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INTRODUCTION

Reconstituting *Haudenosaunee* Law, Sovereignty and Governance

ERROL E. MEIDINGER†

Justice Brandeis reportedly defined law as “that which is boldly asserted and resolutely maintained.”¹ An important lesson of this “Symposium on Law, Sovereignty, and Tribal Governance: The Iroquois Confederacy”² is that Brandeis’ definition of law seems to apply equally well to sovereignty and governance. Thus, while Brandeis’ definition may do little to distinguish law from sovereignty and governance, it does much to illuminate some of their common features and to suggest their interplay.

There is great irony in the fact that the ideal of sovereignty is so important to this symposium on the *Haudenosaunee*. The concept of sovereignty was born in Europe. It originated in a world of monarchical nation-states organized on strikingly different terms than most Indian societies. It was developed by thinkers committed to rationalizing the corrosive ambitions of monarchs who claimed absolute, unlimited and indivisible power over defined territories and the societies living within them.³ When

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1. Personal communication with Nathaniel Nathanson, late Professor of Law at Northwestern University Law School and a former clerk to Justice Brandeis, February 1975.

2. “Iroquois” is the name traditionally used by Europeans to refer to the people of the Six Nations Confederacy, who call themselves *Haudenosaunee*. The term was adopted by the Europeans from the Algonquins, traditional enemies of the *Haudenosaunee*, and translates as “real adders.” See John C. Mohawk, *Iroquois Confederacy*, in *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS* 298 (Frederick E. Hoxie ed., 1996). Not surprisingly, the authors in this volume prefer the term *Haudenosaunee*. It is desirable, however, to use both terms, so that those accustomed to using the term “Iroquois” can link it to the term “Haudenosaunee” and make the transition to using a name for the people that they chose for themselves.

3. See, e.g., JEAN BODIN, *THE SIX BOOKES OF A COMMONWEALE* (Kenneth

those monarchs and their representatives sought to extend their power to the Indian world they confronted societies organized around quite different principles. Indian societies, despite their great variety, all had much less hierarchical structures than European societies. The *Haudenosaunee*, in particular, had developed a federated, horizontal governance structure capable of making binding decisions without giving unitary power to one actor.⁴

Yet it seems neither surprising nor inappropriate that sovereignty became a central focus of *Haudenosaunee* policy. First, starting in the late sixteenth century the *Haudenosaunee* were locked in life-and-death relationships with states that defined themselves in terms of sovereignty. Just as the concept had been developed to organize the relationships among those states, it would also shape relationships with the *Haudenosaunee*, and therefore the *Haudenosaunee* themselves to some degree. Second, the European conception of sovereignty was simultaneously adjusting to incorporate the ideals of democratic decision making, limited government and federation—ideals more consonant with *Haudenosaunee* traditions.⁵ To some extent this change reflected contact with societies such as the *Haudenosaunee*, but it also reflected enormous internal pressures in European societies, as citizens refused to accept the powerlessness and indignity associated with unlimited regal authority. So profound was the upheaval that the European concept of sovereignty was literally turned on its head. The source of sovereignty moved from the king, to the “king-in-parliament,” to the people.⁶

During the same period that European sovereignty was being transformed into the democratic antithesis of its former self, *Haudenosaunee* sovereignty was almost killed by it. Although the reasons are too complicated to detail here, they include the overwhelming military power of Europe, its colonies and offspring, the continuing appeal of the European image of a single polity governing an immense

Douglas McRae ed., Harvard University Press 1962).

4. See, e.g., Mary Druke Becker, “We are an Independent Nation”: A History of Iroquois Sovereignty, 46 BUFF. L. REV. 981 (1998).

5. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1972); EDMUND MORGAN, INVENTING THE PEOPLE (1988).

