

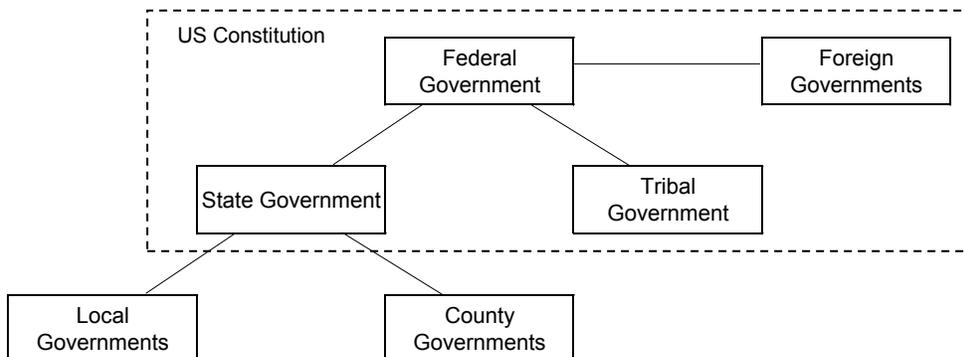


Federal-Tribal Relations and Tribal Sovereignty: A History

In order to appreciate the foundational changes that tribal e-commerce, or any successful economic development, can support at the individual tribal level, it is necessary to understand the historical and legal foundation for tribes' existence as sovereign governments, which is the basis for the federal status and sovereign powers that all tribes hold. Tribal self-determination and e-commerce activity rests upon a number of complicated legal doctrines, including federal Indian policy, states' rights, and U.S. banking policy. Therefore, each tribe's decision to pursue tribal online lending as an economic development strategy is both facilitated and constrained by more than two centuries of federal and state policy. Taking the long view of American Indian law highlights the numerous obstacles that all tribes have had to face in order to secure the right to both develop their own governmental agenda *and* generate the revenues to pursue those goals.

American Indian tribal nations occupy a unique legal and historical position in the American political system. The U.S. Constitution enshrines the political or "government-to-government" relationship between the Federal government and Indian nations, and makes that relationship distinct from that which the Federal government has with states and foreign nations. Under established international law at the time of the US Constitution's writing, only "international" sovereigns had the ability to enter into political relationships with the Indian nations. In keeping with this pattern, the U.S. Constitution was drafted so that the Federal government would have responsibility for Indian affairs.¹ Congress was granted the power to "regulate commerce with the Indian Tribes,"² while the President was empowered to make Indian treaties, with the consent of the Senate.³

The U.S. Constitution Explicitly Recognizes Four Sovereigns



The status of Indian tribes as "international" sovereigns soon became inconsistent with the demands of westward expansion, however, and a new legal basis for dealing with tribes emerged. The United States Supreme Court redefined the status of Indian tribes through a series of opinions in the early 1800's. These cases are now commonly referred to as the "Marshall Trilogy," after their primary author, Chief Justice John Marshall.

The Marshall Trilogy clarified the relationship between Indian tribes and Federal and state governments and provides a basis for the unique tripartite relationship among U.S. sovereigns. These principles have provided the backdrop for a dynamic political relationship between the federal government, the states and the Indian tribes over the past 200 years. However, pursuant to its power to determine tribal jurisdiction, the federal government has from time to time altered

¹ U.S. Const. art. I, § 8, cl. 3.

² *Id.*

³ U.S. Const. art. II, § 2, cl. 2.

slightly the delineated jurisdictions of the three domestic sovereigns. For example, in 1885, Congress passed the Major Crimes Act making seven “major” crimes committed on Indian reservations punishable under federal law.⁴ In 1887, Congress also passed the General Allotment (Dawes) Act that allotted lands within certain Indian reservations to Indians and allowed non-Indians to homestead on un-allotted or “surplus” lots.⁵

One of the more drastic alterations of the jurisdictional division between the Indian tribes and the states was the 1953 passage of Public Law 280 (P.L. 280).⁶ Originally intended to confer jurisdiction on California only, P.L. 280 was the first serious grant of jurisdiction over Indian affairs to the states.⁷ Passed during a period when the Federal government was curtailing its role in Indian affairs through termination programs, P.L. 280 represented a major shift from the predominantly tribal-federal relationship to a tribal-federal-state relationship. P.L. 280 granted criminal and civil jurisdiction over Indian Country to specific states, called P.L. 280 states.⁸ States not expressly covered by the act had the option of assuming jurisdiction by statute or state constitutional amendment.⁹

The immediate effect of P.L. 280 on tribal governments was that of undercutting federal funding for tribal programs. In theory, P.L. 280 empowered state governments to provide services to tribes, but there was a significant absence of federal financial support for state governments as well.¹⁰ Eventually, the federal government’s failure to adequately support either tribes or states resulted in a severe lack of basic social and political infrastructure in Indian Country. The fact that California was designated one of the original P. L. 280 states would also eventually figure into both state and federal Indian gaming policy debates since there was much confusion about the actual degree of jurisdiction transferred or retained by each government.

