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Symposium Keynote: "Isolation and Restraint: Maine's Unique Status Outside Federal Indian Law"

Michael-Corey Francis Hinton

SYMPOSIUM KEYNOTE: "ISOLATION AND RESTRAINT: MAINE'S UNIQUE STATUS OUTSIDE FEDERAL INDIAN LAW"

Michael-Corey Francis Hinton*

Ntolis Michael-Corey Francis Hinton
Peskotomuhkat nil
Nujayaw Portland, *Waponakik*
Nutapeks Sipayik naga Miyaks
Nuskuhutomon yut ikolisomani-tpaskuwakon naga ktopaskuwakononnul.
Pihce yut peciptasu ikolisomani-tpaskuwakon, on toke ktuwehkanen naka knokotomonen kilun ktopaskuwakononnul.
N'pehqiyal Don Gellers *pemkiskahk*
Nekom nilun kisi-wicuhkemit.
My name is Michael-Corey Francis Hinton.
I am Passamaquoddy.
I live in Portland, in the Dawnland.
I am from the Passamaquoddy village Sipayik, which means the place at the edge of the water, and I am from the Francis family.
I am here today to speak about English-American law and our laws, tribal law or Indian law.
A long time ago English rule was brought here, and now we just use it, leaving behind our own laws.
I honor Don Gellers today.
He's the one who helped us.
Thank you for the opportunity to begin with an introduction in Passamaquoddy. I am learning the language and try to take every opportunity to speak it. They say the ancestors can always hear us when we speak the language, so I wanted them to know that I brought our language today to a new house of learning, which will educate and inspire future generations of Indian law attorneys and defenders of civil rights.
For those that do not know the story of Attorney Don Gellers, I strongly suggest you read up on him. He was a great champion for civil rights in this state. Don Gellers was the first legal champion for the Passamaquoddy People in the modern era.[1] He stood up for justice in this state at a time when we were still considered wards and when the civil rights movement in other parts of the country

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* Michael-Corey Hinton is the Leader of the Tribal Nations Practice Group at Drummond Woodsum and a citizen of the Passamaquoddy Tribe (Sipayik). The following is a lightly edited and footnoted version of his keynote remarks at *Maine Law Review*'s 2023 symposium.

1. *See* Colin Woodard, *Passamaquoddy's Legal Champion Becomes a Target*, PORTLAND PRESS HERALD (July 22, 2020), https://www.pressherald.com/2014/07/04/passamaquoddys-legal-champion-becomes-a-target/; Colin Woodard, *Gov. Mills Grants Full Pardon to Late Tribal Attorney Donald Gellers*, PORTLAND PRESS HERALD (Jan. 7, 2020) [hereinafter Woodard, *Gov. Mills Grants Full Pardon*], https://www.pressherald.com/2020/01/07/gov-mills-grants-full-pardon-to-the-late-tribal-attorney-donald-gellers/.

seemed like a far-off fantasy for those living on state-managed Indian reservations in Maine.

Attorney Gellers paid dearly for his service to my people. It is no secret that state police arrested Attorney Gellers immediately upon returning home after just filing the land claims case.[2] Police charged him with "constructive possession" of marijuana cigarettes found in his home. Attorney Gellers was convicted on one of three counts, a felony, was sentenced to prison time, and was disbarred from practicing law in Maine.

Attorney Gellers then left the United States and the State of Maine never insisted that he serve his sentence. Attorney Gellers immigrated to Israel where he served in the Israeli Army and became a war hero during the Six-Day Arab-Israeli War. He eventually became a rabbi and taught at a synagogue in New York City.

Governor Mills posthumously pardoned Attorney Gellers in 2020 after tremendous advocacy by Maine Attorney Robert Checkoway.[3] In her pardon statement, the Governor noted multiple factors, which called into question the State's motivation behind arresting, vehemently prosecuting, and then declining to incarcerate Attorney Gellers. Perhaps most notably, she stated that "Mr. Gellers' arrest, trial and appellate oral argument were all handled by the State's top officials; a unique level of attention to a small personal possession case."[4]

The Press Herald reported several years ago that a prominent civil rights attorney from Boston overheard state officials discussing the Gellers case shortly after the arrest.[5] According to the individual who overheard state officials speaking in a diner, the "powers that be" concocted the plot to take down Gellers, a "trouble maker," "who was stirring up the Indians."[6] According to quotes in the Press Herald, the idea was to get Gellers "off the Indian suit."[7]

This is for you, Don. Thank you for standing up for us and for dynamiting the path forward for tribal advocates in this state.

