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Tribal-State Relations

by Donna M. Loring

Stephen Brimley's article is very good, and the historic facts and issues surrounding the Maine Indian Claims Settlement Act are clear and accurate. He does an excellent job in presenting the importance of the settlement act and its implications in policy development. Brimley's view, however, is that of a non-Indian. I would like to address tribal and state relations involved in the settlement act from a tribal perspective. It is my belief that communication and education equal understanding, and with understanding comes respect and equality.

It is essential to know something about the historic foundation upon which the relationship between the tribes and the state is based. The situation is well-described in *The Wabanakis of Maine and the Maritimes, A Resource Book About Penobscot, Passamaquoddy, Maliseet, Micmac and Abenaki Indians* (1989: A21):

> When Maine became a State in 1820 they immediately took over the obligations that Massachusetts had with the tribes. Between 1821 and 1839 the State Legislature authorized the harvesting of timber from Passamaquoddy land in violation of the treaty of 1794. Over the years, also in violation of the treaty, the Legislature authorized sale or lease of various pieces of Passamaquoddy land without compensation and without consent of the Passamaquoddy tribe. Several of the Penobscot islands were sold without compensation. In addition in 1833, in violation of its own deed procedure as well as a former treaty, four townships, or 95% of the Penobscot land at the time, were transferred to the State of Maine…The State placed $50,000 dollars into trust when it took these townships without tribal consent.

One of the townships held the sacred mountain of the Wabanaki people—Mt. Katahdin.

Maine then made the tribes settle in one place and put an agent in charge to monitor them and to dispense clothes, food, wood, commodities, etc. The agent used monies from Penobscot resources to do this. The state of Maine also put monies from the sale of lands and leased timber into a trust fund and distributed the money to tribal members.

> …The State's treatment of the tribes was paternalistic and the Legislature assumed it had authority to do whatever it wanted to do whenever it wanted to do it…. The courts' treatment of Indians was no better. In a case decided by the Maine Supreme Court in 1842 Murch V Tomer 21 Me. 535, the court said: "[I]mbecility on their [the Indians'] part, and the dictates of humanity on ours, have necessarily prescribed to them their subjection to our paternal control; in disregard of some, at least, of abstract principles of the rights of man"(*Wabanakis* 1989: A21).

Tribal members grew up believing they were paupers and totally dependent on the state. They were left with little or no dignity or self-respect. They were not aware that the goods and services for which they were begging from the Indian agent were bought with the tribes' own money. The state of Maine stole tribal lands and resources and impounded the trust fund monies during World War II to pay for state expenses incurred by the war, totally draining the trust funds (Proctor 1942). Through years of abuse and neglect, the tribes built up a total distrust for the state of Maine. The state has kept tight control over the tribes, and has maintained a position that tribal governments are not sovereign. The state of Maine has challenged the tribes' jurisdiction at every turn.

The Maine Indian Claims Settlement Act was thought to be the instrument by which the tribes could become equal and respected. The tribes saw it as a way out of poverty, abuse and control. The state looked at the land claims act much differently. Governor Longley used the situation to his political advantage by coining the phrase "Nation within a Nation" and playing on the fears of the general public that the Indians were going to take away their homes and land. Longley said he would not pay one penny to the Indians, nor would he give up the state's jurisdiction over the tribes. He also was determined not to allow the state to be held responsible for any wrongdoing in the past. The land claims act never went to federal court, but was negotiated. Brimley covers this well in his paper. Governor Longley got most of what he wanted. The land claims settlement act was a state's dream. The federal government paid every penny, the state kept most of its jurisdiction, and most important of all, the state was held harmless for all its past injustices and abuses.

After the settlement act was signed into law on September 10, 1980, the state of Maine eliminated its office of Indian Affairs, thereby cutting any formal ties the

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executive branch had with the tribes. This did nothing but totally stop communications between the tribes and state government. The settlement act now was the sole source that determined tribal-state relations. Tribal-state views of the act were very different.

