uphold the constitutional rights of vulnerable minorities and that it would not be displeased to have the Court set the record straight" (Choper, 1980: 68).

Theorists of this school draw a picture of the Court's actions which extends far beyond those of legitimation alone. Casper (1976) carefully dissected Dahl's analysis and argued that the Court will often seize the initiative and will create policies other institutions are unwilling or unable to promulgate (p. 60). The Court, said Casper, is not only far more active--it has struck down legislation more frequently today than when Dahl's article appeared (1957), but its decisions largely have not been reversed by legislation, constitutional amendment, or by a reversal by the Court.

Furthermore, Casper noted that Dahl's analysis was flawed because it was based upon the premise that policy-making is best described in terms of influence and power, winners and losers. The Supreme Court's policy-making process is far more than a win-lose, zero-sum situation, argued Casper. It is, instead, a dynamic process "in which even 'losers' contribute importantly to outcomes that eventually emerge" (pp. 61-62). In short, conflicts among political institutions produce not "winning" and "losing" policies but rather "tentative solutions that themselves become the basis for future policy-making." Examples of contested but largely unresolved issues include the fishing rights struggles of the Great Lakes and Northwest Coast regions, racial equality, legislative reapportionment, church-state relations, and criminal procedure.

The third theoretical perspective, most forcefully articulated by Agresto (1985), and the one most pertinent for our discussion, posits as its central premise that the court is an **imperial** body wielding judicial supremacy. Agresto says that the Supreme Court is imperial not as a result of its activism, nor is it imperial simply because its decisions are largely "unchecked." "It is imperial," Agresto argues, and exceedingly dangerous because it is active and unchecked in its ability to be the creator, the designer, of new social policy. The Court has the "unhindered ability not simply to prevent legislative acts but to govern affirmatively outside the boundaries of either checks and balances or democratic traditions" (p. 11). While recognizing that the court is entitled to exercise judicial review, Agresto believes the Court has gone too far and operates without any restraints on its activity (p. 37). This is the paradox, according to Agresto: How, he asks, can we allow the Court to be powerful and let it be the developer of fundamental principles without substituting its own principles for the Constitution (pp. 156-157).

Agresto believes that the will of the national majority enacted into law will generally contain enough protection for the rights of minorities (p. 30). Interestingly, he sees the court as only "marginally connected to democratic choice." The justices, "unelected, life-tenured, with secure salaries, have **plenary power** over the interpretation of the nation's fundamental law and authority to direct private and public activity in accord with their opinion of the demands of that Constitution. And when the Court uses that authority to stand against the democratic will or to direct public policy, we are unsure what to think, much less what to do about it" (p. 36).

For Agresto, the solution to judicial supremacy is for the three branches to begin acting as partners, as though they were coordinate with one another. Congress, according to Agresto, especially needs to reassert its authority to interpret the Constitution. "If the Court has decided wrongly Congress should... force a reconsideration of the constitutional issue. Just as the Supreme Court should encourage Congress to engage in sober second thinking, so too should Congress engage the Court in such thinking" (Kommers, 1985: 120).

Not surprisingly, one can find evidence in Indian history, law, and policy supportive of each of these policy-making positions utilized by the Court.[12] But it is Agresto's theoretical perspective of an imperial judiciary that most accurately capsulizes the Rehnquist Court's collective attitude and recent decisions, particularly on the subject of Indian religious freedom. This is most evident when we compare the court's activity over the last decade or so with the enactments and policy directives adopted by the political branches. In fact, it is fairly evident based on the cases diagrammed in Table III that the religious rights, practices, and beliefs of both tribes and individual Indians are considered as belonging not to the actual practitioners themselves, but to the subjective domain[13] of the Supreme Court. Furthermore, the Court in this area of law deems itself as the "ruler" of the polity rather than as an interpreter of the Constitution or congressional enactments. The Court is no longer checking legislative actions or legitimating congressional or executive activity; nor is it acting in a dynamic way to address social and political issues that the Congress or President are negligent in addressing. Instead, it is involved in a revolutionary attempt to reshape Indian societies and their belief systems in a manner consistent with what the Court deems appropriate and in direct contradistinction to what the political branches are supporting. "More often," says Kommers, the Court in recent years has not guided constitutional dialogue or served as a generator of "sober second thought in the larger political community." It has instead, "stopped the conversation, concluded the argument, and foreclosed any policy other than the one it has mandated" (1985: 120). This certainly seems to be the case when questions of American Indian religious rights come before the Court.

