## Advent of Europeans in North America

When Columbus first contacted North America in October of 1492, he and his men confronted the Arawak Indians of the Bahamas and noted in his log that "with fifty men we could subjugate them all and make them do whatever we want". We know from historians that the primary goal of his expedition was gold, followed by other resources, and a shortcut route to India. He and his men built a fort from the timbers of his flagship, the Santa Maria, on the island of Hispaniola – what is now Haiti and the Dominican Republic. It was they who first began the atrocities toward the Native Americans, taking prisoners, killing Indians with swords, maiming them, and decimating the inhabitants through disease, slavery, and war.

Columbus sent expeditions into the interior of the interior of Hispaniola, and in 1495 sent his men on a slave expedition that resulted in the capture of 1,500 Arawak slaves. Later, in the attempt to pay back the debt he had incurred and to make good the promise of wealth to Spain, Columbus forced the Indians to bring him gold (that he knew was there). Any Indians who brought gold to Columbus were given copper tokens, which they were required to hang around their necks. Any Indians who were not wearing the tokens, after the quest for gold began, had their hands cut off for "non-performance", and bled to death. Any Indians who tried to escape their fate were hunted down and murdered. Those who remained began a campaign of suicide by taking cassava. In a two year period, more than 100,000 Arawaks died of suicide, torture, or murder. Their aboriginal population on the island of Hispaniola became extinct by the year 1650.

The Spanish priest and historian, **Bartholome de Las Casas**, arrived in Hispaniola in 1508, and began his History of the West Indies. In these two volumes, and in transcriptions of Columbus' journal, he details life among the Arawaks and the treatment of them by the Spanish soldiers, citing cases where children were beheaded for sport, or where strips of skin were cut from them to "test the sharpness of their knives".

Howard Zinn, in his book "A People's History of the United States" discusses these atrocities and more, and he gives a "conventional" view of Columbus as seen through the writing of Samuel Eliot Morison – historian from Harvard – and the "most distinguished writer on Columbus", who admits that "the cruel policy initiated by Columbus and pursued by his successors resulted in complete genocide". However, at the end of his book "Christopher Columbus, Mariner (1954), he states that:

> "Columbus had his faults and his defects, but they were largely the defects of the qualities that made him great – his indomitable will, his superb faith in God and in his own mission as the Christ-bearer to lands beyond the seas, his stubborn persistence despite neglect, poverty and discouragement.

> But there was no flaw, no dark side to the most outstanding and essential of all his qualities – his seamanship."[1]

In 1519, Hernando Cortez conquered the Aztecs of Mexico, and in 1540, Francisco Pizarro did the same to the Incas of Peru, thus bringing to an end perhaps a thousand years of New World civilization that produced, among other things, the domestication of the most important food crop in the world, along with the most accurate calendric system known in any human culture. DeSoto, from 1539 to 1542, and Coronado, from 1540 to 1541, made minor expeditions into the interior of North America and met with some documented resistance.

In 1604, Champlain began a lengthy exploration of Northeastern North America and established – by the end of the decade – the colony of New France. Jesuit missionaries followed by 1611, and began the systematic undermining of Native American culture by means of religion and slavery. It was not until 1607 that the English established a permanent colony in North America, and, followed by the Dutch in New Amsterdam (New York), created a series of colonies along the Atlantic Coast.

By 1619, a new episode in colonial slavery had begun, with the importing of the first African slaves to the colony of Virginia. By 1622, the "first" Indian uprising took place in Virginia in reaction to their treatment by the colonials, but by the time of the war known as King Phillip's War – from 1672 to 1676 – almost all "organized" resistance to the colonies ended with the defeat of the Indians and subjugation of the Indians of the New England area.

A later uprising did occur in the Pueblo region with the Zuni against the Spanish explorers, who were driven from the area – chased from the area – and pushed southward to what is now the border between the United States and Mexico. The victory was short-lived, however, and in 1692 the Spanish returned to nearly annihilate the Zuni. Finally, in 1763, the British defeated the French and their Indian allies in what became known as the French and Indian War. That same year, the British government took control of the official relationship with the Indians – taking any responsibility for jurisdiction over the Indians away from the colonies. Thereafter, each tribe was considered to be an independent nation, and dealt independently with the British government. That proclamation lasted a mere 5 years, when in 1768 the colonies were given back the control of trade and other relationships with the Indians. Ten short years later, in 1778, the first treaty with any Indian culture and the United States of America was conducted with the Delaware Indians. Earlier treaties between England and the New England tribes

[1] So that Italian Americans can have something to cheer about, and so that American school children can be properly schooled in the depths of the "Columbus myth", we celebrate Columbus Day here in America as a shameful tribute to a genocidal butcher, and we enlist the complicity of our celebrated and anonymous educators to push the myth on our young school children by carefully omitting any reference to Columbus' behavior after the first contact.

had been made as early as 1664, but the terms and the treaties themselves changed abruptly over time.