Some people feel that the settlement act was supposed to settle the question of jurisdiction once and for all. The settlement act created the Maine Indian Tribal-State Commission to help reach consensus on issues and to make decisions on some land use regulations as well as land purchases for Indian territory. The act now defines the relationship between the tribes and the state. It continues to be a relationship of litigation and contention. This was evidenced by the walkout of Passamaquoddy and Penobscot representatives at the last Maine Indian Tribal-State Commission meeting held in November 2003. Brimley mentions this walkout briefly in his paper, but fails to articulate the real reason for it. The walkout was significant symbolically, as it was a result of the tribes' total loss of trust in state government. Governor Baldacci took such a highly visible stance in opposition to the casino initiative that the tribes felt totally abandoned in their quest for economic self-sufficiency. In the 2003 elections, the "racino" referendum, with its 1,500 slot machines, was approved by Maine voters who voted against the tribes' casino initiative by a two-to-one margin. Having the governor add the "Power Ball" lottery in Maine only advanced the atmosphere of distrust and resentment. The tribes felt this was the absolute height of hypocrisy.

Even before recent events surrounding the casino vote and its aftermath, the state-tribal relationship in Maine has, quite simply, been an adversarial one, with distrust as its foundation. For example, Maine was the last state in the country to allow Indians to vote in state elections. Maine Indians could not vote in state elections until 1967! One of the most glaring injustices perpetrated on Indian people by the state of Maine was disenfranchisement, an injustice upheld by Maine's highest court in 1941 (Proctor 1942: 46).

Another example of the depth of this mistrust is the litigious situation that exists between the tribes, the state and the paper companies. *Great Northern Paper, Inc. v. Penobscot Nation, 2001 ME68* plays out the tribes' fears that Maine is only looking to eliminate them as tribal governments. In this instance, the state intervened as a third party to support several corporations (Great Northern Paper, Georgia Pacific Corporation, International Paper). This court action was brought against the tribes by the paper companies because the companies feared the tribes would want to control the amount of toxins they dump into the rivers. The paper companies thought the tribes would have zero tolerance and would basically put them out of business. The state claimed an interest in this case because it involved interpretations "of jurisdictional relationship between the State and the tribes" (*Penobscot Indian Nation; Passamaquoddy Tribe v. Great Northern Paper, Inc.; Georgia-Pacific Corporation; International Paper Company; and the State of Maine, 12*).

This case was a tremendously important issue for the tribes, in that it involved clean water and the very survival of our tribal members, tribal government and culture. If the paper companies could bring the tribes totally under state jurisdiction, with no federal protection, then they could do what they wanted with toxic discharges. The tribes would no longer be considered tribal governments and would no longer enjoy federal trust status. The tribes consider this case a breech of their sovereign status by the state's interpretation of 30MRSA 6206 ss 1 of the Maine Indian Claims Settlement Act. The state claims the tribes are quasi-municipal entities and therefore are political subdivisions of the state subject to the Maine Access Act.

One could hope that fairness still might be found in the courts. But the Maine Supreme Judicial Court decided this case on May 1, 2001. They found that the Maine Access Act, which was written to give the public access to information about public officials and public issues, applied to Maine Indian governments. I find this ludicrous, since the general Maine public does not elect our tribal officials, nor do they have a say in our internal tribal matters. The land claims settlement act has been used to erode the sovereignty of the tribes. This clearly was not the purpose of the act.

As I have pointed out, there are many areas in the settlement act that can be interpreted in various ways. The most contentious is the section stating that tribes have municipal status. This section, the state contends, makes the tribes into political subdivisions of the state and municipalities. The tribes say not so. This language was used for grant purposes only. It is this section of the act that will cause more litigation in the future, as we can already see in the recent case with the paper companies. The state continues to erode tribal sovereignty at every turn. The tribes see the state as an insatiable beast that just cannot stop taking and taking from them. The tribes fear that the state will erode their sovereignty until they no longer exist as tribal governments.

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The paradigm from the state's perspective needs to be changed. Times have changed. Tribes should no longer to be considered as imbeciles and liabilities. Tribes have much to offer in a partnership of equality. In this world of global competition, tribes and the state need to work together. There is a lot we can do as partners to improve the dire economic situation the state now faces. Tribes should be considered assets, and a foundation of trust must be established.

