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## Native Sovereignty: An Essential Element of Indigenous Nations

David E. Wilkins

*“Every time we carry an eagle feather, that’s sovereignty. Every time we pick berries, that’s sovereignty. Every time we dig roots, that’s sovereignty.” Billy Frank, Jr., Nisqually Nation*

The U.S. Supreme Court recently shifted judicial gears by reaffirming U.S. treaty obligations and Native sovereignty. What is Native sovereignty, why is it important, and how do Native Nations coexist with America’s federal system?

Recent studies by Paulette Steeves (Cree-Metis) and other scholars place Native peoples continuously in the Americas for at least 130,000 years. During those millennia, communities organized themselves in various ways, continuously exercising a set of powers we now call *sovereignty*.

Sharon O’Brien, in *American Indian Tribal Governments*, defines sovereignty as “the force that binds a community together and represents the will of a people to act together as a single entity. A sovereign community possesses certain rights, including the rights to structure its government as it desires, to conduct foreign relations and trade with other nations, to define its own membership, to make and enforce its own laws, and to regulate its resources and property.” Sovereignty is, therefore, essential to the very existence of Native nations.

Native peoples inhabit homelands that provide them a unique spiritual identity. They follow traditions, and many speak languages that distinguish them from other racial and ethnic groups. A majority operate under formal constitutions, some dating back to the early 1800s. They wield powers typical of any sovereign nation, such as deciding who can be admitted as a citizen or member and taxing their own citizens or non-Native businesses and individuals on Native lands. Most operate their own essential services such as schools, courts, utilities, law enforcement, and environmental protection.

The 574 formally acknowledged Native nations within the 48 contiguous states and Alaska are self-defining political, economic, legal, and cultural polities; yet the federal government insists that it has the authority to “recognize” some Native communities using criteria it devised for itself, thereby denying “recognition”

to numerous other Native communities for various reasons. Today, these 574 governments and their citizens, as validated by the federal government, receive certain benefits and services as recognized sovereigns, including authority to engage in government-to-government relations with federal, state, and local governments.

Like their federal and state counterparts, Native nations are not absolute sovereigns. As they all interact, the national, Tribal, state, and local governments must constantly navigate the political realities of competing jurisdictions, complicated local histories, circumscribed land bases, and overlapping citizenships. The sovereignty of each party is constrained by the sovereignty of the others. The relationship between Native nations and the federal and state governments is an ongoing contest over the parameters of their neighboring and overlapping jurisdictions. At stake are fundamental questions of identity, economic power, and self-government.

### MODERN ORIGINS OF THE CONCEPT OF SOVEREIGNTY

The Europeans’ invasions of North America, beginning in 1492, triggered an unprecedented period of violent confrontations and occasional cooperation between Indigenous nations and the various European and later Euro-American polities. During this chaotic time, three major principles emerged that would undergird federal policy and law vis-à-vis Native peoples. First, under the legal fiction called the “doctrine of discovery,” land was generally believed to ultimately belong to the United States, although Native nations were viewed as holding a lesser use and occupancy title. Second, Indigenous peoples were broadly viewed as culturally, technologically, and intellectually inferior to Euro-Americans. Third, despite their diminished land title and allegedly inferior status, Native nations were treated as nations with the capacity to negotiate diplomatic accords and conduct warfare.

The influence of these principles structured the language used by U.S. policymakers in describing the political status of Native nations, particularly in regard to nationhood and sovereignty. Nearly all colonial and early U.S. treaties negotiated with Indigenous nations called them nations. Treaty-making and recognition of Indigenous national status explicitly and implicitly

ly acknowledged the inherent sovereignty of Tribal nations as self-governing polities capable of diplomacy and war, even if the term “sovereignty” was used only sometimes.

European notions of sovereign authority were originally legitimated by God, but secular political theorists, beginning with Thomas Hobbes, achieved a broad cultural acceptance of a separation between church and state. Based on this principle, Hobbes devised a hypothetical civil covenant in which fear-driven individuals living “solitary, poor, nasty, brutish, and short” lives in a state of nature consented to a common government for purposes of safety and security not beholden to divine revelation. Although later theorists such as John Locke, Baron de Montesquieu, and Jean-Jacques Rousseau held different views of human nature, they, too, relied on Hobbes’ civil covenant framework. Governments, according to these theorists, are voluntary associations of free people willingly surrendering their right to unrestrained behavior to a governing superior in return for law, order, and basic rights protection.