The Rehnquist Court and Indian Rights

There is general agreement that the Supreme Court is functioning in an imperial manner when it comes to the subject of American Indian religious rights (see, for example, Sewell, 1983; Barsh, 1986; Loftin, 1989; Wyatt, 1989; Boyles, 1991; Deloria, 1988,1989a, 1991a, 1991b, 1991c, and 1992). Restating our original question: Why has the court consistently failed to extend constitutional first amendment protection to Indian and tribes in the area of religion despite the 1978 American Indian Religious Freedom Resolution which Congress enacted as part of its plenary exclusive authority; and 2) Why is it that despite triple citizenship--tribal-federal-state--individual Indians still lack enforceable constitutional rights to practice their traditional religions.

These are not easy questions to answer. For despite explicit legislative and citizenship recognition of tribal religious rights, it is true as Riker and Weingast observe that "rights are not sufficient to guarantee liberty. A guarantee at least requires, in addition, appropriate governmental structures, appropriate traditions of civility, and other related factors" (1988: 375). Unfortunately, because of the distinctive nature and

basis of tribal rights, pre- and extra-constitutional in their origin, it is difficult to ascertain what kind of "appropriate governmental structure" is available to protect tribal rights. As we noted in the beginning of this paper, that is why the Congress is empowered with plenary exclusive authority to address the special needs and collective rights of tribes--because tribal rights are protected neither by the Constitution nor the Bill of Rights. And although "traditions of civility" are certainly relevant and have contributed to the protections of Indians and minority rights on occasion, they have proven to be an unreliable and unenforceable basis on which tribes could hope to have their rights shielded from governmental infringement.

...the Rehnquist Court has become an imperial entity intent on crafting its own social policy.

There are, we would argue, three[14] plausible, interrelated and sometimes overlapping, reasons why the Rehnquist Court has become an imperial entity intent on crafting its own social policy in contradistinction to what the Congress and the Bush administration is supporting for tribes: 1) the alleged cultural and spiritual inferiority of indigenous cultures belief systems; 2) individualism-assimilation; and 3) federalism, Rehnquist style.

Cultural Inferiority: Petoskey (1985), Deloria (1989a), and Echohawk (1989) have argued that a principle reason the justices are unwilling to recognize the religious rights of Indians is because tribal religious experience and sentiment are not considered as entailing real religious expression and are therefore "not to be taken seriously" (Deloria, 1989:12). It is also argued that tribes cannot expect justice because the federal court jurists view tribal religious claims through Judeo-Christian values and therefore are unable or unwilling to grasp the value of tribal views of the world which differ radically from those of western industrialized nations (Petoskey, 1985: 221).

Individualism-Assimilation: Closely related to the first explanation is an argument broached by Holm[15] who asserts that the Court seems to be resurrecting notions of individualism-assimilation along the lines of those of the late nineteenth century Christian reformers. Those reformers, it will be recalled, were convinced that the destruction of tribal religions were essential before the processes of Americanization, Christianization, and Civilization could evolve.

