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Five Hundred Sixty Nations Among Us: Understanding the Basics of Native American Sovereignty

by Stephen Brimley



Stephen Brimley presents a general background on the historical context of Native American tribal sovereignty on the national level, and the current political and legal environment in which tribal rights are defined. He describes how tribes have retained varying degrees of the rights they had prior to European contact, and the ways in which state power over tribes has been expanded through court action in the past several decades. Maine's Native American groups are in a somewhat unique situation with regard to sovereignty, as defined in the Maine Indian Land Claims Settlement Act of 1980. A later article in Maine Policy Review will focus on sovereignty issues and their recent implications among Maine's Native Americans. 🐾

Without fences and border crossings to help define reservation boundaries, it is difficult for most Americans to comprehend that legally there are no differences between the 560 federally recognized native nations within the United States and other sovereign nations around the world such as England, China or South Africa. Indeed, the majority of Americans are unaware that individual Native American tribes are defined by the U.S. Constitution, by the American courts and by several international conventions as sovereign nations. It is also difficult for most to believe that individual tribes are sovereign nations because the U.S. federal government has rarely treated them as such.

The historical context in which Native American sovereignty has been created and the current political and legal environment in which the rights of tribes are defined today are complex and lengthy. Several authors have devoted entire books to the subject so this article will not unduly attempt to reinvent the wheel. This article will, however, borrow heavily from the content and format of many of those previous works.¹ Although this article will touch briefly on the issue of the unique nature of Native American sovereignty in Maine, the primary goal here is to familiarize the reader with the basic principles of sovereignty at the national level. A future article in this publication will deal more specifically with the topic of Native American sovereignty in Maine.

THE BASICS OF NATIVE AMERICAN SOVEREIGNTY

Although it is nearly impossible to know the exact number of native communities prior to European contact, by most accounts there were more than 500 within what is now considered the United States. Each community had systems of governance; some had laws and the means to enforce them; and each community had processes for conducting relations (both friendly and hostile) with other communities. By European standards these newly “discovered” communities appeared to possess many of the same attributes that defined sovereign nations elsewhere in the world. Consequently, early relations between European settlers and native communities were conducted on a “nation-to-nation”

basis.² The regular use of treaties between native and non-native communities was an acknowledgement of these relations and of the sovereign status of native communities.

Government-to-government relations were initially continued, in theory, by the newly formed U.S. government. However, the economic and political pressures of rapidly expanding non-native populations quickly changed the course and nature of the relations between the U.S. government and native nations forever. As settlers expanded their reach farther into Indian country in search of new riches, the U.S. government was forced to conduct a diplomatic balancing act between the treatment of native communities as the inherent sovereigns that they were and the perceived notion of being conquered nations.

The resulting “schizophrenic” nature of federal Indian law and policy soon became apparent in subsequent actions by Congress and in several rulings made by the U.S. Supreme Court.³ In 1832, in writing the decision for the Supreme Court case *Worcester v. Georgia*, Chief Justice Marshall wrote:

Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States. . . .

Although the ruling in *Worcester v. Georgia* was considered a landmark victory for Native Americans at the time, the long-term impact of the case has been profoundly negative for tribes. In particular, Chief Justice Marshall went on to declare that native tribes were in fact “domestic dependent nations” that had a relationship with the United States that resembled a “ward to his guardian.” The implication of the ruling was that although tribes were inherently sovereign

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(as acknowledged elsewhere in the ruling and in the U.S. Constitution), they were incapable of exercising such powers and, therefore, were dependent on the United States. United States federal Indian policy has been grounded in this contradictory premise—sovereign but dependent—ever since.

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Worcester v. Georgia also highlighted the growing tension between states and tribes that to this day remains a major source of contention. Despite these conflicts, it is somewhat ironic that states and tribes share many of the same political and economic challenges. Both states and tribes are forced to continually lobby to secure federal funding for programs whose budgets are being cut while the demand for the programs are increasing. Similarly, both states and tribes have long argued for greater control and self-determination. The Tenth Amendment of the U.S. Constitution declares that states retain the powers that are not given to the federal government or that are not prohibited.⁴ United States courts have supported the notion that what is not distinctly taken away from tribes by Congress or given away by tribes remains intact. Although both states and tribes share similar quasi-sovereign status in the eyes of the federal government, it would be unfair and unjust to equate the powers that tribes possess with those that states and local governments have been implicitly or explicitly granted.