## INDIGENOUS CONCEPTIONS OF INHERENT AUTHORITY

Within Native communities, there is no hypothetical civil covenant or social contract. Each society views self-government, self-determination, and self-education in ways that comport with their own origin accounts, lands, philosophies, norms, values, ceremonies, and languages. They are unique socio-cultural-political communities that, across thousands of generations, learned to organize, not just to survive physically but also to reach self-fulfillment and maturity.

Native peoples created and lived within cultural and political systems based on responsibility, clans, and kinship. As described by Native ethnologist Ella Deloria in *Speaking of Indians* (1998), “all peoples who live communally must first find some way to get along together harmoniously and with a measure of decency and order . . . And that way, by whatever rules and controls it is achieved, is, for any peoples, the scheme of life that works. The Dakota people of the past found a way: it was through kinship.” “One must,” said Deloria, “be a good relative.” Being a good relative, a good citizen of society, “was practically all the government there was. It was what men lived by.”

Kinship was intimately connected to the clan systems utilized by most Native societies. Clans linked Tribal citizens within nations but were also an important stabilizer in a broader philosophical-cultural context. A vast, inter-Tribal clan network established and maintained kinship ties that made it difficult for any single nation to break alliances or wield supreme and unaffiliated power. And just as there is little evidence for the existence of absolutely autonomous Native nations, there is no record or shared tradition of individual Native leaders exercising unchecked power over their fellow citizens. As Russel Barsh noted: “In the Indigenous North American context, a ‘leader’ is not a decision-maker, but a coordinator, peacemaker, teacher, example and comedian. . . to minimize differences of opinion, to remain above anger or jealousy, and to win respect and trust by helping his constituents through death, danger in hard times at his own risk and expense.”

## SOVEREIGNTY, THE U.S. CONSTITUTION, AND THE SUPREME COURT

Early colonizers learned that Indigenous peoples had their own ways of organizing and exercising their powers. Trade and treaty negotiations were grounded in this shared organizing principle. Thus, Native sovereignty is explicitly recognized in the U.S. Constitution as inherent to these nations and pre-dating colonial encroachment. The Constitution’s drafters, explicitly in the commerce clause (Art. I, Sec. 8, Para. 3) and by implication in the treaty clause (Art. II, Sec. 2, Para. 2), recognized Indigenous nations as polities distinct from the federal and state governments.

After half a century of little mention, federal recognition of Indigenous *sovereignty* was central to the landmark Supreme Court case, *Worcester v. Georgia* (1832), holding that “the Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial.” Even with this legal clarity, federal and state lawmakers continued their assault on Native sovereignty through the nineteenth century and beyond. Although Indigenous self-determination was occasionally acknowledged by federal lawmakers, it was not until the late 1950s that the Supreme Court rendered opinions that explicitly focused on Native sovereignty. For example, in *Williams v. Lee* (1959), the Court held that “in the absence of Congressional legislation, states may not extend their laws or exercise jurisdiction on a reservation if this would infringe upon the right of Indians to govern themselves.”

The Supreme Court’s view of Indigenous issues has varied greatly since John Marshall’s Court (1801-35). Recently, two important rulings affirmed the inherent sovereignty of Native nations: *McGirt v. Oklahoma* (2020) and *Haaland v. Brackeen* (2023). In *McGirt*, decided by a 5-4 majority, the Court held that the Muscogee Creek Nation’s three-million-acre reservation, established by a ratified treaty in 1832, and which includes much of the city of Tulsa, Oklahoma, is, in fact, still in existence. Because the reservation had never been formally disestablished by Congress, Justice Neil Gorsuch said that the Muscogee reservation constituted Indian Country. The specific question in *McGirt* was whether a state (i.e., Oklahoma) could prosecute and convict a member of the Seminole Tribe for crimes committed on the Muscogee Creek Nation’s historical lands. The Court said, “no”; instead, *McGirt* had to be tried in federal court.

*McGirt* upheld both the territorial and political sovereignty of the Creek Nation, affirmed the sanctity of treaties, reminded states that they lack jurisdictional authority inside Indian Country unless specifically authorized by Congress, and made plain that Native-reserved lands set aside by treaty, statute, or executive order are the permanent homes of Indigenous nations and cannot be terminated or diminished by states or any other entity save Congress.

*Brackeen* (2023) was another victory for Native sovereignty. In a 7-2 ruling, the Court upheld the constitutionality of the Indian Child Welfare Act, a 1978 law built upon the fundamental principle that Native nations exist as political sovereigns and that the

welfare of Native children belongs under the authority of Native families and Native governments. The act aimed to stop more than a century of Native children being forcibly removed from their communities and placed in non-Native schools and families.