The modern court disavows the use of such blatantly ethnocentric language as "primitive," "savagery," and "barbarism," but their arguments, though couched in much less graphic language, amount to something quite similar. In short, the Court seems to be pushing the view that if tribal sacred sites are destroyed, and if the use of sacred plants like peyote are restricted or forbidden, then this may eventually force both tribes and individual Indians to abandon their aboriginal spiritual ways. Presumably, those deculturalized Indian individuals would then adopt traditional Judeo-Christian religious doctrines and values. Justice Hugo L. Black issued a stinging dissent in *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 124 (1960), which typifies an opposite, more tolerant view of tribal culture and the indigenous person's relationship to the land. It was, however, a minority judicial perspective in 1960, and it is most certainly a minority view today. In this case the Tuscarora Nation, which had treaty-recognized rights and fee-simple title to much of their reservation, lost their case before the supreme court and had nearly a quarter of their territory "taken" for the construction of a hydroelectric power plant. Justice Black, decrying this act of confiscation of tribal land as violative of federal law, Indian policy, and as a "breach of Indian treaties," (p. 125) noted:

> These Indians have a way of life which this Government has seen fit to protect, if not actually to encourage. Cogent arguments can be made that it would be better for all concerned if Indians were to abandon their old customs and habits, and become incorporated in the communities where they reside. The fact remains, however, that they have not done this and that they have continued their tribal life with trust in a promise of security from this Government (p. 141).

In a closing line, Black uttered one of the Court's most famous (or infamous) lines: "Great nations, like great men, should keep their word" (*Ibid.*).

This second argument individualism-assimilation--is more problematic and less evident than the first one. It is plausible, we argue, because while the Court until recently operated from a more affirmative role in the areas of religious tolerance and civil rights than earlier in its history, its recent decisions in the areas of civil rights (especially those involving the criminally accused, minority men, women, and reverse discrimination) seem more intellectually and philosophically grounded in a historical time known as "classical legal thought." This period emerged between the 1850s and the 1880s and lasted until about 1940 when the Court was far less interested in protecting civil liberties and individual freedoms (Kennedy,1980).

This historical era witnessed the development of an alliance between legal treatise writers, leaders of the American bar, and Supreme Court justices who shared a particular conception of law that went beyond old

conflicts. These legal elites allied with science against what Kennedy called "the crudities of democratic politics" (p. 4). Fundamental to Kennedy's arguments is the notion of "legal consciousness," which he says must be recognized and confronted. This consciousness operates to distinguish the Court from other political institutions. For Kennedy, legal consciousness has a "measure of autonomy." "It is," he argues, "a set of concepts and intellectual operatives that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest" (p. 4).

The importance of this concept, for purposes of understanding the Court's Indian case law, are such that an extended quotation is called for:

> The autonomy of legal consciousness is a premise; yet that autonomy is no more than relative. Not only the particular concepts and operations characteristic of a period, But also the entity that they together constitute, are intelligible only in terms of the larger structures of social thought and action.
>
> This approach denies the importance neither of ideologies like laissez-faire, nor of concrete economic interests, nor of the underlying structure of political power. It insists only that legal consciousness, which has its own structure, mediates their influence on particular legal results... (p.4) ...The notion behind the concept of legal consciousness is that people can have in common something more influential than a checklist of facts, techniques, and opinions. They can share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind. Yet everyone, including actors who think they disagree profoundly about the substantive issues that matter, would dismiss without a second thought... an approach appearing to deny them. These underlying premises concern the historical background of the legal process, the institutions involved in it, and the nature of the intellectual constructs which lawyers, judges, and commentators manipulate as they attempt to convince their audiences" (p. 6).

While consciousness, broadly put, refers to the essence of opinion, attitudes, goals, theories, emotions, and sensibilities held by an individual or group, legal consciousness more particularly refers to that type of consciousness that the legal profession as a social group holds at a given moment (p.23). Unlike basic individual or group consciousness, however, legal consciousness is differentiated because of legal rules, ideals, arguments, and legal theories operational at a given time.