As previously discussed, the powers and rights that tribes have predate the United States and were only confirmed by the Constitution in recognition of

the independent and sovereign status of tribes. The majority of people in America falsely assume that the comparatively limited powers that tribes possess today were given to them by the United States through treaties and through the U.S. Constitution. Conversely, tribes relinquished certain rights to the United States through treaties or agreements or their rights were taken through specific acts of Congress without their consent. It is important to note that many of the legally binding agreements, such as treaties between the United States and individual tribes which have limited the powers of tribes today, are distinctly Anglo concepts. Tribes rarely or fully understood what they were agreeing to in signing such treaties, and they often signed under extenuating circumstances. The promised and much needed benefits of signing a treaty, such as food, land and housing, made it impossible for tribes to weigh the short-term benefits against the long-term impacts on their sovereignty.

Due to their respective histories and their unique relations with the United States, each tribe has retained varying degrees of the inherent rights that it possessed prior to European contact. These rights often differ, sometimes dramatically, from one tribe to the next. While it is difficult to draw generalizations that are applicable to all 560 federally recognized tribes, there are some basic rights that all tribes share in common. These include the power to:⁵

- **Define their own form of government:** In 1896, the U.S. Supreme Court ruled in *Taylor v. Hayes* that the U.S. Constitution does not impose the same regulation on tribes in forming their governments as it does on states and the federal government—recognizing the pre-contact sovereign status of tribes. That remains true today unless Congress specifically acts to limit those powers. Numerous attempts by Congress have been made to influence the structure of tribal governments in the past such as the passing of the Indian Reorganization Act (IRA) in 1934. The act encouraged/coerced tribes into adopting written IRA constitutions which imposed a Western-style government structure. Although

there was a “cultural match” for some tribes, most tribes were ill-suited for such a government structure and have since taken reform efforts to develop more culturally appropriate systems of governance.

- **Determine the conditions for membership:** Although federal and state agencies often have their own criteria for determining who is Indian and therefore eligible for services, native nations are able to define their own criteria for citizenship. Membership requirements vary from tribe to tribe and often differ from federal criteria for who is and who is not an Indian. Tribal membership requirements vary from customary or historical practice to more recently developed laws or standards established in treaties. Perhaps the most publicized and controversial means of defining membership by tribes has been the adopted federal policy of “blood quantum” or “degree of Indian blood.” Although the levels vary depending on the tribe, the practice remains highly controversial. To this day, in order to be eligible for membership in a federally recognized tribe, individual Native Americans must first obtain a Certificate of Degree of Indian Blood (CDIB) from the Bureau of Indian Affairs. Besides identifying the individual as Native American, it quantifies the amount of “Indian blood” that the individual possesses.

Blood quantum was most notably used by Congress as part of the General Allotment Act passed in 1887 in an effort to “civilize” Native Americans. The premise behind the use of blood quantum was to eventually assimilate Native Americans into the at-large American society through the dilution of Indian blood through the inevitable mixing with non-natives. What was not fully understood by the non-native population was that most Native Americans tribes had a long-standing practice of mixing with other tribes and even

adopting non-tribal members into their communities regardless of color, previous affiliations or amount of Indian blood.

- **Administer justice and enforce laws:** With some rare exceptions where tribes have relinquished their jurisdiction or where Congress has removed jurisdiction, tribes have the right to (1) develop laws that govern the conduct of both native and non-native individuals on their reservation; (2) establish institutions such as a police force or courts to enforce those laws and to administer justice; (3) prohibit non-members from entering reservation lands; and (4) regulate fishing, hunting and gathering activities on tribally owned land. As noted later in this article, Congress has made specific attempts to remove this type of jurisdiction from tribes.
- **Tax:** Unless a treaty or act of Congress states otherwise, tribes have the inherent right to collect taxes from members and non-members doing business on the reservation. Although many tribal governments do not exercise the power to tax as a means of promoting and encouraging economic development, they continue to have the power if they choose to exercise it.
- **Regulate domestic relations of its members:** Among several other domestic activities, tribal governments have the authority to regulate marriage, divorce, adoption and support of family members. Federal statutes have recognized that marriages conducted according to tribal laws and customs are no different than marriages conducted according to state laws.
- **Regulate property use:** As owners of land that are not subject to state taxes, tribes are for the most part able to regulate how their land is used. Tribal governments have the authority to define licensing provisions, zoning laws and the terms of inheritance of property.

