

**ECONOMIC DEVELOPMENT
IN
AMERICAN INDIAN RESERVATIONS**

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SELF-DETERMINATION AND THE CONCEPT OF SOVEREIGNTY

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Sovereignty is an ancient idea, once used to describe both the power and arbitrary nature of the deity by peoples in the Near East. Although originally a theological term it was appropriated by European political thinkers in the centuries following the Reformation to characterize the person of the King as head of the state. The complicated political intrigues of medieval Europe had produced the strange doctrine that rulers of the temporal realm were chosen by God and divinely ordained to rule their nations. Political power was thus located in the person of the sovereign who was limited only by his relationship with God.

As European nations encountered peoples of other continents their first presumption was that these peoples shared the view that political power must be located in a specific person and they attributed immense absolute powers to those spokesmen of other nations who dealt with them. Thus leaders of Indian communities, before they were called "chiefs" were commonly called "kings" and were believed to represent the nationhood of the people they represented.

In the technical language of the seventeenth and eighteenth centuries, sovereignty was the absolute power of a nation to determine its own course of action with respect to other nations. Quite often this power was interpreted as the independent power of making war although even Europeans would admit that for smaller nations, sovereignty was restricted to the power to regulate one's own internal functions in the field of domestic relations. Few nations were powerful enough to insist upon total independence from other nations and legal fictions replaced a frank discussion of the actual state of affairs. Treaties between equal "sovereigns" often disguised the fact of interdependence of European nations.

With the eighteenth century colonial wars for possession of North America, Indian communities were acknowledged to have a European version of sovereignty as long as they held sufficient territory and military strength to be an important factor in determining the outcome of the colonial conflicts. As the respective European nations retired from the field and England became predominant on the continent the idea of Indian sovereignty became less popular. The Iroquois, for example, under their famous Haldimand agreement with England, became joint conquerors of Canada during the French and Indian War (Seven Years War) which concluded in 1763. But with the French excluded from political activities in North America and England and Spain comfortably dividing the continent and separated geographically, there was no need to dwell upon the elevation of the League of the Iroquois to international status. While such political theorists as John Locke and Charles Montesquieu referred to the Iroquois as an instance of nonwestern people establishing a government with sufficiently precise institutions to be accorded national status among the other countries, in practical terms the English preferred not to mention Indian nations and the idea of political sovereignty in the same context.

The American Revolution revived the idea of Indian sovereignty. While reciting polite phrases about the equality of man, the American revolutionaries were plainly outside the

law of civilized societies in their revolt, and to gain respectability they adopted the most acceptable posture toward the Indians possible with the hope that by demonstrating their ability to act in traditional political terms they could allay the fears of other nations so as to legitimize their activities. Thus in order to neutralize the Indians on their northern and western frontiers the Americans signed several treaties during the course of the Revolution which greatly expanded the acknowledged powers and status of these Indian peoples.

Two of the first series of treaties with the Indians, the Delaware and Cherokee treaties, made provisions for the appointment by the Indians of a delegate to the Continental Congress when they wished to be represented in the councils of the new American nation. These articles were later neglected but they serve as an indication of the political status which the Americans perceived the Indians to possess. The first period of political relationships between Indians and the United States can be said to begin with the Revolutionary War and continue through the War of 1812 until the conflict with the British was resolved and the Americans were assured of their own political independence. During this time Indian treaties carefully distinguished the respective political rights of the two contracting parties and passports, provisions for civil and criminal jurisdiction and extradition indicated the belief that Indian governments were fully capable of dealing with both internal and external affairs. With the withdrawal of Great Britain from activities in the Ohio and Mississippi valleys following the War of 1812, the respective Indian communities who had been allies with the United States and Great Britain were required to sign peace treaties acknowledging as superior sovereign that larger nation within whose territorial claims they found themselves at the conclusion of the war.

The United States claimed political sovereignty over the interior of North America almost by default. Neither Britain nor Spain could afford to carry on extensive military activities in North America and were content to allow the Americans to push their way into the midcontinent area without much molestation or conflict. But the United States, arguing that its claim to lands in the Interior was a valid one that should be respected by European nations, adopted the posture that it had inherited from Britain the superior title to lands based on the doctrine of discovery which had been used a century earlier to establish European state claims to various parts of the nonwestern world. Discovery was a difficult doctrine to defend. John Marshall, describing it in *Worcester v. Georgia*, remarked:

It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.¹

But the need to classify and identify the actual status of the Indian governments continued to be a pressing problem if the United States were to successfully expand westward.

