

APPENDIX B

UNDERSTANDING THE POLITICAL SOVEREIGNTY OF AMERICAN INDIAN NATIONS

Native American tribes and tribal members, including members of the five tribes of Utah, possess political sovereignty. Each tribe and tribal member has particular burdens, rights, and responsibilities that differ from those of non-tribal members. Tribes have an inherent and inalienable right to self-government and to define their own tribal membership. Tribal governments have the ability to create and enforce laws and to govern all resources in tribal possession, including, for example, land and water holdings that are essential to tribal survival.

The political relationship among tribes and between individual tribes, the federal government, and the state governments has an evolving and complicated history, one which is riddled with contradictory evidence that makes a normative, unified narrative problematic. Furthermore, for each distinct tribe, that history can be just as varied and unique as the history of sovereign relations between the United States and different foreign nations. Because of the numerous contradictions and variations, sovereign relations between a tribe and the United States, or individual states like Utah, are best understood by analyzing the specific historical developments between the parties in question. However, the brief overview that follows provides an historical introduction to the evolving legal framework of political sovereignty for those exploring this critical aspect of United States and American Indian relations for the first time. While this overview concentrates on legal history, it is essential to remember that the actions of individuals and groups, not the abstractions of the law, often played the determinative role in the development of tribal-state relations.

Native American political sovereignty existed long before the establishment of the United States in 1776. In the period of *tribal independence* before Europeans, Africans, and Asians arrived on the American continents, Native Americans governed themselves with no

interference from the outside world. For some tribes this period of independence extended in modified form into the colonial era. From 1492 to 1787, many Indian nations independently controlled their own territory and exercised forms of self-government. Yet, during this same period, as European colonists began to settle in the Americas and extract resources from the land, Indian communities at different times transitioned into an era in which the relationship between individual tribes and colonial government was best characterized as *agreements between equals*. In some places during this period native governments were somewhat more powerful than settler governments, in others the opposite occurred, and in yet others power was equal. But overall, prior to the American Revolution individual native nations and the foreign states that represented the colonists settled disputes as equals through negotiation and the ratification of treaties and other official agreements.

The American victory in the American Revolution meant that some eastern tribes lost a powerful ally in the British. However, at least initially, the American government did not treat Native Americans as a conquered people. The Northwest Ordinance of 1787, which created the Northwest Territory in the area that is now Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota, pronounced: “The utmost good faith shall always be observed towards Indians. Their land shall not be taken from them without their consent.” The U.S. Constitution, adopted in just two months after the passage of the Northwest Ordinance, outlined the abilities of the three branches of government to deal with Native American communities in two separate articles. Article I, section II specified that untaxed Native Americans were excluded from the population count that determined each state’s share of direct taxes and number of delegates in the House of Representatives. The third clause of Article I, section VIII, known as the

Commerce Clause, empowered Congress “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” This clause, in particular, suggests that the American founders viewed Indian tribes as sovereign governments.

Starting in the 1800s, America’s westward growth increasingly threatened the sovereignty of American Indian communities. During the *removal and relocation era*, from 1828 to 1887, a series of laws and rulings from the U.S. Supreme Court helped define the American government’s evolving approach to dealing with the sovereignty of independent Indian nations. Known as the Marshall trilogy after John Marshall, the justice presiding over the Supreme Court at the time and the author of the majority opinions, these three cases are now understood as the backbone of American Indian law in the United States. *Johnson v. M’Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia* all acknowledged the sovereignty of tribal nations and began to shape the legal limits from the American judiciary’s perspective of tribal independence. The first case, *Johnson v. M’Intosh* (1823), held that only the United States government could enter into land sales with American Indians. This ruling was a major step in the U.S. government’s effort to control interactions with American Indians because it stated that states and individuals were not allowed to enter into property sales with native nations. The case recognized aboriginal right of occupancy to lands and decreed that only the federal government can preempt such right. While *Johnson v. M’Intosh* could be understood as providing some legal protection to tribes, that protection relied upon the willingness of powerful individuals and groups to abide by the rule of law. When it came to American Indian sovereignty, that willingness time and again proved elusive.