I would also like to thank the *Maine Law Review* for the invitation to speak this afternoon as well as my friends and colleagues who spoke today as part of this wonderful symposium.

I am humbled to be here today before so many people, all gathered to learn about the issues of federal Indian law, the Maine Indian Claims Settlement Act (MICSA),[8] and the tragic history of tribal-state dealings in this state.

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2. Woodard, *Gov. Mills Grants Full Pardon*, *supra* note 1.

3. *Governor Mills Issues Posthumous Pardon for Former Passamaquoddy Advocate Donald Gellers*, STATE OF ME. OFF. OF GOVERNOR JANET T. MILLS (Jan. 7, 2020), https://www.maine.gov/governor/mills/news/governor-mills-issues-posthumous-pardon-former-passamaquoddy-advocate-donald-gellers-2020-01.

4. *Id.*

5. Colin Woodard, *Evidence Emerges, Lending Credence to Conspiracy*, PORTLAND PRESS HERALD (July 22, 2020), https://www.pressherald.com/2014/07/09/evidence-emerges-lending-credence-to-conspiracy/.

6. *Id.*

7. *Id.*

8. Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (1980) (codified at 25 U.S.C. §§ 1721–1735); *see also* Act to Implement the Maine Indian Claims Settlement, P.L. 1979, ch. 732, §§ 1–31 (codified at 30 M.R.S. §§ 6201–6214 (2022)).

The fact that a legal symposium on this subject matter in Maine is even permitted is remarkable. This would be truly amazing to someone like Attorney Gellers if he were still alive. I do not mean to be dramatic, but the sad, yet inspiring story of Don Gellers shows that we cannot take this forum for granted. If it was the 1960s or '70s, and a group of attorneys and advocates interested in Indian law attempted to gather in Portland, we would be more likely to be hauled off to jail or heckled by protesters than granted permission to use a grand space such as this. After all, this state was the absolute last to allow natives to vote in elections[9] and was most likely the last state to have state employees serve as actual Indian agents to manage the affairs of entire native communities.

There are many in the communities here who still remember the state Indian agents and what life was like before federal recognition, before the Settlement Act. This is our living memory, not some distant far off oral history passed from one generation to the next. Our elders survived state sponsored genocide at the hands of Indian agents, they fought for civil rights, they experienced total tribal sovereignty in the late 1970s and the fear mongering from state officials that came with it. Now, they've lived under the Settlement Act for forty-plus years. And here we are, in 2023, and someone gave a Passamaquoddy lawyer a microphone for thirty to forty-five minutes. So now, without further ado, you're about to get a millennial Wabanaki lawyer's take on the Settlement Act.

I was born in 1986, six years after the Settlement Act was approved. It is all I've ever known. I came to social consciousness and awareness during the 1990s and 2000s amidst failed casino referendums and battles over environmental quality. Initially, I only ever heard private, behind-closed-door conversations about "The Settlement Act." I ultimately learned the back story, how the deal went down, who profited, and who suffered. In all the stories, one thing remained constant: the tribes lost in the end.

One summer when I was maybe twelve or thirteen, my dad and I were driving up to Sipayik to visit family for our summer celebrations. Somewhere between belting out Hinton family road trip classics, such as the Rolling Stones "Get Off My Cloud" and Warren Zevon's "Werewolves of London," my dad told me about the Settlement Act, from beginning to end.

From elders finding our 1794 treaty carefully wrapped and tucked away in a dusty box, to relative riches, and back to abject economic failure and poverty. He told me about Don Gellers and then Tom Tureen,[10] who became our Tribe's attorney after Don Gellers was run out of Maine. He told me about how the Tribe received money to buy land to restore what was illegally taken but how most of those lands could never be purchased and how we ultimately ended up losing more than we gained, more than we could have ever imagined back in 1980.