Historical examples of Supreme Court decisions which evidence that body's unique consciousness on Indian and tribal status, rights, and identity are legion.[15] More importantly, in the last fifteen years both the Burger and now the Rehnquist court's have adopted, for certain purposes, a political stance which clearly evidences its own legal consciousness in a way that perpetuates a number of stereotypes and myths about tribes and tribal-federal relations. For instance, the Court held in U.S. v. *Wheeler* that tribal sovereignty existed "only at the sufferance of Congress" (435 U.S. 313, 323 (1978)); in *Oliphant v. Suquamish,* the Court stated that "upon incorporation into the territory of the U.S. the Indian tribes thereby came under the territorial sovereignty of the U.S. and their exercise of separate power is constrained so as not to conflict with the interest of this overriding sovereignty" (435 U.S. 191 (1978)); and in U.S. v. *Sioux Nation* it was determined that Congress had "paramount power over the property of the Indians" (448 U.S. 371, 408 (1980)). Neither of these three cases contain evidence of any form--historical, political, constitutional, or legal--which justifies the Court's expressions "sufferance," "overriding sovereignty," or "paramount" congressional authority over tribes. These are legal fictions developed by the court to satisfy its own political and social agenda (see, for example, Ball, 1987).

...in the last fifteen years both the Burger and now the Rehnquist court's have adopted, for certain purposes, a political stance which clearly evidences its own legal consciousness in a way that perpetuates a number of stereotypes and myths

More pertinent to this article are the recent religious cases where the court has argued, for instance, that notwithstanding the fact that logging and road building would have "devastating effects on traditional Indian religious practices..." "the Constitution," said Justice O'Connor, "simply does not provide a principle that could justify upholding respondents' [Indians'] legal claims" *(Lyng* v. *Northwest Indian Cemetery Association,* 485 U.S. 439, 451-452 (1988)). Furthermore, in *Employment Division v. Smith* (108 Led. 876 (1990)), the majority held that while "it would doubtless be unconstitutional" for example, "to ban the casting of statues that are to be used for worship purposes, or to prohibit bowing down before a golden calf" it was declared constitutional, on the other hand, for a state to impose general prohibitions against the use of peyote, even though the law infringed on the individual's practice of his religion. But Blackmun noted in a powerful dissent in *Smith,* that

"if Oregon can constitutionally prosecute them [Indians] for this act of worship, they, like the Amish, may be forced to migrate to some other more tolerant region...." ..."This particularly devastating impact must be viewed in light of the federal policy--reached in reaction to many years of religious persecution and intolerance--of protecting the religious freedom of Native Americans" (pp. 912-913).

Ironically, in both *Lyng* and *Smith* the factual disputes prompting both cases has since been resolved in a way that should have averted the litigation in the first place. For instance, the construction of the six-mile stretch of road which was disputed in *Lyng* has been abandoned (Deloria, 1991b: 286); and in Oregon the legislature has since enacted regulations that allows an "affirmative defense" for anyone using peyote "in connection with the good faith practice of a religious belief, as directly associated with a religious practice, and in a manner that is not dangerous to the health of the user or others who are in the proximity of the user" (Oregon Revised Statutes, 1991, Vol. 8: 37-83, 37-84).

Two other cases should suffice as evidence indicating a unique "legal consciousness." In a 1991 case, *Oklahoma Tax Commission v. Potawatomi,* a unanimous court held that "Congress **has always** been at liberty to dispense with such tribal [sovereign] immunity or to limit it" (51 CCH S.Ct.Bull. p. B932). Finally, in a January 1992 case involving the Yakima nation, Justice Scalia, writing for a majority, uttered a statement which typifies the regnant legal consciousness of the Rehnquist Court. Scalia noted that while "the Yakima Nation argues that state jurisdiction over reservation fee land is manifestly inconsistent with the policies of Indian self-determination and self-governance that lay behind the Indian Reorganization Act and subsequent congressional enactment this seems to us a **great exaggeration**" (*Yakima v. County of Yakima and Dale Gray,* 60 USLW 4067, 4071). Blackmun, the lone dissenter challenging the majority's powerful and apparently entrenched consciousness, quoted from *McClanahan v. Arizona State Tax Commission* (441 U.S. 164, 179 (1973)) where a unanimous court held that they were "far from convinced that when a State imposes taxes upon reservation members without their consent, its actions can be reconciled with tribal self-determination." In the *Yakima* case Blackmun could find no legitimate constitutional or statutory basis on which the Court based its reversal of long-standing federal policy. In fact, the Bush administration filed an amicus brief in support of the Yakima's contention that if the Congress had not explicitly authorized state taxation of fee patented lands within a reservation then the state was precluded from acting to tax those lands.