Tribes, however, are not able to sell, purchase or lease their land without the involvement of the federal government.

FEDERAL AUTHORITY OVER TRIBES

Federal authority over tribes originates in the Constitution.⁶ More specifically, the Commerce Clause (Article I, section 8, clause 3) states that “Congress shall have the Power...to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.” This is the only power from the Constitution that Congress has retained to this day as it abolished treaty making with native tribes in 1871 (these powers were given to Congress in Article II, section 2, clause 2). However, Congress has subsequently expanded its powers over tribes through more general interpretations of the powers incorporated in the Constitution and through several subsequent court decisions. Most notable were the Supreme Court decisions in *Johnson v. McIntosh* (1823) and later in *Tee-Hit-Ton Indians v. U.S.* (1955).⁷ Both decisions were grounded in the premise that Congress was granted authority over all peoples within the United States as the successors to the European powers who “discovered” and “conquered” the original inhabitants.

In 1998, the U.S. Supreme Court ruled: “Congress possesses plenary power over Indian Affairs, including the power to modify or eliminate tribal rights,” and that Congress can assist or destroy an Indian tribe as it sees fit.⁸ Although the power is plenary, it is not absolute, however, as there are some theoretical limits to the power that Congress has over tribal affairs. These limitations include:

- **The Due Process Clause of the Fifth Amendment:** No person may be deprived of life, liberty, or property without due process of law. Congress is, therefore, prohibited from enacting any laws that are “arbitrary, unreasonable, or invidiously discriminatory, including laws that discriminate on the basis of race.”
- **The Just Compensation Clause of the Fifth Amendment:** The clause does not

prohibit Congress from taking land but it does require that just and fair compensation is made for private land that is taken. With regard to Native American lands, the courts have required Congress to compensate tribes in addition for the loss of hunting, fishing and gathering rights and for the loss of tax immunity.

- **The doctrine of trust responsibility:** Requires Congress, at least in theory, to act in the best interest of tribes, to remain loyal to tribes and to honor all treaties with tribes. However, since the doctrine is not legally enforceable, tribes have to rely on the moral and ethical integrity of the members of Congress—“an integrity that in many instances has fallen short.”⁹

Despite its plenary powers, Congress does not have the ability to manage tribal affairs on a day-to-day basis. These responsibilities are delegated to several federal agencies. In 1824, the administration of Indian issues was relegated to the newly formed Office of Indian Affairs. In a sign of the times, the office was placed in the now defunct War Department. The office was moved to the newly formed Department of Interior in 1849 and renamed in 1947 to its current name, the Bureau of Indian Affairs (BIA). Today, the BIA still has the majority of responsibility to oversee federal Indian programs. The BIA is responsible for, among other things, the sale and leasing of Indian land; operating social welfare programs on reservations; controlling the use of water on irrigated Indian lands; operating Indian schools; purchasing land for individual Native Americans and for tribes; and, regulating federal law enforcement on reservations. The Departments of Health and Human Services, Housing and Agriculture also oversee a wide variety of federal programs on reservations.

Throughout history Congress has been reluctant to allow tribes too much power, particularly in the area of criminal jurisdiction. In 1885, Congress passed the Major Crimes Act, which gives the federal government jurisdiction over Native Americans who commit murder, manslaughter, rape, assault with the intent to kill, arson,

burglary and larceny, regardless of whether the victim is Native American and regardless of whether the crime is committed on a reservation.

In 1975, Congress made an exception and granted limited authority to tribes by passing the Indian Self-Determination and Education Assistance Act. This act specifically grants Congress the authority to delegate the administration of federal programs on reservations to tribes. Several tribes have taken advantage of this act and are now successfully administering schools, health clinics, environmental programs, social welfare programs and law enforcement activities on their reservations.

