Breaking Faith With the Tribal Sovereignty Doctrine

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The great Seneca Nation leader and diplomat Red Jacket is said to have illustrated the tribe's frustration with the insatiable encroachment of those seeking Seneca lands during a negotiation with the Holland Land Company's agent, Joseph Ellicott. The two were seated on a log. Every few minutes during their discussion, Red Jacket crowded Ellicott on the log, forcing Ellicott to "move along" down the log. Ellicott eventually ran out of room on the log and insisted he could move no further "without ending up off the log in the mud."[1] As Red Jacket said, the Seneca Nation had likewise been crowded and pushed off of their lands bit by bit and had run out of room for further concession.

So it is with the doctrine of inherent tribal sovereignty in the U.S. Supreme Court today. Some members of the Supreme Court seem determined to push the scope of inherent tribal sovereignty off the edge of the proverbial log. In this article, I will discuss some ways in which the Court's recent jurisprudence threatens tribal sovereignty by moving toward a reimagination of the nature of tribes. In my view, some justices and tribal adversaries advocate not just narrowing the scope of tribal sovereignty, but embracing an alternate vision of tribes as essentially voluntary organizations rather than as governing organizations possessed of an aboriginal sovereignty that has never been extinguished.

The threat to tribal sovereignty that tribes and advocates must prepare for may be a judicial declaration rendering the doctrine of tribal sovereignty "a nullity," and in its place, a declaration that tribes are to be like private clubs, with the limited rights of association but without the powers of sovereign governance over people and territory. Were it to come to that, it would be the culmination not only of the judicial movement to pare back the branches of tribal sovereignty, with roots in *Oliphant v. Suquamish Indian Tribe,*[2] but also of the judicial usurpation of the role of the political branches in federal Indian policy. If realized, this break with the doctrine of tribal sovereignty would violate not only hundreds of years of constitutional and legal precedent, it would also violate the separation of powers doctrine and represent an unconstitutional intrusion by the Court on the Indian affairs power of Congress to set federal Indian policy.

The Assault on Sovereignty

It is now axiomatic to say that modern Supreme Court jurisprudence has eroded the doctrine of tribal sovereignty.[3] We have seen the Court move to curtail both criminal and civil jurisdiction and move to diminish both regulatory and adjudicatory authority. The source and scope of tribal sovereign powers over people and territory continue to be the subject of litigation, legislation, and debate. These assaults on tribal sovereignty have come primarily in the context of tribal authority over non-Indians in the territories of the tribes, but they have provided occasion for justices to voice their wholesale skepticism of the doctrine of tribal sovereignty. The Court has paid lip service to its long-standing precedent that tribes are "a good deal more than 'private, voluntary organizations'"[4] and has repeated the maxim that, in fact, tribes are domestic dependent nations whose sovereignty has been diminished but never extinguished.[5] At the same time, the Court has diminished both the regulatory and adjudicatory authority of tribes, bit by bit. Even in the increasingly rare cases where tribal interests prevail, the concurring and dissenting opinions are ever more boldly dismissive of the doctrine of tribal sovereignty and hint at a willingness to abandon the long-standing doctrine altogether.

For example, several justices laid down markers in this debate in *United States v. Lara.*[6] Justice Clarence Thomas wrote, "The time has come to re-examine the premises and logic of our tribal sovereignty cases."[7] Justice Thomas concurred in the result upholding tribal jurisdiction as a matter of *stare decisis* but called "doubtful" the (precedential) assumptions that first, Congress has broad plenary power over sovereign tribes without that sovereignty being "a nullity," and second, that tribes retain inherent criminal jurisdiction over their own members.[8] The fundamental question of *Lara* was whether Congress could define the boundaries of tribal sovereignty by affirming the inherent power of tribes where the Court had found those powers to have been implicitly divested. But the very question presupposes the existence of a sovereignty that is less than absolute, as has always been the construction of tribal sovereignty in federal law. For Justice Thomas, a sovereignty that is less than absolute is null.

