



The Right of Indigneous Peoples in the United States

Lesson Plan:
What does Sovereignty
Look Like?

Grade Level: 9-12



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Lesson Plan: What does Sovereignty Look Like?



Goal: To understand tribal sovereignty and violations of the right to self-determination for indigenous peoples in the United States.

Time Frame: 3-4 class periods

Age Level: 9th grade - Adult

Objectives:

- Students will understand the meaning of sovereignty in general and the powers of a sovereign nation.
- Students will compare the sovereignty of the United States to the sovereignty of Native American nations.
- Students will propose changes in U.S. policy to better recognize indigenous sovereignty.

Essential Question: What do we mean when we say tribes have sovereignty?

Resources:

- *Handout: The Rights of Indigenous Peoples in the U.S.* fact sheet - download at www.discoverhumanrights.org/toolkits.html
- *Handout: The Right to Self-Determination in the UN Declaration on the Rights of Indigenous Peoples*
- *Handout: From Marshall to Marshall*
- Chalkboard/whiteboard/flip chart and chalk/markers
- Access to the internet

Social Studies and Language Arts Standards: This lesson plan meets the Minnesota State Standards for grades 9-12 in Social Studies and Language Arts.

Social Studies

- **Citizenship and Government, 9.1.2.2:** The United States is based on democratic values and principles that include liberty, individual rights, justice, equality, the rule of law, limited government, common good, popular sovereignty, majority rule and minority rights.
- **Citizenship and Government, 9.1.3.5:** Citizenship and its rights and duties are established by law.
- **Citizenship and Government, 9.1.3.10:** The United States establishes and maintains relationships and interacts with indigenous nations and other sovereign nations, and plays a key role in world affairs.
- **Government and Citizenship, 9.1.5.12:** Governments are based on different political philosophies and purposes; governments establish and maintain relationships with varied types of other governments.
- **Geography, 9.3.2.3:** 3. Places have physical characteristics (such as climate, topography and vegetation) and human characteristics (such as culture, population, political and economic systems).
- **Geography, 9.3.3.8:** Processes of cooperation and conflict among people influence the division and control of the earth's surface..
- **History, 9.4.4.15:** North America was populated by indigenous nations that had developed a wide range of social structures, political systems and economic activities, and whose expansive trade networks extended across the continent..

- **History, 9.4.4.16:** Rivalries among European nations and their search for new opportunities fueled expanding global trade networks and, in North America, colonization and settlement and the exploitation of indigenous peoples and lands; colonial development evoked varied responses by indigenous nations, and produced regional societies and economies that included imported slave labor and distinct forms of local government.
- **History, 9.4.4.19:** Regional tensions around economic development, slavery, territorial expansion and governance resulted in a civil war and a period of Reconstruction that led to the abolition of slavery, a more powerful federal government, a renewed push into indigenous nations' territory and continuing conflict over racial relations.

Language Arts

- **Writing, 11.7.1.1:** Write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence.
- **Writing, 11.7.3.3:** Produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience.
- **Writing, 11.7.7.7:** Conduct short as well as more sustained research projects to answer a question (including a self-generated question) or solve a problem; narrow or broaden the inquiry when appropriate; synthesize multiple sources on the subject, demonstrating understanding of the subject under investigation.



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Procedure:

Activity 1: The Powers of Sovereign Nations

In this activity, students will brainstorm some powers that the United States has because it is a sovereign state.

1. **Explain.** Tell students that the United States is a sovereign country. Ask them to define what “sovereign” means in this context. Possible answers include that the U.S. governs itself, is not under the control of another country, etc.
2. **Brainstorm.** Have students name some powers the United States has as a result of its sovereignty, and write them out on a whiteboard or chalkboard. Possible answers include the right to make and enforce laws, to decide who is allowed to enter the U.S., to make treaties with other countries, and more.

Note: If students do not arrive at the ability to make its own laws and enforce them, bring this up as an important power of sovereignty - as well as the associated right not to be governed by anyone else’s laws. Also explain that in international law, rights related to sovereignty are often described in terms of the **“right to self-determination,”** or in other words, the right of a nation or people to determine its own form of government without influence from the outside.

Activity 2: The Sovereignty of U.S. First Nations

In this activity, students will explore the rights to self-determination that Indigenous nations in the U.S. possess.