One of the most important pieces of legislation to come from the early United States with regard to the Indians was the Northwest Ordinance. The history of the events that led to its passage by Congress is an interesting one, and involves the relationship among the states, the British, the French, and the Indians. Beyond the issue of the proscription of slavery in the northwest – what is now Ohio, Indiana, Michigan, and Illinois – the main part of the ordinance of interest to students is the fact that the ordinance guaranteed that **land and other property would not be taken from the Indians without their consent – *except in just and lawful wars authorized by Congress*.** In 1790, further detail was added to the tenets of the ordinance.

## Treaties with Native Americans

While the total number of treaties conducted with the Indian tribes within the boundaries of what is now the United States is problematical, my data suggest that **389** such legal agreements took place between 1778 and 1871, and a number of additional proclamations, agreements, and assorted legal documents were added since 1871. Early on in the treaty process, however, it became obvious that the United States had no intention of honoring agreements with the Indians – even though the Northwest Ordinance of 1787 had much broader and far-reaching policy impact than that directed specifically toward the Indians in the northwest.

Each time the United States entered into a treaty agreement with the Indians, they came back – often within months – to change the terms, almost always in the interest of taking more land from the Indians. The Potawatomi Indians, for example, entered into 23 treaties with the United States, until finally they were removed from what small portion of land they had left and taken to a reservation nowhere near their original homeland. Similarly, 13 treaties with the Cherokee, 8 with the Chickasaw, 9 with the Delaware, 11 with the Creek, 12 with the Cree, indicate that the process of abrogation of treaty terms was not only commonplace, it was part of the original plan to ultimately disenfranchise all Indian tribes.

Here is the first treaty conducted by the newly-created United States of America. It is with the Delaware Indians, and it is presented – as an example – in its entirety. Note the terms as they are spelled out.[2]

[2] In the interest of space and time requirements, a better-representative list of treaties will not be presented here. The entire assemblage of treaties between the United States and Native tribes is available to anyone on request, however.

# TREATY WITH THE DELAWARES 1778
## Sept. 17 1778 , 7 Stat., 13. [3]

**Articles of agreement and confederation, made and entered into by Andrew and Thomas Lewis, Esquires, Commissioners for, and in Behalf of the United States of North-America of the one Part, and Capt. White Eyes, Capt. John Kill Buck, Junior, and Capt. Pipe, Deputies and Chief Men of the Delaware Nation of the other Part.**

**ARTICLE 1. That all offences or acts of hostilities by one, or either of the contracting parties against the other, be mutually forgiven, and buried in the depth of oblivion, never more to be had in remembrance.**

**ARTICLE 2. That a perpetual peace and friendship shall from henceforth take place, and subsist between the contracting parties aforesaid, through all succeeding generations: and if either of the parties are engaged in a just and necessary war with any other nation or nations, that then each shall assist the other in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation: and that if either of them shall discover any hostile designs forming against the other, they shall give the earliest notice thereof that timely (sic) measures may be taken to prevent their ill effect.**

**ARTICLE 3. And whereas the United States are engaged in a just and necessary war, in defense and support of life, liberty and independence, against the King of England and his adherents, and as said King is yet possessed of several posts and forts on the lakes and other places, the reduction of which is of great importance to the peace and security of the contracting parties, and as the most practicable way for the troops of the United States to some of the posts and forts is by passing through the country of the Delaware nation, the aforesaid deputies, on behalf of themselves and their nation, do hereby stipulate and agree to give a free passage through their country to the troops aforesaid, and the same to conduct by the nearest and best ways to the posts, forts or towns of the enemies of the United States, affording to said troops such supplies of corn, meat, horses, or whatever may be in their power for the accommodation of such troops, on the commanding officer's, &c. paying, or engaging to pay, the full value of whatever they can supply them with. And the said deputies, on the behalf of their nation, engage to Join the troops of the United States aforesaid, with such a number of their best and most expert warriors as they can spare, consistent with their own safety, and act in concert with them; and for the better security of the old men, women and children of the aforesaid nation, whilst their warriors are engaged against the common enemy, it is agreed on the part of the United States, that a fort Of [41 sufficient strength and**

**capacity be built at the expense of the said States, with such assistance as it may be in the power of the said Delaware Nation to give, in the most convenient place, and advantageous situation, as shall be agreed on by the commanding officer of the troops aforesaid, with the advice and concurrence of the deputies of the aforesaid Delaware Nation, which fort shall be garrisoned by such a number of the troops of the United States, as the commanding officer can spare for the present, and hereafter by such numbers, as the wise men of the United States in council, shall think most conducive to the common good. For the better security of the peace and friendship now entered into by the contracting parties, against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contract parties and natural justice: The mode of such trials to be hereafter fixed by the wise men of the United States in Congress assembled, with the assistance of such deputies of the Delaware nation, as may be appointed to act in concert with them in adjusting this matter to their mutual liking. And it is further agreed between the parties aforesaid, that neither shall entertain or give countenance to the enemies of the other, or protect in their respective states, criminal fugitives, servants or slaves, but the same to apprehend, and secure and deliver to the State or States, to which such enemies, criminals, servants or slaves respectively belong.**

