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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.

Lawrence Rosen is the Cromwell Professor of Anthropology at Princeton University and adjunct professor of law at Columbia Law School. He edited *American Indians and the Law* (1978), has published widely on the rights of indigenous peoples, and has worked as an attorney on a number of American Indian legal cases. He summers in Castine, Maine.