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David E. Wilkins
University of Richmond, dwilkins@richmond.edu

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Transformations in Supreme Court Thought: The Irresistible Force (Federal Indian Law & Policy) Meets the Movable Object (American Indian Tribal Status)

DAVID E. WILKINS*
University of Arizona

This article is a content analysis examination of 107 federal court cases involving American Indian tribal sovereignty and federal plenary power rendered between 1870 and 1921. Our focus, however, is the U.S. Supreme Court's Indian law jurisprudence; thus ninety of the cases analyzed were Supreme Court opinions. The cases seemingly entail two separate braces of opinions. One brace included decisions which affirmed tribal sovereignty. The other brace entailed cases which negatively affected tribal sovereignty. These negative decisions generally relied on doctrines such as plenary power, the political question doctrine, or the so-called "guardian-ward" relationship. We argue that the Supreme Court, as a partner in the ruling national alliance, generally deferred to the legislative branches during this critical historical era, Indian treaties and extra-constitutional rights notwithstanding. In seeking to explain the two separate, though not unrelated sets of opinions, we focus on the Court's role in formulating public policy towards American Indian tribes in four major issue areas: congressional power, criminal law, allotment and membership, and natural resources. And we attempt to explain how and why the Court's perception of these issues were transformed over time and how these changes affected tribal sovereign rights. Finally, we develop a synthetic, abstract model of judicial decision-making which provides some explanatory power regarding why the Court decides Indian related issues the way it does.

*Direct all correspondence to: Dr. David E. Wilkins, Department of Political Science, University of Arizona, Tucson, Arizona 85721. Telephone: (602) 621-7600.

The U.S. Supreme Court occupies a seminal, vacillating, though certainly not detached role in elaborating upon the distinctive political and legal relationship between tribal governments (which are situated as both pre- and extra-constitutional polities alongside the federal government) and the U.S. Congress. While numerous studies have been done on the Supreme Court's Indian law jurisprudence, systematic and longitudinal examination of virtually all the Court's Indian decisions during a crucial era, 1870-1921, which attempts to explain both the positive and negative cases and the impact of those decisions on the doctrine of tribal sovereignty has not been done.

This study presents evidence distilled from an in depth analysis of 107 federal court cases (90 Supreme Court decisions)¹ which explicitly or implicitly invoke congressional plenary power and tribal sovereignty. It also looks at the role played by the Court in formulating public policy towards native American tribes in four major issue areas: congressional power, criminal law, allotment and membership, and natural resources. And we attempt to explain how and why the Court's perception of these issues has changed over time and how these changes affected tribal sovereign rights.

We address an important and largely ignored (at least by political scientists) substantive question: the Supreme Court's treatment of the American Indian tribes treaty and constitutional rights. The dynamics of this area of law and policy in the period studied lead us to conclude that the Supreme Court, as part of the ruling alliance, assumed an extremely deferential position to the legislative branches which adopted policies in this era aimed at the detribalization-assimilation of Indians into American society, treaties and the tribes extra-constitutional rights notwithstanding.

Judicial deference to the legislative and electoral majorities is not unique, and other scholars have commented on this before.² The Court assumes that the legislative branches will protect the rights of the people. But as Riker and Weingast have recently shown, there is a "fundamental and inescapable arbitrariness to majority rule" and "majority rule processes are manipulable under certain circumstances, namely when there is a small group controlling the agenda..."³

Riker and Weingast, however, operate from a basic premise that was not relevant for tribal peoples in the time period of this study. They assumed a citizenship status for the American constituency and argued, correctly, that over the constitutional history of the United States the Supreme Court has devised a judicial role as the "protector of citizens' rights against invasion by government." However, during the duration of our study period, particularly before the 1887 General Allotment Act, tribal individuals (with some few exceptions) were not citizens of the United States and therefore lacked the constitutional shielding available to citizens which both protect them from the state and give them a voice in government affairs—i.e., civil rights and the ballot, etc. Even after some Indians acquired federal citizenship via allotments and certain treaties, they were doubtless stunned when the Court ruled in *United States v. Nice*⁴ 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."

We also find that while tribes and individual Indians secured certain legal victories during the era, these victories, usually in the area of natural resources, were attained as a result of federal supremacy and were not validations of tribal sovereignty, *per se*. Other Indian judicial victories were secured when, in the process of assimilation, individual Indians received lands and other assets that were transferred from the tribal unit; those rights were sometimes protected from non-Indian infringements.⁵

Besides judicial deference, we will be noting other significant inconsistencies in court precedent and try to unravel the rationale behind novel doctrines the Court has developed or employed which have served to both constrain and, occasionally, benefit tribes and their efforts to function as distinctive governments.

For instance, during an intense and critical period, 1886 through 1914, the Supreme Court in nineteen opinions asserted that Congress could exercise "plenary"⁶ power with regard to Indian tribes. In addition, the Court on numerous occasions, beginning with the 1846 case, *United States v. Rogers*⁷ employed the "political question" doctrine as a primary justification when it chose not to review tribal charges of fraudulent federal dealings and other questionable activities conducted by federal administrators. The political question doctrine was not officially repudiated as a legal doctrine limiting tribal claims regarding certain rights against the United States until two relatively recent decisions: *Delaware Tribal Business Committee v. Weeks*⁸ and *United States v. Sioux Nation*.⁹

Finally, we have already described the Court's general willingness to adopt a deferential position relative to the legislative branches. Certainly judicial deference to congressional authority is not unusual. But, as Newton has observed, "extreme deference to Congress may have been proper in the early days of this nation's history, when Indians were regarded as holding allegiance to separate nations, and Congress dealt with them as if they were foreign nations. Indian affairs then were a branch of foreign affairs, an area in which the court has traditionally deferred to the political branches..."¹⁰ Today, however, tribes are not accorded the respect of foreign nations and yet the Court continues to exhibit a tenaciously deferential attitude that often leaves tribes with virtually no legal protection in certain areas of law.¹¹

These doctrines, plenary power, political question, and judicial deference, when employed singly or linked together, and the Court's usage of non-constitutional phrases like "wardship" and "dependency," have at times resulted in devastating defeats for tribal nations. They have been used to deny tribes the right to institute claims against the United States arising out of treaty stipulations.¹² They have been used as rationalizations to force tribal members to engage in compulsory labor before they were eligible to receive their treaty entitlement.¹³ They have been used to justify federal leases of fee-simple tribal land without tribal consent.¹⁴ They have been used to sanction explicit abrogations of treaty provisions.¹⁵ And they have been used to support the direct imposition of federal criminal laws into Indian country.¹⁶

Finally, the use of these doctrines allowed the courts to justify the maintenance of tribal members on reservations as prisoners, unable to leave without the permission of the Indian agent.¹⁷ While some of these insidious practices ended with time (compulsory labor, and Indians as prisoners of war) or have been legally

terminated, in a fundamental sense tribes and their citizens are still denied many judicial remedies under United States law.

For instance, Coulter has noted that with respect to the following fundamental issues tribes are without legal redress: the status of Indian governments, the title to aboriginally held tribal lands,¹⁸ the operation and validity of Indian treaties, the power of Congress to legislate over tribal people and territory, and historic tribal claims against the United States.¹⁹

SCHOLARLY EXPECTATIONS

The Supreme Court's role in elaborating upon federal Indian policy and law has been chronicled by a variety of authors. Some posit that the Court is the most helpful branch of the government and the tribe's best hope of securing justice.²⁰ Others stress that the Court is "The Most Dangerous Branch..." and acts as the tribes' chief antagonist.²¹ Recent scholarship, on the other hand, points out that while the Court is the most logical place for tribes to secure justice, the present trend of decision-making is leaning toward decisions which will negatively impact tribal autonomy.²²

Furthermore, previous scholars have also developed a variety of explanations for the Supreme Court's opinions which articulate unlimited federal authority over tribes. These range from conquest to the modern reality that many tribes were simply termed powerless and irrelevant.²³ Other scholars have cited variables as obvious and diverse as racism and ethnocentrism,²⁴ federal paternalism,²⁵ the negative influence of corporations,²⁶ a new conception of Indians as "the beginnings of a man,"²⁷ to economic, natural resource, and political pressure.²⁸ In addition, some authors stress "institutional factors" like court deference and sensitivity to state interests²⁹ and the use of "borderline history" which allegedly enables the Court to recreate historical or contemporary facts in such a way that the Court may justify the paradigm with which it is already familiar.³⁰ Finally, there is some literature which argues that the Court acts as it does because of a traditional interpretation of a *laissez-faire* judicial attitude toward federal regulation of Indian affairs.³¹

These studies have significantly contributed to our understanding of the tribal-federal relationship. The majority of scholarly work in this area, however, has been written by historians, anthropologists, and most notably, attorneys. Clearly legal scholars predominate in the field. One scholar has argued that lawyers dominate the field of Indian law and policy because they tend to "think in terms of 'tests' and Indian sovereignty cases are largely based on concepts like the 'infringement test,' the 'federal preemption test,' and the 'sovereignty as a backdrop' concept."³² One could more plausibly state, as did Nathan Margold in 1942, that legal scholarship is so dominant because many of the conflicts and problems involve "a mass of statutes, treaties, and judicial and administrative rulings, that includes practically all the field of law...the law of real property, contracts, corporations, torts, domestic relations, procedure, criminal law, federal jurisdiction, constitutional law, conflicts of laws, and international law."³³

