

Symposium Introduction

REDEFINING TRIBAL SOVEREIGNTY FOR THE TWENTY-FIRST CENTURY

By grouping Indian tribes in the Commerce Clause¹ with two other sovereigns—the foreign nations and the states—the Framers of the United States Constitution expressly recognized the then-obvious and legally-acknowledged fact that Indian nations constituted separate peoples not subject to direct American governance. As with other matters, however, Indian peoples and the new Anglo-American settlers failed to agree about what this concept of tribal sovereignty meant.

American models of sovereignty, derived historically from feudal European monarchical notions relating to the reach of the Crown's writ within the realm, assumed that sovereignty meant the political power to make binding legal rules to command, tax, or otherwise govern others. This conception involved a vertical system of political organization in which the government made laws that citizens/subjects were expected to follow as authoritative commands. Federalism later added to this model by creating an additional governmental layer in the vertical hierarchy.

While the over 500 tribes in North America varied considerably in their social and political organization at first contact with Europeans, North American tribal communities traditionally had no monarchs and were not governed through such top-down authoritative political command structures, a fact English and American treaty negotiators repeatedly ignored. Rather, the tribes were often organized horizontally through interlocking kinship, clan, society, or even town subdivisions, which created an efficient web of separate, yet interdependent, responsibilities. Each individual in a tribe was sovereign in a European political sense because none was subject for his actions to authoritative command or punishment, as opposed to gossip, criticism, and ostracism.

Indeed, European encounters with Indian political organization may have helped introduce both expanded notions of personal liberty and the concept of the state of nature to Western European liberal thinking. Nevertheless, the interlocking tribal web of reciprocal obligations and kinship relationships tended to produce societally efficient and appropriate behavior. Except in extreme cases, bad actors in a community were not labeled as criminals or marginalized as outsiders, but rather were regarded as community members who acted as

if they had no relatives, with all the group shame that such behavior entailed. Families, clans, and societies therefore controlled their own, creating a highly localized system of surveillance and policing. The traditional Indian tribal sense of the "sovereignty" of its people did not involve the right to coerce and punish others. Rather, it constituted the tribal community's right to control its cultural destiny through internal discussion and debate and its right to act in its land unmolested by others, whether invading tribes or American settlers.

The often unilateral and pretentious claims of some Euro-American governments to sovereignty over Indian country, and later over Indian peoples, seriously disrupted traditional tribal notions of communal autonomy. This disruption occurred in two different ways. First, any American claim of right to govern or otherwise make authoritative laws controlling tribal lands or tribal members was at odds with traditional Indian notions of the tribal nation's right to control its own destiny in its own country. Second, and equally significant, these claims had the effect of substituting Eurocentric conceptions of sovereignty, defined as the political right to issue authoritative governmental commands, for the Indian tribal sense of social cohesion through networks of interdependent familial systems of reciprocal obligation.

Since Indian tribes traditionally did not rely on coercive legal commands to provide their customary law, as Euro-American settlements encroached the tribes had no choice but to adopt the European notion of governance in order to preserve the fundamental right to control their destiny. Tribes quickly found that if they did not supply authoritative coercive law that satisfied the expectations and traditions of the Americans, the state or federal government would do it for them. Thus, contact produced not only a colonization of tribal lands, but also colonization of tribal legal and political systems, leading to major internal political disruption.

Perhaps the first major tribes to feel such pressures were the southeastern tribes, including the Cherokee, Choctaw, Muscogee (Creek), Chickasaw and Seminole. The rapid transformations of their governments after 1820—from traditional clan and town based structures to Western forms of representative government with written laws, courts of record, and the like—earned them the name still found in old federal statutes of nineteenth century: the Five Civilized Tribes. Yet, at its core, this survival move, like many made by Indian tribes in response to Euro-American settlement, was fundamentally defensive. It was designed to preserve their sense of

¹ U.S. CONST. art I, § 8, cl. 3.

peoplehood. Despite this defensive move, American encroachment on tribal lands and concomitant threats to tribal autonomy created a crisis that reached its apex in the tribal debates over state legal encroachments and the Removal Act of 1830. The unratified Preamble to the Treaty of Dancing Rabbit Creek, the Choctaw removal treaty, eloquently states the choices tribes made to preserve their sense of sovereignty and peoplehood. It provides:

WHEREAS the General Assembly of the State of Mississippi has extended the laws of said State to persons and property within the chartered limits of the same, and the President of the United States has said that he cannot protect the Choctaw people from the operation of these laws; *Now therefore that the Choctaw may live under their own laws* in peace with the United States and the State of Mississippi they have determined to sell their lands east of the Mississippi and have accordingly agreed to the following articles of treaty.²