1. **Read.** Hand out and read to the students, or write on the whiteboard, some of the articles in the *Handout: The Right to Self-Determination in the UN Declaration on the Rights of Indigenous Peoples* provided in this lesson plan. Explain that these are articles of international law pertinent to the legal sovereignty or self-determination of indigenous peoples. Tell the students that they will be reading about the sovereignty of indigenous peoples in the United States. Hand out copies of the *Rights of Indigenous Peoples in the U.S.* fact sheet available at www.discoverhumanrights.org/toolkits.html and the *Handout: From Marshall to Marshall* in this packet. Have students read them individually or in groups (this can also be given as homework). Assign students to choose one or two issues related to the right to self-determination that U.S. law appears to violate.
2. **Discuss.** After reading the handouts, discuss the following questions as group:
 - If indigenous nations are sovereign, why does it matter what rights the U.S. says they have?
 - In what ways is it important for the U.S. to recognize their sovereignty?

Note: If discussion is slow, possible topics to spark conversation include the importance of sovereignty for recognizing treaties as legally binding, the fact that recognizing sovereignty prevents overt re-colonization of lands currently held by Indigenous nations, and the importance of accepting the dignity of Native peoples.



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Activity 2: The Sovereignty of U.S. First Nations (continued)

- 3. Form groups.** Have students choose one of the issues of sovereignty that they highlighted in the readings to investigate. Then, have them find a group of other students interested the same topic. Multiple groups may look into the same issue; keep groups small. Tell them they will be proposing a change to U.S. policy regarding the right of indigenous peoples in the United States.

Activity 3: Take Action on Indigenous Rights

In this activity, the groups will propose policy changes on tribal sovereignty.

- 1. Research.** In their small groups, instruct students to choose a place in the United States that is affected by their chosen issue related to tribal sovereignty. The group should develop an argument about how tribal sovereignty is being violated, which will probably require outside research. You may want to direct students to the resources in the *Advocates' Rights of Indigenous Peoples Toolkit* for assistance. Groups should then propose a specific change or set of changes in U.S. law that could help remedy the issue. Groups should strive for a policy that preserves U.S. respect for indigenous sovereignty without placing an impossible burden on indigenous peoples.
- 2. Write or Present.** Ask students to propose their changes in the form of an Op-Ed letter, a letter to a legislator, or a presentation for other students. Give the following options to students:
 - **Op-Ed Letter:** As a small group, compose an “Op-Ed” (opinion/editorial) letter to a national paper in which you express your views about the need for changes in relations between U.S. and indigenous governments. An Op-Ed letter is usually about 600-800 words and presents an argument in a clear, concise manner. Let the editor know who you are and why you are writing, and support your argument with some of the facts you gathered from the assigned reading or outside research. An Op-Ed typically ends with a one-sentence summary of your argument, so it may be helpful to start at the end and work backwards.
 - **Contact Your Legislator:** Compose a letter or email to the person who represents your community in Congress. Let her/him know who you are and why you are writing. Be sure to support your position on this issue with some facts about the rights of indigenous peoples in the United States. To find your legislators' contact information, visit www.govtrack.us/congress/findyourreps.xpd.
 - **Prepare a Presentation:** Share what you have learned with other people in your school. Create a 10-15 minute presentation about your proposal that you could present to another class. Explain to them why you need to make a change and how your proposal will help.
- 3. Take the Next Step.** Have each small group brainstorm what they can do next. Send their letters! Present to the class next door!



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Handout: The Right of Self-Determination in the UN Declaration on the Rights of Indigenous Peoples

Preamble: *Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.*

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law.

Article 1: *Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.*

Article 2: *Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.*

Article 3: *Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

Article 4: *Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*

Article 5: *Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.*

Article 6: *Every indigenous individual has the right to a nationality.*

Article 7: (1) *Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.*
(2) *Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.*

Article 14: (1) *Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.*
(2) *Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.* (3) *States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.*

Article 16: (1) *Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.* (2) *States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.*

Article 18: *Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*



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Handout: Excerpts from the Declaration on the Rights of Indigenous Peoples related to sovereignty and self-determination

Article 19: *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*

Article 23: *Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.*

Article 26: (1) *Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.*

Article 27: *States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.*

Article 32: (1) *Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. (2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (3) States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*

