

SOVEREIGNTY IN THE FOURTH WORLD

This paper provides a context for the idea of "sovereignty" and a starting point for understanding Indian tribal sovereignty. The origin of the concept and ancient and contemporary controversies surrounding it provide a framework for this discussion. Further, this essay provides a brief account of the historical development and legal history of tribal sovereignty with an emphasis on the significance of Papal authority and Marshall's Trilogy. In conclusion, this paper offers a final viewpoint on the contemporary understanding of tribal sovereignty.

Defining Sovereignty

Sixteenth century legal philosopher Jean Bodin developed the concept of sovereignty with his claim that the prince, or the sovereign had the power to declare law (d'Errico 1998). Since then, many theorists have expanded and challenged the nature of sovereignty, which has given rise to numerous definitions. In 1905, Oppenheim noted that there is no commonly accepted definition of sovereignty, stating: "There exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon" (Hannum 1998). Nevertheless, sovereignty is classically defined as supreme legal authority in a political community (d'Errico 1998); constitutional or legal independence (Hannum 1998); and freedom from suit (Wilson 1999).

Controversies

These definitions typically stem from one of three central assumptions about the nature of sovereignty: (i) that sovereignty lies with the unitary state as portrayed by Thomas Hobbes; (ii) that sovereignty lies with the people as described by Jean Jacques Rousseau; or (iii) that sovereignty is a purely legal construct related to constitutionalism as suggested by Immanuel Kant (Hinsley 1986). In federal Indian law, the definition of sovereignty captures two ancient controversies (d'Errico 1998). The first controversy is whether supreme authority is traced to the people or to the "divine right" of rulers. The second controversy is about the relation between legal authority and political-economic power, which may influence or dominate law. Philip Prygoski (1995) states that the two competing theories of tribal sovereignty are that (i) the tribes have inherent powers of sovereignty that predate the discovery of America by Columbus; and (ii) the tribes have only those attributes of sovereignty that Congress gives them. In order to understand the contemporary meaning of tribal sovereignty, it is necessary to consider its historical development.

Historical Development

Early political communities were stateless societies of tribal communities in which there was no need for a "sovereign" government (Hannum 1998). Control was exercised in accordance with moral or social authority. Legitimacy arose from daily operations that conformed to the traditions of the tribe. Later, there was still no need for a "sovereign" government in Greek city-states or the Roman Empire because authority was in the province of the gods. Rulers were legitimate insofar as they conformed to the divine law of the gods. This system continued through the Middle Ages, and no ruler was able to exercise real control over the political system he theoretically headed. Eventually, secular law was separated from divine law (Hannum 1998).

Sovereignty as a power system originated in international law in the sixteenth century by Christian European states in their dealings with each other and the Catholic Church (d'Errico 1998). An 1848 international order (Treaty of Westphalia) based on the sovereign equality of states was established and replaced the former hierarchical structure (Hannum 1998). By the nineteenth century, "the European outlook upon the extra-European areas...became one which instinctively applied the concept of the



sovereign state and the notion of international sovereignty to conditions in which these ideas remained alien” (Hinsley 1986). Bartelson (1995) claims that sovereignty became “the dominant concept in the field of...political assumptions...the essential qualification for full membership [in] the international community.” Sovereignty provided state power with an “inside” and an “outside” (Bartelson 1995). As such, states declared supreme power inside their “domestic realms” and defined other states’ realms as “outside.”

Thus, the concept of sovereignty evolved to include classical attributes of “absolute, unlimited power held permanently in a single person or source, inalienable, indivisible, and original” (d’Errico 1998). These are characteristics of power associated with divine right monarchy and the Papacy of the Christian Church. They are the brainchild of Jean Bodin and Thomas Hobbes that set the tone for Indian policies (See Appendix A).