**ARTICLE 4. Whereas the confederation entered into by the Delaware nation and the United States, renders the first dependent on the latter for all the articles of clothing, utensils and implements of war, and it is judged not only reasonable, but indispensably necessary, that the aforesaid Nation be supplied with such articles from time to time, as far as the United States may have it in their power, by a well-regulated trade, under the conduct of an intelligent, candid agent, with an adequate salary, one more influenced by the love of his country, and a constant attention to the duties of his department by promoting the common interest, than the sinister purposes of converting and binding all the duties of his office to his private emolument: Convinced of the necessity of such measures, the Commissioners of the United States, at the earnest solicitation of the deputies aforesaid, have engaged in behalf of the United States, that such a trade shall be afforded said nation, conducted on such principles of mutual interest as the wisdom of the United States in Congress assembled shall think most conducive to adopt for their mutual convenience.**

**ARTICLE 5. Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion, that it is the design of the States aforesaid, to extirpate the Indians and take possession of their country: to obviate such false suggestion, the United States do engage to**

**guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner, as it hath been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold fast the chain [5] of friendship now entered into. And it is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to Join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress: Provided, nothing contained in this article to be considered as conclusive until it meets with the approbation of Congress. And it is also the intent and meaning of this article, that no protection or countenance shall be afforded to any who are at present our enemies, by which they might escape the punishment they deserve.**

**In witness whereof, the parties have hereunto interchangeably set their hands and seals, at Fort Pitt, September seventeenth, anno Domini one thousand seven hundred and seventy-eight.**

**Andrew Lewis**

**Thomas Lewis**

**White Eyes, his x mark**

**The Pipe, his x mark John Kill Buck, his x mark**

**In presence of**

**Lach'n McIntosh, brigadier-general, commander the Western Department.**

**Daniel Brodhead, colonel Eighth Pennsylvania Regiment,**

**W. Crawford, colonel,**

**John Campbell,**

**John Stephenson,**

**John Gibson, colonel Thirteenth Virginia Regiment,**

**A. Graham, brigade major,**

**Lach. McIntosh, jr., major brigade,**

**Benjamin Mills,**

**Joseph L. Finley, captain Eighth Pennsylvania Regiment,**

**John Finley, captain Eighth Pennsylvania Regiment.**

## Main Points In The Treaty with the Delaware

**Article 1** – forget the past
**Article 2** – mutual assistance against enemies
**Article 3** – the "meat" of the treaty – here is where the Delaware give up their rights to control access to their land, and allow the United States to build a fort, man it, stock it, and pass through Delaware land in the conduct of affairs deemed relevant by the United States. And, the Delaware agree to help defend the fort.
**Article 4** – trade is established between the two "nations" so that the United States shall be able to supply the Delaware with "necessary" items "as the United States is able to do so".
**Article 5** – "**guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner, as it hath been bounded by former treaties*, as long as they the said Delaware nation shall abide by, and hold fast the chain [5] of friendship now entered into.*"**

The second treaty with the Delaware was conducted in **1804**, and consisted in Article 1 of the following:

**ARTICLE 1.**

"The said Delaware tribe, for the considerations hereinafter mentioned, relinquishes to the United States forever, all their right and title to the tract of country which lies between the Ohio and Wabash rivers, and below the tract ceded by the treaty of Fort Wayne, and the road leading from Vincennes to the falls of Ohio." Quite a change from the guarantee in Article 5 of the first treaty.

## Third Treaty with the Delaware

In the **third treaty** with the Delaware, just one year later, the following change is made:

"Whereas, by the fourth article of a treaty made between the United States and the Delaware tribe, on the eighteenth day of August, eighteen hundred and four, the said United States engaged to consider the said Delewares as the proprietors of all that tract of

country which is bounded by the White river on the north, the Ohio and Clark's grant on the south, the general boundary line running from the mouth of Kentucky river on the east, and the tract ceded by the treaty of fort Wayne, and the road leading to Clark's grant on the west and south west. And whereas, the Miami tribes, from whom the Delawares derived their claim, contend that in their cession of said tract to the Delawares, it was never their intention to convey to them the right of the soil, but to suffer them to occupy it as long as they thought proper, the said Delewares have, for the sake of peace and good neighborhood, determined to relinquish their claim to the said tract, and do by these presents release the United States from the guarantee made in the before-mentioned article of the treaty of August, eighteen hundred and four.

**ARTICLE II.**

"The said Miami, Eel River, and Wea tribes, cede and relinquish to the United States forever, all that tract of country which lies to the south of a line to be drawn from the north east corner of the tract ceded by the treaty of fort Wayne, so as to strike the general boundary line, running from a point opposite to the mouth of the Kentucky river, to fort Recovery, at the distance of fifty miles from its commencement on the Ohio river"

In this agreement, the land that the United States had though it obtained from the Delaware was actually owned by the Miami, Eel River, and Wea tribes, and therefore a new treaty had to be made to properly "take" the land, since the Delaware did not actually "own title" to the land – but, rather, had "**usufruct**" with regard to it. In essence, the treaty made it possible to legally "cede" the land to the United States once correct ownership was ascertained. This principle has been upheld in subsequent Supreme Court decisions, as you will see. The point of conducting this "third treaty" was to correct a mistake that the United States had made in the earlier treaty, and if that error was not decisively corrected by the subsequent 3rd treaty, the United States would be liable to having the decision overturned by subsequent courts and/or law suits brought on behalf of the Miami, Eel River, and Wea tribes.