Elsewhere in the treaty the Choctaw Nation carefully negotiated a guarantee from the United States to “secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State.”³

Faced with the drastic choice of whether to preserve their sovereignty, as they understood it, and lose their aboriginal homelands or whether to try to hold onto their aboriginal domain and lose their autonomy, the Choctaw, like many other tribes that followed them, reluctantly chose the latter option under extreme duress and threat. Yet, they sought and secured explicit treaty guarantees of sovereignty, promises that theretofore had been implicit in all tribal dealings with other Indian tribes. They wanted to live in a country in which they would be governed only by their own laws. To preserve their autonomy, however,

the Choctaw, like most tribes, accepted Western definitions of sovereignty: the authority to rule and govern others. In the process of seeking to preserve their autonomy, therefore, even the tribes’ legal and political structures became colonized. Like the Five Tribes, most tribes today have governments with Western-style representative democracies, employing written constitutions, codes, and sometimes executive regulations enforced by tribal courts of record.

The challenge for most tribes today, as it was for the Five Tribes in the 1830s, is how to simultaneously defend against federal and state governmental encroachments on their autonomy while making their own tribal governments (the forms of which often are partially borrowed from Western models) more relevant to the tribal communities they serve. This challenge often involves trying to adapt Western-style tribal governments to very different tribal cultures and traditions. Most of the nineteenth and twentieth centuries were devoted to the first challenge—assuring that there was a space in which tribal peoples could operate. This first challenge involve two struggles: (1) seeking to preserve a defined land base to protect the geographic space in which the tribe could exercise its autonomy; and (2) thwarting federal and state encroachments on tribal authority to ensure the jurisdictional space necessary for tribal sovereignty.

Indian law is today at a critical juncture. Many of the fights on this first set of issues have been fought, often successfully by the tribes. Nevertheless, many non-Indians remain unsatisfied with these results and continue to nibble away, with increasing success, at the Indian land base and their governmental sovereignty by enlarging federal and state powers in Indian country and diminishing the scope of tribal powers. But while tribes must continue to wage this struggle, the biggest challenge for Indian tribes in the twenty-first century is an internal struggle—the need to develop tribal institutions that simultaneously serve the traditions, values, desires, and needs of their tribal community, while securing recognition of their actions from the federal, state, and other tribal governments with which they must interact.

The articles in this symposium reflect the diversity of the sovereignty challenges faced by tribes, many of them involving this newer internal challenge. Professor Rebecca Tsosie and Wallace Coffey’s work, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, builds on these themes by encouraging a decolonized conception of tribal sovereignty. She focuses attention on questions of cultural sovereignty—the right to control the definition, ownership, and destiny of a tribe’s important cultural heritage. Such questions are central to the Indian sense of autonomy but often ignored by Euro-American politically-

² Treaty of Dancing Rabbit Creek with the Choctaw Nation, Feb. 21, 1831, 7 Preamble, Stat. 333 (emphasis added). While the United States Senate ratified the Treaty and thereby accepted the Choctaw cession of their lands east of the Mississippi River, it expressly refused to ratify the Preamble, perhaps fearing that recognizing the overt duress under which the Choctaw Nation entered into the treaty might undermine its validity.

³ *Id.* at Art. 4.

driven conceptions of tribal sovereignty. Professor David Wilkins' work, *The Manipulation of Indigenous Status: The Federal Government as Shape-Shifter*, addresses the various efforts of federal law to define the legal status of Native Americans as a tool of federal policy, thereby often depriving Indians of the right to define themselves.

Tracey LeBeau's piece, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development*, also speaks to internal tribal development, focusing on tribal infrastructure and economic development in the energy supply area. Professor James Nason's paper, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, focuses attention on the need for intellectual property legislation to protect tribal control over cultural property and patrimony.

Douglas Endreson's article, *Improving the Legislative Process in Indian Country Through Use of Tribal Legislative Fora*, discusses new tribal tax and regulatory initiatives designed to address this second challenge and the reactions they have engendered. Finally, Mark Myer's article, *Federal Recognition of Indian Tribes in the United States*, addresses problems of intergovernmental recognition by focusing on who continues to control the very definition of an Indian tribe. He discusses the problems some non-federally recognized tribes have had in the legal process of securing federal recognition under existing processes.

In short, this symposium represents an exploration of the major challenge of tribal sovereignty in the twenty first century—decolonizing Euro-American conceptions of tribal sovereignty by returning to tribes the right to define and protect themselves by permitting them to exercise authority and autonomy in their own country, and by having Indian nations successfully exercise such rights without federal and state governmental interference and with full federal support.

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