North American political scientists, however, with few exceptions, have generally ignored the field for one of several reasons. First, it may be perceived as not being

a relevant area of study. Second, since tribes are a statistically-insignificant population (less than two million) there has not been a great demand for appropriate literature. Finally, despite the political and social diversity evident in Indian country, and despite the important inter-governmental, constitutional, and extra-constitutional questions the tribal-federal-state relationship spawns, political scientists in conjunction with federally-related funding have rarely opted not to tackle the field.³⁴

Fortunately, this is slowly but inexorably changing. Several recent studies have been completed by political scientists as well as historians and legal scholars, which attempt to assess some of the often-ignored legal and political dimensions of the tribal-federal relationship. Studies on Indians in comparison with other minorities,³⁵ on the value of interpreting federal Indian policy through the theory of federalism and public policy analysis³⁶ on the role of the United States in Indian Affairs,³⁷ on the applicability of international law to Indian tribes,³⁸ and on the problems which arise when "individualism" encounters "tribalism"³⁹ have raised many interesting questions. In addition, articles on the impact of demographic variables in jurisdiction decisions in Indian law;⁴⁰ on analyses of individual Supreme Court cases that have proven especially devastating to Indian sovereignty;⁴¹ and studies which focus on the optimum conditions necessary for tribes to secure "victories" in the federal courts⁴² have also added depth and texture and a fresher set of explanations to the persistent questions in federal Indian law and policy.

While adding to our knowledge, these studies, like those cited earlier, generally emphasize only one or two of a myriad of variables which were critical during the period under examination—the unresolved issue of federal-state jurisdiction, economic interest of the federal-state-private-sector, theories of cultural evolution (Christianization and civilization of the savage tribes), professionalization and bureaucratization of the federal government, racism and ethnocentrism, and conflict between liberal individualism and tribal or communalism.

Each of these factors are important. However, a systematic and longitudinal content analysis of the major Indian Supreme Court cases which focus on the positive and negative tribal sovereignty cases between 1870 and 1921, how and why the Supreme Court formulated public policy in four broad issue areas, and how judicial precedent transformed over time has not been conducted. Several legal texts have topically examined the complex subject of Indian Law. But these studies, like some of those mentioned above, are largely descriptive and many of them exhibit a commitment to a preconceived set of principles which often distorts the past in order to make their own perspective appears justified. Furthermore, they often repeat, without analysis, doctrines like plenary power which are enunciated or exercised by the Court without examining how or why such doctrines originated and whether they are based in law.

An examination of virtually every Indian Supreme Court decision in this critical historical era, along with an examination of other pertinent historical and political data should enable us to provide a fuller explanation for the overall impact of the Court's decisions which both placed and properly acknowledged tribes in a precarious position outside the constitutional framework.

JUDICIAL TRENDS

In attempting to explain the Supreme Court's public policy role in Indian affairs combined with its adoption of a deferential position to the legislative branches in explicating tribal-federal relations, we focus specific attention on how and why transformations in legal thought occur in four broad issue areas: (1) congressional power and tribal sovereign status; (2) criminal law; (3) allotment and membership; and (4) natural resources. We originally grouped the 107 cases into two separate, though we will argue, not conflicting decision trends during the era—1870 to 1921.

Decision Trend One

Supreme Court opinions involving tribal sovereignty and congressional plenary power interpreted Congress's power over Indians as "plenary" (here defined as absolute/unlimited). In a number of important cases the Court deferred to Congress and often relied on the "political question" doctrine as its basis for choosing not to review congressional actions which proved detrimental to tribal property, civil or political rights. Beginning in 1886, the Supreme Court elaborated on the "untrammelled, 'plenary' nature of federal constitutional power to alter tribal property and jurisdictional prerogatives contemplated by the treaties and treaty substitutes."⁴³

Decision Trend Two

Supreme Court opinions dealing with tribal sovereignty during the same period generally acknowledged the internal sovereignty of tribes and their pre-constitutional aboriginal right of self-government. These decisions largely left tribes free of the constitutional constraints applicable to the states and the federal government. *Talton v. Mayes*,⁴⁴ is an especially eloquent case which articulates some of the assumptions and attitudes of this separate brace of opinions.

The Court ruled in *Talton* that Indian tribes were not constitutionally required to provide a Fifth Amendment grand jury proceeding because tribal powers of self-government preexisted the United States Constitution and had never been subsequently modified or surrendered. In reviewing the long treaty and statutory history between the Cherokee Nation and the United States, the Supreme Court concluded that the Cherokee's rights of self government had not been delegated by Congress and were therefore not powers arising from or created by the federal Constitution. In short, the Court maintained that "as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon the Fifth Amendment, which, as we have said, had for its sole object the powers conferred by the Constitution on the National Government."⁴⁵

Taken at face value, these two trends apparently symbolize a dichotomous classification. We hypothesize, however, that this is not the case. We argue that even the Supreme Court opinions which affirmed the inherent sovereignty of tribes and their exemption from constitutional constraints and state interference will

contain language, either explicit or implicit, which sanctions and legitimates preeminent federal authority—plenary power—over tribal nations, their territories, and their collective and individual political rights. Besides attempting to explain the Court's Indian law decisions which involved tribal sovereignty and how and why the Court's decisions were transformed over time—for clearly it will be seen that there was a significant change in the way the Court conceptualized and articulated tribal sovereignty Congress' plenary power, and the relationship between the two—this study also seeks to explain whether the Court's decisions in the four issue areas named earlier makes a difference in what the Court decides. To reiterate, these areas are congressional power, criminal law, allotment and membership areas, and natural resources.

DATA

It is a little-known fact that ordinary legal doctrines and procedures used in American domestic law generally do not apply to Indian cases. In reality, "federal Indian law contains so many exceptions to traditional Anglo-Saxon jurisprudence as to constitute a field qualitatively and procedurally distinct from it."⁴⁶ In part, this distinction is a result of two factors: the large number of tribes and the unique treaty relationship. There are more than 312 federally-recognized tribes in the lower 48 states and approximately 200 entities in Alaska. Most tribes have their own internal laws and nearly every one is subject to one or more federal treaties or statutes. In addition, some 359 treaties between these tribes and the federal government were negotiated and ratified.⁴⁷ Beyond this, an entire volume of the United States Code, Title 25, is devoted to the subject of Indian law, as is one volume of the Code of Federal Regulations.

Thus, when cases come before the Federal Courts, judges have at their disposal a significant and varied body of law, and may also at times look to non-legal historical and anthropological sources.⁴⁸ In *The Supreme Court and the Uses of History*, Charles Miller asserts that "[i]n disputes concerning American Indian tribes the courts have also considered and often decided cases principally on the basis of historical material." This has happened, notes Miller, because "it has been white man's law that has provided the chief source of security for the Indian, and beyond an appeal to conscience and legal documents the best evidence in most Indian cases is the testimony of history."⁴⁹ Hence, Indian law, more than any other body of law, is steeped in time.⁵⁰

My principal data base consists of 107 federal court cases, 90 of which are Supreme Court opinions. In selecting these cases, we first began by reviewing Cohen's comprehensive work *Handbook of Federal Indian Law*.⁵¹ A review was conducted of the relevant chapters in which Cohen focused on the transformed and transforming status of tribes from sovereign groups to dependent "wards." Further, we extracted his citations of cases which invoked "plenary" power and the "political question" doctrines. A thorough search was then made of his citations for cases which reinforced tribal autonomy and sovereignty. To supplement this list, primary scholarly works and case books on Indian policy and law were perused for additional cases.⁵²

The Court is not an isolated institution and attention was also focused on the functions of Congress and the executive branch, principally the activities of the BIA and its administrative head, the Commissioner of Indian Affairs, who served under the Secretary of the Interior. During this era, and until the 1940s, both Houses of Congress maintained permanent Committees on Indian Affairs. Besides the data mentioned above, we also drew heavily from other primary sources: relevant Indian treaties, statutory law, Annual Reports of the Commissioner of Indian Affairs and the United States Board of Indian Commissioners, opinions of the U.S. Attorney's General and Solicitor of the Department of the Interior, Presidential Messages on Indians, and other relevant executive documents.

A few words about the dates selected for beginning and ending this study are in order. We began with 1870 for several reasons. First, events were underway in the Supreme Court which would culminate in a May 1, 1871 case, *Cherokee Tobacco*,⁵³ which held that a congressional action in direct violation of a treaty provision was a purely "political question" that "the courts were powerless to remedy."⁵⁴ Second, the Senate Judiciary Committee issued a report on December 14, 1870 in which they assessed the effects of the Fourteenth Amendment upon Indian Tribes. In their words:

[T]he Constitution and the treaties, acts of Congress, and judicial decisions above referred to, all speak the same language upon this subject, and all point to the conclusion that the Indians, in tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the term jurisdiction is employed in the Fourteenth Amendment to the Constitution.⁵⁵

Interestingly, this report was not cited in the *Cherokee Tobacco* case, despite the fact that the Senate had an extra 5,000 copies printed and the Court's decision was not handed down until nearly five month after the Senate Report was issued.