Justice Thomas cited *Black's Law Dictionary* for the proposition that sovereigns are those entities vested with "independent and supreme authority."[9] Through this limited lens, sovereignty is an all-or-nothing proposition. As a result, Justice Thomas looks askance at the tribal sovereignty doctrine: "The tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously."[10] The Thomas concurrence is but a recent salvo in the dialogue regarding the future of federal-tribal relations and how (and by whom) that trajectory will be determined. At issue is whether the United States "reflect[s] the formative ethos of legal pluralism that characterized early intergovernmental relations" with tribes or whether tribal identity is again threatened by the ascendancy of a "liberal democracy [that] situates the individual, not the group or the collective, as the bedrock moral unit of society."[11] Tribal

sovereignty skeptics cite the "ideology of legal centralism, and the overriding institutional supremacy of the nation-state"[12] as justification for minimizing the powers of tribal sovereigns and limiting those powers to internal self-government.

In the same case, Justice Anthony Kennedy similarly suggests that any inherent powers of tribes should be limited to the relations among its own members and suggests that recognizing a broader governing authority, especially over non-Indians, would raise constitutional concerns.[13] In the December 2015 oral argument of the *Dollar General* case regarding civil tort jurisdiction over non-Indians operating on trust land, Justice Kennedy challenged tribal courts as "nonconstitutional entities" and suggested that they might only have jurisdiction over non-Indians who expressly consent to such jurisdiction.[14] Advocates for the Mississippi Choctaw and the U.S. solicitor general repeatedly asserted that the claim to sovereign adjudicatory authority is not conditioned upon express consent, primarily because tribal courts are the instruments of tribal sovereigns rather than private dispute resolution entities like the American Arbitration Association.[15] While questions and hypotheticals asked during oral argument are certainly not authoritative, these exchanges appear to affirm a growing notion by some justices that tribes are analogous to private, voluntary organizations with power only over their own members or those who expressly consent.[16]

These and other examples forewarn of a potential willingness of the Court to break faith with the long-standing tribal sovereignty doctrine, not to mention its own clear precedent holding that tribes are sovereign in character. In *United States v. Mazurie*, the Court held that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory" and "a good deal more" than the private, voluntary organizations the U.S. Court of Appeals for the Tenth Circuit had found them to be.[17] It is difficult to overstate the magnitude of the departure from precedent that would be required for the Court to upend the doctrine of tribal sovereignty and power of governance, or to limit the powers of tribes to purely internal matters, like regulating membership, as do private, voluntary organizations.

The Roots and Branches of the Doctrine of Tribal Sovereignty

Federal Indian law draws upon a different conception of sovereignty than the narrow and tidy definition encapsulated in *Black's Law Dictionary* and embraced by Justice Thomas. Tribal sovereignty is not the all-or-nothing, supreme independence, on-off switch described by Justice Thomas. Rather, under federal law, tribal sovereignty is a power of governance over both people and territory. To be sure, the United States does not recognize tribes as sovereigns in the sense of international nation-states.

Instead, the doctrine of tribal sovereignty in federal law posits a legal pluralism that recognizes tribes as subordinate in certain ways to the superior sovereignty of the United States, but self-governing to a large extent. Certainly, the federal government, and in particular, the political branches, must work in concert with tribes as questions continue to arise as to what specific powers that sovereignty entails and over whom those powers may be exercised.

In that sense, tribal sovereignty in federal Indian law is more like a dimmer switch than the on-off switch conceptualized by Justice Thomas.[18] The doctrine of tribal sovereignty is best understood as encompassing a continuum of sovereign powers. A diminished sovereignty is not an extinguished sovereignty, nor does it render that sovereignty null.[19] The doctrine of tribal sovereignty underpins the right of self-government for tribes, a domestic authority within a tripartite federal system. The status of tribes as sovereigns possessed of governing power over people and territory is enshrined in the Constitution, treaties, statutes, executive orders, and Supreme Court decisions.