## "The Right of the Agriculturists Was Paramount to That of the Hunter Tribes"

The above quotation comes from a state court case – **Caldwell v. The State of Alabama** (1832) – where a white man killed a Creek Indian on Indian land. The state of Alabama revised the constitution of the United States by interpreting not only its own jurisdiction in the matter, but also in defining the relationship between the states and the Indian tribes in future relationships, cases, treaties, and the breaking of treaties. The case is also famous because the decision of the Alabama court is based on the argument most often either "presented" or at least "subscribed to" by both adjudicators and private citizens alike. That is the "doctrine of discovery" theory, which shapes the minds and arguments in favor of relegating Indians to the status outside the civilized conduct of nations in the

world arena. This "doctrine" – this carefully constructed argument without any supporting evidence – allowed any nation or its parts to take land, jurisdiction, history, and life from any Indians on the grounds that they were incapable of appreciating the true meaning of sovereignty and therefore were not truly sovereign. The basis for this state argument can be found in Johnson v. McIntosh (1823) in which the opinion of the majority, written by Chief Justice Marshall, makes it clear that the United States, or any of them separately, has the right to jurisdiction. I quote from it later.

If the Indians, the argument contends, were in "possession of a territory" and "in the practice of the arts of civilization" and "employed in the cultivation of the soil" and "with an organized government, no matter what may be its form":

> "they form an independent community; their rights should be respected, and their territorial limits not encroached on. From such a people, territory can only be acquired consistently with good faith, and national law, peaceably by treaty; by conquest, in open war; or by a forcible trespass, in violation of political right. The first mode of acquisition would be in accordance with the soundest principles of morality; the second, sanctioned by the uniform usages of war; the last would be morally wrong; and if the power whose rights had been invaded, was too feeble to extort redress, other governments would be justified in making common cause in enforcing right against the wrong doer. But if the usurpation was acquiesced in, the political aspect of such an acquisition would be in favor of the ***jus possessionis.*** The code of national law, by which political societies should be tried, to establish their national rank, is not one of express enactment; nor the result of any convention of assembled nations: **but it is a system of elementary principles, to which, the influence of morality and propriety, has constrained all civilized nations**, tacitly to yield their assent; and is now considered as binding and obligatory as if sanctioned by the most solemn treaties. **Savage tribes, without a written language, or established form of government, and wholly ignorant of the customs and usages of civil society, are not capable of appreciating the principles of this code**; and, (not yielding obedience to its canons) have never been looked on as parties to this compact of nations."

So, if the Indians here in North America had been in possession of the components of "civilized nations" such actions as have been undertaken by our various states and our national government would have been unjustified. Since, however, the Indians were

1. "composed of numerous tribes, subsisting by fishing and hunting, without any uniform or established system of government"

and since any

2. "authority exercised was adventitious and temporary, passing from one warrior to another, as accident might determine, and what was essential to national character, they had no geographical boundaries"

therefore:

***3.*** "***the continent is discovered by the Europeans. What ought they to have done? The fairest quarter of the globe is roamed over by the wildman, who has no permanent abiding place, but moves from camp to camp, as the pursuit of game might lead him. He knows not the value of any of the comforts of civilized life: he claims no definite boundary of territory. In what way is he to be treated with? As well might a treaty, on terms of equality, be attempted with the beast of the same forest that he inhabits. If it were possible to treat with them, and a hunting camp should be purchased, the right of purchase would not extend beyond its confines: another tribe, or the same, might settle down at the immediate door of the purchaser. The Indians, until long after the first Europeans came among them, had no idea of any actual or ideal line of demarcation, between their several tribes…….The civilized nations of Europe, had either to adjust among themselves, a fair, an equitable mode of acquisition according to their own canons of morality and national law, or leave this fair continent in the rude and savage state in which they found it. They reasoned, and reasoned correctly, that the right of the agriculturists was paramount to that of the hunter tribes."***

Our national government has weighed in on this issue on occasions to numerous to mention here, although I will provide a list of the massacres and broken treaties we have conducted with the Indians.[3] The now-famous "Marshall Court", in the case of **Johnson v. McIntosh**, provides a sober look at the position of the United States government with regard to the Indians:

> "the United States maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest, and gave them also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise".

[3]The list is available on request from anyone who wishes to have it.

“By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.”

“We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.”

“The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security

should gradually banish the painful sense of being separated from their ancient connections, and united by force to strangers."

"But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; ***to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.***"[4]

## Questions of Sovereignty in Native North America – Plenary Power

The following annotation gives at least a few of the more important legal decisions by the United States Supreme Court that have a direct bearing on minority populations in particular with regard to the free and unabridged exercise of religion:

**Wisconsin v Yoder** (1972) held that the Amish could remove their children from state education prior to high school – on the grounds of interference with religious beliefs and the maintenance of their (Old) Amish culture.