In 1830 president Andrew Jackson signed into law the Indian Removal Act, in order to legitimize the taking of lands from many southeastern tribes. The act specifically sought to remove the people of the Cherokee nation from their historic homelands in the Southeast to areas west of the Mississippi River. To prevent the implementation of this unjust policy, the Cherokee nation sought recourse through the

United States legal system, which in turn led to *Cherokee Nation v. Georgia* (1831). The Court ruled that the United States held no jurisdiction in a case between the state of Georgia and the Cherokee nation. Additionally, the Court expanded the ruling of *Johnson v. M’Intosh* by asserting that American Indians tribes were “domestic dependent nations” separate from state entities. Based upon the Articles of Confederation, the court reasoned that American Indian tribes were both “domestic,” because they were aboriginal to lands that the United States claimed to own, and “sovereign,” because they comprised separate and legitimate nations independent to the U.S. Constitution. Marshall did not advocate for the removal of Indians but rather felt it was an unjust act. However, because of the Cherokees’ sovereign nation status, Marshall believed the Supreme Court was not the appropriate venue for adjudicating the issue.

The final case in the Marshall trilogy, *Worcester v. Georgia* (1832) expanded the rights of American Indians nations in the courts of the United States by arguing that states have little to no authority to pass laws concerning American Indian tribes. The court ruled that the Cherokees were a distinct community upon which the laws of Georgia “can have no force.” Once again the record of legal opinions does not tell the full story of Worcester’s influence on how the U.S. grappled with native sovereignty issues. Both the executive and legislative branches responded with hostility to Worcester and continued advocating the removal of the Cherokees from their national homelands. President Andrew Jackson and the State of Georgia blatantly disregarded both the ruling of Supreme Court and the will of the Cherokee nation, and they forced the Cherokees on an exodus from Cherokee lands to what is now Oklahoma. Along with the president’s decision to ignore the Supreme Court, the strength of the U.S. military played an instrumental role in the removal of the Cherokees. Indeed, American military power became a primary tool in the federal government’s campaign to force Indian nations from their national homelands to distant areas, in order to create space for non-native settlers. Closer to Utah, the Navajo people, to name just one such instance, were sent on a brutal forced

march from their homelands into New Mexico (see “The Long Walk and the Escape to Utah” lesson).

While individuals like Jackson did enormous harm to native people by ignoring the law, the effect of the Marshall cases on American Indian sovereignty has been far reaching. For instance, in the twentieth century both the *reserved rights doctrine* and the *canons of interpretation* emerged from the Marshall cases as key judicial methods for adjudicating the relationship between the United States government and native nations. The reserved rights doctrine contends that a tribe only gives up the rights explicitly stated in a said agreement, while preserving all pre-established rights not detailed in the wording of the agreement. The canons of interpretation for Indian law, in simple terms, demand interpretation of a treaty based on the conditions under which the tribe would have reasonably signed it reflecting their own best interests.

At the end of the nineteenth century, during the era of *allotment and assimilation*, a set of destructive practices were formalized and extended, and these policies had a profound effect on the changing relationship between the federal government, state governments, and sovereign tribal nations. Allotment and assimilation policies attempted to break American Indians away from their native identities and move them toward membership in dominant white society. Native children, for example, were removed from their families and communities and placed in boarding schools. The explicit mission of these institutions was to sever student’s ties to their indigenous communities by indoctrinating them in the ways of white society. Similarly, the Dawes Act of 1887 enabled the United States to open sovereignly held Indian lands to non-Indian settlers, a gross violation of previous trust relations between the United States and native nations and also reflective of the effort to erase individual tribal identity. The Dawes Act parceled acreage to individual tribal members based upon the individual’s degree of indigenous heritage, with the intention of dividing tribal communities into individual farmsteads. Tribal members with higher degrees of aboriginal ancestry were allotted larger tracts of

land; however, the federal government chose to hold in trust the land allotted to tribal members with complete aboriginal heritage for a period of twenty-five years. This left many tribal members unable to use the land even if it was their wish to do so. Even more damaging, tribal lands not allocated to tribal members became available to non-Indian settlers. Connected to the Dawes Act is one important Supreme Court case that indicated the U.S. government’s penchant during this era for attempting to erode native sovereignty. In 1903, *Lone Wolf v. Hitchcock* held that “plenary power” of the United States Congress could abrogate treaty obligations between the United States and American Indian tribal nations, including the modification of American Indian land holdings. Lasting until the early 1920s, the assimilation and allotment era whittled away Indians’ land bases and proved devastating to the sovereignty of Indian nations and the related ability of Indian communities to sustain themselves and the ties between land, language preservation, and cultural continuity.