STATE AUTHORITY OVER TRIBES

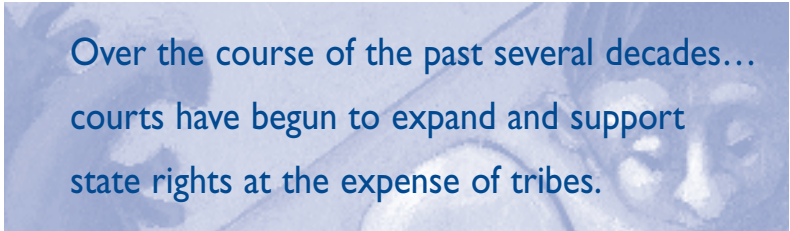
The power of states to regulate tribal activities within reservation borders is one of the most complicated and contentious issues affecting Native Americans; it has been a great source of tension between states and the federal government. With its plenary power, Congress has been very reluctant to relinquish any power over tribal matters to respective states. Over the last several decades, however, courts have begun to expand and support state rights at the expense of tribes. States now have jurisdiction without the consent of Congress over crimes that occur on reservations between non-natives. In addition, states have the ability to tax non-native owned land within reservation boundaries.

As in the ruling in *Worcester v. Georgia* and other subsequent rulings, courts until the mid-1800s had ruled that states could not impose their rule of law on tribes or on individuals within reservation borders without the consent of Congress. Two laws, however, have been passed by Congress in the past which have increased certain jurisdictional powers of states over tribes: the General Allotment Act of 1887 and Public Law 83-280 in 1953.

In an effort to “civilize” tribes, Congress passed a series of laws aimed at fully assimilating Native Americans into the at-large American economy and society during the late 19th century. The General Allotment Act (also known as the Dawes Act) was the centerpiece of those assimilation policies. The act mandated that all tribally owned lands would be

divided and dispersed to individual tribal members. The desired goal of the act was to encourage individual Native Americans to produce an income through farming. Any land not dispersed was sold on the open market. To facilitate this process, Congress established the criterion of one-half or more Indian blood to qualify as a Native American for the initial distribution of land. Since most Native Americans at that time did not meet that “blood quantum” criterion, the majority of once tribally owned land was sold. The land that was parceled to Native Americans often was the worst land available and ill-suited for most activities, particularly agriculture. For the most part, Native Americans were unable or unwilling to adopt the agricultural lifestyle and were ultimately forced to sell their land.

As a result, more than 90 million acres of the originally owned tribal lands were sold to non-natives. All land that was transferred out of native hands to non-natives subsequently came under the jurisdiction of the respective states unless the new owner entered into an agreement with the tribe or the tribe could show that the activities of the owner were causing irreparable harm to the tribe. Regardless, the transfer of some parcels of once tribally owned lands literally created a “checkerboard” of jurisdiction within reservation boundaries that has complicated relations between tribes, states and the federal government ever since.



Over the course of the past several decades... courts have begun to expand and support state rights at the expense of tribes.

The passing of Public Law 83-280 in 1953 further complicated tribal-state relations. As part of the effort to terminate the official status of tribes, Congress originally gave five states (known as mandatory states) criminal and partial civil jurisdiction over tribal members. It was no coincidence that Congress chose states with large and often powerful Native American

populations. In 1958, the state of Alaska was added to the mandatory list. All other states were offered the option of assuming jurisdiction over Native Americans as long as state laws were passed acknowledging the increased jurisdictional responsibilities. Only 10 states took advantage of the opportunity (known as optional states). Most states did not want, or were not able, to bear the financial burden associated with assuming more jurisdictional powers. Further increasing the tension between states and the federal government, states have long argued that with increased civil and criminal jurisdiction over tribes they should also have the right to increased powers to tax. However, the courts have not supported that claim so tribal lands remain exempt from state taxes. In 1968, Congress added a tribal consent clause so that states were no longer able to assume jurisdiction without the approval of the tribes or without a specific request from tribes.

Mandatory States	Optional States
Alaska	Arizona
California	Florida
Minnesota	Idaho
Nebraska	Iowa
Oregon	Montana
Wisconsin	Nevada
	North Dakota
	South Dakota
	Utah
	Washington

Since 1968, Congress has passed several acts that have conferred varying amounts of jurisdiction over particular tribes to states such as New York, Rhode Island, Florida and Oklahoma. Perhaps the most infamous and contentious of them all occurred in 1980, when Congress passed the Maine Indian Land Claims Settlement Act.

