

American Indians and Federalism

- **Vocabulary for this article:**
 - **Sovereignty**: a self-governing state.
 - **Plenary Power**: In United States constitutional law, plenary power is a power that has been granted to a body or person in absolute terms, with no review of or limitations upon the exercise of that power.
 - Underlined sections of this article identify information that will be on the unit test.
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- (1) A common definition of federalism...is the division of power between the national and state governments. This system, developed as a compromise during the Constitutional Convention, created a strong central government without stripping states of their inherent sovereignty. When created, however, the Constitution was largely silent with regard to a third set of sovereign governments operating within what would be called the United States—American Indian nations... Relations among First Nations, the federal government, and the states have been something of a shifting target, and the deep legal historical roots that have continually changed, and are still changing, have made it extremely difficult to properly place Indian nations within the federal system of government. For instance, the federal government has recognized tribes as international sovereigns, domestic dependent nations, wards that require protection, and quasi-sovereign governments. Thus federal policies have fluctuated from treating native nations as separate political entities with a status requiring treaties, to an attempt to assimilate native people into the general society by refusing to recognize sovereignty at all.
- (2) Lost in the vacillation is the idea that First Nations and their relations to other governments within the federal system are unique in that their position relative to both the states and the federal government is not derived from the Constitution; rather, tribal governments derive their powers from an inherent right of self-government. This inherent right and the unique relationship of the tribal governments to the federal government have created special problems in trying to define the role of tribal governments in the federal system. For instance, local governments, through Dillon's Rule, are creatures of the state and derive their power from the state. Therefore, the place of local governments is outlined. The states, like tribal governments, are in a perpetual process of defining their relationship with the federal government over state sovereignty and federal supremacy. However, the U.S. Constitution clearly establishes

the supremacy of federal law through the Supremacy Clause and provides for a much clearer resolution of conflicts between state and federal government. Rules exist that were developed by the judicial system, which determine when state powers are preempted. In this sense, the place of states is somewhat settled—they are sovereign, but their laws can be preempted by the national government...There has been no Dillon's Rule or consistently applied constitutional clause to clarify the position of tribal governments within the federal system as there has been for the states and local governments....

EARLY PERIOD of Federalism and Native Peoples

- (3) Prior to independence and the founding of the United States under the Articles of Confederation, foreign nations such as Spain, France, and England dealt with Indian nations as international sovereigns and more than 500 treaties were signed between these European powers and the various tribal governments in North America...The fact that these superpowers would negotiate an agreement is evidence that tribes were viewed as independent governments.
- (4) After the war for independence, the newly established U.S. government continued to follow the lead of its colonial predecessors by dealing with tribes via treaties rather than through conquest. The exclusive relationship between the federal government and the various tribal nations was reinforced through several acts of Congress, including the Northwest Ordinance of 1787 and the Trade and Intercourse Act of 1790. The Northwest Ordinance basically provided that Indian land would not be taken and that Indian rights and liberties would always be protected and preserved. The Trade and Intercourse Act dictated that Indian land could not be purchased by states or individual citizens—that only the federal government could enter into agreements to purchase land from tribal nations. Thus we see early on that tribal nations were viewed to be at least on an equal level to states, if not provided an elevated status via the treaty-making process that was normally reserved for foreign governments.
- (5) From the mid-1820's through the early part of the twentieth century, perceptions of Indians and the status of tribal nations within our system of federalism would be dramatically changed. Rather than continue to view these unique enclaves as foreign

states, moves were made by the U.S. Supreme Court and Congress to move tribal governments to a less prominent position relative to the national government...

- (6) Despite laws designed to protect Indians from white encroachment..the United States was rapidly growing and citizens often looked toward Indian lands as a way to ease migration and settlement. Both Congress and the Supreme Court responded through laws and rulings that shifted the position of Indian nations from that of foreign states to domestic dependent nations that were subject to the plenary power of Congress. Johnson v. McIntosh (1823), Cherokee Nation v. Georgia (1831), and Worcester v. Georgia (1832)...began to change the position of tribal governments within the American system...In Johnson, the Court ruled that tribal nations did not own the land on which they resided but were, instead, more like tenants with a right to occupy land owned by the United States. In Cherokee Nation v. Georgia, the Court went further by noting that while the tribal nations enjoyed the right to occupy land...they could not be accurately defined as foreign nations. Instead, the Court explicitly stated that tribal governments were “domestic dependent nations” and that the relationship between the United States and tribal nations was that of “a ward to its guardian.” In other words, the Court ruled that tribal sovereignty was secondary to the power of the United States...While sovereignty relative to the federal government was diminished in both Johnson and Cherokee Nation v. Georgia, the placement of tribal governments relative to state governments was established in Worcester. Here the Court established that state law has no force within Indian borders and that all interactions with tribes are “vested in the government of the United States.”
- (7) ...Congress also acted to change the relationship of tribal governments in relation to the United States from that of foreign states to domestic dependent nations. In the Indian Appropriations Act of 1871, a rider was attached that prohibited further treaty making between the U.S. government and tribal governments...a clear sign that the relationship was changing and that the placement of first nations within the federal system was changing too. This became evident with the passage of the...Dawes Act. This act opened up Indian land for white settlement under the guise of guardianship. White philanthropists believed that assimilation into general society was in the best interest of Indians and that breaking up tribal lands would be the quickest way in achieving this. In the words of Theodore Roosevelt, the Dawes Act was a “mighty pulverizing engine to break up the tribal mass.”...

