Chapter Two

Legal Indeterminacy, Historical Categorizations of Tribes and the Re-emergence of Tribes as Governments

Introduction

In this chapter I first present an extensive historical contextualization of the contemporary status of tribes. In doing so I identify the contradictions and ambiguity characterizing federal policy and legal rulings that provided opportunities for tribes to promote new beliefs and practices. I begin by briefly highlighting the historical indeterminacy of tribal legal status. I then identify five categories through which tribes have been formally and informally perceived and treated, as documented primarily but not exclusively in federal policies. These categories are *conquered peoples / wards*, *minorities*, *rights-holders*, *corporations*, and as *sovereign nations* represented by *governments*. In documenting the last conception, I describe in more detail the contemporary set of policies and practices that constitute the outcomes I am attempting to explain. After this, I consider the origins and early policy statements of the self-determination policy and demonstrate that these eventual outcomes were not clearly intended by the policy.

A History of Legal Indeterminacy

The fact that tribes are *extraconstitutional* and are "not afforded constitutional protection because they were not created pursuant to, and are not beholden to, the U.S. Constitution" (Wilkins 1997: 5), raises the stakes regarding the impact of U.S. policies towards tribes. The Supreme Court has ruled that Congress has *plenary power*, an apparently unlimited and unreviewable authority, over tribes, (but see Wilkins and Lomawaima 2001: 98-116). Unconstrained by the Constitution, the Court can exercise great leeway in interpreting tribal rights. Legally, the relative fragility of tribal status stands in contrast to that of states. As Wilkins points out, "states may generally rest assured that at any given time at least some of their inherent sovereign powers are respected, that their existence as polities is constitutionally established and

protected, and that they need not fear being terminated as polities. Tribes have none of these assurances" (Wilkins & Lomawaima 2001: 122).

Due to this *extraconstitutional* standing, there is no grounding for legal interpretation of tribal rights other than the changing, often conflicting, policies of the U.S. government, even with the existence of approximately 371 treaties. As a consequence, tribal legal rights *in practice* – and as widely criticized by legal scholars sympathetic to tribes- are best understood as a relatively unmediated *reflection* of policy rather than as law understood as first principles or as enactments which must be respected "to the letter of the law" once established.[1] The centrality of plenary power makes the intent of Congress and its authorized representatives crucially important in interpreting conflicting and ambiguous legislation and delivering rulings on tribal status and rights. Yet in matters as subtle and nuanced as tribal status this may lead to fairly intractable questions of historical interpretation regarding the meaning and intent of actions undertaken by shifting groups of individuals across wide expanses of time. For example, in court tribal rights claims almost invariably hinge on subtle historical interpretations of the nature of tribal status at the time of treaties and at the time of past legislation. It is difficult if not impossible to ascertain the tribal status various Congresses intended to recognize through the hundreds of treaties its representatives negotiated and it ratified. For this reasons, Biolsi argues that the intent of Congress regarding tribal status is a "*legal fiction*" (Biolsi 2002: 67).

In light of such limited legislative guidance courts often use the *current* policy as a guide in lieu of the intent of the law at the time it was passed. That is, courts to some degree *re-interpret* laws based on current policy, taking signals not only from Congress but the Executive Branch, including the President and the BIA in particular. As Wilkinson observes, "results repeatedly turn on the tension between maintaining integrity and stability in the law and affording the flexibility that law must maintain in order to meet the demands of changing circumstances"

[1] For critical reviews from a pro-tribal perspective, see especially Wilkins 1997, Williams 1990, and Frickey 1997.

(Wilkinson 1987: 23). These changing circumstances, quite obviously, include changing federal policy. This is further suggested by the contemporary observations of Indian law professor and policy participant Rennard Strickland. "It may be heresy for a law professor. . . But it is an historical truth. ... that this collection of doctrines and decisions we call Indian law is primarily an expression of Indian policy. And that policy is little more than the collective judgments of society at any given moment: a matter of history. . . The content of our Indian law depends upon society's definition at any point in time of the so-called Indian problem" (Strickland 1998: 109). As suggested by this passage, the court frequently seeks to align its rulings with the broad direction of current Indian policy and tribal realities.

Throughout its history of rulings, the Supreme Court and lower courts have sometimes used a circular logic involving tribal status on one hand, and tribal powers and authority on the other. At heart has been the issue of sovereignty, which even in its ambiguity has very concrete legal implications rather than merely serving as adornment to more substantive elements. The Court has sometimes employed deductive reasoning to declare tribal status, inferring the category of tribes from previous actions by the U.S. vis-à-vis tribes. For example, in the 1832 ruling in *Worcester v. Georgia*, Chief Justice Marshall affirmed Indian nationhood, writing "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and *consequently admits their rank among those powers who are capable of making treaties*" (cited in Prucha 1994: 166, italics added here).[2] Such classifications may then be used, either within the same case or in subsequent cases, to justify upholding or denying rights linked to the category in

[2] In Cherokee Nation v. Georgia, 1831, Marshall referred to the Cherokees as a State. The Cherokees "have been uniformly treated as a State from the settlement of our country. The numerous treaties made with them...recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character...Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a State, and the Courts are bound by those acts." (quoted in Prucha 1994: 166). Yet, rather than casting tribes as foreign nations Marshall said they were "domestic, dependent nations" whose relations with the U.S. "resembles that of a ward to his guardian." In the subsequent Worcester v. Georgia ruling Marshall stated that tribes had retained "their original natural rights and again affirmed that Indian nationhood had not been destroyed.

on the final "tribes as sovereign governments" categorization, and trace its uneven history in both policy and legal rulings.