Cohen once remarked that the decade of the 1870s represented the first decade in which federal Indian law was "entirely a matter of legislation rather than treaty"... "it is marked by a steady increase in the statutory powers vested in the officials of the Indian Service and by a steady narrowing of the rights of individual Indians and Indian tribes."⁵⁶ While the last section of this quote is accurate, the first part is incorrect and bears correction.

It is true that an amendment was attached to an Interior Department appropriation bill in 1871 that declared the United States would thereafter negotiate no more treaties with the Indian tribes, although it also declared that existing treaties would be honored.⁵⁷ Between 1871 and 1914, however, both houses of Congress approved 56 additional agreements with Indian tribes,⁵⁸ agreements that have been described as the equivalent of treaties by federal officials, attorneys general, congressmen, and in several Supreme Court Opinions.⁵⁹ Cohen asserts that "agreements differed from formal treaties only in that they were ratified by both houses of Congress instead of the Senate alone. Like treaties, these agreements can be modified, except that rights created by carrying the agreement into effect cannot be impaired."⁶⁰

For several reasons, 1921 was chosen as the year of cloture. Although the national trend of both federal legislative and public sentiment continued to be focused on Indian assimilation that reached a zenith when: (1) the allotment system was made flexible and federal administrative powers connected with the allotment system were greatly expanded; and (2) the attempt to "wind up tribal existence reached a new high point and various powers formally vested in the tribes were transferred by Congress to administrative officials;"⁶¹ a melange of other events were transpiring that heralded a new trend in Indian affairs.

Two critically important movements were just beginning in 1921; the drive for universal Indian citizenship and the difficulties over the Pueblo Land Act. The land problems of the Pueblo villages were inspired by the Supreme Court's *Sandoval* decision in 1913.⁶² An outgrowth of these two movements was the emergence of a number of private lobbying groups who argued that Indian land, civil, and religious rights must be protected from federal, state, and private interests bent on their destruction.⁶³ From a tribal perspective, the Pueblo's land battles had both cultural and institutional ramifications. Not only were the Pueblo tribes, assisted by various non-Indian groups, able to reassert their aboriginal title, but equally important, their political entanglements would culminate in 1922 in the establishment of what is generally regarded as the "first important Indian political organization."⁶⁴

Third, on November 2, 1921, Congress enacted the Snyder Act⁶⁵ which authorized the Bureau of Indian Affairs (BIA) to "direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States..." This act consolidated all of the old treaty appropriations and allowed the BIA to spend money without congressional oversight.

Finally, by 1920, many tribes were beginning to seek legislation which allow them to sue the United States in the Court of Claims for injuries they claimed to have suffered from the federal government in previous treaty negotiations. Interestingly, white Americans under the Indian Depredations Act⁶⁶ were extended the opportunities to sue tribes for alleged injuries as early as 1891.

FINDINGS AND DISCUSSION

Content analysis of the four critical issue areas, congressional power and tribal government status, criminal law, allotment and membership, and natural resources, is by no means exhaustive of the multitude of issues that were litigated during the years of this study—but nevertheless represents a reasonable way to group the Supreme Court's tribal sovereignty cases during the term of this study.

To more fully comprehend the significance of these issue areas, two comparative, tables, Tables 1 and 2, have been developed. These tables are distillations of data drawn from the 107 cases which form our core data base. They delineate the similarities and differences in the Court's activity across the issue areas in various subject areas (Table 1) and across time at ten-year intervals (Table 2).

Comparisons Across Issues

Table 1 explicates several important dimensions of the Court's position. These include: the constitutional basis of the majority of the decisions; the Court's reliance on extra-constitutional doctrines; the Court's policy position; the interinstitutional role adopted by the Court; the role of federalism; the Court's position on tribal sovereignty; the alleged cultural status of tribes as viewed by the Court; and the Court's general conclusion about tribal status.

A close examination of the various components reveals both expected and unexpected results. For instance, regarding the constitutional and extra-constitutional basis of the Court's finding, a similar pattern is evident among three of the four issue areas, natural resources being the exception. There, the Court usually chose not to rely on several key doctrines listed under the extra-constitutional category.

Although the judiciary sometimes leaned heavily on congressional plenary power (defined as unlimited/absolute) and sanctioned a vast administrative (Bureau of Indian Affairs) discretionary power when it chose to justify congressional actions in the first three areas of law, it usually couched its more positive Indian natural resource questions in constitutional and treaty terms. This was particularly the case after 1900 when progressive reforms were taking hold to some degree in Washington, D.C.

The next three elements, however, constitute a slightly more complicated picture. Regarding federalism and the Court's policy position and interinstitutional role, there are some interesting disparities between the first two issues—congressional power and tribal status and criminal law, and the last two issues—allotment and membership and natural resources. The Court is apparently more willing to act in an imperial capacity when it addresses issues that are perceived as more crucial to tribal existence. Furthermore, when a tribe's natural resources are involved, the Court almost invariably linked the federal government's interest with that of the tribes, thus shielding the Indians from potentially injurious state or private policies or actions. Deloria has argued, therefore, that tribal rights, usually to natural resources, have occasionally been protected from state jurisdiction and control by being phrased in terms of federal prerogatives. Why? "Because it is in the interests of the federal government not to allow the states to challenge federal powers, of which land ownership and natural resource allocation is a crucial area."⁶⁷

This raises the question "Is the federal government actually supporting tribal sovereignty, or is it more interested in protecting, and even enhancing, federal supremacy if it feels that this is threatened by the states?" Here McCulloch's recently developed thesis⁶⁸ that the theory of federalism may help explain certain federal Indian policies toward Indian tribes receives some strong support. While federalism, generally speaking, involves a constitutional division of power and functions between a central government and a set of peripheral governments, McCulloch's central argument has a different slant. The federal government, not the states, is constitutionally authorized to deal with tribes. This has not, however, prevented states from occasionally attempting to interfere in tribal affairs. The Supreme Court has frequently been called upon to settle questions regarding the states' efforts to

intrude, beginning with *Worcester v. Georgia*,⁶⁹ where the Court decided that the State of Georgia was without authority to imprison a white man residing on an Indian reservation with the consent of tribal and federal authorities, but who refused to conform to state laws governing Indian affairs. Hence, McCulloch argues that many federal Indian policies are a result of conflict or cooperation between states and the federal government (i.e., *Indian Removal Act of 1830*; *Indian Allotment Act of 1887*; the *Termination era* [1953-1960s]). The evidence reviewed during this study provides strong corroboration of McCulloch's argument.

The sixth, and most important component—from a tribal and this study's perspective—is the Court's general perspective on tribal sovereignty. This category highlights the most profound differences of all of Table 1's elements. When the Court was called upon to address issues of congressional power and criminal law, it usually posited a negative tribal sovereign position. In large part this resulted from the Court's usual willingness to defer to Congress (usually citing the "political question" doctrine), given the Indian tribes constitutional location in the Commerce Clause. However, there were several exceptions, usually involving the Five Civilized Tribes.

Regarding the issues of land allotment and tribal membership, the Court's decisions encompassed both positive and negative declarations of tribal sovereignty, depending on Congress's role and the distribution of tribal property. More importantly, the evidence indicates that the issue of tribal membership is usually one reserved for tribal determination, unless property or tribal funds are directly involved. In these cases, the Court often deferred to Congress or administrative officials. Once again, however, when tribal natural resources were involved, tribes usually secured important legal victories. Why? There were three principle reasons: (1) the importance of the subject matter to tribal survival; (2) the general clarity in which resource rights appear in legal documents; and (3) the role of federal sovereignty.

The next component, the Court's perception of the so-called inferior cultural status of tribes is not unusual given the sporadic outbursts of prejudicial statements present in a number of Supreme Court decisions.⁷⁰ The courts frequently spoke about the "possibility" of tribal "cultural advancement," given adequate resources and time. The "evolutionary" theories, insofar as they were applied to tribal people, appear with greater frequency after 1900 with the birth of the progressive movement.

The last component, the Court's overall characterization of tribal political-legal status is quite cohesive across the four areas of law. The only important difference is that in the area of natural resources, wardship is not as clearly articulated as in the other areas for reasons described earlier. Nevertheless, language in even these generally pro-Indian cases indicates that the Court perceived tribes as "dependent" and "defenseless" people.