Marshall linked the status of Indian lands and governments together to insist that as lands were sold or taken, the extent of sovereignty also declined in importance. In *Johnson v. McIntosh*, he wrote:

They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.²

Marshall's reconciliation of political sovereignty and land ownership did not last a decade after he first articulated it.

In two Cherokee cases the question arose concerning the precise status of Indian governments: If the Cherokees were a "foreign" nation, they had access to the Supreme Court in an original action; if not, then they were barred from the United States courts and their remedies. These cases tied jurisdictional questions involving lower American political entities such as counties and states with Indian governmental sovereignty which had traditionally been a subject of international interest thus developing a most confusing and conflicting theoretical basis for dealing with Indians by the United States. In *Cherokee Nation v. Georgia*, Justice McLean, concurring with Marshall's majority opinion, developed a much more comprehensive analogy to then-existing doctrines of political rights when he said of the Cherokees:

Their condition is something like that of the Israelites, when inhabiting the deserts. Though without land that they can call theirs in the sense of property, their right of personal self-government may exist though the land occupied be in fact that of another. The right to expel them may exist in that order, but the alternative of departing and retaining the right of self-government may exist in them. And such they certainly do possess; it has never been questioned, nor any attempt made at subjecting them as a people, or restraining their personal liberty except as to their land and trade.³

Here Justice McLean attempts to sever political status from land ownership in effect making the Cherokees what one would describe as an "expectant" or "incipient" nation in the eyes of the United States.

In *Worcester v. Georgia*, the companion case which was heard the year following Cherokee Nation, both Marshall and McLean made another attempt to define the status of Indian tribes with some clarity. Marshall suggested a peculiar status for the Cherokees, writing:

The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights . . . with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians . . . the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government and ceasing to be a state.⁴

Marshall described Indian peoples as "domestic dependent nations."

Once possessing this status as domestic dependent nation, an Indian people could only lose it by voluntarily surrendering the remaining attributes of sovereignty or by becoming so shattered by the passage of events as to be incapable of exercising any social or political powers whatsoever. Justice McLean suggested the latter alternative when he wrote:

If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. The point at which this exercise of power by a state would be proper, need not now be considered: If indeed it be a judicial question . . . so long as treaties and laws remain in full force, and apply to Indian nations, exercising the right of self-government, within the limits of a state, the judicial

power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional.⁵

The anomaly of federal Indian law is that the two Cherokee cases represent the best efforts of the United States legal authority to arrive at a satisfactory definition of the status of an Indian government with respect to state and federal governments. All subsequent decisions revolve about the definitions given in these two cases and variances occur in direct proportion to the relative knowledge of the federal government with respect to the conditions of the Indians involved in any specific dispute.

As this century began the historical pendulum was swinging toward a more profound definition of Indian sovereignty and the original content of sovereignty as a reservoir of political powers was revived with respect to Indian governments. In *Talton v. Mayes* the Supreme Court carefully distinguished those political powers which had been inhibited by Congress and those which flowed from the natural rights of a "distinct people" which could not be curtailed by legislative action:

But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers federal powers arising from and created by the constitution of the United States . . . It follows that as the powers of local self-government enjoyed by the Cherokee nation existed prior to the constitution, they are not operated upon by the fifth amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on our national government.⁶

With *Buster and Jones v. Wright*, the idea of a residual sovereignty inherent in Indian governments became a positive factor in protecting the communal decisions and values of Indian communities:

The authority of the Creek nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origin in an Act of Congress, treaty or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it . . . The fact remains nevertheless that every original attribute of the government of the Creek nation still exists intact which has not been destroyed or limited by Act of Congress or by the contracts of the Creek tribe itself . . .⁷

While court decisions have generally supported this doctrine during this century, different administrations have seen attempts to erode or replace the idea of inherent sovereignty.