Article 33: (1) *Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. (2) Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.*

Article 37: (1) *Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements. (2) Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.*

Article 40: *Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.*



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Handout: From Marshall to Marshall

From Marshall to Marshall: The Supreme Court's changing stance on tribal sovereignty

By Philip J. Prygoski, professor of law at the Thomas M. Cooley Law School

From the era of Chief Justice John Marshall through the time of Justice Thurgood Marshall, the Supreme Court has struggled to define the doctrine of American Indian tribal sovereignty. Tribal sovereignty is not simply an abstract legal concept; it is part of the military, social, and economic development of our country. The following is a look at how the decisions of the Court for the past 170 years have defined, defended, and ultimately diminished that sovereignty.

The role of the Supreme Court in affecting Indian sovereignty is best understood in relation to the powers of Congress and the President. Under the Constitution, Congress has the power to regulate commerce with the Indian tribes. The Indian Commerce Clause (Article I, 8, clause 3) is the main source of federal power over Indian tribes and has been the primary vehicle used by Congress to recognize and define tribal sovereignty. In addition, the Court has ruled that Congress, as the legislative body of the nation, has an intrinsic power to deal with the Indian nations that reside within the borders of the United States.

Presidential power over the Indian tribes is centered on the ability to enter into treaties, a power that was used in the early years of federal Indian law to secure tribal acquiescence to the demands of the encroaching waves of European settlers. (In 1871, Congress passed legislation that ended the practice of the United States entering into treaties with Indian tribes.)

It has been the Supreme Court's role to interpret the actions of the President and Congress, and to strike a balance between the rights of the Indian nations and the interests of the European conquerors. Tribal sovereignty was, and continues to be, a primary issue for the Court.

A Matter of Perspective

There are two competing theories of tribal sovereignty: first, the tribes have inherent powers of sovereignty that predate the "discovery" of America by Columbus; and second, the tribes have only those attributes of sovereignty that Congress gives them.

Over the years, the Court has relied on one or the other of these theories in deciding tribal sovereignty cases. It is important to note that whichever theory the Court has favored in a given case has determined to a large extent what powers the tribes have and what protections they receive against federal and state government encroachment.

In what is known as the "Marshall trilogy," the Supreme Court established the doctrinal basis for interpreting federal Indian law and defining tribal sovereignty.

In the first of these cases, *Johnson v. McIntosh* (21 U.S. (8 Wheat.) 543 (1823)), Chief Justice Marshall ruled for the Court that Indian tribes could not convey land to private parties without the consent of the federal government. The Court reasoned that, after conquest by the Europeans and the establishment of the United States, the rights of the tribes to complete sovereignty were diminished, and the tribes' power to dispose of their land was denied.

In *Cherokee Nation v. Georgia* (30 U.S. (5 Pet.) 1 (1831)), the Court addressed the question of whether the Cherokee Nation was a "foreign state" and, therefore, could sue the State of Georgia in federal court under diversity jurisdiction. Chief Justice Marshall ruled that federal courts had no jurisdiction over such a case because Indian tribes were merely "domestic dependent nations" existing "in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian."

The statements by the Court in *Cherokee Nation* established the premise that Indian nations do not possess all of the attributes of sovereignty that the word "nation" normally implies. Indian nations are not "foreign," but rather exist within the geographical boundaries of the United States, which necessarily limits their sovereignty. It would be unacceptable for an Indian nation located within the United States to enter into treaties with other countries, or to cede Indian land to foreign countries (to have a French or German enclave in the middle of Montana, for example.)



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Handout: From Marshall to Marshall

The Court's characterization of the tribes as "dependent nations" is the basis for what has been called the trust relationship between the United States and the Indian tribes, through which the federal government protects the tribes from interference and intrusion by state governments and state citizens. Inherent in the concept of a "trust" relationship is the implication that the tribes are incompetent to handle their own affairs. This presumption has served as the justification for many actions by the federal government that have intruded on and diminished tribal sovereignty.

In the last case of the Marshall trilogy, *Worcester v. Georgia* (31 U.S. (6 Pet.) 515 (1832)), the Court addressed the issue of whether the state of Georgia could impose criminal penalties on a number of missionaries who were residing in Cherokee territory, without having obtained licenses from the governor of Georgia. Ruling that the laws of Georgia could have no effect in Cherokee territory, the Court said, "[t]he Cherokee nation...is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress...." In *Worcester*, the Court established the principle that states are excluded from exercising their regulatory or taxing jurisdiction in Indian country.