The third factor that may help explain the court's Indian case law involving questions of religious freedom centers on the doctrine of **federalism,** with the active participants being Congress, the federal courts, and the states. While the interactions of these three entities can be troublesome enough, the introduction of tribes which are non-federal entities, along with individual Indians, who because of triple citizenship must be viewed through a different set of lenses, depending on the power source involved, makes this an extremely problematic area.

There is abundant evidence, first of all, that as a partner in the ruling national alliance, the court will usually support the federal government's position, particularly if there is a conflict between federal power and tribal sovereignty (Dahl, 1957; McCulloch, 1991). This dimension is rarely disputed and has persisted since Marshall's trilogy of cases in the early 1800s (Burke, 1969). But it is the Rehnquist court's orientation towards state's rights that has generated major concern among tribes and individual Indians (Burton, 1991; Lawson and Morris, 1991).

One could hypothesize, and there is good evidence to affirm, that the more deferential a Supreme Court justice is to the traditional powers of state government, "the more likely he or she will be to vote in favor of the States and against the Indians whenever a jurisdictional conflict between the two occurs" (Burton, 1991: 39). Furthermore, one could test the hypothesis that over the last two decades, which encompass both the Burger and Rehnquist courts, that as the Court has leaned more towards a reassertion of states' rights it has become less supportive of tribal rights. This second hypothesis has been tested and confirmed in the area of water rights (Burton, 1991) and natural resource issues (Holland, 1989). And it has been implicitly confirmed, though not necessarily systematically tested, in the area of free exercise of religion (see Deloria, 1989a, 1991a, 1991c, 1992; Gordon, 1991; Moore and DeCoteau, 1991; Brooks, 1990; Martin, 1990; Wyatt, 1989; and Barsh, 1986). Finally, there is also some evidence showing that the Supreme Court is extremely sensitive to instances where tribal activities will have an adverse affect on non-Indian citizens and interests of the states, particularly if the state lacks jurisdictional authority to regulate the tribal activity (Kramer, 1986: 991).

This issue is more complex, however. We can conceive of a large set of legal relationships in the United States--i.e., private citizens to private citizens, private citizens to states, legislature to judiciary, federal to state, tribal individual to tribal government, tribal individual to state government, tribal individual to federal government, tribal government' to state, and tribal government to federal government. Each of these,

including the first four sets of relationships which do not explicitly involve Indian actors, can have an effect on tribal or individual rights.[17] And the role of the states has certainly become more prominent under both the Burger and Rehnquist courts. In fact, Rawlings posits that the Court has recently developed a trend of "setting aside spheres in which it allows the government (both state and federal, depending on the issue) to assert almost unchallenged authority in making laws that infringe on individuals' free exercise rights" (1991: 585-586).

Conclusion

We have spent considerable time and energy analyzing the relationship between tribes and individual Indians and the Congress, on the one hand, and the relationship between tribes and individual Indians and the U.S. Supreme Court. There is currently a yawning chasm dividing the way the federal government's political branches, especially the Congress, and to a lesser, though still vital sense, the executive (though the BIA is an uncooperative partner in the new process of self-governance) and the Supreme Court conceptualize tribal political status, sovereignty, personal and collective property rights, and individual tribal members' civil liberties. Historically, tribes received little support from the U.S. Congress on central issues of property, self-governance, religious freedom, etc. And there is still nothing inherent in the political process, much less in the constitutional structure to guarantee that the federal government's political branches will not engage in infringements of the political or property rights of tribes or individual Indians. There is, however, at the present a vital effort by the political branches, supported by a growing number of tribes, to resuscitate the process of bilateral agreements which would restore some semblance of tribal autonomy to those tribes who choose to participate.