Brimley recommends a return to the Department of Indian Affairs. Maine Indians have bad memories and do not want to return to the same model that controlled and abused them. I therefore vigorously disagree with a return to such a model.

To begin the groundwork toward renewing a trust relationship, I recommend the following:

- There should be a formal admission of the state's historic maltreatment of the tribes. This would be a beginning and would show the tribes that the state truly regrets its past actions and is willing to treat the tribes as equal partners.

- Reestablish communication with the tribes on an executive level by creating an office of tribal-state relations and appointing a commissioner of tribal-state relations. (This should be a cabinet-level appointment.)

- The office of the commissioner of tribal-state relations would be utilized to explore areas of economic partnership and establish communication between various state agencies and tribal agencies, as well as act as a resource for both the tribes and the state. The result would vastly improve the tribal-state relationship and would recognize the importance of the tribal governments.

- The governor should create an executive order recognizing tribal sovereignty. This would not jeopardize the state in any way. Other states have done this. For example, the former governor of Minnesota, Jessie Ventura, made such a declaration.

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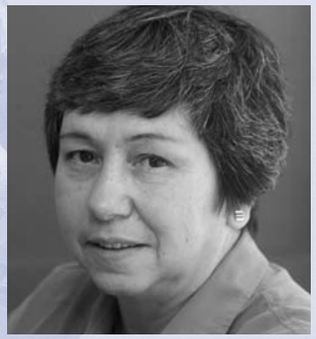

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From Clean Water to Casinos: Why Sovereignty is Important to Native Americans

by Lisa K. Neuman

On the surface, Native Americans appear to be just one of the many ethnic groups that make up the contemporary United States. In fact, this idea, while common today, is relatively new and is actually a misleading perception of Native Americans simply as individuals who embody racial, ethnic, and/or cultural *difference* in a modern multicultural American landscape. In spite of these common perceptions, it is important to understand that Native Americans are in a vastly different historical and legal position than any other American minority, ethnic, or racial group. This is because the identities of Native Americans have been defined historically primarily in relation to their membership in native tribes or nations. These native tribes or nations have had a highly specialized legal relationship to the U.S. government, one that has shifted over the years from one of shared sovereignty to one where the federal government and the states have jointly eroded tribal sovereignty and have left America's indigenous nations with shreds and patches of their original powers.

Prior to contact with Europeans, conservative estimates are that there were somewhere between five and 10 million Native Americans living in what is now the United States (Sanger, personal communication; also see Sutton 2004: 8). The languages, cultures, religions, economies, types of social organization, and forms of governance differed dramatically from one group to the next, and these characteristics of America's indigenous population shifted over time as a result of complex interactions between groups. At the time of European contact, there existed in what would become the United States many hundreds (at the least) of well-organized native groups that were governing themselves in sophisticated—albeit different—ways.

After contact, the observation that Native Americans had complex trade networks and forms of self-government led some European observers to recognize in principle, if not in practice, the sovereignty of native groups and the rights of such groups to the lands they occupied. The concept of sovereignty—essentially meaning "autonomy" or "right of self-government"—would figure centrally in the relationship between native tribes and the Europeans who settled in their territories. Combined with the European concept of ownership of private property, the principle of native sovereignty was fundamental to a growing American nation's efforts to assert its own rights by recognizing the established rights of America's original inhabitants. The fledgling U.S. government would depend on international recognition of Native American sovereignty in order to bolster its own claims to independence from Great Britain. In the European tradition, treaties were made between sovereign nations. The fact that the United States of America entered into somewhere around 400 treaties with native tribes between 1778 and 1871 helped to solidify the new American nation's position as a sovereign government on par with the British, the French, the Spanish, or any other. It is in this historical context that native tribes are appropriately referred to today as native nations (for an interesting discussion, see Dorris 1981: 48-9).