Tribes as Conquered Wards

First, tribes have been viewed as *conquered peoples* and relatedly as *wards of the state* in both federal policy and Supreme Court rulings (see Wilkins and Lomawaima 2001: 19-97). The perception that tribes were militarily conquered – an historically simplistic and in some cases inaccurate assessment given the variation among tribal experiences and the many treaties of *peace and friendship*, not *surrender* per se - has subsequently been used to justify the non-observance of treaty promises when whites sought tribal land and natural resources. Appeals to this reasoning grew as tribes survived longer than expected. Ward status, even though often dissociated from the rough political equality implied by treaties, has been positively linked to those treaty promises which did not provide obstacles to white resource acquisition: that the U.S. would provide for the health, education and welfare of tribes in perpetuity. Acting to promote the best interests of tribes in its corresponding trusteeship role – which itself is interpreted in various and conflicting ways - the U.S. government has subjected tribes and their members to unilateral action. In particular, wardship status has been the primary justification for the uniquely heavy-handed control exercised over tribes by the Bureau of Indian Affairs. Because of this BIA role, state and other officials frequently thought of reservations not only as technically "federal" land but as land more or less directly controlled by federal officials; tribal members lacked Constitutional and other legal protections prior to the extension of U.S. citizenship to all Indians in 1924[6] and the extension of many provisions of the U.S. Bill of Rights to tribal members in 1968[7]. The 1887 Dawes allotment act and the 1950s policy of terminating tribes were also centrally justified by the need to act in the best interests of tribal members – in these cases by "liberating" them from their outdated culture.

[6] Indian Citzenship Act.
[7] 1968 Indian Civil Rights Act.

If tribes are seen as conquered peoples and consequently also as wards, distinct powers and rights will likely be seen as extremely inappropriate, or even as an outrage to the "victors" who may engage in a backlash. Wards are most fundamentally conceived of as incompetents, and incapable of wielding powers and rights responsibly or effectively. Similarly, while wards should be treated well, they should not have the potential to get ahead or enjoy exceptional rights due to policies based on wardship status. Wardship is fundamentally incompatible with the sovereign basis of tribal rights claims. Accordingly, any such rights are illogical and receive no support from conceptions of tribes as conquered peoples and as wards. Treatment of tribes as conquered peoples is so ubiquitous as to constitute a general background condition in predominant non-Indian conceptions of tribes. It is often unstated, there is rarely any discussion of tribal survival on any other terms, and Indian policy is clearly understood as something done *to* tribes as conquered wards. Occasionally it will be spoken, as the caller to a state Indian Affairs office said in crudely complaining about tribal fishing rights: "We kick their ass and they get half the fish?"

Secondly, tribes have been widely viewed as *minorities* comprising economically disadvantaged groups, culturally distinct groups, or both. This characterization has its logical basis in the extension of U.S. citizenship to all tribal members in 1924[8]. In this conception, tribes are considered similar to African-Americans and other minority groups. Based on need, historic mistreatment, and cultural status, tribes as minorities fall under special policies targeting poverty-stricken groups. This perspective is evident in the IRA, which was partly an attempt to bolster the cultural survival of a declining race. Conversely, a conception of tribes as minorities provided motivation and justification for the post-WWII termination policy, as tribal separatism was unfavorably compared to the post-war integration enjoyed by other ethnic groups (see Cornell 1988: 121-123, Nash et al 1986: 129-135). More narrowly poverty- focused policies have notably been applied to tribes through the inclusion of tribes in 1960s War on Poverty

[8] It should be pointed out that this was a unilateral act and that tribal members retained tribal membership or, as some pointedly emphasize, tribal *citizenship*. They thus continued to be members of a distinctive political community within the U.S. as well as full U.S. citizens.

programs and later efforts under Presidents Nixon and Reagan to promote minority capitalism (see Wilkins 2002: 137-138, 221-222 for a brief synopsis, Castile 1998 for a more detailed account). Separately, individual tribal members *as Indians* could qualify for affirmative action benefits (Skrentny 2002: 124-129).

Conceiving of tribes as minorities equates tribes and their members with the broader and singular category of "American Indians," and does not recognize tribal groups as a meaningful distinction. Within the logic of minority policies, if Indians are to enjoy distinct group rights, such rights should be uniform and apply equally to all members of the group. Furthermore, within-group inequalities as a result of distinct rights de-legitimize minority-based policies, making tribal variation in outcomes such as political influence and economic development problematic. Regarding minority policies commonly understood as responses to disadvantage and impoverishment, distinct policies or opportunities may logically be withdrawn if need is diminished. Following a somewhat parallel but unique logic, cultural change *perceived by the majority group to depart from tradition* may delegitimize policies supporting minority cultural survival. A final minority perspective implication, which overlaps with those derived from a conception of tribes as rights-holders (see below), regards the source of such rights. As stated by a former tribal official, "Minorities just have whatever rights the legislature decides to give them" rather than having more lasting or foundational sources of rights and authority (Skykowski interview).