The collective effect of the Marshall trilogy on the development of federal Indian law has been described as follows:

Three bedrock principles thus underlie *Worcester* and the earlier decisions: (1) by virtue of aboriginal political and territorial status, Indian tribes possessed certain incidents of preexisting sovereignty; (2) such sovereignty was subject to diminution or elimination by the United States, but not by the individual states; and (3) the tribes' limited inherent sovereignty and their corresponding dependency on the United States for protection imposed on the latter a trust responsibility. (American Indian Law Deskbook. (University Press of Colorado, 1993).)

These principles have continued to guide the Court in its interpretation of the respective rights of the federal government, the states, and the tribes.

In *Ex Parte Crow Dog* (109 U.S. 556 (1883)), the Court overturned the conviction in federal court of an Indian who had murdered another Indian in Indian country. The Court reasoned that the ability of the tribe to deal with such an offense was an attribute of tribal sovereignty that had not been specifically abrogated by an act of Congress.

The Court's reaffirmation of tribal sovereignty in *Crow Dog* was in large measure responsible for passage of the Major Crimes Act by Congress in 1885 (18 U.S.C. 1153). Under the act, seven major crimes—if committed by an Indian in Indian country—were placed within federal jurisdiction, regardless of whether the victim of the crime was an Indian.

The Major Crimes Act was a great intrusion into the internal sovereignty of the tribes in that it deprived the tribes of the ability to try and to punish serious offenders in Indian country. The theory underlying it was that Indian tribes were not competent to deal with serious issues of crime and punishment.

A year later, the Court upheld the constitutionality of the Major Crimes Act in *U.S. v. Kagame* (118 U.S. 375 (1886)), a case in which two Indians were prosecuted for killing another Indian on a reservation. The Indians argued that Congress did not have the constitutional authority to pass the Major Crimes Act. The Court agreed that the prosecution of major crimes did not fall within Congress's power to regulate commerce with the Indian tribes, but it ruled that the trust relationship between the federal government and the tribes conferred on Congress both the duty and the power to regulate tribal affairs.

The ruling implied that because Indian tribes are wards of the United States, Congress has the power to regulate the tribes, even to the point of interfering with their essential sovereign power to deal with criminal offenders within Indian country.

The trust relationship was again the basis for a Court decision that favored Congress in *Lone Wolf v. Hitchcock* (187 U.S. 553 (1903)). In *Lone Wolf*, the Court ruled that the trust relationship served as a source of power for Congress to



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Handout: From Marshall to Marshall

take action on tribal land held under the terms of a treaty: The Court held that Congress could, by statute, abrogate the provisions of an Indian treaty. It went on to say that the status of the Indians who entered into the treaty and their relationship of dependency to the United States were such that Congress had a plenary power over the government's relations with the tribes. The power of Congress in these matter was so complete, the Court reasoned, that it would not even consider the merits of the argument regarding Congress's inability to abrogate an Indian treaty by statute—it said that any complaints about congressional action must be taken to Congress for redress.

Justifying Instruction

The scope of the trust relationship, and its concomitant grant of power to Congress, was illustrated in *U.S. v. Sandoval* (231 U.S. 28 (1913)), in which the Court upheld the application of a federal liquor-control law to the New Mexico Pueblos, even though the Pueblo lands had never been designated by the federal government as reservation land. The Court ruled that an unbroken line of federal legislative, executive, and judicial actions had "...attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders..." Moreover, the Court said that once Congress had begun to act in a guardian role toward the tribes, it was up to Congress, not the courts, to determine when the state of wardship should end.

Sandoval is one more example of how the trust relationship was used to justify federal intrusion into the internal affairs of Indian communities. Clearly, the trust doctrine not only protected tribes and other Indian communities from encroachment by state governments, it also provided the justification for extremely intrusive actions by Congress.

In more recent cases, the Court has upheld the principle of tribal sovereignty first articulated in *Worcester*. For example, in *Williams v. Lee* (358 U.S. 217 (1959)), the Court ruled that Arizona state courts did not have jurisdiction in a civil case that involved a non-Indian who sued two reservation Indians for an alleged breach of contract that happened on the reservation. The Court concluded that allowing state jurisdiction in such a case would undermine the authority of tribal courts to decide matters that arise on the reservation—a clear infringement of the right of Indian self-government.