From this perspective, to question the sovereignty of native nations is to question the legal foundations upon which the United States of America was built. The very existence of the United States (and hence both its federal and state governments) was based on the transfer of land through treaties signed with Indian nations. It is important to realize that not all tribes had treaties with the federal government and that many treaties were never ratified. However, the treaties that were made were essentially a transfer of rights (in many cases, the right to control land) from native nations to the United States. The tribes retained any rights not explicitly transferred in their treaties, for example, the rights to hunt, gather, and fish in tribal territory. In return for their lands, native nations were given promises by the U.S. government, which in many cases included promises to provide health care, education to Indian children, and protection for the group from intrusion by foreign nations and/or neighboring tribes. Many of these promises were necessary because, having relinquished a large portion of their land base, the tribes realized they would no longer be able to provide the same level of protection and care for their descendents as they had before.

Although the United States eventually would break a large number of its treaty promises, the very process of treaty-making itself created what is still known as a "trust responsibility" between the federal government and the tribes. This means that the federal government has a

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specific legal obligation to the tribes with which it contracted treaties in the past, and this is manifest today in the federal programs (often mistakenly referred to as "welfare benefits") that provide educational scholarships and social services for members of many Indian tribes. Ironically, while such federal programs for Indians should serve to remind us of the historical sovereignty of native nations, today they often create misunderstandings among non-Indians, who tend to view them as indicators of the poverty and lack of independence of modern native communities.

In his article "Native American Sovereignty in Maine," Stephen Brimley aptly demonstrates that today when three of Maine's American Indian tribes—the Penobscot, the Passamaquoddy, and the Maliseet—attempt to behave as sovereign entities, they find themselves bound by the restrictive language of the 1980 Maine Indian Claims Settlement Act. The courts consistently have upheld the language of the settlement, which both defines the tribes as municipalities and excludes them (unless they are specifically named) from benefiting from any federal Indian legislation passed after 1980. As Brimley points out, this strict interpretation of the language of the settlement has been used to erode the sovereignty of the three tribes, particularly when they attempt to pursue economic enterprises. This is one reason why many people from native communities outside of Maine view the settlement as an example of the kind of thing they want to avoid in potential future negotiations between their tribes and state governments.

On this issue, Brimley does a very good job explaining to those who might assume that three of Maine's Indian tribes unthinkingly signed away their sovereignty that this was not, in fact, the case. The Maine tribes that signed the settlement believed that they were advancing their sovereign rights vis-à-vis both the federal government and the state of Maine. As Brimley explains, they had good reason to believe so. And, lest we also jump to the conclusion that Maine's Indian nations were alone in confronting this issue, it is important to realize that since the United States became a nation, other native nations have had to struggle against the gradual erosion of their sovereignty by both the federal government and the states.

Two particular events—one a piece of legislation and the other a Supreme Court decision—formed the basis for this erosion of tribal sovereignty across the United States. Under the Constitution, the president, with the approval of two-thirds of the Senate, was given the power to contract treaties with native nations. However, in 1871, Congress passed a law prohibiting future treatymaking between the United States and native nations. This law was passed to allow the House of Representatives to have a stronger voice in the administration of Indian affairs (Pevar 2002: 49). Since treaties had served up to this point to affirm the sovereignty of both parties who signed them, this ban on treatymaking greatly affected native sovereignty. From this point on, federal legislation would replace treatymaking as the means of defining the relationship between the federal government and Native Americans. This effectively eliminated the need for the United States to obtain tribal consent to annex native lands. In addition, in 1903 the Supreme Court handed down a decision in a case known as *Lone Wolf v. Hitchcock,* in which it ruled that existing Indian treaties had the same status as, but no greater authority than, federal laws. Furthermore, the High Court stated that a federal law could change or even repeal a treaty made with a native nation in the past (for a good discussion, see Pevar 2002: 49).