Thirdly, tribes and tribal members have been considered as *rights holders*, inheritors of rights *granted* by previous federal government action who otherwise have no distinctive political status other than as U.S. citizens. Indian policy historian Francis Prucha identifies this categorization in his interpretation of a late 19th century court ruling: "On one hand the sovereign political character of Indian communities was denied; on the other, the tribes continued to exist as subjects of the rights the old treaties promised" (Prucha 1994: 17). This perception can be seen in the design of the Indian Claims Commission, created by Congress in 1946 as a means to create a

"final" resolution of treaty claims. The Commission had broad jurisdiction to award money judgments as compensation for Indian losses, but it could not return land in any situation, even when the Indian title was unextinguished. More generally, this conception of tribes and their members can be seen in the (ambivalent) recognition of tribal rights, *apart* from other understandings of tribal status, by law enforcement officials throughout much of the 20th century. For example, after years of inaction, in the late 1960s the Justice Department began supporting the fishing rights claims of northwest tribes (Bureau of Indian Affairs 1976). Distinctly, and with the opposite goal, such a conception of tribes and tribal rights can be seen in intermittent contemporary efforts to promote a legislative abrogation of treaty rights, so as to bring policies in line with the modern American principle of "equal rights" (Cohen 1986: 182-187).

Viewing tribes primarily as rights holders implies that the sovereign status of tribes in the treaty-making era, the basis for many tribal rights, is no longer active. Rather than retaining some moral authority from the negotiated nature of these rights and their mutual acceptance, these rights are now seen as emanating from a voluntaristic granting of rights by the U.S. Under this conception, the status of tribal rights is similar to the final implication of a minority conception: rights *given* by a superior political body can be legitimately *rescinded* in a simple matter of ordinary policymaking. It is also linked to the notion that these rights may be re-interpreted by the court to bring them into alignment with contemporary social and political realities, as courts commonly do when laws are viewed as anachronistic and superseded by new beliefs and laws (i.e., parents' rights regarding children, husbands' rights regarding wives, laws against interracial marriages, etc.). In terms of their actual enforcement, tribal capabilities viewed as inherited and anachronistic rights may suffer from lack of protection due to conflicting legal interpretations and a lack of legitimacy in the eyes of local law enforcement officials. Tribes are cast as rights-holders when treaties as the basis of rights are ignored and when it is suggested that the rights in question are the simple and direct result of recent Congressional activity.

Fourth, tribal groups or their members have sometimes been actively re-shaped and subsequently construed as *corporations* or as *businesses*. Felix Cohen, a pivotal figure in Indian law and an architect of the IRA, imagined tribes as one of many self-governming groups within what legal scholar Dalia Tsuk has identified as a "pluralist" vision of society (Tsuk 2001). Working with BIA Commissioner John Collier, Cohen drew upon corporate law in fashioning IRA policies. For example, the legislation facilitated the creation of "Business Development Councils" as the formal ruling body for some tribes. Because of the semi-imposed[9] nature of the IRA, latter commentators have suggested tribes are more akin to government-derived corporate bodies than traditional, indigenous groups (Resnik 1989, see Goldberg-Ambrose for an analysis of Resnik's interpretation). Later, and separately, the 1971 Alaska Native Claims Settlement Act (ANCSA) emphasized a corporate model.[10] It created 13 regional, 4 urban, and over 200 village Native corporations, making Alaska Natives *shareholders* and transforming the previous centrality of traditional tribal government structures. Some additional federal policies have focused on tribes as economic entities in seeking to promote tribal economic development.

When tribes are cast as businesses or corporations, they may be granted distinct rights in targeted situations to advance social goals. However, they should still be subject to appropriate regulation, and along with these distinct rights comes the expectation of a heightened degree of transparency and scrutiny by a wide range of regulatory bodies. Beyond this, the continuation of such distinct rights should be contingent upon whether the rights are successful in achieving the policy goals. Tribes are framed as corporations when they are compared to businesses and incorporated but non-governmental or quasi-government entities or interest groups of other kinds.

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[9] Congress first gave tribes one year to accept or reject a new Constitution, then extended it an additional year. As discussed in Wilkins (2002: 134-5), three controversies accompanied the elections. First, the voting structure required a majority of a tribe's voters to vote against the IRA, and counted abstentions as affirmative votes. Second, the act required a single vote per reservation, which in many cases were home to numerous tribal nations. Third, there was confusion about whether a whether a tribe had to have land before adopting a constitution or whether the process was properly the reverse. There remains considerable mixed opinion within tribal communities regarding the IRA.

[10] Formal statute data

Finally, tribes have been inconsistently treated as *sovereign nations* represented by *governments*. Due to its centrality for the study as well as its complex historical basis and its unfamiliarity, I examine the treatment of tribes as sovereign governments in more detail. I separately present its history in policy and law, respectively. I conclude this section with additional elaboration regarding the contemporary outcomes I seek to explain.

Tribes as Sovereigns Governments

> The founding fathers could have created, and they did not, a union of states and tribes. Instead, they waffled, and we have confusion…There is…a denial of tribal status. Tribal governments are a thorn in the state and federal system.
> - former BIA Director Philleo Nash[11]

> that goes back to what we were talking about, tribes do not want to be viewed as a minority. They're not a minority, they are a government. That is a huge difference.
> - former tribal employee

Tribal Governmental Status in Policy

In the initial period of treaty relations between the fledgling U.S. and tribes, the latter were treated as sovereign governments by the federal government. Tribes as governments of sovereign nations have the right and responsibility to act in a myriad of ways to provide for the public good of their *citizens*. As governments, they are legitimately held accountable only to their own citizens rather than, for example, other tribes or all Indians. Their primary justification for action is found in the consent of the governed political community. Acting in the interests of the nation, governments can generate public resources, make policies, and enforce laws within the nation's territory. They can rightfully determine what information they want to share with others outside the political community, and what to keep private and confidential. Nations have the right to utilize their own political structures, citizenship criteria, economic strategies, and in general make their own choices. Occasionally national governments are corrupt, inefficient, experience fiscal

[11] Nash et al 1986: 131-2.

crises, and display other negative qualities while at other times (or other governments) exhibit more positive qualities, and are run exceptionally well.