Legal History

The legal history of “tribal sovereignty” began with colonialism (d’Errico 1998) and the necessary instrument of Europe’s colonial expansion was the emergence of the sovereign state (Camilleri 1990). When the colonists came to America in the 1600s, they treated the native tribes as separate nations (Wilson 1999). The young republic entered into numerous treaties, many of which were military alliances created to “bolster the colonies’ strength in the fight against the English” (Wilson 1999; Joranko 1995).¹ Within the ‘treaty paradigm,’ the “real” policy was to “gain the maximum amount of land for white settlers (who would ‘efficiently’ use the land) at the least possible cost, in terms of warfare and lives” (Tsosie 2001; Kades 2000).²

According to Peter Nabokov (1991):

The legal basis for making treaties with the Indians was established as early as the sixteenth century by lawyers for the Spanish Court. Although vast portions of the New World were claimed by the conquistadors, Spain still felt that the Indians enjoyed some vague “aboriginal title” to the country...Other Europeans and Americans also granted Indians a “right of occupancy.” Behind these manipulative phrases and contradictory postures lay the white man’s vacillation between greed and conscience. He was determined to take possession of the territories he “discovered,” but he needed to feel he was acquiring them fairly and legally.

Thus, based upon the theory of “divine right” and religious doctrines decreed by the Pope, the colonizing powers asserted sovereignty over indigenous people (d’Errico 1998). Consequently, indigenous nations were legally stripped of their independent status. As such, their existence was either unrecognized, and their lands considered vacant (*terra nullius*), or, their existence was recognized, and they were declared to have a “right of occupancy” (but not ownership) of land. Two Papal Bulls documenting the legitimacy of Christian domination over “pagans,” sanctifying enslavement and expropriation of property, and the doctrine of discovery and conquest characterize this period (d’Errico 1998):

¹ The Articles of Confederation granted power over Indian tribes to both the state and federal governments.

² The country’s first “Indian policy,” written in a letter by George Washington to James Duane (1783), was that: “[p]olicy and [economy] point very strongly to the expediency of being upon good terms with the Indians and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there...the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho’ they differ in shape.” (Getches 2000). President James Monroe’s 1817 message to Congress provided the philosophical justification for the policy of divesting Indians of lands through treaty and warfare, stating: “No tribe or people have a right to withhold from the wants of others more than is necessary for their support and comfort” (Tsosie 2001). [President Monroe established the Office of Indian Affairs within the Department of War in March 1824.]



ROMANUS PONTIFEX, JANUARY 8, 1455 — “[W]e bestow suitable favors and special graces on those Catholic kings and princes,...athletes and intrepid champions of the Christian faith...to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and...to reduce their persons to perpetual slavery, and to apply and appropriate...possessions, and goods, and to convert them to...their use and profit...”

and

INTER CAETERA, MAY 3, 1493 — “Among other works well pleasing to the Divine Majesty and cherished of our heart, this assuredly ranks highest, that in our times especially the Catholic faith and the Christian religion be exalted and everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself...[O]ur beloved son Christopher Columbus,...sailing...toward the Indians, discovered certain very remote islands and even mainlands...[W]e,...by the authority of Almighty God...do give, grant, and assign forever to you and your heirs and successors, kings of Castille and Leon, all and singular the aforesaid countries and islands....”

Papal authority is the basis for the United States power over indigenous people and from it, United States Supreme Court Judge John Marshall borrowed the “essential legalisms needed for state power over indigenous peoples.”³ In doing so, “he encased Christian religious premises within the rhetoric of European expansion” (d’Errico 1997). In what is now known as the “Marshall Trilogy,”⁴ the Supreme Court established the doctrinal basis for interpreting federal Indian law and defining tribal sovereignty (Prygoski 1995).