In summary, despite the Court's important decisions supporting Indian rights in the area of natural resources, though usually for reasons related to federal supremacy,⁷¹ there is far more evidence supporting a view of the Supreme Court as an entity which overwhelmingly deferred to Congress; regardless of whether the legislature was acting to (1) maintain alleged tribal "wardship," (2) selectively reinforce tribal sovereignty, or (3) enact laws designed to detribalize Indians and

Table 1. Comparison of Supreme Court Activity Across Four Issue Areas

<i>Issues</i>	<i>Constitutional Basis¹</i>	<i>Extra Constitutional Basis²</i>	<i>Supreme Court Policy Position³</i>	<i>Inter-Institutional Role⁴</i>	<i>Federalism Invoked⁵</i>	<i>Supreme Court's Tribal Sovereignty Position⁶</i>	<i>Tribal Cultural Position as Perceived by the Court⁷</i>	<i>Tribal Status⁸</i>
Congressional Power	Commerce, Property, Treaty	Wardship, ⁹ unlimited congressional plenary power, ¹⁰ virtually unreviewable administrative discretionary power ¹¹	Deference ¹² Legitimitor ¹³	Least Dangerous	Frequently (federal supremacy) ¹⁴	Generally Anti-with specific exceptions (usually involving the Five Civilized Tribes) ¹⁵	Inferiority	Alien Nation ¹⁶ Wardship, Domestic-dependent ¹⁷ Semi-Sovereign ¹⁸
Criminal Law	Commerce, Treaty	Wardship, unlimited congressional plenary power, virtually unreviewable administrative discretionary power, simultaneous federal citizenship and wardship	Deference, Legitimitor	Least Dangerous, Broad Discretion ¹⁹	Frequently (federal supremacy, federal preemption) ²⁰	Generally Anti-with specific exceptions (usually involving the Five Civilized Tribes)	Inferiority	Wardship, Semi-sovereign, Domestic-dependent, Individualization ²¹
Allotment and Membership	Property, Commerce	Wardship, unlimited congressional plenary power, virtually unreviewable administrative discretionary power	Legitimitor, Initiator ²²	Least Dangerous, Broad Discretion	Periodically (federal supremacy)	Both Pro- and Anti-sovereignty positions. Tribal membership more represented than allotment	Inferior	Semi-sovereign, Domestic-dependent, Individualization

Natural Resources	Commerce, Property, Treaty	Wardship	Legitimitor, Initiator, Imperial ²³	Least Dangerous, Broad Discretion, Imperial Power	Almost always (federal supremacy)	Mostly pro-sovereignty	Inferior, but can "advance" with federal help	Semi-sovereign, Domestic-dependent, Individualization
General Assessment ²⁴	1.5	2.5	5.0	5.0	5.0	7.5	2.5	5.0

Notes: 1. = Constitutional Basis. Decisions which are grounded on constitutional provisions; 2. = Extra-Constitutional Basis. Decisions which are based on non-constitutional doctrines, or legal "masks" (i.e., wardship, plenary power, dependent status, etc); 3. = Supreme Court Policy Provision. Policy-making role assumed by the Court. The three policy roles are defined in subsequent footnotes; 4. = Supreme Court Interinstitutional Role. Court's role vis-a-vis the other branches of government; 5. = Federalism Invoked. When questions of the federal-state distribution of authority/jurisdiction are involved; 6. = Supreme Court's Tribal Sovereignty Position. General judicial stance on doctrine of tribal sovereignty; 7. = Supreme Court's Perception of Tribal Cultural Status. The Court often cited Darwinian terminology which emphasized "cultural evolution." In its most degrading sense, people of color, i.e., Blacks, Indians, Orientals, and Hispanics, were deemed "culturally inferior" to whites; 8. = Tribal Status. General political-legal status of tribes as defined by the Supreme Court; 9. = Wardship. A concept with many different meanings. (See Cohen, *Handbook*, 1972 ed., p. 169-173 for description of the various definitions). When used in an extra-constitutional sense it is applied to tribes, rather than individuals, and it is a power used in two ways: (1) "as a justification for congressional legislation in matters ordinarily within the exclusive control of the states," and (2) as a justification for federal legislation which would be considered 'confiscatory' if applied to non-Indians" (Ibid., p. 170); 10. = Unlimited Congressional Plenary Power. Power defined as "absolute" and "omnipotent" (see Note 7); 11. = Administrative Discretionary Power. By the latter part of the 19th Century, the Supreme Court had implied a federal administrative power over internal tribal sovereignty based solely on the questionable grounds that the United States was the "guardian" of tribal interests. This notion is, however, lacking a constitutional basis. See, e.g., Anonymous (comment), "Federal Plenary Power in Indian Affairs After *Weeks and Sioux Nation*," *University of Pennsylvania Law Review*, 131 (1982): 268; 12. = Deference: When the Supreme Court acquiesces to the legislative branch, often citing the political question rule; 13. = Legitimitor. When the Supreme Court acts to uphold the constitutionality of congressional laws; 14. = Least Dangerous. A perception of the Court in which it is perceived as the weakest of the three federal branches; 15. = Federal Supremacy. When the Supreme Court rules that federal law takes precedence over state law; 16. = Alien Nation. Since tribes were classed as neither "foreign" nations or "states" by the Supreme Court, it has often wrestled with their status. Sometimes it has simply said they were "alien" because their status was extra-constitutional in origin; 17. = Domestic Dependent. Tribal status first delineated by Chief Justice John Marshall in *Cherokee Nation v. Georgia*, 5 pet. 1, 17 (1831); 18. = Semi-Sovereign. This term is synonymous with "domestic-dependent." Essentially, it posits that tribes retain internal sovereignty, but that they have somehow, purportedly because of their "dependent" status, lost external sovereignty; 19. = Broad Discretion. When the Court exercises its option to either legitimate or generate public policy; 20. = Federal Preemption. The legal principle that federal laws take precedence over state laws; 21. = Individualization. General process whereby the federal government sought to destroy the communal aspect of tribal society by the enactment of policies and laws designed to individualize both tribal property and funds; 22. = Initiator. When the Supreme Court actively engages in the formulation of domestic public policy; 23. = Imperial. According to Agresto, the Court acts in this manner because its actions are active and unchecked. In effect, it has the ability to be the creator or designer of new social policy (Ithaca, NY: Cornell University Press, p. 164); 24. = General Assessment. This category provides a summary scale of the general patterns that emerge from a review of each category. The scale runs from 1 = very similar to 10 = very different.

in the process provide individualized Indians with a set of civil rights. The Supreme Court has declared provisions of five federal statutes⁷² which have involved Indian lands or rights as unconstitutional. However, none of these invalidations involved Congress' power to dilute tribal sovereign rights. In other words, while the Supreme Court has on a few occasions declared acts of Congress invalid if they infringed previously recognized or congressionally created rights,⁷³ the Court has never voided a single congressional act because it diminished or abrogated an inherent or aboriginal tribal right.

Why this deference? And more importantly, is it based on legitimate grounds? As we noted at the outset, the Supreme Court is a partner in the dominant national alliance and generally supports the major policies of this alliance.⁷⁴ And while acknowledging that the Supreme Court is not merely an "agent of the alliance"—that is it has a significant amount of power it can use—the "main task of the Court," said Dahl, "is to confer legitimacy on the fundamental policies of the successful coalition."⁷⁵

Besides congressional deference, there was a significant level of ideological consensus evident in the Supreme Court's decisions. This is evidenced by the paucity of dissent in the ninety cases examined. There was written dissent in only five cases: *Cherokee Tobacco*, *Leavenworth Railroad Co. v. United States*, *Elk v. Wilkins*, *Choctaw Nation v. United States*, and *Donnelly v. United States*.⁷⁶

Comparisons Across Time

Table 2 graphically depicts the legal and political transformations that occurred in tribal status, the tribal-federal relationship, and federal Indian policy between 1870 and 1921. Ten-year intervals were used simply because they represent a concise and graphic way to categorize the information perused. Moreover, the unpredictable and inconsistent nature of legal thought precluded a more substantive way of organizing the material studied.

Table 2 comprehensively represents (1) the Court's overall policy position on tribal sovereignty, (2) the reigning congressional policy, (3) the federal relationship with tribes, and (4) the general political-legal status of tribes during the decade.

Not surprisingly, this table—like the previous one—displays telling overlaps from one interval to the next. More importantly it shows the sporadic yet significant transformations that occurred over time. For instance, regarding Court policy, there were major changes between the decades of 1870-1880, when many tribes were still dealt with as relative sovereigns, to the 1880-1890 decade, when the doctrines of unlimited congressional plenary power and "wardship" were formally introduced and became entrenched in Supreme Court case law, beginning with *U.S. v. Kagama*.⁷⁷

This combination, plenary power (when defined as unlimited/absolute) and "Indian wardship," represented a massive transmutation in tribal status from sovereign nations to subject peoples. The plenary power era was inaugurated with *United States v. Kagama*, though the term "plenary" is absent from the decision. The Supreme Court was called upon in *Kagama* to determine whether the Major Crimes Act⁷⁸ was constitutional. The Court, unable to locate a constitutional basis for the Congress' imposition of its criminal jurisdiction over seven major crimes occurring in Indian country, instead crafted a two-pronged explanation