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9. *Voting Rights for Native Americans*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-native-americans/ [https://perma.cc/J5C4-G8S2]; Dana Hedgpeth, *'Jim Crow, Indian Style': How Native Americans Were Denied the Right to Vote for Decades*, THE WASH. POST (Nov. 1, 2020), https://www.washingtonpost.com/history/2020/11/01/native-americans-right-to-vote-history/.

10. *See* Brian Kevin, *Fifty Years Ago,* Passamaquoddy v. Morton *Launched a Pivotal Fight for the Return of Tribal Land*, DOWNEAST (2022), https://downeast.com/history/passamaquoddy-v-morton/.

It was heavy windshield talk and my dad decided to pull over at a marina, probably somewhere around mid-coast, to smoke a cigar, his favorite vice. When there, lo and behold, out of nowhere, was Tom Tureen. The man, the myth, the legend himself, was hanging out next to the dock where we parked, tending to a beautiful forest green vintage World War II-era army jeep. It turns out that he was loading up the jeep on to a barge to take it off-roading on an island. My dad and Tom knew each other, so pleasantries were exchanged, and I was introduced to Tom. I was astounded. That is it. Memory over.

I don't know then if I knew I wanted to be a lawyer working on Wabanaki sovereignty issues, but I like to think that was some sort of seminal moment in my career path. After that, for many years, it was generally more heartbreak for the Tribes when it came to tribal-state relations. As a teenager, I remember the casino referendums. I remember successive governors making nice overtures to the Tribes only to see us blocked in the legislature or at the ballot box.

For years, I saw the Maine Attorney General's Office consistently issue legal opinions or take stances to block federal programs, hinder economic development, or obstruct fishing, the Passamaquoddy way of life. I have seen governors refuse to fund or appoint commissioners to the Maine Indian Tribal State Commission,[11] and I have seen the same Governor issue and rescind their own tribal-state consultation policy.[12] Through it all, the Tribes tend to consistently, if not always, come up frustrated and without their objectives met.

The worst part about this experience is that it stands in stark contrast to how progress is developing around Indian country. My day job is as a tribal attorney for tribal nations and their businesses. On any given day, for clients elsewhere in the country, I am helping tribal nations work under tribal and federal law to license their own businesses, build and expand casinos, start cannabis operations, run courts, administer complicated zoning processes to build community infrastructure, and generate economic development and tax revenue. These are opportunities that are all generally unavailable to my clients here in Maine. And for seemingly no good reason either; because all of these activities are legal under Maine law, just not if conducted by tribes under tribal law. As a result, I have seen countless business ventures related to manufacturing, agriculture, gaming, and energy development come and go from Wabanaki Territory. This is how things tend to go under the current Settlement Act framework.

To be optimistic though, I stand here on the heels of a two-year legislative session, which saw great improvements with respect to tribal-state relations and real policy progress in the areas of safe drinking water, taxation, and sports betting. Wabanaki advocacy left an indelible mark on the legislative session concluded at the end of 2022. For a period last spring, the local papers were running near daily stories, op-eds, and letters to the editor regarding the efforts of the Wabanaki to

11. *See An Act Making Unified Appropriations & Allocations for Expenditures for the Fiscal Years Ending June 30, 2021, June 30, 2022, and June 30, 2023: Hearing on L.D. 221 Before the J. Standing Comm. on Appropriations & Fin. Affs. & the J. Standing Comm. on the Judiciary*, 130th Legis. (2021) (testimony of Paul Thibeault, Managing Dir. of Me. Indian Tribal-State Comm'n).

12. *See Chronology of Tribal Representation*, ME. STATE LEGIS. (Jan. 4, 2017), https://legislature.maine.gov/lawlibrary/chronology-of-tribal-representation/9262.

seek full recognition of their sovereignty by the State of Maine. More than 1,600 Mainers testified in favor of Wabanaki sovereignty in Augusta and in Washington, D.C.[13] Our efforts fell short, but our impact was felt. This was the greatest outpouring of support that I have seen for Wabanaki causes in my entire lifetime.