Marshall’s Trilogy

In the Marshall Trilogy, the Supreme Court gave lip service to the sovereign integrity of the Indian tribes (Wilson 1999). Indian nations were recognized as separate, but placed under the protective control of Congress. In *Cherokee*, the tribes were considered “domestic dependent nations” — not quite states but not quite foreign nations, either. In *Worcester*, the Court held that “Indian nations, their citizens, and their territory remained completely apart from the states in which they were located.”⁵ Indians were also separate from the federal government, inasmuch as they were considered citizens of their individual tribes, not citizens of the United States. The collective effect of the Marshall Trilogy on the development of federal Indian law has been described as follows:

Three bedrock principles thus underlie *Worcester* and the earlier decisions: (1) by virtue of aboriginal political and territorial status, Indian tribes possessed certain incidents of preexisting sovereignty; (2) such sovereignty was subject to diminution or elimination by the United States, but not by the individual states; and (3) the tribes’ limited inherent sovereignty and their corresponding dependency on the United States for protection imposed on the latter a trust responsibility.⁶

³ *Johnson v. McIntosh* 21 U.S. (8 Wheat.) 543 (1823).

⁴ *Johnson v. McIntosh*; *Cherokee Nation v. Georgia* 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832).

⁵ From Timothy W. Joranko’s *Tribal Self-Determination Unfettered: Toward a Rule of Absolute Tribal Official Immunity from Damages in Federal Court*, 26 ARIZ. ST. L.J. 987, 1023 (1995) in Wilson’s “Nations Within a Nation: The Evolution of Tribal Immunity.”

⁶ American Indian Law Deskbook. 1993. University Press of Colorado in *From Marshal to Marshall: The Supreme Court’s Changing Stance on Tribal Sovereignty*.



Johnson v. McIntosh

In 1823, the United States Supreme Court addressed its first federal Indian question in *Johnson v. McIntosh*. The Supreme Court did not recognize a private purchase of land between a non-Indian and an Indian tribe. In so doing, the Court gave federal sanction to the doctrine of discovery, which declared that Indians held only a possessory use interest in the land, and that the United States held legal title. Although the legal question was primarily one of aboriginal land title, the decision, in terms of federalism, recognized the United States' right, not Indian tribes or states, to the land. "Without this decision, the new federal government's power would have been severely limited because it would have encountered a legal quagmire in deciding the legitimacy of land titles in United States territory" (Wilkins 1998).⁷

Chief Justice Marshall ruled for the Court that Indian tribes could not convey land to private parties without the consent of the federal government (Prygoski 1995). The Court reasoned that "after conquest by the Europeans and the establishment of the United States, the rights of the tribes to complete sovereignty were diminished, and the tribes' power to dispose of their land was denied" (Prygoski 1995). The Court further noted that:

"On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character of religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity" (d'Errico 1997).

Steve Newcomb (1993) stated that: "Indian nations have been denied their most basic rights ... simply because, at the time of Christendom's arrival in the Americas, they did not believe in the God of the Bible, and did not believe that Jesus Christ was the true Messiah. This basis for the denial of Indian rights in federal Indian law remains as true today as it was in 1823." Essentially, *Johnson v. McIntosh* established "Christian discovery" as the legal foundation for United States sovereignty over indigenous lands (d'Errico 1998). After Marshall's opinion, no lawyer or court would need to acknowledge that land title claims in United States law are based on a doctrine of Christian supremacy. From then on, the term "Christian" was replaced by the term "European." After having written that "Christian princes" could take lands "unknown to all Christian peoples," Marshall conceded that the doctrine was an "extravagant ... pretension" which "may be opposed to natural right" and may only "perhaps, be supported by reason." Nevertheless, he concluded that it "*cannot be rejected by courts of justice*" (d'Errico 1998, emphasis added).⁸

⁷ David Wilkins argues that the U.S. Supreme Court used federalism to deny Indians and Indian tribes justice, stating: "The mask worn by the federalizing agents viewed the United States as the core unit such that nonfederal entities must either be absorbed or vanquished. The masks applied by the Court to the tribes divided them according to degree of "savagery,"...into the assimilable and unassimilable, tribal nations that were deemed capable of being Americanized (from a Euro-American perspective) and joining the United States as separate, though integrated, political entities versus those mostly western tribes that were caricatured as "wild" and "uncivilized." In masking the legal process, *Law* was clearly an agent of national unity. During the late 1800s and well into the twentieth century, the Court rendered a number of decisions indicating a clear intent to dilute the extraconstitutional status of tribes by unilaterally declaring them "wards" of the government and disavowing their separate, independent status. The assertion of congressional power over tribal lands, resources, and rights is evidence of this nationalizing effort. (p. 16).