During the Eisenhower administrations, Congress "terminated" federal supervision over several Indian peoples. But this "termination" was made subject to the most excruciating examination by the Supreme Court which concluded in the case of the Menominees that no intention existed in the minds of Congress to violate any treaty which the government had with them. Nearly all efforts to restrict inherent sovereignty, if contemplated by the legislative branches of state and federal governments, have generally failed to survive the precision demanded by the courts which would assure them constitutionality.

In the course of these developments, it has become increasingly clear that the idea of Indian sovereignty is not simply a legal concept. Numerous references to sovereignty cite the notion of a distinct people, separate from others, as the chief characteristic of Indian sovereignty indicating that so long as the cultural identity of Indians remains intact no specific political act undertaken by the United States government can permanently

extinguish Indian peoples as sovereign entities. Although sovereignty originated as a means of locating the seat of political power in European nations, it has assumed the aspect of continuing cultural and communal integrity when transferred to the North American setting.

Sovereignty has become a difficult political issue in recent years because of its exclusive use as a legal concept. The Supreme Court has shied away from articulating an expanded theory of Indian sovereignty in recent years although it has used peripheral doctrines to bolster sovereign and self-governing powers of Indian governments. The Supreme Court, referring to Indian sovereignty in the *McClanahan* case, tried to avoid the issue:

The trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.⁸

The reasoning is deceptive here. Obviously, the "applicable treaties and statutes" are precisely those which describe and articulate the sovereignty of the respective Indian nations in relation to the United States. So little is gained with this definition except additional time in which the passage of events can present a better opportunity to comment on the topic.

The conflict over Indian sovereignty today originates in part because of the misconception held by the non-Indians with respect to social institutions and nationality and the adoption of that misconception by Indian political leaders, in some cases, as a means of communicating with and influencing the larger social and political institutions. North Americans have a tendency to look at the sources of power rather than the proper exercise of it. Thus concern is focused on whether or not a certain institution has the right to do certain things rather than the wisdom of what it does. American politicians are discarded when they have lost their sources of power (usually financial), not when they have done wrong. Social and moral responsibility does not revolve about right and wrong but whether, in fact, an institution or person should be involved with the subject matter under consideration.

This tendency to focus on the origin of things rather than their essential characteristics has led American society into a desperate situation in which it cannot solve the simplest problems but only seems to aggravate conditions with each attempt to bring about order. The decline of American prestige abroad and the drastic reduction of faith in the American system as indicated by the "credibility gap" which public institutions now suffer is further testimony to this ingrained fallacy and misidentification of the source for the substance of things. When we focus specifically on the field of Indian affairs it is not difficult to see that the major concern of the Bureau of Indian Affairs with respect to the Indian peoples is whether they can exercise certain powers, not the wisdom of the course under consideration.

In the 1970's American Indians have made their appearance on the world stage. This movement began with the widespread publicity which the occupation of Wounded Knee received and continued on with the efforts of delegations of traditional Indians to achieve recognition in the eyes of various United Nations committees and commissions. The presentation at the Palais des Nations (UN) in Geneva, Switzerland, in the fall of 1977 brought home to many Indians the realization that certain types of political and cultural activities had a place on the world stage and could not be restricted to the domestic affairs of the United States. Insightful American thinkers are also beginning to realize the radical change which this perception is making in the eyes of other nations regarding the

American position in the world. The discussions which some resource-rich Indian governments have had with OPEC nations are certain to have additional repercussions.

What is particularly important in the movement of Indians onto the world stage is that the cultural traditions have proven the most fruitful manner of communicating national and political existence to other nations. This aspect of communal existence is precisely on point in historical perspective since the recognition of political sovereignty was originally a projection by Europeans of their own institutional structures into the activities of another cultural tradition. The majority of Supreme Court decisions which treat with sovereignty refer to the Indians as a "distinct people" and this characteristic seems to dominate the immediate perceptions which courts have concerning the continued existence of attributes of sovereignty. Sovereignty, in the final instance, can be said to consist more of continued cultural integrity than of political powers and to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty.