And our efforts have resumed in 2023 with a new head of bi-partisan steam and a renewed sense of optimism that feels stronger and more vibrant than ever before. The Nations plod ahead with the support of thousands of Mainers, over one hundred organizations, well more than half of the Maine State Legislature, and 50% of the Maine Congressional delegation.[14]

What are the Nations asking for? Equality, sovereignty, and fairness. In particular, the Nations seek the rights, privileges, powers, and immunities possessed and exercised by federally recognized tribes elsewhere in the United States. Equality: for us, it means equal rights for all tribes across the United States, including the Wabanaki.

It is an indisputable fact that the Wabanaki Nations have less access to opportunities to self-govern and self-determine their future than the vast majority of tribes across the United States. The socioeconomic outcomes of this forty-year social experiment are clear and were documented by the Harvard Project on American Indian Economic Development in a report published in 2022.[15]

The Harvard Report concluded that the Wabanaki Nations lag behind in a variety of key indicators.[16] For example, according to the Harvard Report, per capita income for American Indians in Maine as identified in the Census is markedly lower than the annual per capita income of other Mainers.[17] Maliseet and Mi'kmaq are the lowest among all Wabanaki Nations with around $11,320 and $11,431.[18] Maine's per capita income is nearly triple that at $34,593.[19]

Another indicator is the level of increase in average resident income. Since 1989, the real (inflation-adjusted) income of the average U.S. resident (excluding Maine) has increased by 17%.[20] For Mainers, income has increased 25%.[21] Meanwhile, since 1989, the real income of the average American Indian resident of Lower 48 reservations (excluding Maine) has increased by more than 61%.[22] In

13. Kevin Miller, *Maine Tribes' Yearslong Campaign for Sovereignty Has Stalled Under Veto Threat. What Happens Next?*, MAINE PUBLIC (Apr. 29, 2022), https://www.mainepublic.org/politics/2022-04-29/maine-tribes-yearslong-campaign-for-sovereignty-has-stalled-under-veto-threat-what-happens-next.

14. *See* Randy Billings, *Tribal Leaders Call for Expanded Rights in Rare Appearance Before Joint Session of Maine Legislature*, PORTLAND PRESS HERALD (Mar. 16, 2023), https://www.pressherald.com/2023/03/16/tribal-leaders-speak-to-joint-session-of-maine-legislature/.

15. JOSEPH P. KALT ET AL., THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., ECONOMIC AND SOCIAL IMPACTS OF RESTRICTIONS ON THE APPLICABILITY OF FEDERAL INDIAN POLICIES TO THE WABANAKI NATIONS IN MAINE (2022).

16. *Id.* at 9.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 16.

21. *Id.*

22. *Id.*

stark contrast, Wabanaki residents have seen a mere 9% increase in real per capita incomes.[23]

Child poverty rates, which measure the percentage of children living in households with incomes in the poverty level, are even more shocking. According to census data collected by the Harvard Report, the five-year average poverty rates for Wabanaki communities range from a low of 40.2% at Passamaquoddy's Indian Township to a high of 76.9% at Mi'kmaq.[24] By comparison, Maine's child poverty rate for the same period is reported as 15.1%.[25]

This is absolutely unacceptable inequality.

The irony in all of this is that the Wabanaki proudly stood as America's first allies and have served in every American war since the Revolution.[26] Leading up to the American Revolution, the British and the Americans consistently and actively sought support from Wabanaki interests.

Ultimately, the Americans made the biggest international splash when, within weeks, they signed both the Declaration of Independence and the fledgling country's first Peace and Friendship treaty with foreign states—in this case, the Wabanaki Nations. Thus, the Wabanaki were the first nations to recognize the sovereignty of the United States. The primary objective of the negotiations, held in Watertown, Massachusetts, was for the Americans to secure military support through the immediate provision of Wabanaki warriors to General Washington's ranks and through the recruitment of additional fighters.

The Treaty of Watertown embodied the parties' sovereign commitments of mutual defense, political alliance, and friendship. In exchange for regional military and diplomatic clout, the United States offered to protect and aid the Wabanaki against not only the British, but also the "[s]ubjects of . . . Massachusetts Bay, or of any other of the United States."[27]

The ensuing alliance proved geopolitically significant and established the northern border of the United States by bisecting Wabanaki territory held by the Mi'kmaq, Maliseet, and Passamaquoddy. When Wabanaki warriors did not join the American ranks as quickly as General Washington hoped, the General himself wrote letters to the Passamaquoddy and Maliseet Chiefs on Christmas Eve of 1776. The day before he led American forces in his iconic crossing of the Delaware River, he was reiterating his desires for peace and friendship with the Wabanaki. Wabanaki warriors ultimately served in the Revolution in various ways in fulfillment of their treaty obligations.