The Supreme Court, on the other hand, has struck out on its own and has imperially stripped American Indian individuals and tribes of their right to practice traditional religions and frequent sacred places if those rights appear to clash with the property rights of federal agencies or state interests. Tribal individual and indigenous governments, however, are not idly sitting by while the Court dismantles their religious (or other) rights. Ably supported by concerned congressional representatives, various Christian denominations, Indian and non-Indian lobbying and interest groups and pan-Indian organizations (i.e., Association on American Indian Affairs, Native American Rights Fund, National Congress of American Indians, and various "Green" groups) and even an occasional state government (i.e., California in the *Lyng* case), American Indians have and are vigorously seeking legislative action to counter the negative effects of several Rehnquist Court decisions. Tribes and their supporters have already been successful in securing enactment of a 1991 congressional law (105 St. 646) which overturned a major criminal law case, *Duro v. Reina* (58 USLW 4643 (1990)) which had effectively deprived tribal governments of their right to exercise misdemeanor criminal jurisdiction over nonmember Indians.

Legislation has already been introduced (See Table II) to rectify the serious constitutional problems the Court's Indian religion cases have generated. Representative Stephen J. Solarz (D., New York), for instance, introduced H.R. 2797, the "Religious Freedom Restoration Act," on June 27,1991 which, if enacted, would reverse "the disastrous effects of a dastardly and unprovoked attack on our first freedom by the Supreme Court of the United States." (Congressional Record, 1991:E2422). Reciting the essence of the *Smith* case which eliminated the first amendment's requirement that government "accommodate the religious practices of all Americans unless it can demonstrate that the burden imposed is the least restrictive means available to achieve a compelling state interest," Solarz' bill seeks to prohibit the government from burdening a person's free exercise of religion, "even if that burden results from a rule of general applicability, unless it can demonstrate that the governmental action is essential to further a compelling governmental interest and that it is the least restrictive means of furthering that compelling governmental interest" (*Ibid.*).

Simultaneously, a broader based effort is underway by the aforementioned intertribal and intra-organizational alliance, with a core of traditional Indian people, in an effort to get redress by Congress. A new omnibus religious freedom bill will be introduced sometime in 1992 which will not only address the court's recent litigation, but will probably also encompass a new federal policy designed to provide real, that is to say, legally enforceable, rights of action and some enforcement mechanism which the original 1978 resolution lacked. There is hope that such legislation, in conjunction with Congress' own current political consciousness which is geared towards a recognition of aboriginal rights, would act to protect American Indian religious rights (Deloria, 1991c: 24; Boyles, 1991).

Even if these bills fail of enactment, there is still room for optimism, at least for tribal citizens. In his most recent and one of his most provocative works on this emotionally-charged subject, "Trouble in High

Places: Erosion of American Indian Rights to Religious Freedom in the United States" (1992), Deloria offers a brilliant analysis of what he terms "the three major paths" that federal Indian law has and continues to travel--the treaty relationship, the Trust Doctrine, and federal property ownership of public lands.

After critically assessing the advantages and pitfalls of each of these "possible theories" of the tribal-federal relationship, Deloria engages in a critical analysis of the *Lyng* case and shows 1) how a negotiated settlement, formulated along the lines of the former treaty-agreement process could have been used to settle this religious dispute without the need for litigation; 2) how the federal government's so-called "trust responsibility" which **should** have operated to protect the sacred sites of the California tribes, was instead completely negated by the O'Connor majority; and 3) how the property rights of the United States are defined by the Court and pertinent federal agencies as if they [the property] "belongs to them [government employees] personally, and that any effort by the public to participate in management is a personal affront" (1992: 287).

Deloria, however, ironically and astutely suggests that within a few years the *Lyng* case might actually be recalled as a "positive landmark by Indian people," though O'Connor and her majority cohorts certainly did not intend for this to result. Deloria says this is a distinct possibility and suggests that "*Lyng* may have been a necessary step in replacing the Trust Doctrine with the treaty settlement process, thus reversing a century-long trend of making the treaty rights a function of the willingness of the federal entity to fulfill its promises" (p. 286). We should all, Indian and non-Indian alike, hope he is right.

Notes

1. The Bush Administration on June 14,1991 issued its position reaffirming the political relationship between tribes and the U.S. Bush asserted that his administration was intent on "fostering tribal self-government and self-determination" (Weekly Compilation of Presidential Documents, Vol. 27, No. 25: 783-784).