⁸ "However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right,



The "discovery doctrine" required force and the *Spanish Requirement* of 1513 is an example of this force. Royal law required it to be read before hostilities could be undertaken against a native people. In Latin and/or Spanish, witnessed by a notary, the Conquistadors read:

On the part of the king, Don Fernando, and of Doña Juana, his daughter, queen of Castile and Leon, subduers of the barbarous nations, we their servants notify and make known to you, as best we can, that the Lord our God, living and eternal, created the heaven and the earth, and one man and one woman, of whom you and we, and all the men of the world, were and are descendants, and all those who come after us. Of all these nations God our Lord gave charge to one man, called St. Peter, that he should be lord and superior of all the men in the world, that all should obey him, and that he should be the head of the whole human race, wherever men should live, and under whatever law, sect, or belief they should be; and he gave him the world for his kingdom and jurisdiction.

...

Wherefore, as best we can, we ask and require you that you consider what we have said to you, and that you take the time that shall be necessary to understand and deliberate upon it, and that you acknowledge the Church as the ruler and superior of the whole world.

...

But if you do not do this, and maliciously make delay in it, I certify to you that, with the help of God, we shall powerfully enter into your country, and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and obedience of the Church and of their highnesses; we shall take you, and your wives, and your children, and shall make slaves of them, and as such shall sell and dispose of them as their highnesses may command; and we shall take away your goods, and shall do you all the mischief and damage that we can, as to vassals who do not obey, and refuse to receive their lord, and resist and contradict him: and we protest that the deaths and losses which shall accrue from this are your fault, and not that of their highnesses, or ours, nor of these cavaliers who come with us. (d'Errico 1998)

Cherokee Nation v. Georgia

In 1831, the Court addressed the question of whether the Cherokee Nation was a "foreign state" and, therefore, could sue the State of Georgia in federal court under diversity jurisdiction (*Cherokee Nation v. Georgia*, 30 U.S. 1). Chief Justice Marshall ruled that federal courts had no jurisdiction over such a case because Indian tribes were merely "domestic dependent nations" existing "in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." As such, tribal peoples have a "lesser form of 'sovereignty'...a special kind of non-sovereign sovereignty" (d'Errico 1998).⁹ That is to say, the Cherokee Nation was denied full sovereignty as an independent nation, but was regarded as having authority over the relations of its tribal members – an "internal" or "tribal" sovereignty.

and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be [*592] adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice." *Johnson v. McIntosh* 21 U.S. 543.

⁹ D'Errico notes that the *Cherokee* suit has not been overturned. Yet, the Supreme Court decided in 1997 that the Cour d'Alene Tribe could litigate its land claims against the state of Idaho only in Idaho courts. The Supreme Court threw the suit out of federal court stating that "Indian tribes...should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity. *Idaho v Cour d'Alene Tribe* No. 94-1474. States d'Errico: "The Cherokee were barred from suing the Supreme Court because an Indian nation is not a foreign nation. The Cour d'Alene were barred from suing in district court because an Indian nation is a foreign nation."



The Court's classification of the tribes as "dependent nations" ultimately served as the basis for the "trust relationship" between the United States and the Indian tribes. Through this relationship, the federal government established for itself a duty to protect the tribes from interference and intrusion by state governments and state citizens (Prygoski 1995). Inherent in the concept of a "trust" relationship is the implication that the tribes are incompetent to handle their own affairs. This presumption has served as the justification for many actions by the federal government that have intruded on and diminished tribal sovereignty.

Worcester v. Georgia

In the last case of Marshall's Trilogy, *Worcester v. Georgia* (31 U.S. 515) (1832), the Court addressed the issue of whether the state of Georgia could impose criminal penalties on a number of missionaries who were residing in Cherokee territory, without having obtained licenses from the governor of Georgia (Prygoski 1995). Ruling that the laws of Georgia could have no effect in Cherokee territory, the Court said, "[t]he Cherokee nation...is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress...."