Colonel John Allan of the Massachusetts Militia, who was directly funded by Congress to maintain relations with the Wabanaki, even authorized the

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23. *Id.*

24. *Id.* at 9.

25. *Id.*

26. *See* Michael-Corey F. Hinton & Erick J. Giles, *Eli-Tpitahatomek Tpaskuwakonol Waponahkik (How We, Native People, Reflect on the Law in the Dawnland)*, 74 ME. L. REV. 209, 221 (2022). For additional historical background on the Wabanaki Nations' participation in the American Revolution and subsequent subjugation by the State of Maine, see *id.*

27. *Id.* at 220–21 (quoting Treaty of Watertown, July 19, 1776, https://digitalmaine.com/cgi/viewcontent.cgi?article=1006&context=arc_200_exhibit_wabanaki_relations [https://perma.cc/2KKR-LQVT]).

Passamaquoddy to guard the coast from Machias to Passamaquoddy Bay and authorized them to seize the enemy's vessels.[28] In furtherance of his orders, Passamaquoddy Captain Sopiel Socktomah took fifty warriors, captured an armed British schooner in Passamaquoddy Bay, and ran the boat to Machias where it was turned over to the Americans.[29]

After the Revolution, Congress enacted the Indian Nonintercourse Act of 1790 to prevent the sale of Native-owned lands unless approved by the federal government. Despite the Non-Intercourse Act and requests from the Wabanaki Nations, the federal government did not protect the Wabanaki following the Revolutionary War. The Treaty of Watertown's promises of mutual defense, friendship, and assistance rung hollow in the years following, as the Wabanaki people were displaced from the vast majority of their traditional territories by the time Maine entered the Union in 1820. Treaties to protect certain lands and resources were executed with Massachusetts and then Maine. The People of the State of Maine ratified a constitution that dutifully engrained these treaties as part of Maine's organic law. Thus, upon Maine's entrance to the Union, the Wabanaki were told that our treaty rights would be upheld.

We were then dismayed to see the State of Maine install itself as a colonial overlord to whom Wabanaki lands and resources were nothing but opportunities to create material wealth. Whether through the theft of the Penobscot's treaty reserved townships or the flooding of Indian Township to power lumber mills, the Wabanaki Treaty rights referenced in Maine's Constitution have never been properly respected. The bountiful natural and marine resources that once sustained the Wabanaki People became the capital investments needed to create "new" wealth in non-native lumber towns and fishing communities throughout the state.

Now, the State of Maine has always fancied itself as "independent," with a sort-of cheeky New England rebelliousness. One area in which the state has been particularly immune from national policy and legal norms is with respect to indigenous rights. The United States Constitution gave Congress plenary authority to regulate commerce with "foreign Nations . . . and with Indian Tribes."[30]

Between 1823 and 1832, the United States Supreme Court issued a series of opinions authored by Chief Justice John Marshall, now known as the "Marshall Trilogy."[31] The Marshall Trilogy recognized that indigenous nations were endowed with inherent sovereignty to govern themselves and their lands to the exclusion of the states and under the protection of the United States. The last of these decisions, *Worcester v. Georgia*, was intended to protect the Cherokee from the incursions of the State of Georgia.[32] President Andrew Jackson is said to have

28. Speech by Lewis Mitchell, Representative of the Passamaquoddy Tribe of Indians before the 63rd Maine State Legislature, 1887 *in* Hard Times – The Survival of the People 1800–1950 Appendix F, THE ABBE MUSEUM, https://static1.squarespace.com/static/56a8c7b05a5668f743c485b2/t/5a679f4071c10b6b5468dcda/1516740423356/Wabanaki+Time+Line-+Hard+Times.pdf [https://perma.cc/AJ82-JFDF].

29. *Id.*

30. U.S. CONST. art. I, § 8, cl. 3.

31. The Marshall Trilogy consists of Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

32. *Worcester*, 31 U.S. at 534–45.

infamously responded that, "John Marshall has made his decision; now let him enforce it." The Trail of Tears immediately followed.