Table 2. The Transformation of Legal Thought Across Time

Dates	Court Policy	Congressional Policy	Federal Relationship to Tribes	Tribal Status
1870-1880	Affirm tribal sovereignty (Tribal status questions, membership)	Reservation ¹ Bilateral agreements ²	Nation-to-Nation ³ Guardian-Ward ⁴	Foreign Alien Nation ⁵ Domestic-Dependent ⁶
1880-1890	Decreasing affirmation of tribal sovereignty Creation of Wardship status (Criminal law issues dominate)	Assimilation? ⁷ Reservation Allotment Guardianship Bilateral Agreements	Guardian-Ward Selected ⁹ nation-to-nation (esp. Five Civilized Tribes)	Foreign Nation Domestic-Dependent Ward
1890-1900	Continuation of Wardship status. Selected recognition of tribal sovereignty (esp. Five Civilized Tribes)	Assimilation Reservation Allotment Guardianship Bilateral Agreements	Guardian-Ward Selected nation-to-nation terminated during this decade	Ward Domestic-Dependent (Five Civilized Tribes)
1900-1910	Continuation of Wardship. Increasing recognition of tribal natural resource rights (Congressional power and tribal status, natural resources, membership and taxation issues dominate)	Modified Assimilation ¹⁰ Reservation Allotment Guardianship Last of the Bilateral Agreements.	Guardian-Ward Quasi-recognition of Tribal Rights ¹¹	Ward
1910-1921	Continuation of Wardship. Continued recognition of tribal natural resource rights, and individual rights	Modified Assimilation Reservation Allotment Guardianship	Guardian-Ward Quasi-recognition of Tribal Rights	Ward Domestic-Dependent

Notes: Congress's official Indian reservation policy began in the 1850s and continued until the mid-1880s when it was replaced by the Allotment Policy; 2. = Although treaty-making with tribes ostensibly ended in 1871 (16 St. 544, 566), bilateral agreements, which were often interpreted as treaties by the courts, continued to be negotiated until 1914; 3. = A political relationship in which the federal government asserts that it is acting as the "guardian" of the so-called Indian Ward. Cohen has conclusively shown that although Indians were often referred to as "wards," there was never any explicit law placing them in that debilitating status (Felix S. Cohen, "Indian Wardship: The Twilight of a Myth," *The Legal Conscience: Selected Papers of Felix S. Cohen*, edited by Lucy Cohen (New Haven: Yale University Press, 1960), p. 328); 5. = Some cases explicitly refer to tribes as "Foreign" or "alien" nations because of their extra-constitutional and pre-constitutional status; 6. = A reduced political status first enunciated by Chief Justice Marshall in 1831 (see discussion of *Cherokee Nation v. Georgia* in text); 7. = Congressional policy from 1880s to 1930s designed to "absorb" Indians into larger non-Indian culture; 8. = The allotment (breakup of tribal lands) of the majority of Indian reservations (24 St. 388) was the central element in the federal government's assimilation program; 9. = While most tribes were reeling from the effects of allotment, missionaries, and other assimilative tools, the Five Civilized Tribes were still generally treated as independent nations and were accorded a large measure of political recognition; 10. = Although assimilation continued as the principal federal Indian policy, by the early 1900s it was modified to reflect the more progressive and tolerant attitude of the influential policy makers in Congress, the courts, and in the Bureau of Indian Affairs. 11. = By the second decade of the 20th Century, the federal government, as a direct outgrowth of the Progressive era, began to extend a measure of recognition towards certain tribal rights, especially in the areas of internal civil matters and tribal natural resources.

for the federal action: alleged Indian "helplessness," and federal land ownership, though not based on the Property Clause.

First, Justice Miller transmuted John Marshall's analogy that Indian nations were "in a state of pupilage" and that "their relation to the United States *resembles* that of a ward to his guardian."⁷⁹ Miller, inaccurately cited Marshall's wardship analogy. He claimed that "in the opinions in these cases⁸⁰ they [tribes] are spoken of as 'wards of the nation,' 'pupils,' as local dependent communities."⁸¹ It is true that Marshall used the term "pupilage" in *Cherokee Nation* and that he described tribes as "domestic-dependent nations," but nowhere in either case does he say Indians are "wards." Miller went on to assert that when Congress decided in 1871 to terminate the treaty-making process, this unilateral federal action, not consented to by tribes, somehow empowered Congress "to govern them [Indians] by acts of Congress."⁸²

Having reified the concept of wardship, and having invested in Congress a self-arrogated power to unilaterally govern tribes, it was an easy step for Miller to then say: "These Indian tribes *are* wards of the nation. They are communities dependent on the United States."⁸³ Continuing, the Court said that "from their very weakness and helplessness...there arises the duty of protection, and with it the power." This "power," said Miller, "must exist in the [U.S.] government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."⁸⁴

Second, the Court asserted that because of U.S. property ownership of the continent's lands, the federal government had acquired a power "outside the Constitution that allowed it to deal arbitrarily with the Indians under the guise of protecting them."⁸⁵ Since land ownership, combined with alleged Indian "wardship," and not constitutional enumerated delegations of power were the cornerstones of this decision, the basis of plenary power was set.

This decision, articulating a virtually unlimited and unreviewable congressional and judicial power over the status of tribes and their rights, was reinforced in a number of major Supreme Court decisions in succeeding years: *Cherokee Nation v. Southern Kansas Railway*, *Stephens v. Cherokee Nation*, *Cherokee Nation v. Hitchcock*, and most notoriously in *Lone Wolf v. Hitchcock*.⁸⁶

In *Lone Wolf*, which involved the Kiowa, Comanche, and Apache (KCA) Tribes, the Supreme Court upheld the Congress' forced allotment of treaty-recognized Indian land which, according to the 1867 KCA treaty, could not be ceded without the consent of three-fourths of the adult male Indians. The Court also held that the federal law enacted in 1890 to implement the 1892 agreement to allot the KCA lands, which was obtained without the requisite consent of three-fourths of the adult male vote, did not violate the due process clause. In short, the Court dismissed the tribes treaty claims by arguing that Congress could abrogate Indian treaties. "Plenary power," said the Court, "over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."⁸⁷

After citing extensive sections of the *Kagama* decision, the Court more ominously noted in deferring to Congress that it would not consider evidence brought by the

tribes that many of the Indians' signatures to the 1892 agreement had been obtained by "fraudulent misrepresentations and concealment; or that the three-fourths requirement had not been met as required by the 1867 treaty; or that the 1867 treaty had been amended by Congress without tribal consent."⁸⁸

In closing statements, the Court stated that it would continue to operate under the premise that Congress "acted in perfect good faith" with the Indians, but that "if their were injuries sustained by the tribes relief must be sought by an appeal to that body for redress and not to the courts."⁸⁹ However, the fact that most Indians were still excluded from the American political arena because they were not U.S. citizens and could not vote seemed as irrelevant to the Court then as it had to the *Kagama* court in 1886.⁹⁰

By the end of this study's period, 1921, although plenary power and wardship were still the dominant doctrines, the Court had slowly begun to re-acknowledge, sometimes in dramatic language, that the tribes had a right to exist and have their cultures and natural resources protected.

Generally speaking, the five decades depicted show a judiciary which developed and corroborated Indian policy that is inconsistent, but one that is actually held together by a distinctive and fairly-consistent legal "consciousness."⁹¹ Congressional policy fluctuates similarly, and is actually slightly more contradictory. For instance, from 1870 to 1880, the United States maintained its policy of negotiating agreements with Indian tribes and segregating them on reservations. During the next two decades, however, contradictory policies of allotment and assimilation (the goal of which was to include Indians in non-Indian society) and guardianship and bilateral agreements (whose goals were to exclude Indians from non-Indian society) operated simultaneously.

The last 20 years, from 1900 to 1920, witnessed a continuation of the earlier fluctuating policies, with two important exceptions. First, bilateral agreements were no longer negotiated after 1914. Second, "modified" assimilation replaced stark assimilation. It was modified in the sense that although the principal federal goal remained the Americanization of Indians, there was a growing recognition that there was room in America for some cultural diversity.

Not coincidentally, this was also an era in which new immigrants from Eastern and Southern Europe, representing many diverse ethnic and national groups (Russian Jews, Poles, Hungarians, Irish, and Bohemians), began to have a direct impact on social and political reforms.⁹² "It indicates," according to Huthmacher, "that the urban lower class provided an active, numerically strong, and potentially necessary force for reform—and that this class was perhaps as important in determining the course of American liberalism as the urban middle class."⁹³ These diverse ethnic groups had become so prominent and influential that Congress, on May 19, 1921, curbed immigration and established a national quota system.⁹⁴ Prominent philanthropists and influential congressmen began to suggest that Indians, as the original Americans, should have the right to remain culturally distinct, even if they were eventually supposed to merge politically with Americans.

The third category, federal relationship to tribes, is similar in its conflicting scope and institutional alterations, as well as contradictory perceptions to the previous

category on congressional policy. There are, however, a few important differences. In this group, one sees more clearly the transition in the relationship from the original nation-to-nation (in law, if not always in practice) basis to that of guardian-ward (in practice, not in law). Note the overlap across the decades, and the "selected" aspect of the nation-to-nation relationship between the 1880s and 1900.

By the 1900-1910 period "wardship" was the dominant federal paradigm. There was, however, an emerging sense that certain tribal rights, particularly internal criminal and civil tribal disputes and Indian natural resource matters were entitled to federal protection. This attitude intensified during the last decade in the limited areas discussed earlier.