After the period of initial intergovernmental relations, however, this understanding of tribes as nations and treatment based upon it became minimal in subsequent eras. Because tribes were neither extinguished nor accorded their previously-understood status, tribes became anomalies in U.S. governance. Yet there were attempts to clarify tribal governmental or quasi-governmental status, particularly regarding their relationship to states. I discuss these below, drawing heavily on work by one of the most authoritative historians of Indian policy, Francis Prucha (1994).

Even soon after the founding of the U.S. there was some uncertainty about tribal status. For example, in 1784 New York State policymakers considered whether to treat Indians as ""*independent Nations*"" or as "'antient dependents'" and thus as "*Members of the State*" (Hough, 1861, pp. 21-24, as cited in Prucha 1994:. 44). Notably, Indians and tribes were for the most part left out of the Constitution. After the War of 1812, with a new "position of assured dominance," the U.S. questioned "the propriety of considering the Indian tribes, no matter what their power, political organization, and sophistication, as sovereign nations, with whom the only means of dealing was by formal treaty" (129). Andrew Jackson strongly argued against this policy and perspective, viewing Indian treaties ""an absurdity"" (153). Clearly casting Indians and tribes as conquered wards, he wrote that the policy of treaties came at a time when "the arm of government was too weak to enforce" regulations and policy," but that "this has passed away" (154). Nonetheless, treaties and rhetorical recognition of tribal sovereignty remained U.S. policy.

In the context of efforts by the Cherokee Indians to resist encroachment and removal by the state of Georgia in the 1820s and 1830s, federal and state officials renewed discussions of tribal status. Prucha reports that the issue generated a "full-scale debate on Indian treaties…and the Indian nationhood on which they rested" (156), as "From 1827 until…1838, the arguments echoed through the halls of Congress and the public press" (157). Those in favor of the

Cherokees argued that "'Communities of Indians have been called nations, in every book of travels, geography, and history…" (160), while opponents claimed that no such equality of status implied by such an interpretation existed; "Treaties with the Indian tribes are, *in fact*, merely matters of convenience to us…In treaty we were merely purchasing their consent to leave the lands, or their consent to our occupying it'" (161). In the end, the U.S. Army forced the Cherokees to leave Georgia starting in 1838, and the issues surrounding the case became functionally moot.

During the Civil War, both the Confederacy and the Union considered new political arrangements for tribes. A bill was submitted near the war's end that would have established "set boundaries and a government similar to that of other federal territories" (Prucha 1994: 265) for the Indian territory to which eastern tribes had been relocated. The bill did not pass and land self-governed by Indians was not directly incorporated into the U.S. However, the U.S. did consider a more formal ending of the previous system. General Pope saw no reason to treat tribes as sovereign nations, and felt annuity payments and treaty obligations should be halted. He argued that Indians with whom treaties had already been made should be treated as wards, and 'wild Indians' should simply be controlled by the army. His view did not carry the day, as the treaties were still considered active and in force (275), though the concept of sovereignty was increasingly dissociated from tribes.

In the late 1800s, a number of territories and states entered the Union under enabling acts or state Constitutions that contained explicit language disclaiming state power over Indian land and rights. In the eyes of legal scholar Frank Pommersheim (1995: 143-144), these disclaimers signified a moment in which the issue of state-tribal relations could have been clarified, and one aspect of the question of tribal status put in place. Political scientist David Wilkins states that the purposes of these disclaimers were to "reiterate exclusive federal authority over Indian affairs, reaffirm tribal sovereignty *vis-à-vis* the states, and remind states that their sovereignty in the federal system does not extend into Indian Country" (Wilkins 1998: 80). However, whatever their

potential, disclaimers were faltering in effect; as allotment began to change the demographics of Indian Country so that reservations contained increasing numbers of non-Indians, states ignored the disclaimers.

In this same period it was hard to perceive a recognition of sovereignty in U.S. policies, although separatism remained in force. Congress had declared an end to treaty-making with Indians in 1871. As assimilationist policies became institutionalized in the Dawes act and perceptions of the "vanishing Indian" developed, principles of honoring treaties and tribal communities further withered. According to Prucha, by "the end of the nineteenth century and early in the twentieth, special commissions, new laws, and Supreme Court decisions made clear that treaty provisions, once considered sacred, need no longer be adhered to. The Indians were to be individualized as yeoman farmers on their allotted lands, brought under the sway of American law, and treated as individual citizens not tribal members" (Prucha 1994: 288).

As noted above, the 1934 IRA enacted measures to help tribes regain self-control, including some governmental powers. However, it did not restructure federal policies so that they treated tribes as governments, and nor did it address the larger questions of how tribal governments might fit into federalism or how tribes were to relate to states. There appears to have been little said regarding any of these topics, or regarding the treaties closely linked to sovereign nationhood status. In contrast, the Indian self-rule that was promoted by the IRA, even with its governmental aspects, seems to be consistent with the pluralistic conception of tribes as (unique) incorporated interest groups (as discussed by Tsuk 2001, 2002).

