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## [Introduction to] Uneven Ground: American Indian Sovereignty and Federal Law

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# *Uneven Ground*

## AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW

BY DAVID E. WILKINS  
AND K. TSIANINA LOMAWAIMA

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# INTRODUCTION

When the Pilgrims landed on the coast of what would one day be called New England, desperate to replenish their dwindling supplies (especially of beer), they had no intention of settling; they were headed for the mouth of the Hudson River, in what was termed Virginia. But they found unexpected gifts of cleared fields, granaries full of corn, and no people. The Pilgrims knew Indian people existed and inhabited these coasts but had little accurate information about them. As a consequence the Pilgrims feared Indians. Imagine their surprise when they were greeted by Samoset, who had learned English from cod fishermen, with "Welcome, Englishmen." Sometime later, they were met by Squanto, or Tisquantum, who had been captured by English captain Thomas Hunt, had escaped from slavery in Spain to England, and had guided a subsequent trans-Atlantic voyage—a sojourner who had returned home. Surely this was a sign from God to his chosen people that they had found a rightful home. God further expressed his divine wishes in ensuing decades, as to which population should prosper. Pilgrims certainly suffered those first harsh winters, but native populations were decimated by infectious epidemic diseases to which many Europeans had developed immunities.

The situation, of course, looked quite different to the Wampanoag, Narragansett, Pequot, and other native communities. Decades of

intermittent contact with European fishing fleets and mutual trade, raids, and hostilities had built a foundation of knowledge about these newcomers. Some native people had been captured and returned, like Squanto, bringing firsthand accounts of European cities, industries, customs, and tastes. With these contacts came epidemic diseases. The area that would become known as Plimoth Plantation was deserted by the native Patuxets when the Pilgrims arrived in 1620 because of a devastating series of illnesses that swept through between 1617 and 1619. Native political, economic, social, and religious life had been damaged, no doubt, but was not moribund. Significant native populations remained and caused the English no small amount of grief, as Indians resisted expanding immigrant populations and expansive English claims to jurisdiction over lands and peoples.<sup>1</sup>

The contest among the diverse English colonies and diverse native nations of this newly named New England would be repeated, in many times and many places, across the American continent. Local details varied, but the contests were similar—they all involved peoples asserting and defending their sovereign rights. The contest remains today. What is at stake? Important questions of identity, jurisdiction, powers of government, and rights to make decisions are involved, and all are bound up in the notion of sovereignty. A sovereign nation defines itself and its citizens, exercises self-government and the right to treat with other nations, applies its jurisdiction over the internal legal affairs of its citizens and subparts (such as states), claims political jurisdiction over the lands within its borders, and may define certain rights that inhere in its citizens (or others).

The United States of America declared itself an independent and sovereign nation with the successful revolt against Britain and the ratification of the Constitution as a governing document. Does the United States today, as an international superpower, possess an unlimited sovereignty? Certainly not. The United States is bound, as a nation, by the terms of its treaties with other sovereign nations (including hundreds of treaties with Indian nations); federal pow-



ers are balanced with state powers in what we know as the federalist system; the Constitution reserves certain rights and powers to the people, rather than vesting those powers in the government. In the real world, sovereignty operates within constraints.

American Indian tribes are sovereign nations. Their sovereignty is inherent, pre- or extraconstitutional, and is explicitly recognized in the Constitution. What do these terms mean? Inherent sovereignty inheres in self-governing human groups—various scholars no doubt define different criteria of political organization as requisite for sovereign status. Tribes existed before the United States of America, so theirs is a more mature sovereignty, predating the Constitution; in that sense, tribal sovereignty exists “outside” the Constitution. The drafters of the Constitution, in express wording in the commerce clause, recognized Indian nations as something distinct from the United States. The relevant constitutional phrasing will be discussed in greater detail as we proceed; suffice to say for now that this clause and the treaty and property clauses add a constitutional basis to understandings of tribal sovereignty. Are tribes today unlimited sovereigns? Certainly not. The political realities of relations with the federal government, relations with state and local governments, competing jurisdictions, complicated local histories, circumscribed land bases, and overlapping citizenships all constrain their sovereignty.

The relationship between American Indian tribes and the U.S. federal government is an ongoing contest over sovereignty. At stake are fundamental questions of identity, jurisdiction, power, and control. Who defines tribes? The federal government, through the process of recognition? Or states? Or tribes themselves? In the contemporary world, the federal government officially recognizes over 560 American Indian tribes and Alaska Native villages. A few tribes are state-recognized, but not federally recognized. Some groups claim Indian identity but have no standing in law. Many tribes maintain tribal courts and police forces; others are under federal jurisdiction; some are under state or local law enforcement jurisdiction; many reservations are tangled in a complicated web

of interlocking jurisdictions depending on the ethnicity of the victim and/or perpetrator or the seriousness of the offense. Tribes have certain powers of self-government: the right to establish criteria for tribal membership, for example, or to elect governing councils, or to tax on-reservation businesses and persons. Some tribes have their own departments of education and run their own schools. Some reservations are incorporated into public school districts and thus are subject to the rulings of state departments of education. Some communities are served by the federal school system operated by the Bureau of Indian Affairs (BIA): the possibilities for self-determination, for local decision-making in education, vary widely across these diverse circumstances.