Finally, tribal status, as defined by federal policy makers, vacillated impressively during this 51-year period. Tribes originally defined as "foreign" or "alien" nations, were also classed as "domestic-dependent" nations. They were then, in the next decade, simultaneously treated as foreign, domestic-dependent, and "wards" of the state. Between 1890 and 1900 the wardship characterization dominated, though the Five Civilized Tribes were (at least prior to 1898) still regarded as separate nations. By the last decade, while tribes and individual Indians were still generally treated as wards, they were sometimes regarded as domestic-dependent nations, capable and entitled to a separate cultural, political, and legal status.

A MODEL OF JUDICIAL DECISION-MAKING REGARDING TRIBAL SOVEREIGNTY

Restated briefly, my original hypothesis was that even those Supreme Court decisions affirming tribal sovereignty would contain language that sanctioned or legitimated overriding congressional authority over tribes. Has my empirical data and case analysis confirmed or denied this statement? In short, it has been loosely confirmed. We have inductively developed the following model, Figure 1, which accounts for the two distinctive though interlocked sets of opinions. The two judicial trends are interrelated by the legal consciousness that permeates the Court as an autonomous institution. This distinctive consciousness, according to Kennedy⁹⁵ has evolved according to a pattern uniquely its own. Kennedy has observed that the "notion behind legal consciousness is that people can have in common something more influential than a checklist of facts, techniques, and opinions." "They can," said Kennedy, "share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind."⁹⁶ The cases analyzed indicate a powerful level of ideological consensus exhibited by the Court. This, as noted above, is best evidenced by the virtual lack of dissent in the 90 Supreme Court cases analyzed.

This model is a plausible account of those important factors which impinge upon or may redirect a Court's final Indian or Indian-related decision legitimating significant federal power over tribes. Although it is primarily descriptive, it graphically charts some of the particular complexities that may be involved in a given case.

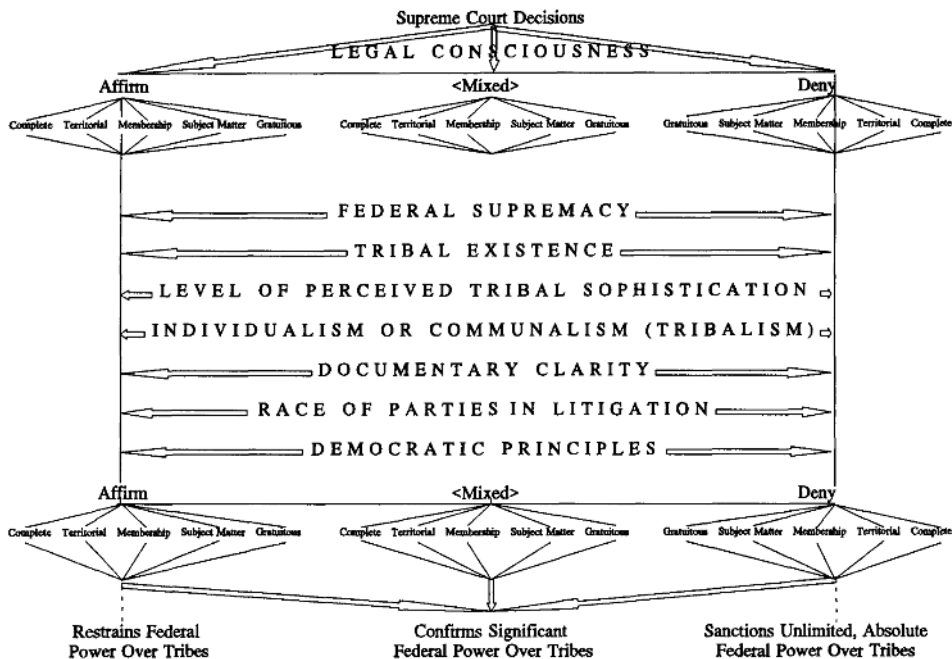


Figure 1. A Model of Judicial Decision Making Regarding Tribal Sovereignty

Model Description

In reviewing the Court's Indian-related sovereignty cases, we dichotomized them initially into two separate categories: Decision Trend I cases which adversely affect tribal sovereignty, and decision Trend II cases which were generally supportive of tribal rights. However, in reviewing the cases it was necessary to develop a taxonomy that reflected the Court's different means of treating the concept of sovereignty. We, therefore, disegregated the concept sovereignty into five major types: complete, territorial, membership, subject matter, and gratuitous comment.⁹⁷

Once the sovereignty case had been categorized, the presence or absence of one of several factors (or combination of factors) may affect the Court's final decision. First, the most important issue appears to be the presence or absence of congressional power (*i.e.*, whether or not Congress has the right to enact various laws without tribal consent, or federal supremacy when challenged by states or private interests). If the Court perceives that a tribe or state is directly challenging federal sovereignty or a particular federal policy, it generally sides with the legislative branches. This is particularly true if constitutional provisions are being tested—the Commerce, Treaty, or Property clauses. This is not surprising since, as we have shown, the Court is an integral part of the ruling alliance. The Court, in short, functions predominantly as a legitimator of congressional or executive actions.

Second, the Court may also generate of its own volition, an implied or implicit congressional intent if it will serve the Court's perception of what it believes is in the affected parties interest and, if the issue is considered vital to a tribe's continued existence, usually, though not always, as a distinct cultural entity. What the Court considers in the "tribal interest," however, may not be what the tribe desires.⁹⁸ Furthermore, the Court's perception of what is necessary for continued tribal existence is also sometimes problematic.

Third, if the tribe is considered culturally or socially "sophisticated" because of the comparatively "advanced" development of its legal and political institutions, this appears to have a bearing on how the Court ruled.⁹⁹ Fourth, depending on the constellation of factors under discussion, the Court may also examine the situation from the philosophical paradigm of liberal individualism as contrasted to communalism or tribalism.¹⁰⁰ This is a fundamental factor because of the overwhelming emphasis placed on individual rights in this society. Also, the Court is sometimes cognizant that the existing political relationship is based upon nation-to-nation treaties and agreements and attempts to develop arguments to support tribalism.

Fifth, the clarity with which a particular or collective set of tribal rights appears in federally sanctioned treaties, agreements, or federal laws may also have a direct bearing on a Court's final decision.¹⁰¹ Sixth, racial makeup of the parties involved in the litigation could also be determinative of the outcome of cases. For instance, during the historical era of this study, half-breeds or mixed-blood Indians were often treated in a distinctive manner. While this factor alone guaranteed neither a legal victory or defeat, depending on their tribal membership and other factors, it certainly had a bearing on the outcome of some of the decisions in our sample of cases.

Finally, the prominence of explicitly named democratic values or principles can be important and may modify the Court's final opinion. For instance, when "morality," "consent," "humanity," or "justice," are alluded to by the Court this sometimes works to the benefit or disadvantage of tribal sovereignty.

Theoretical Implications

Either of the above factors, individually, when paired, or in any combination may materially affect the outcome of a Supreme Court decision. It is impossible, however, to predict with any certainty, which factor or combination of factors will have the effect of affirming or denying tribal sovereignty. Thus, despite the clarity of recognition of the sovereign status of tribal states as existing political and cultural entities in the Commerce Clause, in over 300 ratified treaties, in some 50 bilateral agreements, in numerous federal statutes and federal court decisions, the evidence perused for this article supports both Deloria¹⁰² and Wilkinson's¹⁰³ statements that the Supreme Court has developed no real consistent legal doctrines over time, insofar as tribal sovereignty is concerned. It is plausible, however, to state that the Supreme Court as a policy-making institution, has exhibited a fairly distinctive and fairly consistent legal consciousness over time when addressing the reality of tribal nations encapsulated by a constitutional democracy.

This model modifies our initial hypothesis in a fundamental sense. Originally, we hypothesized that when the courts legitimated congressional plenary power over tribes, it was always a power that was omnipotent and absolute. This model and the preceding content analysis of the case law, however, while confirming that the Court does sometimes sanction inordinate power, often confirms a much less stark, though still not insignificant congressional power and in some cases even restrains congressional power.

Hence, while the Court's Indian decisions can be tracked along a spectrum from the left, which interdicts or restrains federal power, to the middle, which sanctions a significant thought constitutionally-based federal authority, to the far right, which legitimates unlimited, absolute federal power, it is clear from the model that the perceptual screen bonding all this together is legal consciousness that affects, though in a difficult manner to quantify, the Court's decisional outcomes.

This study has not generated any law-like generalizations. But it has produced more than merely idiographic explanations for the transformations in legal thought and the Court's development or reification of non-constitutional doctrines like "wardship," "dependency status," and federal land ownership, which sometimes supplanted the legitimate Commerce and Treaty constitutional clauses that historically constituted the parameters of the tribal-federal relationship. These non-constitutional doctrines, along with the sometimes bizarre interpretations of the Property Clause of the Constitution and the definition of Indians as a "race," served a dual and ironic purpose of both legitimating congressional power (both exclusive and absolute) over tribes while, at the same time, they were used to sometimes protect tribes or individual Indians from federal, state, corporate, or private interests.

CONCLUSION

We began this article by noting that the United States Supreme Court occupies a distinctive position in defining, elaborating and, when necessary, clarifying the status of American Indian tribes and their treaty and extra-constitutional rights. We set out to determine what the Court's role was in formulating public policy towards the American Indian tribes during a pivotal era in constitutional and American Indian history, 1870-1921, by grouping the core data, 107 cases, into four broad issue areas: congressional power in conjunction with tribal sovereignty, the application of western criminal law on American Indian tribes, allotment and membership, and natural resources.