As a result, a significant proportion of federal legislation passed after 1871 has served overall both to reduce the powers of native nations and to enhance the powers of the states over them. The recent period (from the late 1970s onward) is often referred to by scholars as a period of great tribal "self-determination" (see Brimley, this issue). However, this characterization is certainly best understood as a contrast to the overwhelming number of official government policies following the treaty era that negatively affected tribal sovereignty. These detrimental policies included assimilation (for example, 19th century allotment and the break up of reservations; the forced schooling of Indian children; and the mid-20th century termination of tribes) and assaults on the civil rights of Indians (for example, the FBI's attacks against the American Indian Movement of the 1960s and 1970s; the involuntary sterilization of large numbers of Indian women at Indian Health Service clinics during the middle part of the 20th century; and the placement of large numbers of native children in non-Indian foster and adoptive homes prior to the passage of the Indian Child Welfare Act of 1978).

In reality, as Brimley's discussion of the case of Maine illustrates, full tribal self-determination has not been realized today. Moreover, I would argue that many of the positive (pro-sovereignty) pieces of legislation and court decisions in the past 25 years or so stem not from new attempts by the federal government to confer sovereignty to native nations, but from specific instances of native tribes (and sometimes Native American individ-

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uals) asserting their unique legal status as members of historically sovereign groups.

The case of a tiny tribe from California, the Cabazon, provides a good example. In the 1980s, the Cabazon asserted their sovereignty by setting up a high stakes bingo operation on their reservation near Palm Springs. In response, the state of California argued that the tribe was in violation of the state's anti-gambling laws, while the Cabazon argued that the state of California could not infringe on this aspect of their sovereignty. The U.S. Supreme Court ultimately ruled in 1987 for the Cabazon, claiming that the state of California did not have jurisdiction over gaming operations on reservation lands. As a direct result of this case (known as *California v. Cabazon Band*), Congress quickly passed the 1988 Indian Gaming Regulatory Act (IGRA), which today defines on a national scale how Indian gaming can be conducted and regulated by both the federal government and the states. In many respects, the IGRA was a reactive and preemptive piece of federal legislation, as the *Cabazon* decision forced Congress to legislate rules governing Indian gaming, lest it wanted the issue to replay itself again and again in state and federal courts. In this case, a modern native group had asserted a sovereign right, challenged a powerful state that historically had been given widespread jurisdiction over Indian affairs, and won. However, in acknowledging this victory for tribal sovereignty, it is important also to realize that the IGRA actually gave power to the states and allowed them more control over Indian gaming than the *Cabazon* decision would have indicated (for an in-depth discussion of laws affecting Indian gaming, see Pevar 2002: 319-32).

While the federal government has redefined its own relationship to Native Americans over time, native nations today maintain a view of their own sovereignty that preserves the core of their original relationship with the United States government. In spite of challenges to their sovereignty, native nations continue to assert their rights to be self-governing within a larger modern American society. When the Wabanaki fight to regulate water quality on their reservations or when they strive to operate a casino as an economic enterprise, Mainers would do well to understand that these efforts stem not from the tribes' attempts to assert unique rights as ethnic minorities but from a legitimate claim to sovereignty that is also the very foundation upon which the sovereignty of the United States was built.

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Negotiating Difference

by Lawrence Rosen

Americans have always been deeply ambivalent about their native population. In the 16th and 17th centuries, drawings commonly showed Native Americans dressed in toga-like garments and arrayed in forums reminiscent of Roman senators. At the same time, biblical passages were cited, such as that inscribed from the Book of Acts on the seal of the Massachusetts Bay Colony, suggesting that the natives were pleading for the word of God to be brought across the seas for their enlightenment. Later, Andrew Jackson could ignore the Supreme Court in removing the Cherokee and others to the West. However, he also had to ignore petitions by a huge proportion of Americans who opposed his action. Notwithstanding bitter Indian wars in the Great Plains, the Supreme Court at the same time recognized the right of an Indian to be regarded as a "person" before the law. In modern times, whites who would never dream of adopting a black infant readily seek to welcome an Indian child into their family, and yet seek to question the right of Indian tribes to vote in state elections despite their immunity from state taxation. They will comment on the shameful treatment of Indians in the past, yet react, sometimes with violence, when Indians assert their right to fish according to 19th century treaties, or claim to be honoring Indians when they refuse to recognize the insult of using derogatory terms about Indians for their favorite athletic team. In every instance, the deep-seated ambivalence toward native peoples reveals itself anew.