1. one of the deciding factors was the prolonged (3 centuries) as "an identifiable religious sect" and "a long history as a successful and self-sufficient segment of American society"
2. therefore "the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role which belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the state's enforcement of a statute generally valid as to others.
3. "Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those over-all interests that the state advances in support of its program of compulsory high school education. In light of this convincing showing, one which probably few other religious groups or sects could make, and weighing the minimal difference between what the state would require and what the Amish already accept, it was incumbent on the state to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."

[4] I should hope so. As an anthropologist, educator, humanist, and citizen of the United States, I should also hope that any citizen of any country – including ours – would do the same.

In later cases, however, and those that dealt specifically with Native American spiritual issues – a cultural component about which the United States Supreme Court has ***absolutely no prior knowledge***, and must therefore rely on expert (anthropological, for breadth and depth as well as native, for depth) testimony – the United States Supreme Court has not been generous in interpreting the Constitutional rights to freedom of religion. The Supreme Court also changed its position and revised a pivotal stance in moving from Amish to Indian. In Yoder, the Amish were accorded the status of both a recognized religion and a culture that subscribed to values that were not, in the court's words, substantially different from that of the educational system of Wisconsin. The burden of proof, then, rested with Wisconsin to show that it would be harmed if Amish children were not required to attend public high school. In the Abenaki or Hoopa cases, however, the Supreme Court ignored the parallels with Amish culture Wisconsin v. Yoder, arguing that anything that presented a different value system was invalid.[5]

1. In **Bowen v Roy** (1986), the Supreme Court ruled that Abenaki children must be given social security numbers.
2. The Court argued that in order "to maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would radically restrict the operating latitude of the legislature."
3. The court's claim was that their decision was based on the issue of possible welfare fraud – again, reducing claims of Native Americans to an economic issue.[6]

[5] It is difficult to see this as anything but pertaining to ownership of land. The Amish, in whatever state they are resident, have clear title to their land, and are, therefore not likely to be a threat to the commercial interests of the United States, and would be subject only to eminent domain proceedings. In the case of Native Americans however – even though the United States took their land and committed prolonged genocide against them – the "land on which they currently reside" is "actually" federal land either "granted" to them, or "reserved" for them by the United States government.

[6] The problem with this is that, on the one hand, Native Americans are said to represent 1 part of a 3-part system of sovereignty in the United States – Federal, State, and Indian sovereignty. On the other, the Native American case is compared by the Court to that of the Amish, who are not recognized as a "sovereign entity" in the above system, but whose rights are protected – in large measure – by a legal decision that treats them as if they are "more significant than sovereign" in the eyes of the Court. As an anthropologist, I see this as mixing emics and etics. Religion and etic sovereignty are in no way consistent with each other. Religion, in our Constitutional Government, is merely free from limitation of practice by the political state. Sovereignty, especially as it is applied to Native American control over their own lands – sacred or not – is a completely different issue, and one more example of enacting a law, on the one hand, and gutting it, on the other. From an anthropological point of view, the Supreme Court is nothing more than a powerful juridical entity that makes emic decisions unjustifiably – as dissenting opinions rendered by groups of justices on the Court argue. "Truth", "correctness", "legal", "morally right", are concepts that "justice" from a narrow cultural point of view – the view of the government of the United States of America – does not have to consider. The only cultural components that are considered are: "Is it consistent with the narrow needs of the United States of America?" – especially the want of private capital investment on the part of an industry which, like other industries, has contributed to the political campaigns of political leaders – as in the case of John Ashcroft's failed bid for re-election to the United States Senate, and his subsequent appointment to the post of U.S.

In **Lyng v Northwest Indian Cemetery Protective Association** (1988), private, land-based interests are again used to supersede religion – a clear indication of the narrow interests of the United States Supreme Court. Justice Brennan argues that whereas the Free Exercise Clause – as stated by the majority in the decision – concludes that even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, ***the Government is simply not "doing" anything to the practitioners of that faith.*** Instead, the Court believes that ***Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government de facto beneficial ownership of federal property***."

From an anthropological perspective – and I would hope from a legal perspective – this landmark decision by the Supreme Court flies directly in the face of the First Amendment to the Constitution, and from a cultural point of view destroys any free exercise of religion by any cult in the United States. Decisions, therefore, that are based on land-use – and in which the government might now or in the future have a potential commercial interest – are universally above Constitutional jurisdiction. This is nothing more than a "rogue court" operating in the interest of corporations. Justice Brennan, in writing the dissenting opinion states: "Because the Court today refuses even to acknowledge the constitutional injury respondents will suffer, and because this refusal essentially leaves Native Americans with absolutely not constitutional protection" – let alone any sovereignty – "against perhaps the gravest threat to their religious practices," – Brennan asserts – "I dissent"."