We hypothesized that the Court's adopted deferential position as a partner in the ruling national alliance—which does not involve tribes—would significantly influence the decisional outcome of cases by establishing and reinforcing congressional power over tribal property, civil, and political rights. We argued that before 1871 this deferential attitude was justified because tribes were, generally speaking, still dealt with as separate, if unequal sovereigns with whom the U.S. dealt with via treaties, not domestic legislation. After 1871, however, when treaty-making was stopped, and beginning with *Cherokee Tobacco* (1871), which determined that a subsequent statute could override a prior treaty (last-in-time rule) and that so-called "political questions" were "beyond the sphere of judicial cognizance," the Supreme Court adopted a stance that effectively precluded justice for tribes or a recognition of their rights. This deferential judicial position intensified during the next thirty years as Congress and the executive branch embarked on their infamous allotment, assimilation, and Americanization campaign.

It was not until the first decade of the 20th century that the Supreme Court began to issue occasional rulings which supported certain tribal rights, particularly in the area of natural resources and in individualized property rights. But even those decisions contained ample language that left tribes in a nebulous and tenuous political position subject to unconstrained congressional power, when Congress chose to exercise such power.

NOTES

1. Contact the author for a list of the 107 cases constituting my data base.
2. See, e.g., Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law*, 6 (1957): 279-295; and William H. Riker and Barry R. Weingast, "Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislature," *Virginia Law Review*, 74 (1988): 373-401.
3. Riker and Weingast, "Judicial Deference," p. 374.
4. 241 U.S. 591, 598 (1916).
5. See, e.g., *Choate v. Trapp*, 224 U.S. 665 (1912).
6. The American Heritage Dictionary defines "plenary" as "complete in all aspects or essentials; full; absolute..." (1980). On the other hand David E. Engdahl, "State and Federal Power over Federal Property," *Arizona Law Review*, 18 (1976): 283-384, posits that plenary power has three distinctive definitions: (1) plenary meaning

exclusive power; (2) plenary meaning an exercise of power capable of pre-empting state law; and (3) plenary meaning unlimited power. Each of these connotations is present in Indian case law.

7. 45 U.S. (4 How.) 567.
8. 430 U.S. 73 (1977).
9. 448 U.S. 371 (1980).
10. Nell Jessup Newton, "Federal Power over Indians: Its Sources, Scope and Limitations," *University of Pennsylvania Law Review*, 132 (1984): 235-236.
11. *Ibid.*
12. 12 St. 765.
13. See, e.g., Commissioner of Indian Affairs, *Annual Reports*, 1876 p. 526; 1900, p. 8-9; 1913, p. 13.
14. See *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902).
15. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).
16. *United States v. Kagama*, 118 U.S. 375 (1886).
17. See, e.g., *U.S. Census Report, Indians Not Taxed* (Washington, DC: Government Printing Office, 1884), p. 68; U.S. Commissioner of Indian Affairs, *Annual Report*, 1872, pp. 399-400; Cohen, *Handbook*, 1972 Ed., pp. 176-177.
18. While tribes may initiate law suits against other parties, including the federal government for land-related issues, and may receive monetary damages for recognized title seized by the U.S., the *Tee-Hit-Ton* principle (348 U.S. 272 (1955)) established that aboriginal Indian title, sometimes referred to as original title,

is not a property right but amounts to a right of occupancy...which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligations to compensate the Indians. No case in this Court has ever held that taking of *Indian title* or use by Congress required compensation...(p. 279, 281).

19. See, e.g., Robert T. Coulter, "The Denial of Legal Remedies to Indian Nations Under United States Law," *American Indian Journal*, 3 (1977): 5; and see Newton, "Federal Power," pp. 233-235.
20. See, e.g., Grant Foreman, "The U.S. Courts and the Indian," *The Overland Monthly*, 61 (1913): 573-579; Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven: Yale University Press, 1987); Charles F. Wilkinson, "Indian Tribes and the American Constitution," in *Indians in American History*, edited by Frederick E. Hoxie (Arlington Heights, IL: Harlan Davidson, Inc., 1988); Charles F. Wilkinson, "The Idea of Sovereignty: Native Peoples, their Lands, and Their Dreams," *Native American Rights Fund: Legal Review*, 13 (1988): 1-11; Robert Laurence, "Learning to Live with the Plenary Power of Congress Over the Indian Nations," *Arizona Law Review*, 30 (1988): 413-437; and Richard B. Collins, "Indian Consent to American Government," *Arizona Law Review*, 31 (1989): 365-387.
21. Robert Williams Jr., "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence," *Wisconsin Law Review*, (1986) 219-299; Karl J. Kramer, "The Most Dangerous Branch: An Institutional Approach to Understanding the Role of the Judiciary in American Indian Jurisdictional Determination," *Wisconsin Law Review*, 5-6 (1986): 989-1038; and Milner S. Ball, "Constitution, Court, Indian Tribes," *American Bar Foundation Research Journal*, 1 (1987): 1-139.

22. See, e.g., Lauren Holland, "The Use of Litigation in Indian Natural Resource Disputes," *Journal of Energy Law & Policy*, 10 (1989): 33-55.
23. Cohen, *Handbook*, 1972 Ed., p. 123; and Wilkinson, *American Indians, Time*, p. 29.
24. See, e.g., Nancy Carol Carter, "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; and Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).
25. See, e.g., Felix S. Cohen, "Colonialism: U.S. Style," *The Progressive*, 15 (1951): 16-18; and Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln: University of Nebraska Press, 1986).
26. See, e.g. H. Craig Miner, *The Corporation and the Indian: Tribal Sovereignty and Industrial Civilization in Indian Territory, 1869-1907* (Norman, OK: University of Oklahoma Press, 1976).
27. See Frederick E. Hoxie, "The End of the Savage: Indian Policy in the United States Senate: 1880-1900," *The Chronicles of Oklahoma*, LV (1977): 157-179.
28. Sharon O'Brien, "The Application of International Law to the Legal Status of American Indians," Ph.D. dissertation (University of Oregon, 1978); Ann Laquer Estlin, "Lone Wolf v. Hitchcock: The Long Shadow," edited by Sandra L. Cadwalader and Vine Deloria, Jr., *The Aggressions of Civilization* (Philadelphia: Temple University Press, 1984), pp. 216-245; and Kronowitz, "Toward Consent."
29. Kramer, "Most Dangerous," p. 992.
30. Russell L. Barsh and James Y. Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980), p. xi.
31. Newton, "Federal Power," p. 215.
32. Anne Merline McCulloch, "Domestic Dependent Nations: Analytic Perspectives of Native Americans by Political Scientists," Paper delivered at Annual Meeting of the American Political Science Association (Washington, DC, September 1-4, 1988), pp. 28-29.
33. Cohen, *Handbook*, 1972 Ed., p. xxii.
34. Vine Deloria, Jr., "Our New Research Society: Some Warnings for Social Scientist," *Social Problems*, 27 (1980): 265-272.
35. See Edward J. Ward, "Minority Rights and American Indians," *North Dakota Law Review*, 51 (1974): 137-190; and Petra T. Shattuck and Jill Norgren, "Political Use of the Legal Process by Black and American Indian Minorities," *Howard Law Journal*, 22 (1979): 1-26.
36. Emma R. Gross, *Contemporary Federal Policy Toward American Indians* (Westport, CT: Greenwood Publishing Company, 1989); and Anne M. McCulloch, "Tribal Rights and States' Rights: A Federalism Interpretation of Federal Indian Policy," Paper delivered at Annual Meeting of the American Political Science Association (San Francisco, Aug. 30-Sept. 2, 1990).
37. Hoxie, "End of the Savage."
38. O'Brien, "Application of International Law."
39. Frances Svensson, "Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes," *Political Studies*, 27 (1979): 421-439.
40. Philip Lee Fetzner, "International Decisions in Indian Law: The Importance of Extralegal Factors in Judicial Decision-Making," *American Indian Law Review*, 9 (1981) 253-272.
41. See, e.g., Estlin, "Lone Wolf"; and Daniel L. Rottenberg, "American Indian Tribal Death—A Centennial Remembrance," *University of Miami Law Review*, 41 (1986).