Tribes do not exercise the powers of self-government pursuant to a delegation from the United States. Rather, the United States recognizes and affirms, in law and policy, the *inherent* governing authority of tribes as stemming from an *aboriginal sovereignty* that has never been extinguished. Under federal law, tribes are quasi-sovereigns. The boundaries of tribal sovereignty are subject to revision by the dominant sovereign of the federal government. While *Lara* addressed the question of whether Congress was empowered to slide the dimmer switch of tribal sovereignty up or down, especially after the Supreme Court had extinguished tribal power, the Thomas concurrence questions the very nature and foundation of the doctrine of tribal sovereignty. To now suggest the doctrine is a nullity requires the abandonment not only of centuries of precedent, but of fundamental principles of the rule of law, under which the United States asserts authority and holds resources.

The issue is not one of mere semantics. How tribal sovereignty is defined, conceptualized, and justified has important consequences for the federal-tribal relationship, for tribal governments seeking to exercise governmental authority, and for individuals who come within the reach of tribes as sovereigns. The consequences are legal and moral, as well as domestic and international. For better or worse, the United States serves as a model for other nations in the field of indigenous relations. The will of the United States to respect tribal sovereignty and principles of self-determination, which are increasingly regarded as measures of respect for human rights, is amplified in law and policy around the world.

Tribal sovereignty is not a doctrine developed by tribes as a challenge to the sovereignty of the United States that must be quelled. Nor has the doctrine been imposed upon the United States against its laws and will. Rather, the recognition of tribal sovereignty by the United States is a product of the rule of law, by which the United States has claimed its power over the peoples and the territories of the nation. As did the European powers before them, the United States recognized the Indian tribes to be political sovereigns with whom they could treat. In fact, they needed it be so. As a matter of law and necessity, the tribes were recognized as capable of conveying title and negotiating peace, as well as governing people and territory.

Having reaped the benefit and attendant wealth of this legal framework that it embraced for its own ends and in its own interests, the United States should not abandon the rule of law when tribes assert the rights of sovereignty and self-government that have been critical elements of the legal relationship until now.

The doctrine of tribal sovereignty as a principle of federal law finds its roots deep in the legal soil predating America's founding.[20] From the first European contacts with the indigenous people of North America, there existed a tension between the inclination to see the indigenous inhabitations as less-than-human savages and the need for competent, even sovereign, partners with whom land cession and peace treaties could be negotiated. Early legal theorists on the subject found justification for forceful conquest and colonization in the natural law principle that "the West's religion, civilization, and knowledge are superior to the religions, civilizations, and knowledge of non-Western peoples."[21] As preeminent legal historian professor Robert Williams observed:

> Law … [was] the West's most vital and effective instrument of empire during its genocidal conquest and colonization of the non-Western peoples of the New World, the American Indians.[22]

The doctrine of discovery, rooted in natural law and papal edicts, provided the organizing legal principle for the European powers to lay claim to lands and resources in the New World, including the exclusive right to deal with its inhabitants. The British availed themselves of this doctrine to treat with the Indian tribes in forming military alliances, negotiating peace, and extinguishing aboriginal title to lands in North America. In *Johnson v. M'Intosh*, Chief Justice John Marshall was presented with the question of whether the United States would invoke the doctrine of discovery as security for the rights and interests in lands formerly held by the British. *Johnson* involved a dispute between non-Indian parties who both claimed to have acquired a deed from the Indian inhabitants. Marshall framed the inquiry as "the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country."[23] To answer the inquiry, Marshall relied firmly upon the foundation of the doctrine of discovery.[24]

The rights of Indians to occupancy of the lands was legally protected. The nations of Europe "asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives." In completing his embrace of the doctrine, Marshall did admit a legally cognizable interest of the native peoples in the land and in their own self-government, finding "a legal as well as just claim to retain possession of [land], and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished."[25]

Thus, from the beginning of the United States' legal relationship with the Indian tribes, there has been an acknowledgment of a vital sovereignty that, while diminished, endures. The *sine qua non* of that sovereignty, enshrined in and protected by federal law, is the power of self-government.