After tribes were considered as anything but sovereign governments in 1950s termination policies, the War on Poverty programs[12] of the 1960s treated tribes as governments to some degree, but even more so as "public agencies" of the poor. These programs intentionally bypassed all types of governmental administrators to facilitate the "maximum participation by the

[12] In particular, the Area Redevelopment Act (1961) and the Economic Opportunity Act (1964) included tribes as potential qualifying agencies.

poor," and it was on this basis rather than on any distinctive tribal or Indian status that tribal governments qualified for these programs.

Tribal Governmental Status in Law

As indicated at the beginning of the chapter, the Supreme Court has responded to the great latitude derived from these policy vacillations by creating a set of rulings and legal principles that are widely seen as having little coherency. Technically unconstrained by the Constitution, the Court has exercised great leeway in variously interpreting a number of tribal rights "which the federal government is not constitutionally mandated to protect." (Wilkins 2002: 181). In an oft-cited Indian law text, Wilkinson makes the historical origins of such variation clear. He argues that the key to understanding this inconsistency is the "time-warped" nature of Indian law, as conflicting rulings are based on laws or policy generated in different eras, and "born of the explicit regimen and implicit tone of the eras in which they were enacted" (Wilkinson 1987: 13). This variation is particularly true regarding the crucial issues of tribal nationhood and tribal sovereignty, under which the concept of tribes as governments is generally considered. Also briefly noted above, tribal status has been at the heart of the Court's schizophrenic rulings regarding tribal rights.

The Supreme Court has explicitly referred to tribal nationhood and sovereignty in a number of conflicting ways, by *denying* tribes have ever had this character, suggesting a *qualified* tribal sovereignty due to their status as *domestic, dependent nations*, asserting a *diminished* sovereignty, or affirming tribes' retention of *inherent sovereignty*. These rulings begin in the 1820s and 1830s, when the Supreme Court was led by the aforementioned Justice John Marshall.

The Marshall Court issued a sequence of three rulings in which what are now "legendary phrases and concepts in Indian law" were first advanced (Pommersheim 1995: 42). The ruling in the *Johnson v. McIntosh* case of 1823, in which the central issue was the nature of indigenous property rights, found that tribes 'rights to complete sovereignty, as independent nations, were necessarily diminished,' in particular the right to transfer land (as quoted in Wilkinson 1987: 55).

The second case, *Cherokee Nation v. Georgia*, 1831, found that tribes were not foreign nations. Marshall wrote about the Cherokees as a State in the general sense (i.e., *not* as a U.S. state such as Alabama or Delaware), noting that "The acts of our government plainly recognize the Cherokee Nation as a State, and the Courts are bound by those acts." But he rejected the notion of the Cherokee as a foreign nation, and instead suggested that "they may, more correctly, perhaps, be denominated domestic dependent nations" (*Cherokee Nation v. Georgia*). In 1832, in *Worcester v. Georgia* Marshall strongly affirmed the national status of the Cherokees and stated that "Indian nations had always been considered as distinct, independent political communities retaining their original natural rights," and enjoyed sovereignty through an arrangement in which a weak state could choose to "place itself under the protection of one more powerful, without stripping itself of the rights of government, and ceasing to be a state" (*Worcester v. Georgia*).

In contrast to this line of opinions casting tribal governments as largely autonomous under overriding federal authority, another emerged later in the century, punctuated by the Kagama ruling in 1886. According to Wilkinson, "The dominant theme in the time between Chief Justice Marshall and the modern era, however, was sounded ... in *United States v. Kagama*. The opinion upheld sweeping congressional power over tribes. The Court could have justified the federal legislation simply by invoking the notion that Congress possesses broad power over Indian affairs and that it can legislate over the tribes, as dependent sovereignties, a concept already thoroughly formulated in the Marshall Trilogy. Instead, the *Kagama* Court recognized the superior sovereignty of both the United States and the states...and flatly denied the existence of tribal sovereignty: "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. *There exist within the broad domain of sovereignty but these two.*'" (Wilkinson 1987: 57, italics added). Wilkinson writes that Kagama 'implicitly conceptualized tribes as lost societies without power, as minions of the federal government... unable to wield an acceptable level of governmental authority" and in the words of the Supreme

Court, "'wards of the nation'"[13] (Wilkinson 1987: 24). Similarly, in *Cherokee Nation v. Southern Kansas Railway Company* (1890), the Supreme Court said that "'the proposition that the Cherokee Nation is a sovereign in the sense that the United States…or…the states are sovereign…finds no support'" (*Cherokee Nation v. Southern Kansas Railway Company*). Other rulings declare similar findings.

About fifty years later, the publication of Cohen's *Handbook of Federal Indian Law* spurred renewed attention to these fundamental issues. Cohen presented the Marshall trilogy as the foundational rulings for Indian law, and as part of a coherent doctrinal lineage. Pommersheim states that "Cohen's efforts to formulate a doctrinal benchmark about tribal sovereignty" in those particular rulings, issued over a century earlier "was an extraordinary achievement. By culling the strongest interpretations from the Marshall trilogy, as well as exercising his own scholarly heft, Cohen established a theoretical solidity" (Pommersheim 1995: 53) that cast an opposing line of rulings as departures. Thus "Cohen's formulation of tribal sovereignty…played a vital role in countering a growing federal perception of the decline of the viability of tribal autonomy and self-government" (Pommersheim 1995: 53). In light of the general trend of rulings in the first half of the 20th century, Cohen's writing brought forward in time concepts that appeared to be headed for irrelevancy as anachronisms.

