

Erosion of Tribal Sovereignty by the U.S. Supreme Court under Justice Rehnquist (1986-2001) Creating Chaos



Sovereignty is a word used frequently in reference to tribes. At its most basic, the term refers to the inherent right or power to govern. Sovereignty is organic rather than administrative. The U.S. Supreme Court under Justice Rehnquist from 1986-2001 eroded tribal sovereignty and the jurisdictional reach of tribes. This is continuing through the present.

At the time of the European discovery of America, the tribes were sovereign by nature and necessity; they conducted their own affairs and depended upon no outside source of power to legitimize their acts of government. By treating with tribes as foreign nations and by leaving them to regulate their own internal affairs, the colonial powers and later the federal government recognized the sovereign status of the tribes.

One consequence of the view of tribes as sovereign is that when a dispute arises over the exercise of tribal powers of self- government, the decision maker must begin with the assumption that the power exists. A tribe is its

own source of power. Thus a tribe's right to establish a court or levy a tax is not subject to attack on the ground that Congress has not authorized the tribe to take these actions; the tribe is sovereign and needs no authority from the federal government.

The relevant inquiry is whether any limitation exists to prevent the tribe from acting, not whether any authority exists to permit the tribe to act. As a sovereign, a tribe is free to act unless some federal action has affirmatively modified that sovereignty. Two additional consequences have followed from the fact that tribal powers are inherent and not derived from the federal government. The provisions of the Bill of Rights that restrict the federal government have been held not to apply to the tribes. Nor does it violate the U.S. Constitution's Fifth Amendment provisions against double jeopardy for the tribe and the federal government to prosecute a defendant for the same offense.

Indian tribal sovereignty remains a doctrine of considerable vitality because of its internal significance for tribal governments and the resulting external consequences for the states and for non-Indian individuals and corporations within Indian Country. The law since the early days of the nation up through several major U.S. Supreme Court decisions of the modern era has been that the self-governing powers of tribes survive to the extent the federal government has not abolished them.

The Supreme Court under Justice Rehnquist eroded tribal sovereignty and the jurisdictional reach of tribes.

This occurred in the areas of criminal jurisdiction, state taxation of non-Indians and non-member Indians in Indian country, recognizing state zoning regulatory authority on fee lands within the exterior boundaries of reservations, etc. Tribal jurisdiction over non-Indians under the Montana test (as refined in subsequent cases) is limited to instances of (1) "qualifying" consensual relationships, with a commensurate nexus between the tribal regulation and the conduct sought to be regulated or (2) where the conduct threatens or has some direct effect on the tribe's political integrity, economic security or health or welfare.

Justice Rehnquist's view of Indian tribes is best shown in his chosen characterization of Indians in his dissent in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 437 (1980).

Another history highlights the cultural differences which made conflict and brutal warfare inevitable:

"The Plains Indians seldom practiced agriculture or other primitive arts, but they were fine physical specimens· and in warfare, once they had learned the use of the rifle, were much more formidable than the Eastern tribes who had slowly yielded to the white man. Tribe warred with tribe, and a highly developed sign language was the only means of inter-tribal communication. The effective unit was the band or village of a few hundred souls, which might be seen In the course of its wanderings encamped by a water·course with tipis erected; or pouring over the plain, women and children leading dogs and packhorses with their trailing travois, while gaily dressed braves loped ahead on horseback. They lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get

That there was tragedy, deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied. But in a court opinion, as a historical and not a legal matter, both settler and Indian are entitled to the benefit of the Biblical adjuration: "Judge not, that ye be not judged." *Id.* at 437

As stated by David H. Getches in "Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values," 86 *Minn. L. Rev.* 267, 360-361 (2001),

"The Rehnquist Court has shown that it does not view tribal sovereignty either in a historical context--as part of the arrangements a superior power made with indigenous sovereigns to secure peace and access to most of the land on the continent--or as an instrument to achieve current Indian policy goals of economic and political independence set by Congress."

Also, "The Justices must also understand that their recent decisions have begun to dismantle Indian policy, and that this inevitably will cause confusion among state, local, and tribal governments, heighten tensions among Indians and their non-Indian neighbors, undermine reservation economic development efforts, and frustrate lower federal and state courts." Id. at 360.

During its fifteen terms (1986-2001), the Rehnquist Court decided forty Indian law cases; of those decisions, tribal interests have won nine cases, or 22.5% of the total. In its seventeen terms (1969-1986), the Burger Court decided sixty-seven Indian cases; tribal interests prevailed in thirty-nine cases, or 58% of the total. These figures represent decisions on the merits with a written decision. See David H. Getches, "Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values," 86 Minn. L. Rev. 26(2001).

The cases in which Justice Rehnquist has written the majority or plurality opinion are:

Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976) (cigarette tax on non-Indians upheld vendor license tax and personal property taxes on Reservation invalid).

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (Indians did not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress).

Nevada v. United States, 463 U.S. 110 (1983) (Orr Ditch res judicata.)

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) (State may zone open areas of fee land on Reservation, but not closed predominantly tribal area.)

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) (Cigarette tax only applicable in Indian Country to non-Indian and non-member sales.)

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (No to Navajo Nation hotel occupancy tax on trading post hotel owned by non-Indian on

fee land with incidence of tax on hotel consumer; no consensual relationship or imperiling of tribal political integrity (Montana straight up analysis.))

See also:

The Supreme Court and Federal Indian Policy, Matthew L. M. Fletcher, 85 Neb. L. Rev. 121 (2006)

Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America (Indigenous Americas) by Robert A. Williams, Jr., takes an even harsher stance. Williams is a professor of law and American Indian studies at the James E. Rogers College of Law, University of Arizona. A member of the Lumbee Indian Tribe, he is author of *The American Indian in Western Legal Thought: The Discourses of Conquest* and coauthor of *Federal Indian Law*.

Worthen, Kevin J., "Who's in Charge Here? Tribal, State, and Federal Authority over Non-Indian Resource Development in Indian Country," RMMLF, Vol. 47, p. 2-1 (2001).