2. Tribes qua Tribes are not **citizens** and remain extra-constitutional entities not subject to either the U.S. Constitution's constraints or eligible for its protections.

3. Tribal nations are sovereign since they were not created pursuant to the federal constitution. Thus, the Bill of Rights does not apply to the acts of tribal governments and limits on state and federal power delineated in the federal constitution cannot constrain tribal governing powers. Tribes, for instance, may legally discriminate against non-tribal and non-member Indians in voting solely on the basis of race (Indian Civil Rights Act, 82 St. 77); the Fifth Amendment right to indictment by grand jury doe snot apply to prosecutions in tribal courts (**Talton v. Mayes,** 163 U.S. 376 (1896)); and as separate sovereigns tribes enjoy sovereign immunity (**Santa Clara Pueblo v. Martinez,** 436 U.S. 49, 56 (1978)).

4. **Johnson v. McIntosh,** 21 U.S. (8 Wheat.) 543 (1823) and **Worcester v. Georgia,** 31 U.S. (6 Pet.) 515 (1832).

5. Vine Deloria, Jr. has forcefully made this argument on several occasions. But see Felix Cohen (1972 ed.: 91) who asserts with minimal proof that the Congress' power over tribes, in addition to the treaty-making power, gives the Congress "much broader" power over the tribes than over commerce "between states." On the previous page Cohen more accurately noted that "Congress has no constitutional power over Indians except what is conferred by the Commerce Clause and other clauses of the Constitution."

6. Washington State's Constitution, Art. XXVI, Second, contains an example of one such disclaimer: "That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States...."

7. In the period when unlimited congressional power was first sanctioned, **U.S. v. Kagama** (1886), to the time when the Supreme Court first said there might be some limits to such authority, **U.S. v. Perrin** (1914), plenary power was explicitly cited by the Supreme Court in nearly a dozen cases, beginning with **Stephens v. Cherokee Nation** (1899) and ending with **Sizemore v. Brady** (1914). As recently as 1991, the Supreme Court asserted that "Congress has plenary power to legislate in the field of Indian affairs" (**Cotton Petroleum Corp. v. New Mexico, 57 USLW 4445** (1989): 27). The best analytical study of plenary power remains Nell Jessup Newton's excellent article "Federal Power Over Indians: Its Sources, Scope, and Limitation" **University of Pennsylvania Law Review** 132 (1984):195-288.

8. I must reiterate my view that while Congress has generally been supportive of tribal self-determination it is still the case that a fundamental asymmetry exists between the U.S. and the tribes. These larger structural and philosophical issues, including Congress' self-arrogated assumption of a superior political position over tribes, have been treated admirably by others. See Milner Ball's excellent article, "Constitution, Court, Indian Tribes," **American Bar Foundation Research Journal.** 1 (1987): 1-139; and Nell Jessup Newton's piece, "Federal Power Over Indians: Its Sources, Scope, and Limitations." **University of Pennsylvania Law Review,** 132 (1984): 195-288; for good samples of such work.

9. See, for example, Richard Nixon's Indian Policy in 1970; the Alaska Native Claims Settlement Act in 1971; the Indian Education Act of 1972; Menominee Restoration in 1973; Indian Self-Determination and Education Assistance Act in 1975; the American Indian Policy Review Commission, established in 1975, etc. Consult Francis P. Prucha's **Documents of United States Indian Policy,** 2nd edition (Lincoln: University of Nebraska Press, 1990) which contains nearly all the major policies for this and prior years.

10. Numerous studies have shown that the Indian Self-Determination Policy had serious structural, economic, and philosophical problems that effectively precluded it from actually encouraging genuine tribal autonomy (Gross, 1978; Champagne, 1983; Nelson and Sheley, 1985; and Stuart, 1990).