- (8) In Lone Wolf v. Hitchcock (1903), the virtually unquestioned power of Congress over the tribes was upheld by the Court. In this ruling, the Court was asked to determine whether Congress was acting in the best interest of the tribes and whether tribal leaders had been deceived in the process leading up to...the Dawes Act. In ruling, the Court essentially stated that dealings with the tribes were the power of Congress and Congress alone, and that political questions were beyond the scope of the Court's power.
- (9) Together, the three doctrines—treaties, the trust relationship, and plenary power—established that Indian tribes, although their inherent internal powers were diminished over reservation territory and affairs, still retained some degree of internal sovereignty...

MODERN ERA

- (10) The 1960's witnessed a cultural awakening in which the plight of many oppressed people was brought to the attention of the general public...The major shift in the position of First Nations within the U.S. system of federalism, however, came under President Richard Nixon. Nixon put forth two separate policies that would eventually place greater emphasis on tribal authority, autonomy, and inherent sovereignty that had been slowly eroded over time....

New Federalism and Self-determination

- (11) ...Contemporary Indian policy and relations are predicated on the philosophical foundation laid by (President) Nixon. On January 4, 1975, Congress implemented the Indian Self-determination and Education Assistance Act of 1975, which permits tribes to assume control and operation of many federal programs on Indian reservations. The act gives express authority to the secretaries of interior and health and human services to contract with, and make grants to, Indian tribes and other Indian organizations for the delivery of federal services...Tribal programs are funded by the federal government, but the programs shall be controlled and operated by the tribes themselves. The Indian Financing Act, also passed in 1974, provided grants and loans to help Native Americans utilize and manage their own financial resources for reservation development. Cultural

integrity was taken into consideration with the passage of the Indian Religious Freedom Act of 1978.

- (12) Beginning in the early 1980's, Indian policy, and therefore the placement of tribal nations within the federal system, began to shift once again. A number of legislative acts, such as the Tribal Self-government Act of 1988 and the Indian Tribal Economic Development and Contract Encouragement Act of 2000, appeared to have been pushing the era of self-determination to new heights and were aimed at an era of true self-government...Actions impacting indigenous people would require consultation. At the same time, however, other congressional actions and court rulings were inconsistent with the idea of self-governance and actually took away tribal authority—especially relative to state governments. For example, the Indian Gaming Regulatory Act (IGRA) of 1988 allowed for casino-type gaming operations on tribal lands after the signing of a gaming compact with the state. Tribal governments were allowed the flexibility to operate casinos if they wanted, but only if they could convince the state to negotiate a compact—a stark departure from the traditional separation of tribes and states established under *Worcester* in 1832. While one provision of the IGRA allowed tribes to sue states that failed to negotiate in good faith, this provision was ruled unconstitutional by the Supreme Court in *Seminole Tribe of Florida v. Florida* (1996). Thus tribes were left at the mercy of state governments if they wanted to engage in gaming on their own land. Other rulings have tended to support state sovereignty over tribal sovereignty when the two have been at odds...
- (13) Thus, the uncertainty that has historically defined the position of First Nations within the broader American federal system remains. Decades of progress can be suddenly changed, depending on the political climate. One recent example, as of 2018, was the conflict over the Dakota Access and Keystone XL oil pipelines. Since 2000, Tribal nations were consulted prior to any major activities which would impact them. Grassroots protests and the consultation process resulted in both controversial projects being halted by President Barack Obama. However, On January 24, 2017, President Donald Trump issued executive orders reinstating the projects after only four days in office – with no consultation with Tribal nations. Such has been the history of federal Indian policy – ever shifting with no solid foundation for predictability.

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Last updated: December 2017