The Rise of Tribal Governments

The preceding history, while perhaps suggesting continuing policy swings on the central dimension of *separatism – assimilation*, gave little indication of what was to ensue beginning in the 1970s. Starting in that decade, and increasing in the next, a conception and treatment of tribes as governments with sovereign rights began to be established at both federal and state (and local) levels. This process was launched by President Nixon's 1970 pronouncement of "self-determination" as the new federal policy. Under the subsequent 1975 Indian Self-Determination and Education Act (SDEA), tribal governments have taken over significant amounts of service

[13] Kagama v. United States, 118 U.S. 375, 383-384 (1886).

provision from the BIA. In 1983 President Reagan affirmed a "Government-to-Government" relationship as the basis of the relations between the federal government and Indian tribes. In 1984 the Environmental Protection Agency (EPA) became the first federal agency to formally adopt the use of this framework for it's dealing with tribes and regarding all environmental regulation that may affect tribes. Soon thereafter, Congress explicitly authorized tribes to qualify for "treatment-as-state" (TAS) status and to implement federal environmental programs falling under three environmental statutes – the Safe Drinking Water Act (1986), the Clean Water Act (1987), and the Clean Air Act (1990).

In 1988, as an amendment to the SDEA, Congress initiated the Self-Governance Demonstration Project providing for direct and much less restricted funding to tribal governments, completely circumventing BIA involvement. First implemented in 1991, by 1994 participation had grown to 95 tribes, and in that year Congress made the program permanent; tribal participation continues to grow. Relatedly, an increasing number of tribes have in general been actively developing their government capacity by creating or expanding tribal police, tribal courts, planning offices, and natural resource departments, helped by a number of targeted federal programs. In 1991 President George H. Bush affirmed the Government-to-Government policy. In 1994 President Clinton not only affirmed the government-to-government policy as the basis of federal-tribal interactions, but did so through an Executive Order calling for all actions to be done in a way "respectful of tribal sovereignty" (1994 Executive Order). In 1998 Clinton augmented this with an additional Executive Order more specifically directing all Federal agencies to actively consult and coordinate with Indian tribes, again on the basis of tribal sovereignty. In 2000 President George W. Bush affirmed Government-to-Government policy.

State treatment of tribes as governments and as sovereigns unsurprisingly also has its roots in the 1970s. In that period the states of Arizona and Montana passed laws enabling intergovernmental agreements and working relationships with tribal governments, thus facilitating growing intergovernmental functionality. Other states slowly followed (American

Indian Law Center 1991). To great acclaim the State of Washington in 1989 signed the Centennial Accord with 26 federally recognized tribes within its boundaries. In this agreement, each side recognized the sovereignty of the other, and the parties established comprehensive procedures and protocols for government-to-government relations (Centennial Accord 1989). This was the first such formalized, comprehensive, top-down model institutionalizing tribal government status within state government procedures. In the ensuing 12 years, ten other states either signed similar mutual government-to-government accords or unilaterally adopted formal government-to-government policies recognizing tribal sovereignty and specifying procedures for operationalizing the state-tribal relationship (detailed in Chapter Six).

Collectively, these selected examples provide strong evidence that policies relating to Indians tribes, and tribes' overall standing vis-à-vis a set of governmental powers and procedures, have changed quite drastically. Tribes are being treated in a way that is either fundamentally novel, or is a radical renewal of something that previously latent. The profound nature of these changes involve not only tribes but U.S. governance more broadly. The existence of active and empowered tribal governments alongside state governments, even without the full range of powers enjoyed by states, constitutes a structural change in U.S. federalism. The ramifications for other aspects of U.S. governance and minority politics will undoubtedly continue to reverberate as this new tribal reality continues and possibly expands. These collective outcomes seem to pose a puzzle. But was it possible that they simply reflect a relatively unproblematic *continuation* of the core principles launched in 1970 and soon thereafter? In the next section I consider the early development of the self-determination policy. I argue that this *continuity* thesis is clearly inaccurate, and present evidence to support my claim. The Nixon administration and other early policymakers were *not* intentionally responsible for the emergent conception of tribes as governments. Furthermore, policies of the early 1970s did not foretell, much less foreordain, the subsequent advance of tribal authority.

An Ambiguous Platform for Tribal Sovereignty: Self-Determination Policy under Nixon & Congress

> "The new program will turn over to tribal government, as rapidly as possible, *a maximum amount of administration* for Indian affairs. *Minimum control will be retained in Washington; policy will be set there*, but administration of that policy will be in the hands of tribal representatives or Bureau superintendents"
> - BIA official Marvin Franklin, May 1973
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> (quoted in Forbes 1981: 120).