When we view sovereignty in this broadly expanded light, new possibilities for constructive action arise. Cultural integrity involves a commitment to a central and easily understood purpose that motivates a group of people, enables them to form efficient, albeit informal social institutions, and provides for them a clear identity which cannot be eroded by the passage of events. Sovereignty then revolves about the manner in which traditions are developed, sustained, and transformed to confront new conditions. It involves most of all a strong sense of community discipline and a degree of self-containment and pride that transcends all objective codes, rules, and regulations. Unless individuals have a commitment to a larger whole they cannot function efficiently and unless a nation is composed of committed individuals it cannot function with the efficiency that sovereignty is meant to describe.

A self-disciplined community that holds itself together and acts with a unified vision possesses sufficient sovereignty to confront and resolve any difficulty. Much of the erosion of Indian sovereignty is not through the passage of laws of Congress taking away powers of self-government, but rather the alienation of Indian citizens who refuse to be bound by Indian community decisions and values. Unless a political entity can act with the overwhelming majority of its constituents supporting it, it cannot function for long. The Viet Nam experience had demonstrated this truth to the United States though few politicians seem to have learned this important lesson.

An urgent need exists to return to traditional ways of participating in social and cultural functions of the community. This need is presently articulated under the general theme of self-determination and is expressed politically in support of Indian sovereignty. But complex institutions and institutional habits which have been imposed over the course of this century cannot be eliminated in an instance even with the most profound exercise of the community will and determination. A gradual transition back to a more normal and spontaneous expression of community values and traditions must be encouraged so that individual and community growth becomes a natural rather than an artificial or repressive development. The first step in this process of restoration and reconstruction is transferring educational and social welfare functions to complete Indian community control. Indian governments must be allowed to structure these activities according to traditional precepts rather than being required to follow rules, regulations, and eligibility standards established for American society.

The standard arguments against total local control of these important social and cultural functions usually revolve about the ability of the local community to finance its own activities. But this argument is based upon the assumption that human experiences are contingent upon one's ability to pay without the corresponding admission that a situation artificially produced will continue to produce problems until it is returned to its normal

condition. If we base peoples' opportunity to solve problems upon their ability to finance their opportunities we simply aggravate conditions in which no solutions can be found and ultimately produce a situation in which all of society begins to falter.

→ If there was an assurance, with no substantial doubt, that the present direction of social programming would produce predictable results, then this argument would have some validity. But the present configuration of social problems, in Indian communities as well as other poor communities in the larger society, would argue against current theories and concepts and in favor of more traditional methods. Since the continuance of Indian cultural traditions is well within the concept of sovereignty and at the same time falls within the mainstream of human development processes, both cultural and political solutions can be devised through this strategy.

Insofar as Indian goals and customs may not correspond to present understanding of national education, economics, and social welfare concepts, a word of caution must be given. The present developments in American society in the creation of institutional solutions are all divisive steps which do not bring together ideas but perpetuate isolation of individuals and institutions. The direction proposed is a means of allowing human energies and understandings to converge and come together to form a more sensible picture of human life. If the same process could be initiated in the larger society the problems would begin to resolve themselves as growth processes would bring presently isolated programs and ideas into relationship with each other.

“Sovereignty” is a useful word to describe the process of growth and awareness that characterizes a group of people working toward and achieving maturity. If it is restricted to a legal-political context, then it becomes a limiting concept which serves to prevent solutions. The legal-political context is structured in an adversary situation which precludes both understanding and satisfactory resolution of difficulties and should be considered as a last resort, not as a first instance in which human problems and relationships are to be seen.

2. NOTES

1. *Worcester v. Georgia*, United States Reports (Vol. 315, 1832) p. 515.
2. *Johnson and Graham's Lessee v. McIntosh*, Wheat Reports (Vol. 8, 1823) p. 523.
3. *Cherokee Nation v. State of Georgia*, United States Reports (Vol. 30, 1831) p. 1.
4. *Worcester v. Georgia*, p. 517.
5. *Ibid*, p. 518.
6. *Talton v. Mayes*, United States Reports (Vol. 16, 1904) p. 376.
7. *Buster and Jones v. Wright*, Federal Reports (Vol. 135, 1905) p. 947; Appeal, United States Reports (Vol. 203, 1906) p. 599.
8. *McClanahan v. State Tax Commissioner*, Arizona Appellate Reports (Vol. 14, 1971) p. 452.