Discussing the issue of tribal sovereignty, the Court asserted that "...[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."

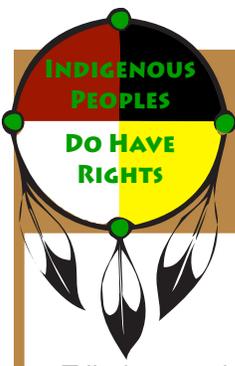
The import of this principle is that when Congress has not by statute or treaty determined that a state may assert jurisdiction over specific activities in Indian country, a state is disabled from taking any action that would interfere with a tribal government's power to regulate the internal affairs of the tribe. Accordingly, it is up to federal courts to determine whether any given state action has interfered too greatly with the internal sovereignty of a tribe.

However, a different situation exists when Congress has addressed the relative spheres of power of state and tribal governments.

Further Erosion

In *McClanahan v. Arizona State Tax Commission* (411 U.S. 164 (1973)), the Court, through Justice Thurgood Marshall, ruled that a state cannot tax the income of an Indian earned on a reservation. Although in *McClanahan* the Court reaffirmed the principle of tribal sovereignty over internal tribal affairs, it emphasized a different basis for tribal freedom from intrusions by a state:

[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption.... The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power...



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Tribal sovereignty was further diminished by the Court in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nations* (492 U.S. 408 (1989)). The Court ruled that the Yakima Indian Nation did not have the power to apply its zoning laws to property owned by non-Indians in areas of the reservation that had lost their Indian character—the population in the disputed areas was largely white. The Yakima Nation could, however, apply its zoning laws to those areas of the reservation that retained their essentially Indian character. Although there was no majority opinion in *Brendale*, the result of the Court's rulings was to eliminate the power of tribes to exercise civil jurisdiction over the activities of non-Indians on the reservation, even where those activities implicate an important tribal interest.

Brendale is significant because the Court took upon itself the power to determine when demographics would change the scope of tribal sovereignty in matters of land-use regulation. The Court's willingness to assume the power to define tribal sovereignty, even in internal matters, continued in a case handed down a year after *Brendale*.

In *Duro v. Reina* (495 U.S. 696 (1990)), the Court held that Indian tribes do not have criminal jurisdiction over non-member Indians who commit crimes on the reservation. The Court asserted that "...the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership."

The majority concluded that the retained sovereignty of a tribe was only broad enough to encompass the power of tribal courts to impose criminal penalties on tribal members, and that non-Indians and nontribal Indians were not within the criminal jurisdiction of a tribe (see *Oliphant v. Suquamish Indian Tribe* (435 U.S. 191 (1978))).

(In 1991, Congress in effect overturned *Duro* by passing a statute that reaffirmed tribal power to exercise criminal jurisdiction over all Indians on the reservation, regardless of whether they are tribal members (see 25 U.S.C. 1301 (4)).)

The Court's theory in *Duro* was that the dependent status of the tribes implicitly divested them of the power to impose criminal sanctions on nontribal Indians. The Court said that tribes are "...prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers inconsistent with their status." The danger of such an approach is that it allows the Supreme Court, at its own discretion, to determine which attributes of internal tribal sovereignty are inconsistent with the tribes' status as "domestic dependent nations." The assumption of this role by the Court not only changes the usual division of power in the federal government (where Congress has the primary power to deal with Indian tribes), but also enhances the power of the Court to diminish the scope of tribal sovereignty.

The Direction Is Clear

At least two troubling aspects of the Court's treatment of the sovereign rights and powers of Indian tribes emerge from a look at the development of the doctrine of tribal sovereignty. First, the Court has moved away from the concept of intrinsic tribal sovereignty that predated the coming of the European conquerors, and has adopted the view that tribal sovereignty, and the concomitant freedom of the tribes from encroachments by the states, exists solely because Congress has chosen to confer some protections on the tribes.

Second, whatever the doctrinal underpinnings of tribal sovereignty may be, it is clear that the sovereignty of American Indian tribes has been progressively and systematically diminished by the actions of the federal government, including the Supreme Court.