Maine has treated indigenous people like Andrew Jackson treated the Five Civilized Tribes leading up to the Trail of Tears. From the end of the American Revolution until 1975, we were treated as practically less than human. In a case from 1842, *Murch v. Tomer*, Maine's highest court infamously wrote "[i]mbecility" on the part of the Natives, "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."[33] In 1892, the Law Court's *State v. Newell* case imparted a different sort of racist-infused legal precedent, one aimed at the systematic erasure of an entire people.[34] In *Newell*, Maine's highest court determined that the Passamaquoddy Tribe did not legally exist.[35] It held that the Passamaquoddy were unlike "the Indian tribes of the west" and could not make war or peace or "administer even civil justice among themselves."[36] And just like that, the State of Maine had legally erased my people from existence.

It took another eighty years until a federal court effectively overturned Maine's systematic and illegal erasure of my people. The fight for equality was a costly one but it ultimately overturned Maine's colonial rule, brought federal recognition, government housing, and the opportunity to operate some federal programs under the Indian Self-Determination Act.

During this period, our children were educated in on-reservation church schools, or they were sent to boarding schools.[37] Many of those children who went away did not return. One who did return was my great uncle George, or "Georgey," as the old-timers called him. George was sent to the infamous Carlisle boarding school in 1909. He was one of many Passamaquoddy youth sent to this and other government-run boarding schools around this era. George joked that he "served as Jim Thorpe's waterboy" during his time at Carlisle. Uncle George fell in love when he was at boarding school and that landed him in trouble. It turns out that romantic relationships were strictly forbidden among the native students and that George fell in love with another student. He eventually left school, joined the Navy, and returned home to Washington County.

Even as a veteran, George could not vote and he found no work, so he left and moved to Detroit where he worked at Ford Motor Company for several decades. After his wife passed and kids grew up, George retired and moved back to Pleasant Point. As he said, he "returned to fulfill a promise to his father," my great, great grandfather. George, now in his seventies, was elected Tribal Governor (or Chief) at Pleasant Point. His tenure as Chief was extremely challenging, but he fought loudly for his people. He recognized that his people were worse off than natives in

33. Murch v. Tomer, 21 Me. 535, 538 (1842).

34. State v. Newell, 84 Me. 465, 24 A. 943 (1892).

35. *Id.* at 943–44.

36. *Id.*

37. *See* Peter Smith, *U.S. Report Details Church-State Collusion on Indigenous Schools*, PBS NEWS HOUR (May 14, 2022), https://www.pbs.org/newshour/nation/u-s-report-details-church-state-collusion-on-indigenous-schools; Mary Annette Pember, *Death by Civilization*, THE ATLANTIC (Mar. 8, 2019), https://www.theatlantic.com/education/archive/2019/03/traumatic-legacy-indian-boarding-schools/584293/.

other parts of the country. According to the Press Herald, which covered his tenure during its *Unsettled* series,[38] George wrote "a fusillade of pointed letters to state and federal authorities."[39]

The letters covered all sorts of issues including how state-maintained sewerage systems on the reservations were overflowing, forcing Indian Township residents "to drink their own sewage"; how the longtime Indian agent, Hiram Hall, was a man with "a nasty Venom tongue like a rattlesnake," who denied food, firewood, dental care, and even children's milk allowances to Indians who questioned his rule; and how one woman, Viola Homan, had starved to death as a result of such denials.[40] "As long as I live, I will tell the whole U.S.A. the condition and mismanagement in regards to your department in handling our affairs," he wrote the state director of Indian Affairs, Paul McClay.[41]

In 1964, the State declared an "Indian Day,"[42] which Uncle George urged other tribal leaders to reject. Why? Because the state was refusing to release money from the Tribe's state-controlled trust fund to hire a lawyer to pursue their land claims. It was ultimately my boisterous Uncle George who hired Don Gellers in 1964. Attorney Gellers' first case was seeking dismissal of charges against several Passamaquoddy women who protested a non-native man's seizure of reservation land after allegedly winning its title in a card game. He quickly resolved a wide range of social services and child welfare matters after uncovering gross fraud and abuse by Indian agent Hiram Hall, who had been appointed the legal guardian of, and controlled benefits and services for, numerous Passamaquoddy over the years.