4. ***Brennan also argues that the Tolowa, Yurok, and Karok Indians have*** "for at least 200 years and probably much longer … held sacred an approximately 25 square mile area of land situated in what is today the Blue Creek Unit of Six Rivers National Forest in northwestern California." "As the Forest Service's commissioned study, the Theodoratus Report, explains, for Native American religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life 'is in reality an exercise which forces Indian concepts into non-Indian categories'. ***Once again, arguing for a breach of Sovereignty (without invoking it).*** To most Native Americans, the area of worship cannot be delineated from social, political, cultural, and other aspects of Indian lifestyle." "A pervasive feature of this lifestyle is the individual's relationship with the natural world; this relationship, which can accurately thought somewhat incompletely be characterized as one of stewardship,

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Attorney General. Monsanto, for whom he had worked, gave the largest single monetary contribution to his campaign. It is a known fact that the U.S. Forest Service gives "sweetheart" deals to private lumber companies – thus robbing the taxpayers of the United States of rightful revenue from the sale of timber – by selling the timber substantially below fair market value – without any input from the public. That, too, should be under review – although it was not in the next case below.

> forms the core of what might be called, for want of a better nomenclature, the Indian religious experience."

Even Brennan understood that "While traditional western religions view creation as the work of a deity "who institutes natural laws which then govern the operation of physical nature," tribal religions regard creation as an ongoing process in which they are morally and religiously obligated to participate. Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it."

He also says that "in marked contrast to traditional western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas. Established or universal truths – the mainstay of western religions – play not part in Indians faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to generation. Commentaries on or interpretations of the rituals themselves are deemed absolute violations of the ceremonies, whose value lies not in their ability to explain the natural world or to enlighten individual believers but in their efficacy as protectors and enhancers of tribal existence. Where dogma lies at the heart of western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance. Within this belief system, therefore, land is not fungible; indeed, at the time of the Spanish colonization of the American southwest, 'all…..Indians held in some form a belief in a sacred and indissoluble bond between themselves and the land in which their settlements were located' (Spicer 1962)."

> "The court does not for a moment suggest that the interests served by the G-O road are in any way compelling, or that they outweigh the destructive effect construction of the road will have on respondents' religious practices. Instead, the Court embraces the Government's contention that its prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices. Attempting to justify this rule, the Court argues that the First Amendment bars only outright prohibitions, indirect coercion, and penalties on the free exercise of religion. All other "incidental effects of government programs", in concludes, even those "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," simply do not give rise to constitutional concerns. [Ever since] our recognition nearly half a century ago that restraints on religions conduct implicate the concerns of the

Free Exercise Clause, [this court has] never suggested that the protections of the guarantee are limited to so narrow a range of governmental burdens."

"It is hard to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondents' religion impossible. Nor do I believe that respondents will derive an solace from the knowledge that although the practice of their religion will become "more difficult" as a result of the Government's actions, they remain free to maintain their religious beliefs. Given today's ruling that freedom amounts to nothing more than the right to believe that their religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise their traditional religions," the decision fails utterly to accord with the dictates of the First Amendment. I dissent".

In the case of **Lyng v Northwest Indian Cemetery Protective Association** (1988), discussed above, the Supreme Court ruled that in protecting Native American sites the government would be harmed because the protection would take away the right of the government to harvest timber or to build a road through a sacred area.

- The majority decision decided in favor of the Forest Service on the grounds that
- The Forest Service had already mitigated the problem by agreeing to avoid known prehistoric sites, and
- Was removed as far as possible from sites used by contemporary Indians for specific spiritual activities.
- Alternate routes that would have avoided the Chimney Rock area altogether were rejected because they would have required the **acquisition of private land** (something the Forest Service does with regularity in California), had serious soil stability problems (?), and would in any event have traversed areas having ritualistic value to American Indians.
- [Simultaneously] the Forest Service adopted a management plan allowing for the harvesting of significant amounts of timber in this area of the forest. The management plan provided form one-half mile protective zones around "all the religious sites identified in the report that had been commissioned in connection with the (G-O) road" (quotations mine).

2. The State of California, on the grounds that the project would violate the **Free Exercise Clause**, the **Federal Water Pollution Control Act**, the **National Environment Policy Act of 1969**, several other federal statutes and

governmental trust responsibilities to Indians living on the Hoopa Valley Reservation, sued the Forest Service. They were joined in the suit by the Northwest Indian Cemetery Protective Association, individual Indians, nature organizations, and individual members of those nature organizations.

3. The United States Supreme Court rejected the 9th District Court of Appeals decision by saying that "except for abandoning its project entirely, and thereby giving the two existing segments of road to dead-end in the middle of a National Forest, it is difficult to see how the Government could have been more solicitous". Such solicitude accords with "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian….including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites" (American Indian Religious Freedom Act, 1996).

4. While recognizing the existence of the Act, the Supreme Court argued that the "act" is not "statute", and therefore cannot be used in an "injunction" argument. The court concluded that "nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."

5. The **American Indian Religious Freedom Act** (AIRFA), when enacted by Congress upon the sponsoring by Representative Udall, was called "a sense of Congress joint resolution" aimed at ensuring that "***the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of Congress or the administrators that such religious practices must yield to some higher consideration***" (124 Cong. Rec. 21444 (1978). ***Representative Udall emphasized that the bill would not "confer special religious rights on Indians", would "not change any existing State or Federal law", and in fact "has no teeth in it".*** (bold and italics are mine).