To Americans of many eras, this ambivalence has been of a piece with the anomalous status of the tribes in our legal and political system. Indians, quite simply, stick in the throat of the American body politic: Unable to absorb them or expel them, white America keeps trying to "solve the Indian problem" with one all-embracing policy after another. Like stratigraphic layers, however, each of these policies, once laid down, is never eradicated, each new approach being simply piled on top of its predecessors with little regard for the inconsistencies thereby created. In the 18th century, Jefferson's hope was that Indians would constitute an indigenous American yeomanry—perfectly adapted, with the right material and spiritual tools, to settle into agricultural pursuits and civilized perfection. However, federal policy at that time sought to create a barrier between the Indians and the whites in order to reduce friction between the two populations and allow Indians time to accommodate themselves to white ways. The ever-changing "Indian Barrier" was only the first of many failures at a comprehensive approach. As Brimley described in his earlier *Maine Policy Review* article (Vol. 13.1, 2004), in the 1830s Chief Justice John Marshall sought to extend the overall power of the federal government at the expense of the states by precluding states from any role in Indian affairs. He thereby set the tone for American ambivalence. In letting the central government claim power through discovery or conquest or the commerce clause of the Constitution, he simultaneously told the government that they possessed reciprocal duties of care and trust for their Indian wards. The tribes, he said, were neither independently sovereign nor inferior to states but "domestic dependent nations" whose inherent powers were not derived from the United States, even if they could be limited by that government.

Each time the court or country faced changing circumstances—whether of movement west or diminution of tribal power in the face of disease and economic blight—Congress was again tempted by a comprehensive fix. So, in the 1870s, with the rise of the reservation system, it was thought that what every Indian really wanted was 160 acres and a mule, and all "surplus" land could then be opened for white settlement. By the 1920s, when the disastrous implications of this policy for the health and well-being of Indians was finally apparent, an Indian "New Deal" allowed tribes a constitutional government—provided the constitution met federal approval. And, when that was thought to help produce an environment in which every Indian would want the government off his back and out of his pocket, still new "termination" policies in the post-World War II era sought to end federal recognition altogether. Only in the early 1970s was the present "self-determination" policy initiated, in which Indian tribes may contract for many of their federal services themselves.

In each of these instances, as Stephen Brimley's excellent analysis demonstrates, Indians have not only adapted themselves to changing policies but have had to live with the uncertainty of wholesale attempts by Congress, the courts, or the states to reorganize their status all over again. Since, like geologic strata, each preceding policy still has continuing effects, the uncertainties are only exaggerated. The result is an environment in which, as Justice Sandra Day O'Connor recently said, the law relating to Native

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Americans is all but incomprehensible even to specialists. The ambivalence and contradictions (as they appear to many whites) in the "special status" of native peoples is only intensified, and the fear of a backlash to every advance is felt by most Indians as a premonitory threat.

Two domains help illustrate this situation—jurisdiction on Indian lands, and the role of states in taxing and regulating Indian enterprises. Justice Holmes rightly said that jurisdiction is power: To subject another to your laws is both an assertion of dominance and a vehicle for constructing one's own sense of that which needs to be protected. In the 1870s, the Supreme Court had recognized that Indian tribes had the inherent right to criminal jurisdiction even over whites on their reservations. Congress immediately limited that power to certain major crimes, but for many decades left intact jurisdiction over non-Indians and whites committing misdemeanors on Indian land. Once the Reagan appointees took hold on the Supreme Court, however, this power was subject to diminution, so that today federally recognized tribes have very little power over non-members on their lands. Attempts by Congress to recognize this inherent power have been dismissed by the Court as beyond the power of that legislative body. The result has been twofold. On the one hand, it has led to lawlessness in many areas, since states are unwilling to pay the costs of enforcement and tribes lack jurisdiction. At the same time, however, this very lawlessness has contributed to one of the most important changes in Indian-white relations, namely the proliferation of agreements (compacts) between states and Indians for the resolution of a number of their points of conflict. In the second domain, that of taxation and regulation of Indian country, states have been allowed to implement an unending array of modes for taxing Indian enterprises in an attempt to reduce the Indians' marketing of their "special status." At the same time, however, because of the underlying ambivalence of policies and attitudes, the states and tribes have, when their individual interests merge, also moved toward agreements forged in the shadow of law and history alike.