In 1965, tragedy struck George's family and the Passamaquoddy Tribe.[43] On November 14, 1965, a white Cadillac full of five white hunters from Billerica, Massachusetts arrived at George's house. George was home with his brother Peter, my great-grandfather. Peter was a disabled World War II veteran, who walked with a limp. He built submarines in Connecticut where he lived at the time, but was visiting home, Sipayik, for an annual hunting trip.

The hunters drank and chatted while they watched football that day with George and Peter. The hunters ultimately made sexual overtures at the young women in the house, who were all high-school age and studying for school the next day. My great-grandfather, Peter, and Kirk Altvater, another Passamaquoddy man,

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38. *Unsettled*, PORTLAND PRESS HERALD, https://www.pressherald.com/unsettled/ [https://perma.cc/58P5-8892].

39. Colin Woodard, *An Unlikely Handshake Alters the Course of Maine's History*, PORTLAND PRESS HERALD (July 22, 2020), https://www.pressherald.com/2014/06/29/an-unlikely-handshake-alters-the-course-of-maines-history/.

40. *Id.*

41. *Id.*

42. Governor John H. Reed, Maine Indian Day Proclamation, June 30, 1964, https://digitalmaine.com/cgi/viewcontent.cgi?article=3049&context=arc_executive_proclamations_1975 [https://perma.cc/5L7J-BPVB].

43. This incident was also covered as part of the *Unsettled* series in the Portland Press Herald. *See, e.g.*, Colin Woodard, *White Men From Out of State Come Hunting For Girls*, PORTLAND PRESS HERALD (July 22, 2020), https://www.pressherald.com/2014/06/30/white-men-from-out-of-state-come-hunting-for-girls/; Colin Woodard, *A Simmering Conflict, Stoked By Alcohol, Erupts*, PORTLAND PRESS HERALD (July 22, 2020), https://www.pressherald.com/2014/07/01/a-simmering-conflict-stoked-by-alcohol-erupts/.

led the hunters away from George's house to try to feed them and send them on their way. The men resisted and ultimately cruised the reservation using an eight-year-old tribal member boy to pick up young girls in the community. By the end of the night, a fight broke out and Peter lay on the road, his head bashed in by a two-by-four. He never woke up and died the next day.

In addition to Peter, his friend and his friend's eight-year-old son were viciously beaten. Neither ever recovered from the emotional wounds of that night. There were eyewitness accounts of what happened. The eight-year-old tribal member present saw one hunter strike my great-grandfather in the head with a weapon. After Peter was struck, the hunters left for a cabin in Princeton where they were staying. No arrests were made for several days despite three victims and one fatality. It took the advocacy of Don Gellers to get local police to make an arrest. They only did so after Gellers convinced a local reporter to write a story about how local police were failing in their duties to investigate or make arrests in connection with local homicides. The article "noted that six Pleasant Point Passamaquoddy had been killed over the previous 17 years – in a community of 330 – with nobody being held accountable. 'Is the Indian testimony being considered seriously and is the law being applied fully in the case?'"[44] The article would ask, rhetorically, "Are (they) second-class citizens, legally as well as socially?"[45]

Ultimately, of the five hunters, one of them was charged with a single crime, second degree manslaughter.[46] At trial, the defense claimed that the single defendant acted in self-defense. An all-white jury found the defendant "not guilty." According to reports, there was applause in the courthouse when the verdict was read.[47]

The killing of my great-grandfather, as well as several other egregious violations of tribal members' civil rights around this time, were a catalyst. Significantly, this was in the years after the Civil Rights Act and Martin Luther King, Jr., was a significant influence on Uncle George. So much so that, in 1968, my great uncle George, the Passamaquoddy Governor from Sipayik at the time, traveled to Washington, D.C., with several tribal members to attend the Poor People's March on Washington.[48] They were inspired by Martin Luther King, Jr.'s passion and vision for equality in this country. The men took these stories home, where they became kindling for the burgeoning fight for sovereignty and respect for our treaty rights.