6. See WOOD, *supra* note 5, at 347-50; J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 391-95 (1971).

territory, the rapid growth of mass production and international trade, and various messianic movements attacking *Haudenosaunee* traditions.⁷

Given the powerful forces arrayed against it, the most remarkable fact is that *Haudenosaunee* sovereignty was not killed—not quite, anyway. The reasons *Haudenosaunee* sovereignty was not killed are nearly as complicated as the forces arrayed against it. For our purposes, the key reasons were the resolute resistance of the *Haudenosaunee* people and the lingering sense in Anglo-American legal thought that it would be a mistake even to declare native sovereignty extinguished. The existence of these two facts made it meaningful to hold this symposium.

This symposium attempted a serious discussion of the current situation of *Haudenosaunee* law, sovereignty and governance, and the path the *Haudenosaunee* will choose to follow in the future. It was partly, but not merely, an academic exercise. It was also an applied effort to clarify the key challenges facing *Haudenosaunee* law, sovereignty and governance today. These were neither simple matters nor uncontroversial ones. People felt strongly about them. When the public symposium was held last Spring the room was filled with hundreds of intensely focused, directly involved members of the *Haudenosaunee* community. Statements made by presenters were closely scrutinized, sometimes vigorously challenged. Many speakers talked about their lives and their roles in the community. The atmosphere was charged. The articles presented in this volume should be read in that light. Not all of the speakers chose to memorialize their comments in writing, but the articles in this issue provide a good sense of the issues discussed and the tenor of the conversation.

Why is sovereignty the central focus of this symposium? I do not believe it is because Bodin, Hobbes, Blackstone and their brethren developed the concept that best describes the authentic aspirations of the *Haudenosaunee* people. Rather, it is because sovereignty is an open-ended concept which can be used to pursue cultural independence and given meaning in practice. It allows the *Haudenosaunee* people both to connect their aspirations to those of other peoples

7. See, e.g., Robert B. Porter, *Building a New Longhouse: The Case for Government Reform within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805 (1998).

and to keep them separate. At the most profound level, it seems to provide a conceptual frame for thinking about and pursuing cultural survival. This symposium contained a number of lessons about native sovereignty in the modern world.

First, the underlying purpose of *Haudenosaunee* sovereignty is cultural survival. The affiliated tribes, clans and moities of the *Haudenosaunee* organized themselves into a society to achieve a distinct way of life.⁸ Sovereignty is a key element in preserving and extending that way of life because it provides a language and strategy that is comprehensible to the outside world.

Second, it is clear that tribal sovereignty in the modern world is as much a type of relationship as it is a state of being. To be sovereign means to have enough autonomy to choose and pursue a distinct cultural path. That path inevitably must be defined and pursued in the context of relationships to other groups. Thus, the battles over taxation⁹ and over legal jurisdiction¹⁰ are best understood as battles over the terms of relationships with outside groups. The battles, however, are not merely negative ones of resistance, but also positive ones seeking to implement different images of the nature of the relationship. The traditional *Haudenosaunee* images of linked arms, circles of linked arms and links in a single chain described by Mary Druke Becker¹¹ provide some affirmative material for reconstituting relationships. They also seem to be in tune with the times, as we come to terms with an era of world history that increasingly relies on horizontal relationships and partnerships among nations and other organizations. The vision of large sovereign powers dividing up the world and ruling from the top promulgated by the original theorists of sovereignty is in decline. Part of its decline reflects a loss of

8. See e.g., Druke Becker, *supra* note 4; John C. Mohawk, *Echoes of a Native Revitalization Movement in Recent Indian Law Cases in New York State*, 46 *BUFF. L. REV.* 1061 (1998); Porter, *supra* note 7.

9. See, e.g., Joseph J. Heath, *Review of the History of the April 1997 Trade and Commerce Agreement Among the Traditional Haudenosaunee Councils of Chiefs and New York State and the Impact Thereof on Haudenosaunee Sovereignty*, 46 *BUFF. L. REV.* 1011 (1998); Chief Irving Powless Jr., *The Haudenosaunee, Yesterday and Today: A Conflict of Concepts and Laws*, 46 *BUFF. L. REV.* 1081 (1998).