The Power of Self-Government

The right to self-determination and the power of self-government ought to provide the framework for the future of the doctrine of tribal sovereignty. The principles outlined and implemented by the United States with respect to tribal sovereignty will be cited and emulated, and thereby amplified, by other nations facing issues of indigenous rights. Federal law ought to embrace a principled approach to tribal sovereignty that encompasses the right to self-determination and the power of self-government.

The story of federal-tribal legal relations has been marked both by rank oppression and by considered accommodation and pluralism. The United States has demonstrated a will and a capacity to abandon policies found to be harmful to the survival of indigenous people and to respect the rights of identity and self-determination for indigenous people by staying its hand despite its overwhelming power. For at least 567 tribes, the determination to survive as peoples ultimately prevailed against the efforts to dismantle tribalism. While not autonomous, tribes are still nations with vital aspects of sovereignty. In determining the boundaries of that sovereignty as recognized by federal law, the United States ought to be guided by a renewed commitment to the ascendant principles of self-determination and self-government. The United States certainly ought not abandon the rules of law and the doctrine of tribal sovereignty that have animated and sustained the federal-tribal relationship.

The United States has pursued a policy of tribal self-determination since the 1970s. Because the evolving definition of the right to self-determination is as varied as the definition of sovereignty, the first step for the United States is to work in consultation with federally recognized Indian tribes to develop a meaningful and appropriate definition of self-determination in federal law. It is unlikely that either tribes or the federal government are seeking to terminate the federal-tribal relationship through secession or a wholesale reordering of the federal-tribal relationship, which some have included within a right to self-determination.

But it is possible that tribes may seek broader rights and opportunities under the heading of self-determination than are currently found in federal law. The Indian Self-Determination and Education Assistance Act implements the federal government's vision for enhanced tribal self-determination. Under the act, tribes are able to negotiate "self-determination contracts" for "the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to federal law."[26] This conception of self-determination is limited and limiting. Tribes are only eligible to manage programs and services already being provided. There is not a mechanism by which tribes may propose or seek funding for innovative programs and services as determined by the tribes themselves. The very limited scope of the available programs leaves to the United States the power to design and set funding levels for the management of tribal programs. Tribes and the United States may collaborate to develop a unique right to self-determination adapted to the federal-tribal relationship and benefiting the interests of all parties.

A broader understanding of and respect for the tribal power of self-government ought to guide the future of the doctrine of tribal sovereignty. This means the federal government ought to take a broader view of what constitutes internal relations or "intramural matters" in assessing the bounds of tribal sovereignty. Specifically, the powers of self-government ought to include power over cultural concerns and a respect for the capacity of tribes, as sovereigns, to exercise the responsibilities incumbent upon sovereigns, such as the regulatory and adjudicatory authority under assault by the courts.

The doctrine of tribal sovereignty ought not look to the literature of the right of association and assembly. While certain organizations have power over membership and constitutionally protected interests in association, tribes are not clubs. The Supreme Court ought to remain faithful to its finding in *Mazurie* that "tribes are a good deal more than private, voluntary organizations." The language and privileges of private, voluntary organizations are not parallels for the sovereign interests of tribes as articulated in the Constitution and as continuously identified in federal law. Courts looking askance at the doctrine of tribal sovereignty break faith with not only the word of the nation and its conviction to uphold the rule of law, but also with history and with emerging international legal human rights norms. Instead, the United States should stand at the forefront to continue to model the legal pluralism that respects interrelated and cooperative sovereigns.