42. Holland, "Use of Litigation."
43. Wilkinson, *American Indians, Time*, p. 24.
44. 163 U.S. 376 (1896).
45. *Ibid.*, p. 384.
46. United States, Special Report, *American Indian Policy Review Commission: Final Report* (Washington, DC: Government Printing Office, 1977), p. 99; and Vine Deloria, Jr., "The Distinctive Status of Indian Rights," in *The Plains Indians of the Twentieth Century*, edited by Peter Iverson (Norman, OK: University of Oklahoma Press, 1985), p. 240.
47. *Indian Affairs: Laws and Treaties*, 5 Volumes, compiled by Charles J. Kappler (Washington: Government Printing Office, 1904, 1904, 1913, 1929, 1941); and *A Chronological List of Treaties and Agreements Made by Indian Tribes with the United States* (Washington, DC: Institute for the Development of Indian Law, 1973).
48. Wilkinson, *American Indians, Time*, p. 12.
49. Charles Miller, *The Supreme Court and the Uses of History* (Cambridge: Harvard University Press, 1969), p. 24.
50. The phrase "steeped in time" is paraphrased from Wilkinson, *American Indians, Time*, p. 13, who observes that Indian law is a "time-warped field." Deloria has noted several times that Indian law is uniquely historical and that most treaty, statutory, and case law is only understandable if it is placed in its historical context. See, e.g., Vine Deloria, Jr., "Revision and Reversion," in *The American Indian and the Problem of History*, edited by Calvin Martin (New York: Oxford University Press, 1987), pp. 84-90; and Vine Deloria, Jr., "Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law," *Arizona Law Review*, 31 (1989): 203-223.
51. Cohen, *Handbook*, 1942 Ed.
52. See, e.g., Price, *Law: Canby, American Indian Law*; Stephen L. Pevar, *The Rights of Indians and Tribes* (New York: Bantam Books, 1983); Vine Deloria, Jr. and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1984); and Wilkinson, *American Indians, Time*.
53. 78 U.S. (11 Wall.) 616.
54. Cohen, *Handbook*, 1972 Ed., p. 265.
55. U.S. Senate, *The Effect of the Fourteenth Amendment on Indian Tribes*, Senate Report No. 268, 41st Congress, 3rd Session (1871), p. 9.
56. Cohen, *Handbook*, 1972 Ed., p. 77.
57. 16 St. 544, 566.
58. United States Senate, *Final Report: A Report of the Special Committee on Investigations of the Select Committee on Indian Affairs*. Senate Report 101-216, 101st Congress, 1st session (1989), p. 41.
59. In 1894 the U.S. Attorney General, Richard Olney, remarked that the Sioux Agreement "was dependent for its validity upon the consent of the Indians. (Sec. 28.) In other words, it was substantially a treaty with the Sioux Nation; acts in this form having taken the place of the ancient Indian treaty..." (20 A.G. 711, 712 (1894))
60. Cohen, *Handbook*, 1972 Ed., p. 67.
61. *Ibid.*, p. 81.
62. *U.S. v. Sandoval*, 231 U.S. 28 (Oct. 20, 1913).
63. See, e.g., Randolph C. Downes, "A Crusade for Indian Reform, 1927-1934," *Mississippi Valley Historical Review*, 32 (1945): 331-354; Margaret G. Szasz, "Indian Reform in a Decade of Prosperity," *Montana, The Magazine of Western History* 20 (1970): 16-27; and Kenneth R. Philp, "Albert B. Fall and the Protest from the Pueblos, 1921-23," *Arizona and the West*, 12 (1970): 237-254.

64. Joe S. Sando, *The Pueblo Indians* (San Francisco: The Indian Historian Press, 1976), p. 224.
65. 42 St. 208.
66. 26 St. 851.
67. Vine Deloria, Jr., "Beyond the Pale: American Indians and the Constitution," in *A Less than Perfect Union*, edited by Jules Lobel (New York: Monthly Review Press, 1988), p. 264.
68. McCullough, "Tribal Rights."
69. 6 Pet. 515 (1832).
70. See Nancy Carter's article, "Race and Power Politics as Aspects of Federal Guardianship Over American Indians: Land Related Cases, 1887-1924." This article discusses the racist dimension of Supreme Court ideology by examining a number of Supreme Court cases found to contain ethnocentric and racist language.
71. See, e.g., *United States v. Winans* (1905); *Winters v. United States* (1908); *Alaska Pacific Fisheries v. United States* (1918); and *Seufert Brothers Co. v. United States* (1919).
72. (1) Joint Resolution of August 4, 1894 (28 St. 1018), *Jones v. Meehan*, 175 U.S. 1 (1899); (2) Act of January 30, 1897 (29 St. 506) in *Matter of Heff*, 197 U.S. 488 (1905) overruled in *United States v. Nice*, 241 U.S. 591 (1916); (3) Act of March 1, 1907 (34 St. 1028) in *Muskrat v. United States*, 219 U.S. 346 (1911); (4) Act of May 27, 1908 (35 St. 313, sec. 4) in *Choate v. Trapp*, 224 U.S. 665 (1912); and (5) Act of January 12, 1883 (96 St. 2519, sec. 207) in *Hodel v. Irving*, 481 U.S. 704 (1987). [These cases are located in Elder Witt, *Guide to the U.S. Supreme Court*, 2nd Ed. (Washington: Congressional Quarterly, 1990), pp. 1001-1009.]
73. E.g., *Choate v. Trapp*, 1912.
74. Dahl, "Decision Making," p. 293.
75. *Ibid.*, p. 294.
76. 78 (11 Wall.) 616 (1871), 92 U.S. 733 (1876), 112 U.S. 94 (1884), 19 U.S. 1 (1886), 228 U.S. 243 (1912).
77. 118 U.S. 375 (1886).
78. 23 St. 362, 385.
79. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).
80. He also cited *Worcester* 6 Pet. 515 (1832), which said nothing about wardship; instead it reaffirmed tribal sovereignty.
81. 118 U.S. 378, 382.
82. *Ibid.*
83. *Ibid.*, pp. 375, 383-384.
84. *Ibid.*, pp. 383-384.
85. Deloria, "Beyond the Pale," p. 260.
86. 135 U.S. 641 (1890), 174 U.S. 445 (1899), 187 U.S. 294 (1902), 187 U.S. 553 (1903).
87. 187 U.S. 553, 565.
88. *Ibid.*, pp. 567-568.
89. *Ibid.*, p. 568.
90. Newton, "Federal Power," p. 215.
91. "Legal consciousness" is an important concept in the growing literature being authored by Critical Legal Theorists. These theorists have waged a vigorous challenge to jurisprudential orthodoxy which is devoted to describing and justifying the role of the judiciary within a liberal democracy. For Critical Legal Theorists, critique begins with the view of law as "ideology." In fact, as Hutchinson notes, "the Rule of Law is a mask that lends to existing social structures the appearance of legitimacy

and inevitability; it transforms the contingency of social history into a fixed set of structural arrangements and ideological commitments" (see below, p. 3). For two examples of recent scholarship on critical legal theory, see *Critical Legal Studies*, edited by Allan C. Hutchinson (New Jersey: Rowman & Littlefield, 1989); and *The Politics of Law: A Progressive Critique*, edited by David Kairys (New York: Pantheon Books, 1982).

92. *Encyclopedia of American History*, 2nd Rev. Ed., edited by Richard Morris (New York: Harper and Row, 1961), p. 474.
93. J. Joseph Huthmacher, "The Progressive Movement: Liberal or Conservative?" in *Interpretations of American History*, Vol. 2 Since 1865, edited by Gerald N. Grob and George A. Billias (New York: The Free Press, 1967).
94. 67 St. 5.
95. Duncan Kennedy, "Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940," *Research in Law and Sociology*, 3 (1980): 3-24.
96. *Ibid.*, p. 6.
97. I developed the following definitions for these types: (1) *Complete*: This definition was used for those cases where the Court adopted an extreme posture and affirmed either complete tribal sovereignty or denied the existence of tribal sovereignty; (2) *Territoriality*: This type refers to a court's decision suggesting that a tribe's sovereignty extends only to its territory or that it does not; (3) *Membership*: This type refers to court decisions asserting that tribal sovereignty extends only to tribal members or that it does not; (4) *Subject Matter*: This type refers to a court's recognition that tribal sovereignty extends to a given subject, *i.e.*, taxation, child welfare, natural resources, civil rights, etc., or that it does not; and (5) *Gratuitous Comment*: Refers to language in a given court decision which is forwarded unnecessarily and without justification but may be interpreted as a positive affirmation of tribal sovereignty, or as a negative comment on tribal autonomy. Comments of this nature are without legal force. However, this category has special relevance because although gratuitous comments are not legally binding, they nevertheless are often cited by attorney's or judges to buffer their own arguments or ideas on their novel construction of a particular doctrine or principle. Thus, gratuitous comments on sovereignty, often lodged *in dicta*, sometimes play critical roles because they may form the legal basis on which tribal sovereignty is altered in the future. I want to thank Prof. Vine Deloria, Jr. for his advice in the development of this typology, especially with regards to gratuitous comment.
98. See, e.g., *Lyng v. Northwest Indian Cemetery Association*, 485 U.S. 439 (1988) and *Employment Division v. Smith*, 58 U.S.L.W. 4433 (1990). Both of these cases involved religious freedom questions. In both cases the tribes and individual Indians concerned sustained major blows to their religious rights.
99. See, e.g., Williams, "Algebra," p. 289.
100. See, e.g., *Ex Parte Crow Dog*, 109 U.S. 556 (1883) and *Elk v. Wilkins*, 112 U.S. 94 (1884).
101. See, e.g., *Famous Smith v. U.S.*, 151 U.S. 50 (1894); *U.S. v. Winans*, 198 U.S. 371 (1905); and *Choate v. Trapp*, 224 U.S. 665 (1912).
102. Deloria, "Laws Founded," p. 223.
103. Wilkinson, *American Indians, Time*, p. 3.