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# Indigenous Nations as Reserved Sovereigns

David E. Wilkins

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by**David E. Wilkins**
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“The vaccination will come from the same society as the disease.” – Leonardo Vitteri

“The Master’s tools will never dismantle the Master’s house.” – Audre Lord

These two powerful and contradictory epigraphs reflect the two dominant sentiments held by a majority of Native nations when they are asked to assess their historic and contemporary political and legal status vis-?-vis the United States.

Some adhere to the idea that the federal government, as a democratic state founded on the rule of law, contains within its legal and political institutions and ideologies a framework that provides the necessary vaccines that will eventually cure the various and sundry indigenous ailments generated throughout American society by its social, economic, political and legal institutions.

By contrast, there are others who vigorously argue that the prevailing institutions of governance and law of the United States are incapable of providing justice to First Nations because they entail systems, ideologies, and values that represent non-Indians and thus they cannot possibly adequately address the distinctive aboriginal, treaty, and trust based rights of indigenous nations.

On balance, the historical record is far more supportive of the Audre Lord quote, given the devastating territorial, treaty, and identity losses Native peoples have and continue to endure at the hands of the federal, state, and increasingly, even county governments and their largely non-Native populations.

This sorry legal and human rights record has prompted a movement by an increasing segment of First Nations folk to pursue international recognition of their cultural and political rights and natural resources. I applaud this effort, even though it, too, is fraught with real difficulties given the structural arrangement of the United Nations – it was created to represent states, not indigenous nations.

While international status will continue to be pursued, First Nations are also intimately bound, both territorially and by treaty, to the United States domestic legal and political systems and are required to utilize those institutions – and their own – as well, despite the ongoing structural and ideological barriers that are pervasive in federal and state institutions of governance.

I'd, therefore, like to focus on one of the few legal doctrines that has proven to be of some merit to indigenous peoples in their quest for domestic peace, tranquility, and justice since it is generally regarded as one of the most important doctrines undergirding the treaty and trust rights of indigenous nations – the reserved rights doctrine. On its face, this doctrine is less problematic than those of plenary power, discovery, trust, or good faith since the word "reserve," is the root word of the "reservations" that constitute a fundamental aspect of the Indian and U.S. relationship.

Broadly defined, reservations are tracts of land expressly set aside or reserved for Indian nations by tribal insistence and some federal action. Many Americans have at least some vague notion and will concede, if reluctantly, that although Indian tribes "lost," "surrendered," or "sold," most of homelands to the United States, railroads, states, and enterprising whites,

they rightfully retained through sheer determination or liberal federal Indian policies, smaller regions designated as “Indian reservations.” In fact, with summer upon us, American tourists are already trekking to reservations in search of indigenous culture and identity.

Interestingly, these same Americans, however, are sometimes taken aback or in some cases become irate when tribal nations and their citizens move to assert reserved rights – be it a property right like the right to hunt, gather, or fish, or a political right like the power to regulate domestic relations, tax, administer justice, exercise civil and criminal jurisdiction, among others. Why these Americans will concede the greater reserved right (recognize tribal land ownership) but refuse to recognize the lesser rights (rights to tribal property or treaty or civil rights) is a most interesting phenomenon, and speaks to the ongoing schizophrenia the American public and many of their lawmakers exhibit towards First Nations.

From a non-Indian perspective, it comes down to a broader question of whether tribal nations reserve all those powers and rights that they have not surrendered, or whether they may exercise only those rights that have been delegated to them by express act of Congress? This crucial question, unfortunately, has no definitive answer from the United States’ perspective, depending, it seems, on the whim of individual justices, congresspersons, or BIA officials.

But Vine Deloria Jr., the leading scholar of Indian law and policy, adopts a more historically accurate vision of the reserved rights doctrine. He, in fact, describes the comparability of the reserved rights clause contained in the U.S. Constitution’s 10th Amendment with that lodged both expressly and implicitly in Indian treaties (and agreements and statutes) where tribal nations reserved all those powers, rights, and resources not expressly surrendered to the federal government.

The 10th Amendment, ratified in 1791 as part of the Bill of Rights, declares that “the powers not delegated to the United States by the Constitution, nor

prohibited by it to the States, are reserved to the States respectively, or to the people" (emphasis added). Of all the amendments demanded by the Anti-federalists in the state conventions that ratified the Constitution, "the one calling for a reserved powers clause was most common."