The commitment of the United States to the rule of law, upon which the doctrine of tribal sovereignty rests, will be revealed in how the Supreme Court proceeds in choosing to abandon or uphold the

doctrine of tribal sovereignty, and whether Congress moves to protect tribes from the legal assault as befits the trust responsibility. ⊙

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Endnotes

[1]Christopher Densmore, Red Jacket: Iroquois Diplomat and Orator 91 (1999).
[2]*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
[3]*See, e.g.,* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Calif. L. Rev. 1573, 1576 (1996) (calling the Supreme Court's approach to Indian sovereignty a "rudderless exercise in judicial subjectivism").
[4]*United States v. Mazurie,* 419 U.S. 544, 557 (1975).
[5]*Oliphant,* 435 U.S. at 209 (citing *Johnson v. M'Intosh,* 21 U.S. 543, 574 (1823)).
[6]*United States v. Lara,* 541 U.S. 193 (2004).
[7]*Id.* at 214-15 (Thomas, J., concurring in the judgment).
[8]*Id.* at 215.
[9]*Id.*; *see also* David P. Weber, *United States v. Lara—Federal Powers Couched in Terms of Sovereignty and a Relaxation of Prior Restraints*, 83 N.D. L. Rev. 735, 756 (2007).
[10]*Lara*, 541 U.S. at 215.
[11]N. Bruce Duthu, Shadow Nations: Tribal Sovereignty and the Limits of Legal Pluralism1-3 (2013).
[12]*Id*. at 3.
[13]*Id.* at 211-12.
[14]Transcript of Oral Argument at 34, 42, *Dollar General Corp. v. Mississippi Band of Choctaw Indians,* 579 U.S. ____ (2016) (No. 131496), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1496_j4ek.pdf (last visited Jan. 13, 2017).
[15]*Id.* at 38-39, 46, 57.
[16]*Dollar General* resulted in a 4-4 tie at the Supreme Court, leaving the Fifth Circuit's holding in favor of the tribe undisturbed.
[17]In *Mazurie*, the Court examined whether Congress could delegate authority to tribes to regulate the distribution of alcoholic beverages in Indian country, including the covered actions of non-Indians. The circuit court had reasoned that Congress could not delegate this power over non-Indians to the tribes "an association of citizens" exercising "governmental authority or sovereignty over other citizens who do not belong … [to] the tribal organization." The tribes, the Tenth Circuit decided, were "in no way comparable to a city, county, or special district under state laws" and had only the authority "as landowners over individuals who are excluded as members." The circuit invalidated the delegation because "Congress cannot delegate its authority to a private, voluntary organization." *Mazurie,* 419 U.S. at 555-56.
[18]The imperfect metaphor begs the question of whose hand rests—or ought to rest—on the switch setting the "metes and bounds" of tribal sovereignty. As I have argued elsewhere, in my view, the courts are most decidedly the wrong branch to perform this function. Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. Colo. L. Rev. 759 (2014).
[19]Stephen D. Krasner, *Pervasive Not Perverse: Semi-Sovereigns as the Global Norm*, 30 Cornell Int'l L.J. 651, 652 (1997) ("[I]n some sense, almost all of the states of the world have been semi-sovereigns. Rarely have states enjoyed full autonomy. Any member state of the European Union is now a semi-sovereign, for the decisions of a supra-national judicial body, the European Court of Justice, have supremacy and direct effect.").
[20]Felix S. Cohen, Handbook of Federal Indian Law, 9-22 (Nell Newton, et al., eds., 2005); *see also* Robert A. Williams Jr., The American Indian in Western Legal Thought: The Discourses of Conquest (1990).
[21]Williams, *supra* note 20, at 6; Cohen, *supra* note 20, at 11 ("thirteenth century Pope Innocent IV, posited a papal right to authorize the use of force against non-Christian peoples when necessary to punish violations of a 'law of nature' derived from Christian doctrines.")
[22]Williams, *supra* note 20, at 6.
[23]*Johnson v. M'Intosh,* 21 U.S. 543, 572 (1823).
[24]*Id*. at 572-73.
[25]*Id.* at 574.
[26]25 U.S.C. § 450b(j).