Although the Cherokee were considered dependent on the United States, they possessed a right to self-government. Thus, in relying upon the constitutional doctrine that regulation of Indian affairs was granted to the federal government and not to the states (Wilkins 1998), the principle that states are excluded from exercising their regulatory or taxing jurisdiction in Indian country was established by *Worcester* (Prygoski 1995).

Contemporary Definition

Minugh, Morris, and Ryser (1989) argue that for the federal government to hold that Indian peoples constitute less than fully sovereign national entities is to simultaneously argue that the entire treaty-making process undertaken by the government with those peoples is and always was illegal.¹⁰ If they are illegal, they must be void altogether. Insofar as the treaties include the land cession clauses by which the U.S. acquired what it contends is 'legal title' to upwards of 70% of its present domestic territoriality, the basis by which the United States has always claimed a right to its own land-base would be obliterated. The only fallback position would then be the resort to the doctrine of the "right of conquest." Thus, current definitions of tribal sovereignty may only be understood from a purely illogical standpoint that: Indian nations are simultaneously fully sovereign and less than sovereign. For purposes of treaty-making and transferring land title, they are fully sovereign. For purposes of allowing legitimate federal control over Indian land, water and other resources, regulation of trade and diplomatic relations, form of governance, recognition of citizenry, jurisprudence, and *ad infinitum*, they are less than sovereign.

¹⁰ This is based on the argument that Article I of the U.S. Constitution affirms that subordinate sovereignties such as states, counties, municipalities and individuals or groups of individuals are prohibited from entering into treaty agreements. Only the federal government itself is allowed to engage in treaty-making, and it may only do so with other *fully sovereign* national entities. It could be argued here that "plenary power" doctrine legitimizes the abrogation of federal-Indian treaties without any judicial standard to govern its exercise because it was found in *Kagama* that Congress' power to protect the tribes from their own "weakness and helplessness" was so magnificent as to encompass this right.



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APPENDIX A INDIAN POLICIES

The United States has been inconsistent in its recognition of tribal sovereignty, combining concepts derived from Papal authority, international law, domestic laws, and the changing social, political, and morals of policymakers (Wolfley & Johnson 1996). Since its birth, the United States has had a variety of fundamental policies, or "eras," of Indian policy. The era of Tribal Independence characterizes the period of 1787 and before. The geographic area that is now known as the United States was inhabited by independent, self-contained Indian tribes. The time between 1787 and 1828 marks the Trade and Intercourse Acts where, in addition to the federal/tribal treaties that were signed starting in this period, the federal goal was apparently to permeate the area of Indian affairs with federal law. From 1828-1887 policies changed to the Relocation of Indians. Specifically, the Indian Removal Act of 1830 forced eastern tribes to move west of the Mississippi; and the gold rush in the 1840s displaced Indians in the west and forced them to accept life on reservations often defined by the federal government. Many Indians at this time became increasingly dependent upon the federal government. The Allotment and Assimilation period (1887 – 1934) marks the passage of the General Allotment Act of 1887 wherein the federal government sought to abolish tribes and assimilate Indians into the dominant society. The government established a variety of programs to accomplish this, including the break up of communally-held tribal lands and the allotment of parcels to individual tribal members in the hope that they would become farmers. In a reversal from the era of General Allotment, the government enacted policies for Indian Reorganization between 1934 and 1953. The Indian Reorganization Act of 1934 prohibited further allotment of tribal lands to individual Indians, and sought to restore and increase tribal land holdings. The federal government at this time attempted to help tribes become independent. Congress abandoned reorganization goals and terminated many federal benefits and support services for tribal members during the time period from 1953 and 1968. Thereafter to now, President Johnson denounced the termination policy and declared that tribal autonomy would once again be promoted. Thus, the current era is coined by Wolfley and Johnson as the Self-Determination Era.