During the *Indian Reorganization* era, from 1934 to 1953, the federal government attempted to repair some of the damage caused by allotment and assimilation policies. The Wheeler-Howard Act, signed on June 18, 1934, became known as the Indian Reorganization Act (IRA). It was intended “To rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.” In other words, the federal government acknowledged and attempted to amend the damage caused by previous policies and actions. The act secured the rights of American Indians and Alaska Natives to self-government and to gain and manage tribal assets. It also prohibited further allotment of tribal land to tribal members and reclaimed land for landless tribes, partially restoring tribal land holdings by adding two million acres. Although not all tribes adopted IRA provisions, overall this period saw native sovereignty bolstered considerably.

After World War II, the federal government once again shifted Indian policy dramatically. During the termination and relocation era, which stretched from 1953 to 1968, Congress abandoned the goals

of the IRA. In August 1953 Congress adopted House Concurrent Resolution 108, which mandated that the U.S. government should abolish federal supervision of Indian tribes. This new policy came to be known as termination, and it essentially meant the termination of federal benefits and services based on long-held agreements with certain tribes. Over one hundred tribes had services cut and land stripped away. Congress then passed Public Law 83-280, which passed some tribal responsibilities from the federal government to the individual states—the traditional adversaries of the tribes. Also at this time a relocation program began that moved American Indians away from strong native communities into urban areas without large native communities.

The devastating effects of termination prompted enormous activism on the part of native people and, subsequently, a new period for American Indian relations, the *self-determination* era, which extended from 1968 to 1977. In 1968 Congress prohibited states from acquiring any jurisdiction over Indian reservations without the consent of the affected tribe. In 1970, President Nixon denounced the termination era, decreeing, “This then must be the goal of any new national policy toward the Indian people to strengthen the Indian sense of autonomy without threatening the sense on community.” In 1974 two acts—the Indian Finances Act and the Native American Programs Act—enabled tribes to develop more effectively their internal resources. In addition, in 1974 the Supreme Court ruled in *Morton v. Mancari* that hiring preferences in the federal agency of the Bureau of Indian Affairs (BIA) for tribal members did not violate the Fifth Amendment. The court found that hiring preferences for tribal members at the BIA was not based on racial bias but rather offered a way to better serve tribal members in their own self-governance. Among the other important legal decisions in regard to sovereignty in this more recent period was *Oliphant v. Suquamish Indian Tribe* (1978), a Supreme Court case that held that tribal courts do not have limited jurisdiction over non-Indians, especially in criminal cases.

In the 1970s and the early 1980s, then, a series of Supreme Court cases and government actions emphasized “Indian sovereignty” and the inherent power of the tribes to assert their economic, political, and cultural authority in appropriate areas. In 1982, the establishment of a United Nations working group to monitor the interactions between various state and indigenous nations added further support to restoration of native sovereignty. And in 1989, the Senate announced a new era of agreements with Indian tribes. But while concrete steps to support native sovereignty partly defined this era, a more thorough analysis affirms that the complexities and contradictions continue to plague the U.S. government’s approach to the question of sovereignty.

American Indian sovereignty, it must be emphasized, exists on its own accord, independently from state and federal governments of the United States. Each tribe expresses sovereignty uniquely in ways that benefit the individual tribe. In this sense, the five tribes local to Utah are distinct in regard to their political organization. The seven lesson plans that comprise the high school curriculum materials all explore the particular histories of sovereignty of Utah’s five tribal nations and their continued struggle to protect their rights. The fourth and seventh grade lesson plans, focused on the themes of culture and ingenuity respectively, also provide a useful context for understanding the roots of tribal independence.