Passage of the Maine Settlement Act put an end to more than four years of negotiations between the state of Maine and the Passamaquoddy Tribe and the

Penobscot Indian Nation over a land claim made by the tribes for more than 60% of the land within the state. The Houlton Band of Maliseets joined the claim at a later date. The basis of the original claim by the tribes was rooted in the Non-Intercourse Act passed by Congress in 1790. Passed to protect tribes, the act stated that no transaction of Indian land could occur without the approval of Congress. The tribes in Maine had been able to show that the majority of land they had lost over time either through treaties with the state of Maine (and previously the state of Massachusetts) or through private transactions had occurred without the consent of Congress. As part of the settlement, the tribes received \$81.5 million—the majority of which (nearly \$54 million) was exclusively set aside for the tribes to purchase nearly 300,000 acres from private landowners who were willing to sell at fair market value. Another \$27 million was held by the federal government in trust for the tribes. In return, the tribes were forced to give up some of their powers of self-governance whereby, except where it clearly stated otherwise, the tribes were subject to the same state laws as municipalities.¹⁰

Unlike many of the other Native American land settlement acts around the country, the Maine act took specific care in detailing the relationship between the affected tribes in Maine and the state. Regardless of those efforts, there still remain several gray areas surrounding jurisdiction and the inherent and de facto rights and powers of tribes that have led to several recent contentious and well-publicized battles, including the most recent state-wide referendum on gambling. An entire article on the rights and powers of tribes in Maine is planned for a later edition of this publication.

CONCLUSION

Not surprisingly, many of the arguments that tribes have for more self-determination and more local control as a means of enhancing their administrative effectiveness are shared by many state and local leaders around the country. Regardless of what side you take in the federalist debate about whether local or state governments should have more control, recognizing

and supporting the inherent sovereign rights of tribes makes the most sense. History is our witness to their sovereignty and to the legally binding treaties and federal government documents that have recognized their powers. Although recent court decisions have been sporadic in supporting Native American sovereignty, it is time to move beyond the conquered-nation mentality that has plagued past state and federal policies and to move into a new era of self-determination and self-governance for all Native American tribes. This move will enable tribal leaders to more effectively and efficiently identify and develop culturally appropriate solutions to local problems. 🐾



Stephen Brimley is a consultant to Native American nations and non-native organizations on environmental, economic development and criminal justice-related issues. Current projects include work with the Northern Cheyenne tribe in Montana to evaluate the U.S. Department of Justice-funded Comprehensive Indian Resources for Community and Law Enforcement (CIRCLE) project. He also has extensive experience working with communities throughout southern and eastern Africa on community-based initiatives. He has a master's degree in anthropology and ecology of development from the University of London.

ENDNOTES

1. See in particular, Pevar, S.L. *The Rights of Indians and Tribes*. Carbondale: Southern Illinois UP, 2002. Also, *Native American Sovereignty*. Ed John R. Wunder. New York: Garland Publishing, Inc., 1999.
2. The concept of "nation" is arguably a non-native concept and therefore, should not be used in this context. However, it is used here to descriptively give insight into the perceived nature and type of relations between European communities and native communities at the time.
3. In the recent Supreme Court ruling in *U.S. v. Lara*, Justice Clarence Thomas wrote in his ruling, "Federal Indian policy is, to say the least, schizophrenic."
4. The Tenth Amendment of the United States Constitution states, "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..." For a discussion about the applicability of the Constitution to Native American tribes, see Lyons, Oren et al. *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution*. Sante Fe: Clear Light Publishers, 1992.
5. The list of powers and some of the explanations were gathered from Kickingbird, K. et al. "Indian Sovereignty," in *Native American Sovereignty*. Ed. John R. Wunder. New York: Garland Publishing, Inc., 1999.
6. This section borrows heavily from Pevar, S. L. "Federal Power Over Indian Affairs," in *The Rights of Indians and Tribes*. Carbondale: Southern Illinois UP, 2002.
7. See *Johnson v. McIntosh*, 21 U.S. 542 (1823); and, *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272, 279 (1955).
8. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).
9. Pevar, S. L. *The Rights of Indians and Tribes*. Carbondale: Southern Illinois UP, 2002: 60.
10. The majority of this discussion was indirectly taken from a paper explaining the Maine Indian Land Claims Settlement Act by Diana Scully, Executive Director of the Maine Indian Tribal-State Commission (February 14, 1995). The paper can be found on the Internet at: http://www.peopleofthedawn.com/land_claims/Settlement_Frame.htm