Perhaps nothing has contributed so much to the present situation as the proliferation of eastern land claims cases in the 1970s and the rise of casino gambling on Indian lands in more recent years. In an era of professed self-determination and ambivalent white guilt about the past treatment of Indians, the land cases made visible that settlement was to be preferred to extensive litigation or wholesale policy change. These cases, particularly as exemplified by the Maine case, set up the possibility for agreements. But as in water rights or lease agreements or fishing treaties, Indians, as the relatively weak party, have often had to forego established legal rights in order to get sufficient resources to live on. They have often had to limit their claims because of the hostility of the states, the Rehnquist Court's move away from established principles of Indian law, and the threat of backlash by localities or Congress. Indians have had to agree to settlements that, while seeming extravagant to those who (once again) cannot understand why Indians should get "special treatment," have, in fact, further eroded tribal sovereignty and economic development. The difference, perhaps, from other moments in American history is that the Indians have, in some instances, been able to acquire both the political and the economic capital to enhance their negotiating position.

The rise of casino gambling has led to an interesting situation with regard to Indian-state relations. Even though the Supreme Court has said that the Indian gaming act cannot require states to give up their sovereign immunity and be forced to negotiate agreements with the Indians, many states have, in fact, made such compacts in order to tap the revenue that tribal casinos generate. Together with the forceful efforts on behalf of native peoples by Senator Inouye and others in the past decade, the Indians have gained considerable experience in negotiating their way through legislative bodies and at the bargaining table. However, since relatively few tribes have benefited from gambling, and notwithstanding the willingness of some states to negotiate with their Indian citizens, the relationship remains one that appears to many state residents and their representatives as somehow illogical, if not politically unnatural.

The fear in Indian country now runs to several possibilities. Some members of the Supreme Court, in their opinions in recent Indian cases, appear ready to extend their general program of returning a great deal of power to the states by actually limiting the powers of Congress itself to those that are explicitly enumerated in the Constitution. Having used Indian cases—whether they concerned religion or gambling or jurisdiction—as stalking horses for larger Constitutional reform, the Court may now try to limit congressional power through cases that have an especial impact on Indians. Similarly, the fear is that any gain in negotiations may yield arrangements that, as circumstances change, leave the Indians with few options for adaptation. Forced by need to give up still more of their powers of sovereignty, tribes understandably fear the concomitant loss of control

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over their own destinies as circumstances change. The result would be consistent with the past: renewed ambivalence on the part of whites, who cannot understand why a deal once made should still imply that treaties are valid or that one can be quasisovereign in ways other than that which applies to states or municipalities; the potential for a backlash whenever Indians seem to be able to avail themselves of legal or political possibilities that do not apply to any other groups; and the fear that American intolerance for ambiguity may settle on the tribes as a convenient target of opportunity.

The key to Indian-white relations undoubtedly lies in the willingness of American society as a whole to embrace differentness for what it is—to recognize that everything does not have to fit one religious or political or social mold, that the Indian is the supreme test of America's commitment to its claimed principles, and that the way in which America answers that test will in the future, as it has in the past, be the final arbiter of the claims we make about our society and our professed beliefs. Tribes need to find better terms by which to articulate their distinctive status and the reasons behind it, despite enormous changes, and white America must keep its integrity by keeping its word. States and their white citizens need to have a clearer appreciation of the dependent position in which the tribes have been placed and the difficulties of living with policies that are subject to the vicissitudes of legislative enactment and fluctuating public opinion. In the full light of history, and with the common goal of making the nation safe for difference, we may yet recapture our mutual ability to negotiate in good faith and thereby reproduce good faith.

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