These rulings from John Roberts' Supreme Court, which has generally not supported Native nations' inherent sovereignty, clearly upheld Native sovereignty over Native lands and peoples.

## CONTEMPORARY INDIGENOUS ASSERTIONS OF TRIBAL SOVEREIGNTY

Most of those familiar with the political, legal, and cultural dynamics of Native nations credit Vine Deloria, Jr.'s 1969 classic, *Custer Died for Your Sins*, as the first contemporary Indigenous publication to explicitly apply the sovereignty concept to Native nations. Trained in both law and theology, Deloria fully understood the doctrine's origins and the manner in which it had evolved across the world. Native nations, as self-governing and treaty-making polities, had historically exercised all the rights of sovereigns, although they had been unfairly denied some of their inherent political powers in the nineteenth and twentieth centuries. He vigorously noted that Native nations still had every right to wield their powers of internal and external governance.

Even as Deloria encouraged Native governments to exercise their core powers of self-definition and self-determination, he and others warned Indigenous peoples, and their leaders, about potential dangers. Some Natives might act as authoritarians, threatening the rights and liberties of their citizens and others on Native lands while hiding behind a cloak of sovereignty. There was also concern that the term might be twisted to simply mimic non-Native systems, rather than follow the distinctive cultural identities and values of particular Tribal nations. These commentators feared that sovereignty would become an empty theoretical word with no real-world applications. In 2021, Rashwet Shrinkhal observed that these concerns remain. For many Indigenous peoples, the traditional understanding of sovereignty is imbued with the stench of colonialism, and some have challenged its underlying assumptions: the principle one being that sovereignty resides in a position rather than in an entire people and the lands, languages, and cultures that distinguish them.

## THE HAWAIIAN DIFFERENCE

Kānaka Maoli (Hawaiian Natives), the Indigenous peoples in the State of Hawaii, continue to wield inherent cultural sovereignty. Their political and legal status is, however, substantially different from that of Alaska Natives and mainland Indigenous nations. While acknowledging Kānaka Maoli as "distinct and unique Indigenous peoples with a historical continuity to the original inhabitants," the United States has not formally "recognized" them as it has 574 Indigenous nations. Some Hawaiian Natives have organized to establish a constitutional government, but there are divisions within the community, as an increasing number of Kānaka Maoli reject what they deem to be the subservient position of the type of government-to-government

relationship that other Native nations have with the United States. Instead, they demand complete political independence.

## CONCLUSION

Although Native nations are sovereign, their interactions with the federal and state governments are an ongoing, awkward game, unilaterally refereed by the federal government, with little regard for the inherent rights of Native peoples--the original, more experienced players. The distinctive cultural, political, geographical, and legal status of Indigenous nations does not fit comfortably within the U.S. constitutional matrix and is set outside jurisdictional bounds by state constitutional documents. The question today is: what are or shall be the legitimate foundations of that sovereignty, and how is this understood and acted upon by Native citizens and their governments, and in their intergovernmental relations with the political entities that have only recently established themselves on Indigenous lands?

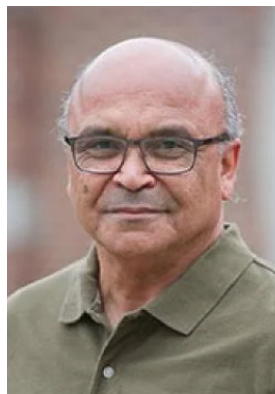
The concept of Indigenous sovereignty is arguably the most important, unifying concept across Indian Country. More than political boundaries, it defines nothing less than the living, collective power that is generated as traditions are respectfully developed, sustained and transformed to confront new conditions. Native governments, like states and the federal government, are abstractions, and it is the people, acting from a foundation of cultural integrity and community discipline, who generate and exercise true sovereignty. Tribal sovereignty is nothing less than the expressed living power of Native nations.

## CLASSROOM QUESTIONS

- How does Native sovereignty compare/contrast with Western understandings of the term?
- How and why has Native sovereignty been constrained by the federal and state governments?
- How can Native sovereignty be enhanced as a force for positive social, economic, political, and cultural change for Indigenous peoples, and can this occur in a way that does not arouse the antipathy of non-Native individuals and governments?
- What kinds of knowledge, pedagogy, and capabilities are required of teachers—at all levels—to ensure continuation of the inherent sovereignty of Native nations?

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## ABOUT THE AUTHOR



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