The Supreme Court squarely addressed the question of jurisdiction in *Bryan v. Itasca County*.¹¹ The Court found that while Congress was particularly concerned about a lack of adequate law enforcement on Indian reservations within the P.L. 280 states, it was only slightly concerned with civil matters and then only with state court access for Indians. Thus, the Court reasoned, Congress granted to the P.L. 280 states broad criminal jurisdiction within the territory of Indian tribes located within those states. However, a similar broad grant of civil jurisdiction was not passed to those states. Instead, P.L. 280 only specified that state courts would have “adjudicatory” power to hear cases involving individual Indians. Thus *Bryan* established the distinction between two distinct substantive types of jurisdiction—

KEY POINTS

- Historically and legally, Native American Tribes are considered sovereign governments, which is the basis for the federal status that all tribes hold.
- The political or “government-to-government” relationship between the Federal government and Indian nations is enshrined in the U.S. Constitution. This relationship is distinct from that which the Federal government has with states and foreign nations.
- The Supreme Court of the United States has consistently reaffirmed the inherent nature of tribal sovereignty.
- Unless tribal sovereignty or jurisdiction has been explicitly modified, tribes are free to regulate conduct in their jurisdiction.
- States have no authority over Indian affairs unless authorized explicitly by Congress.
- Tribally-driven economic development appropriately encourages and promotes business activity that directly benefits American Indian communities.

⁴ 23 Stat. 362, 385 (1885). The list of seven crimes was eventually expanded to include thirteen and has been codified at 18 U.S.C. § 1153.

⁵ 24 Stat. 388 (1887)

⁶ Pub. L. No. 280, 67 Stat, 588 (codified as amended in 18 U.S.C. § 1162 and 28 U.S.C. § 1360).

⁷ Goldberg-Ambrose, Carol. *Planting Tail Feathers: Tribal Survival and Public Law 280*. (Los Angeles: UCLA American Indian Studies Center, 1997) at 48.

⁸ The “mandatory” states included Minnesota (not the Red Lake reservation), Wisconsin, California, Nebraska, Oregon (not the Warm Springs Reservation), and Alaska (added in 1958).

⁹ These were called the “optional” states, See Canby, William C. *American Indian Law in a Nutshell* (St. Paul, MN: West Publishing Company, 1988) at 217.

¹⁰ Goldberg-Ambrose notes that P.L. 280 was “one of the earliest instances of a federal ‘unfunded mandate.’ *Planting Tail Feathers: Tribal Survival and Public Law 280*. (Los Angeles: UCLA American Indian Studies Center, 1997) at xi.

¹¹ 426 U.S. 373 (1976).

“criminal/prohibitory” and “civil/regulatory”— with the former granted to the P.L. 280 states and the latter retained by the tribes. The legal principles and boundaries established in the Marshall Trilogy and *Bryan v. Itasca Country* provide an important background for understanding the jurisdictional issues that have arisen between tribes and states during the modern era.

One enduring principle consistently reaffirmed by the Supreme Court is the inherent nature of tribal sovereignty.¹² Federal authority is not deemed necessary to permit an Indian tribal government to act, but rather tribal governments are presumed to have the right to act because *their authority derives from their pre-existing status as sovereigns*. Unless tribal sovereignty or jurisdiction has been explicitly modified, tribes are free to regulate conduct in their jurisdiction according to their own prerogatives and to adjudicate disputes over regulation in their own forums and subject to the provisions of the Indian Civil Rights Act.¹³ *States, however, have no authority over Indian affairs unless authorized explicitly by Congress*. The question of jurisdiction, then, begs analysis of the express limitation of tribal authority and the express consent of state authority since *tribes and states derive their authority from different sources*—tribes via retention of their inherent sovereignty and states via grants from the Congress. These differing sources of authority translate into complicated and often competing interpretations of law and policy.

Research Demonstrates that Self-Determined Economic Development Works

The research evidence is clear on the overall direction of productive Federal-tribal relations. It is clear that federal support for tribal self-determination is the only Federal policy in a century that has created conditions where American Indian tribal governments have been able to begin to reverse the legacy of poverty and economic suppression to which they have historically been subjected.

For many Indian nations, but not all, economic development activities are now flourishing, often for the first time in a century. Most importantly, *improvement in economic conditions in Indian country has been accompanied by improved social conditions*. Consistent with self-determination policies and the government-to-government relationship between Federal agencies and tribal governments, tribally-driven economic development—whether gaming or e-commerce, ranching or tourism—appropriately encourages and promotes business activity that directly benefits American Indian communities. Federal-tribal consultation and cooperation allows tribal governments to determine what their economic development priorities are and then how best to meet those needs.

¹² Tribes retain the sovereign right to establish their own forms of government, determine membership, police, regulate conduct, charter businesses, and, among other things. Because Indian governmental powers originate with tribal governments, a list of powers cannot be made by reference to a Congressional or Constitutional delegation of powers. Overview treatments of tribal governmental powers can be found in *Indian Tribes as Sovereign Governments*, op. cit; Canby, William C. *American Indian Law in a Nutshell* (St. Paul, MN: West Publishing Company, 1988); and Strickland, Rennard, *Felix S. Cohen's Handbook of American Indian Law* (Charlottesville, VA: Bobbs-Merrill, 1982).

¹³ *National Farmers Union Ins. Cos. V. Crow Tribe*, 471 U.S. 845, 852-53 (1985).