In the **United States v Abeyta** (1986), a member of the Isleta Pueblo, New Mexico, was taken to court over the killing of a golden eagle – a protected bird under U.S. law. Abeyta claimed that the taking of golden (not bald) eagle feathers for religious purposes was within his right. The court upheld his claim because the government's claim to providing an alternative means of acquiring feathers was inadequate. The defense attorneys pointed out that the federal eagle depository operated by the department of Fish and Wildlife Service does not effectively fulfill the pueblos' need for eagle feathers for ceremonial use. As of August, 1985, there were 527 pending applications for eagle feathers. The depository takes 18 months to 2 years to fill each the requests, and 4 of the requests were from Isleta. This means that an Isleta Indian could wait as long as 8 years

to receive a feather – a clear constraint of religious practice, since the eagle feathers are indispensable to the ceremonies of the Katsina Society and other pueblo ritual. Thus, the **Eagle Protection Act of 1940** is held not applicable in this case because the original law applied only to the bald eagle and not the golden eagle. **The Endangered Species Act**, moreover, did not apply because by the government's own admission the golden eagle was not currently endangered.

In 1962, Congress passed a 3-provision amendment to the Eagle Protection Act extending the ban to the golden eagle and specifically prohibited the taking of any bald eagle unless by permit through the Secretary of the Interior. In **United States v Dion** (1986), the Supreme Court reversed a District Court ruling that vacated an earlier decision that Dion was guilty of killing bald eagles. Because Dion did not have such a permit – obtained in advance – the claim that he was "protected" under the umbrella of religious usage was denied.

In **Lone Wolf v Hitchcock** (1903), one of the darkest days in the history of the United States Supreme Court, members of the Kiowa, Comanche, and Apache tribes brought suit seeking declaratory and injunctive relief to prevent the Secretary of the Interior from implementing a statute directing the sale of more than 2 million acres of "surplus" tribal land – land that was "left over after allotment" (carried out with the **Dawes Allotment Act of 1887**).

Under the alleged "**cession**", the federal government could take possession of the land because ¾ of the adult males in the tribes signed such an agreement. Tribal members claimed that there were not sufficient numbers of signatures, and those that were present were obtained by fraud and concealment. The original treaty specified that land could not be taken from the Indians except by an "extraordinary majority" agreeing to it. The court ruled as follows:

> "The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, ***if the assent of the Indians could not be obtained***."
>
> "Now, it is true that in decisions of this court, the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or, as sometimes expressed, as sacred as the fee of the United States in the same lands. [e.g., **Johnson v. McIntosh**; **Cherokee Nation v. Georgia**; **Worchester v. Georgia**.] But in none of these cases was there involved a

> controversy between Indians and the government respecting the power of Congress to administer the property of the Indians. [These cases involved third parties who traced title to Indians. Only the United States has the power to interfere with Indian occupancy.] "It is presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race" [**Beecher v. Wetherby,** 95 U.S. 517, 525 (1877).] ***In other words, the United States has the right to take land from the Indians at any time, and it is justified because they are ignorant of a "higher need" – a "higher truth" or "cause" of which – as an inferior race – they cannot know the significance.***

Plenary authority over 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. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, Chinese Exclusion Case, 130 U.S. 581, 600, the legislative power might pass laws in conflict with treaties made with the Indians.

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress; and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. In [Kagoma] speaking of the Indians, the court said:

> The power of the general government over those remnants of a race once powerful, now weak and diminished in numbers is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that 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.

That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in **Choctaw Nation v. United States**, 119 U.S. 1, 27, and **Stephens v. Cherokee Nation**, 174 U.S. 445, 483.

In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property, we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the agreement of October 6, 1892, was obtained by fraudulent misrepresentations and concealment, that the requisite three fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by Congress without submitting such amendments to the action of the Indians, ***since all these matters, in any event, were solely within the domain of the legislative authority and it action is conclusive upon the courts.*** In other words, it does not matter if the Indians were cheated out of their land by concealment or by misrepresentation, because Congress had the power to take the land anyway, and since it intended to do so, the "fact" that the Indians were mislead is of no consequence. Mislead or not, the land could have been taken – and therefore, it was.

The act of June, 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in **Cherokee Nation v. Hitchcock**, 187 U.S. 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property.

In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. ***In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation***. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

**Lone Wolf** was not a huge departure from prior cases, though it reflected a downward trend. Even Chief Justice John Marshall's great opinion in Worcester v. Georgia, upholding the sovereignty of the Cherokee Nation against the aggression of Georgia, was built on the supremacy of federal congressional power over relations with the Indians, and had nothing to do with supporting Native Americans juridically. Decisions in 1846 and 1886 upheld ever-bolder assertions of federal criminal jurisdiction over Indian nations.

Lone Wolf was specifically foreshadowed by the **Cherokee Tobacco case of 1871**, which upheld Congress' power to abrogate a treaty-based tribal tax immunity. But at least Cherokee Tobacco stirred a powerful dissent. Justice Joseph P. Bradley (joined by Justice David Davis) relied on the "canons of construction" to argue that Congress had not expressly indicated an intent to override tribal sovereignty. Furthermore, Bradley protested that the case "depends on a solemn treaty . . . in which the good faith of the [United States] government is involved."