While Nixon's formal and public declaration of "self-determination without termination" in 1970 is widely acknowledged as a crucial, unequivocal reversal of past policy, it did *not* refer to tribal sovereignty. Rather, the perspective evident in the speech and in administration policy discussions of the preceding years clearly cast Indians, including tribal groups, as an impoverished minority group. Comparisons were made to other minority groups in discussing policy as well as political strategy. Prior to the formal declaration, Nixon called previous Indian policy "a bitter example of what's wrong with the bankrupt old approach to the problems of minorities" (quoted in Kotlowski 2001: 193). White House aide Leonard Garmet wrote in 1969 that the administration could "begin a whole new civil rights initiative –for American Indians and Alaskan Natives" but without much of "the backlash which encumbers efforts to help blacks" (Garment, quoted in Kotlowski:195), and in line with Nixon's views opposing forced integration and supporting new federalism. In the statement itself, delivered July 8, 1970, Nixon refers to the "special relationship" between Indians and the federal government, even referring to treaties, but clearly casts the nature of the relationship as one in which the U.S. solemnly committed itself to providing "community services" rather than an ongoing relationship between sovereigns (Nixon 1970). His 1972 State of the Nation speech re-affirmed the generalized *community self-development* and *community control* approach underlying the policy, asking Congress to join in "helping Indians help themselves" an appeal in which the central thrust could as easily have been made about any other group. More substantive action taken by the Nixon administration reflected

a flexible, ad hoc approach: stepping in on the side of specific tribes in a number of political and legal battles, establishing an Indian desk within the Office of Minority Business Enterprise, and greatly expanding the budget for Indian programs. This same approach remained consistent even after Indian activists demanded that the Indian people be considered "in treaty relations" with the federal government (20 Points 1972); aide Garmet replied in writing that Indian "needs and concerns are being addressed by both the Executive and Legislative branches" and invited Indians to "work with us" (Garmet 1972, quoted in Castile 1998: 128).

Archival research by historians and other analyses suggest that while the eighteen month occupation of Alcatraz that began in 1969[14], the occupation of the BIA in 1972 at the end of the "Trail of Broken Treaties"[15], and the siege of Wounded Knee[16] in 1973 each gained the administration's attention, there is little evidence to suggest that the bulk of Nixon's self-determination policy was either primarily a concessionary reaction to activism or a deliberate strategy to divide and coopt the movement.[17] The singular action that can be seen in this regard is support for the 1971 creation of the National Tribal Chairman's Association (NTCA) as a moderate alternative to both the NCAI, which allowed individual – and less institutionally-accountable– members, and free-wheeling activist organizations like AIM.[18]

It is unclear what motivated the subsequent Congressional action implementing the self-determination policy after Nixon's resignation, but by 1975, most observers have asserted (Castile1998, Kotlowski 2001, Gross 1989), the Congress "had adopted the policy as its own" (*locate cite*). The central bill reflecting this, and seen as the legislative foundation of the self-determination policy, was the Indian Self-Determination and Education Assistance Act of 1975.

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[14] For lengthy description of the events and political impacts, see Johnson, Nagle and Champagne 1997.
[15] See especially Deloria 1974.
[16] There are numerous texts regarding Wounded Knee, including Lazarus 1991.
[17] It is well-documented, however, that the FBI under the Nixon administration targeted and harassed Indian activists, particularly the American Indian Movement, under the Counter-Intelligence Program or COINTELPRO (see Churchill 1993). The self-determination policy simply seems to have been motivated by a wider and different set of factors than the Indian activism.
[18] Though it was an active player for a number of years, the NTCA eventually lost funding, legitimacy, and members, and ceased to exist in the 1980s.

Reflecting the Nixonian approach, the bill did not mention tribal sovereignty or a political relationship between the U.S. and tribes. Instead, it was "An Act, To provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of the Indian tribes in programs and service conducted by the Federal Government for Indians and to encourage the development of human resources for the Indian people; to establish the development of human resources for the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes" (SDEA 1975). Most concretely, the bill allowed tribes to become contractors and replace the BIA as provider of federal services including housing, community development and law enforcement (provision 93-638, also know as 638 contracting). A number of other, issue-specific bills that were substantively important to Indians but did not significantly advance or further clarify the policy or the status of tribes (Indian Religious Freedom Act, Indian Child Welfare Act, others) followed in the late 1970s.

While the promotion of Indian *self-government* in various versions of early self-determination policy statements suggests a potential for tribal governments to play an expanded role, there is little evidence that this concept was linked to a notion of tribal governments as another set of governments within U.S. federalism, or anything even approaching the idea. Self-government, like many Indian policy terms, can be interpreted many ways, and in itself a commitment to Indian self-government commits the federal government to very little in particular. Reports from non-tribal observers testify to this quality of the new policy. Taylor's research in 1970-1971 for his report on *The States and Their Indian Citizens* led him to characterize the policy as one transferring "control and responsibility from the Federal Government to Indian *communities* rather than to State or local government" (Taylor 1972: 72), although he also points out it was not well-defined (160). Tellingly, he does not address tribal governments, even in the context of relationships with state governments. The policy is simply not about tribal governments, and they are not important actors of note.

Scholar George Esber, Jr. more directly points out the limits implied by the self-determination policy. "A common assumption is that Indian communities now have... [the] power" of local community control over decision making (Esber Jr, 1992: 213). "This control, however, is not allowed by the Self Determination Act, nor is it congruent with the structure of federal-Indian relations....Inclusion or 'meaningful participation' is not control but at best a limited exercise of power, which must be translated as 'relative powerlessness' given the legal definition of the federal-Indian relationship" (213).