Although many Federalists, such as Alexander Hamilton, James Madison, and James Wilson, did not believe such an amendment was necessary, the fear of central authority was widely felt and support for an express guarantee that the states would retain control over their internal affairs proved irresistible.

The 10th Amendment, which embodies the principle of federalism, has been both eroded (Civil War and the Great Depression) and embellished (years preceding the Civil War and under the Rehnquist Court, which emphasizes dual federalism) over time, but states may generally rest assured that at any given time at least some of their inherent sovereign powers are respected and that their existence as distinct polities having been constitutionally established will be protected. Furthermore, states certainly need never fear being "terminated" as political entities, a reality that was forced upon some tribal nations in the 1950s and 1960s.

Indian treaties, similarly, reserve to Indian tribes all those powers specifically stated and those not expressly ceded away. As a federal district court said in Makah Indian Tribe v. McCauly, in interpreting a key provision of the 1855 Makah Treaty, "this court is of the opinion that as contended by plaintiffs (Makah) the answer to this question as to the treaty's validity turns upon the sounder theory that the treaty granted nothing to the Indians, but that the treaty in truth and in fact merely reserved and preserved inviolate to the Indians the fishing rights which from time immemorial they had always had and enjoyed" (emphasis added).

In both cases, the states and the tribes have struggled to retain as much of their original governing powers and rights as could be done in the face of an ever-expanding national government. Even as the commerce and welfare clauses became the chief mechanisms for federal intrusions on state

government, the trust doctrine became the major device used by federal lawmakers to diminish or squelch indigenous self-determination efforts. The treaty, however, according to Deloria, performs the same function for First Nations as does the 10th Amendment for state governments.

Of course, state powers, tribal nations have learned, have more permanence because they are constitutionally enshrined, while Indian treaty rights, according to the Supreme Court, "can be altered without recourse to the constitutional amendment process." It is the fragility, the tenuousness of Indian reserved rights, despite their treaty pronunciation, that is most problematic, particularly since tribes were not created by the U.S. Constitution and theoretically are not subject to constitutional limitations.

How the federal or state governments can justify their abridgements of Indian reserved rights, given the extra-constitutional nature of tribes, the fact that treaties are constitutionally recognized as "the supreme law of the land," and the persistence of the federal trust doctrine, raises important questions of fairness, justice, and intergroup relations. Moreover, if we see tribal sovereignty as a bundle of inherent powers then it is clear that First Nations arrived at the treaty negotiating table with a similar body of powers enjoyed by other sovereign nations. Our task then, is simply to identity what specific attributes of sovereignty tribes have ceded away, recognizing that they reserve all other powers, both external and internal to themselves.

The reserved rights doctrine is often listed with three other so-called canons of construction as evidence that the federal government sometimes supports Indian treaties and the trust doctrine. The other canons are 1) that ambiguities expressed in treaties are to be resolved in the Indians favor; 2) that treaties are to be interpreted as the Indians themselves would have understood them; and 3) that treaties are to be liberally construed in favor of the tribes.

But each of these "canons," which theoretically stand for a system of fundamental rules and maxims which are recognized as governing the

interpretation of written instruments, are not really canons at all since each has an opposite corollary that may be cited by the courts when it suits the justices purposes. For instance, while the "canon" of liberal construction for tribes is supported in cases like Worcester v. Georgia (1832), The Kansas Indians (1866), and United States v. Winans (1905), it has been ignored or shunted aside in cases like The Cherokee Tobacco (1871) and Race Horse (1896). And the canon of ambiguous phrases, other cases have held, does not permit reliance on ambiguities that do not exist, nor does it permit the disregarding of the expressed intent of Congress.

More conclusively, the fact that Indian treaties themselves may be expressly abrogated by Congress reveals the tenuous nature of Indian legal rights and the fact is that history shows that treaties – including Indian reserved rights – have been honored more in the breach than the fulfillment. Nevertheless, tribal nations and their treaty and trust recognized reserved rights persist, despite their inconsistent recognition and sporadic enforcement by the U.S.

David E. Wilkins, Lumbee, is a Professor of American Indian Studies at the University of Minnesota.