In no matters – foreign or domestic – has that issue, or any other, been of great concern to the United States – especially where our policies, aims, strategies, goals, and interests with regard to our capitalist enterprises are concerned. As you will see in the next section, United States foreign policy has not been benign, nor has it been aimed at etic support for the democracies we claim to be interested in helping or establishing.[7]

## The Nail in the Sovereignty Coffin

The downhill slide continued even into the otherwise progressive Court led by Chief Justice Earl Warren. In 1955, in **Tee-Hit-Ton Indians v. United States** (less famous but more shocking than Lone Wolf itself), the Court brazenly endorsed one of the most outrageous and unconstitutional assertions of federal power in the history of American law. Tee-Hit-Ton is certainly well-known to Indian law scholars, but I have the sense that it is not nearly as well-known as it should be to legal scholars or the public generally. Even more than Lone Wolf, it truly ranks with **Dred Scott**, **Plessey v. Ferguson**, and **Korematsu v. United States** in the Supreme Court's hall of shame.

In the Tee-Hit-Ton case, the United States Government cut and sold timber for its own benefit from lands claimed by the Tlingit Indians in Alaska. The Tee-Hit-Ton, a band of the Tlingit, claimed, at a minimum, aboriginal or "Indian title" to these lands. In contrast to the Marshall ruling concerning the "rights of agriculturalists, the Tlingits had a well-developed social order – before the advent of the Russians – which included a concept of property ownership. That concept of ownership did not change simply because the Russians occupied the general area.

The Court concluded that if

[7] United States foreign policy, insofar as dictatorships are concerned, is well-established. Despite the doctrinal belief ingrained in the politically-illiterate electorate, the United States has never established, nor has it supported monetarily, any democracies. We support dictatorships, and it is etically obvious why we do. Capitalism, in order to flourish, requires indebtedness and our own domestic workforce has decades ago run out of capital either in labor or wages to support the ever-increasing demands of a voracious system of economic imperialism.

> "Congress by treaty [or statute] or other agreement had declared that thereafter [the] Indians were to hold the lands permanently, compensation must be paid for subsequent taking." But without such "recognition" of the Indian title, even assuming its unbroken historical roots as claimed by the Tee-Hit-Ton, they had merely "a right of occupancy, which may be terminated and such lands fully disposed of without any legally enforceable obligation to compensate the Indians."

This case, more than any other – even more than Lone Wolf itself – the ***Dred Scott of Indian land rights***. In essence, the Tee-Hit-Ton had no rights that the United States was obligated to recognize – even though the Supreme Court has protected private property and the right of just compensation more than any other in American history. "Many cases before, between, and after Lone Wolf and Tee-Hit-Ton have held that even partial or temporary takings, and even some regulations that merely restrict the most profitable possible uses of property, are entitled to constitutional compensation."

The Tee-Hit-Ton went back to the 1823 decision – Johnson v. McIntosh – giving Indians title to their land. But that case was only about the issue of to whom Indians could legally convey their title. Marshall held that Indian tribes could convey full legal title only to the conquering European-American sovereigns: the British Crown before 1776 and the United States Government afterward.

- ***"He held that Indian nations lost full sovereignty and the power to dispose of their lands as a result of the European-American conquest.***
- ***He conceded the power of the United States to extinguish Indian title.***
- ***But he never held that the United States was or should be free to do so without any legal consequences***.
- ***To the contrary, Marshall asserted that "the exclusive power to extinguish that right of Indian occupancy, was vested in that government which might constitutionally exercise it."***
- ***He added that even though "the title by conquest is acquired and maintained by force ……humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired."***

## United States Foreign Policy Outside Our Borders

The history of U.S. involvement in the affairs of governments and cultures around the world is ascertainable by examining several important and well-documented events that have occurred since the founding of this country. Admittedly, no nation is immune to the threat of other nations, and the early history of the United States is no exception. Immediately after gaining independence from England, this new nation became

embroiled in a controversy with France – which had helped the United States in its bid for sovereignty just a few years earlier.[8]

The early history of the United States is fraught with foreign policy intrigue, another war with England, and political issues of great magnitude with regard to Spain, France, Liberia, Russia, and Mexico – all of this within the first 100 years of the establishment of the nation. By the time Adams and Jefferson had died – on the 50th anniversary of the founding of the nation – the United States had established itself as not only a sovereign nation of some importance, it had begun to "reach across" its extant borders toward the resources and capital of its "neighbors".

[8] This alone should tell average Americans that history classes do not present analysis – they present chronology without opinion. France, in its effort to help the United States win independence, did not do so because it loved the concept of freedom or democracy. France was, at that time, a vertically-entrenched kingship, and aided the United States because it had everything to gain in doing so. When the United States – under John Adams – signed a treaty with England, France threatened to attack us. The electorate – completely unaware of the issues – demanded a war with France. Adams refused, and instead arranged a treaty with France – an act which cost him a second term as president, and which allowed Thomas Jefferson – his vice-president – to win the election for president.