10. See, e.g. Porter, *supra* note 7; Powless, *supra* note 9.

11. See Druke Becker, *supra* note 4.

faith in large hierarchical organizations. Another part reflects the widespread acceptance as fact that cooperative, long-term relationships among groups of all kinds are necessary to handle the numerous modern problems which cross social and political boundaries.

Third, a land base is crucial. This was a central theme throughout the symposium, from Professor Oren Lyons' opening speech to closing comments more than a day later. Many of the published articles focus on protecting and regaining *Haudenosaunee* lands.¹² The importance of a land base is thus taken for granted by many commentators. Yet, some of the most intricate discussions at the symposium asked what other elements are required once the land base is present. In a provocative presentation which he did not turn into an article, Peter Hutchins, an eminent Canadian lawyer who has litigated landmark suits protecting *Haudenosaunee* rights,¹³ argued that it is not a good idea to demand sharp borders. He suggested that rigid borders might actually undermine the vitality of Indian communities by removing Indian problems and concerns too far from those of their neighbors. While not widely accepted when he made it, this suggestion provoked a considerable amount of thought in the audience and could circulate for some time to come in the *Haudenosaunee* community.

More immediate and more heated was the debate about the power of tribal governments to exclude individuals or businesses from reservation lands. Some participants argued that the ability to control activity on Indian land is an essential part of sovereignty and government and is necessary to the vitality of *Haudenosaunee* communities.¹⁴ Others countered that the communities cannot thrive if they eject important elements of themselves. This discussion also split into procedural and substantive streams, with some focusing on whether tribal governments have the authority to take such actions and others focusing on their

12. See Porter, *supra* note 7; John Tashuda, *The Oneida Land Claim: Yesterday and Today*, 46 BUFF. L. REV. 1001 (1998); Steven Paul McSloy, *Border Wars: Haudenosaunee Lands and Federalism*, 46 BUFF. L. REV. 1041 (1998); Powless, *supra* note 9; Clint Halftown, *The Haudenosaunee Cayuga Nation Land Claim: Cayuga Nation v. State of New York*, 46 BUFF. L. REV. 1091 (1998).

13. See *Mitchell v. Minister of National Revenue*, 1997 Fed. Ct. Trial LEXIS 741 (Fed. Ct. Dec. 10, 1996).

14. See Powless, *supra* note 9.

wisdom. This problem is of growing urgency in the *Haudenosaunee* world, and its successful resolution presents a significant challenge.

Fourth, tribal governance and legal institutions must be reconstituted and strengthened. A population cannot survive as a distinct people without its own ways of formulating and implementing group decisions. Government and law are the blood and bone of the body-politic. A key challenge facing *Haudenosaunee* government and law is to regain primacy in making and implementing tribal policy. Without the ability to counter the growing resort by tribal members to external institutions to resolve tribal policy issues, *Haudenosaunee* societies will continue to lose the ability to chart their own course. How the governance and legal institutions should be strengthened is a difficult and many faceted issue. The Articles and Essays in this issue contain many proposals, explicit and implicit.

Fifth, sovereignty is cultural deliberation, and deliberation includes sound thinking. The survival and vitality of the *Haudenosaunee* depend not only on their ability to make their own decisions, but also on their ability to make good decisions.¹⁵ The traditional norms—talking questions through thoroughly and becoming of one mind—are a promising foundation. In the modern era, however, they are likely to require new strategies for gaining and assessing information. This means further developing relationships with modern knowledge institutions such as universities, and yet not being dominated by them. The symposium, hosted by a university and conducted by tribal members, lawyers and academics, was a promising beginning, but only an early step in developing a productive relationship.

Finally, sovereignty is a moving target, a continuing creation. As the quote from Brandeis suggests, sovereignty is inevitably a work in progress. It requires a people to constantly recommit to being independent, to making their own policy, and to achieving their goals. If any of these elements flags, sovereignty deflates. This symposium is one moment in the current effort to “boldly assert” and “resolutely maintain” *Haudenosaunee* sovereignty, law, and governance. It is a rich and charged moment. The Articles and Essays that follow offer much sound thinking about the effort. But the work must be carried forward in daily life.

15. See Mohawk, *supra* note 8.