While Indian activists and tribal leaders instantly welcomed the renunciation of termination, they unsurprisingly long harbored distrust of self-determination for, among other things, its ambiguous commitment to tribal governments and tribal sovereignty. There was even significant tribal resistance to self-determination for many years as some saw *termination* in the self-de*termination* policy. As Navajo leader Daniel Peachess said at a hearing in 1974, "The siren song of assimilation is loud and persuasive" (Indian Town Hall 1974: 16). Skepticism continued past the initial years of the policy. Proceedings from an historic 1983 conference on self-rule involving a wide range of influential Indian leaders provides extensive documentation of these views thirteen years into the policy. La Donna Harris stated that "We have become mere extensions of a federal government in order to carry out federal programs. We are not governing ourselves in any sense of the word that governance means" (Nash et al 1986: 108). Others echoed this same point. "The Indian Bureau under PL 638 has made tribal governments an extension of the federal bureaucracy" argued Quinault President Joe DeLaCruz (Old Person et al 1986: 258), and National Indian Youth Council activist Hank Adams said "we have never been talking about self-determination, but about self-administration" (James et al 1986: 239). The policy was so unpromising that former NCAI Director Robert Burnette saw the writing on the wall for both aggressive and limited notions of tribal sovereignty and tribal government jurisdiction. "The total sovereignty that a lot of people are espousing these days is out of the question...It also arms our enemies....In my estimation, there are only two jurisdictions in the

United States. They are state and federal jurisdiction. Indian tribes happen to be under federal jurisdiction, which is superior to state jurisdiction. If people keep claiming tribal jurisdiction to be a fact, they are bound to lose to states' rights because tribes do not have the population or power to maintain their sovereignty." In a similarly negative perception of tribal fortunes under self-determination, R. David Edmunds referred to the disadvantage of Indians compared to other racial pressure groups who have been able to gain "substantially more control over their destinies"...through "very sophisticated and centralized political organizations. This is where Indians have been at a big disadvantage" (Edmunds et al 1986: 291). Clearly, there is little in these perceptions to suggest the self-determination policy recognized tribal sovereignty and tribal governments as governmental entities somehow paralleling states, nor signal that such an outcome was under development.

Perhaps most indicative of Nixon and post-Nixon self-determination policies of the 1970s is the fact that the historians who have most closely examined and written about these policy developments have scarcely mentioned *sovereignty* or a *political* relationship between the U.S. and tribes as part of the policy. For example, it is not to be found in Castile's record of the development of the policy up to 1975 (Castile 1998), and Nixon scholar Kotlowski mentions sovereignty only in the second to last page of his chapter on Indian policy. Furthermore, Kotlowski ends by referencing minority politics, not sovereignty politics, arguing that "(B)y asserting Indian self-determination," Nixonians "acknowledged that 'civil rights' now reflected the aspirations of other disadvantaged groups, not just blacks" (Kotlowski 2001: 221). Castile, after stating that by 1975 the policy already represented a "180" degree swing from assimilation, observes that the "trend has continued toward increased Indian sovereignty" (1998: 175, 179). He, along with other analysts of Indian policy development, are left in an odd situation. They identify a subsequent outcome of the self-determination policy as a *continuation* of the policy, even though the former is quite qualitatively distinct, with implications divergent from a *community self-development* and *community control* conception upon which the policy originated.

Nixon administration policies did not address sovereignty partly because although it was certainly an active focus in some form or another for many tribes, sovereignty was barely perceptible on the national Indian agenda in the 1960s, the period in which the groundwork for Nixon's policy was developed in federal Indian policy arenas. For example, the concluding statement of the historic American Indian Chicago Conference of 1961 mentioned it only minimally and some participants later pointed out its low profile during the discussions (Bennett et al 1986: 211, Edmunds et al 1986: 289). One analyst notes that the term appears to have been re-introduced into the contemporary national Indian agenda in 1966 in NCAI discussions of anti-termination measures (Cook 1996: 126), but in general it was buried or subsumed under broader concerns about assimilation, oppressive BIA control, and specific treaty rights.

Looking back at the period immediately preceding Nixon's 1970 policy statement and the apparent motivations for and initial features of the self-determination policy itself, all the components of the transformed tribal status evident thirty years later are in retrospect identifiable. However, the subsequent combination and configuration of these features is only one out of many that could be imagined, and one that would at face value appear to be among the *least* likely to emerge. The self-determination policy lacked clarity, particularly regarding some of the more problematic issues regarding tribal status. Even with an interpretation of the evidence that is most charitable to the continuity thesis, the self-determination policy was much more ambiguous, uncertain, and meandering than it would suggest. How is it that the conflicting precedents of Indian policy have been reconfigured in a way so that, for the most part, tribal status today is drawn from those which, from a tribal perspective, represent the most positive precedents? Even within a general stated goal of improving tribal "self-determination" there are many models, mechanisms and policy structures through which to accomplish this. Although there are countless weaknesses in the current position of tribes, compared to the situation in 1970 one can conclude that the unfolding of the self-determination policy generally reflects what we might call the highest common denominator of previous policies regarding tribal status, rather than the lowest

common denominator. The puzzle posed by current tribal status remains. While the federal adoption of the self-determination policy clearly signaled an important shift and created powerful resources and opportunities for tribes, it does not directly explain the subsequent outcomes. The origins and originators of the self-determination policy do *not* supply an answer to the underlying question of how tribes have come to be relatively well established as governments instead of the powerless, marginalized minority they were just over thirty years ago.