11. The original tribes were: Confederated Salish & Kootenai Tribes, Hoopa Tribe, Jamestown Band of S'Klallam, Lummi Indian Tribe, Mescalero Apache Tribe, Mille Lacs Chippewa Tribe, Quinault Indian Nation, Red Lake Chippewa Tribe, Rosebud Sioux Tribe, and Tlingit and Haida Central Council.

12. In fact, a number of scholars have argued that, all things being equal, the Supreme Court has acted more often as a **legitimator**

of the activities emanating from the political branches (Barsh and Henderson, 1980; Newton, 1984: 234; Kramer, 1986; Ball, 1987; Riker and Weingast, 1988; and Williams, 1990). The Court's usual deference to Congress is best evidenced by the persistence of the political question doctrine in the field of foreign affairs and the fact that the Courts have never declared an act af Congress unconstitutional with regards to the United States right to diminish tribal sovereignty or aboriginal rights (Coulter, 1978: 35). While the political question doctrine has been repudiated by the Court (**Delaware Tribal Business Committee v. Weeks,** 430 U.S. 73 (1977) and **U.S. v. Sioux Nation of Indians,** 448 U.S. 371 (1980)) in the area of Indian law, the judicial arm still generally defers to congressional decisions regarding federal power over tribal property and tribal sovereignty (Newton, 1984: 235). As a federal court of appeals said in **Buster v. Wright,** (135 Fed. 947 (1905) appeal dismissed by Supreme Court 203 U.S. 599 (1906)), "the opinion of the legislative and executive departments of the government... while not controlling upon the court's are entitled to great deference and grave consideration" (p.954-955). This judicial deference has often compromised the rights of Indians as well as other minorities (Riker and Weingast, 1988: 399).

There is also ample evidence in which the Courts acted as **initiators** of policy when it was determined that Congress was not acting fast enough. See, for example, **Washington v. Fishing Vessel Association,** 443 U.S. 658 (1979) where the court fashioned a pragmatic set of rules which set the future pattern for enforcement of treaty rights in migratory fish in the Northwest coast: including reaffirmation of the major rule that it was logical to establish a 50% share of the harvestable run as the "ceiling" for the Indian fishery.

13. Thanks to Mr. Rudolph Coronado, Jr. for this term.

14. I welcome comments, ideas, and suggestions from readers who might wish to add or explicate this list.

15. I owe a special debt to Dr. Tom Holm who through numerous conversations with me over the past two years has convinced me that the Rehnquist Court is actively engaging in an effort to revisit the spirit of the late 1800s, which persisted into the early twentieth century, when the dominant issues considered by the Court centered on economic regulations, the sanctity of private property, and legitimating the rise of corporate power. We have already described how federal policies of the era were designed to assimilate and acculturate Indians into mainstream America.

16. Racism, ethnocentrism, and the perceived "superiority" of western institutions and values are vividly displayed in a myriad of Supreme Court cases. See, for example, **U.S. v. Sandoval,** 231 U.S. 28, 45 (1913) which referred to Indians as "degraded;" and **U.S. v. Kagama,** 118 U.S. 375 which said Indians were "wards." See Nancy Carol Carter's "Race and Power Politics as Aspects of Federal Guardianship Over American Indians: Land-Related Cases, 1887-1924, **American Indian Law Review,** 4 (1976): 197-248.

17. In my dissertation, which was an analysis of the major Supreme Court cases from 1870 to 1921 (90 in all), the data revealed that in nearly one-half of the cases, 43 in all, there was no tribal or individual Indian represented as a direct party to the case. In other words, in nearly 40% of the cases while an issue or subject matter of importance to Indians was being litigated, there was no direct Indian or tribal involvement. This is a startling figure and indicates an absurd reality. It is a reality which entails the realization by tribal people, frequently after the fact, that their civil and political rights, as well as their property rights, may be diminished or enlarged without the benefit of any Indian involvement (Wilkins, 1990: 76).

The classic example of this type of case with no Indian involvement is **Worcester v. Georgia,** 31 U.S. (6 Pet.) 515 (1832). While this case has been hailed by many as the preeminent tribal sovereignty case, in fact, tribes were not involved. The active parties were several anglo missionaries and the State of Georgia.

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