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44. *See* Colin Woodard, *Tepid Response from Authorities Leaves Tribe Furious*, PORTLAND PRESS HERALD (July 22, 2020), https://www.pressherald.com/2014/07/02/tepid-response-from-authorities-leaves-tribe-furious/.

45. *Id.*

46. *Id.*

47. Colin Woodard, *'Beaten Before We Started' at a Controversial Trial*, PORTLAND PRESS HERALD (July 22, 2020), https://www.pressherald.com/2014/07/03/beaten-before-we-started-at-a-controversial-trial/.

48. Colin Woodard, *Tribe Resists Injustices, In and Out of Court Settings*, PORTLAND PRESS HERALD (July 22, 2020), https://www.pressherald.com/2014/07/12/tribe-resists-injustices-in-and-out-of-court-settings/.

Back at home, however, in response to requests for the State to release tribal funds to support Tribal legal costs for the land claims case the State wrote: "It is the unanimous opinion of the council and the opinion of the Governor as well, that there is not sufficient possibility of benefit for the Indians."[49] George Francis passed away in 1971, with his vision for equality for the Passamaquoddy still unfulfilled.

Maine maintained its colonial domination over the Wabanaki until 1975 when the First Circuit ruled in a historic decision that the Passamaquoddy Tribe was an Indian tribe to whom the United States owed a special trust responsibility.[50] The court then interpreted the Non-Intercourse Act as applying to the Passamaquoddy even though the federal government did not formally recognize the Tribe.[51] The decision prompted the United States to establish federal relations with, and bring land claims on behalf of, the Passamaquoddy and Penobscot.

The First Circuit's decision in *JTC v. Morton* ushered in a new era in Maine in which all principles of federal Indian law, including common law doctrines, applied to the newly federally recognized Wabanaki Nations. Nonetheless, Maine's anti-Indian animus continued in another First Circuit case, *Bottomly v. Passamaquoddy Tribe*, which involved a private contract dispute.[52] *Bottomly* involved the question of whether the Passamaquoddy Tribe possessed the power of sovereign immunity from lawsuit, an inherent attribute of sovereignty possessed by Tribal nations.[53]

In an amicus brief, Maine attempted to argue, without any supporting legal authority and in contravention of federal Indian common law, that tribal sovereignty is not an inherent right, but rather is dependent on a showing that it had been granted to the tribe by the federal government through explicit recognition or implicitly through a course of dealing.[54] The State argued that the Passamaquoddy Tribe was an "ethnic association" because they are "merely remnants or fragments" of a former independent tribe.[55]

The First Circuit wholly rejected this argument finding that the "state seems to us to fundamentally misconceive basic principles of federal Indian law."[56] The First Circuit applied federal Indian common law principles which—contrary to Maine's contention—do not permit state action or "[t]he mere passage of time with its erosion of the full exercise of the sovereign powers of a tribal organization" to constitute "an implicit divestiture" of inherent tribal sovereignty.[57] The court went

49. Colin Woodard, *Passamaquoddy's Legal Champion Becomes a Target*, PORTLAND PRESS HERALD (July 22, 2020), https://www.pressherald.com/2014/07/04/passamaquoddys-legal-champion-becomes-a-target/.

50. Joint Tribal Council of the Passamaquoddy Tribe v. Morton (*JTC v. Morton*), 528 F.2d 370 (1st Cir. 1975).

51. *Id.* at 377.

52. Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1062–63 (1st Cir. 1979).

53. *Id.*

54. *Id.* at 1065.

55. *Id.* at 1062, 1064.

56. *Id.* at 1065.

57. *Id.* at 1066.

on to hold that the Passamaquoddy retained its inherent sovereign immunity from suit.[58]

> As Congress stated in its final committee reports on the land claims settlement in 1980, the U.S. Court of Appeals for the First Circuit had established during the years leading up to the Settlement Act that "the Maine Tribes still possess inherent sovereignty to the same extent as other tribes" and that they were "entitled to protection under federal Indian common law doctrines."[59]

Efforts to settle the land claims began in earnest in 1977 after President Jimmy Carter intervened.[60] At that time, the legal claims of the Passamaquoddy, Penobscot, and Maliseet covered as much as two-thirds of the State of Maine.[61] The claims complicated the ability of private landowners to alienate land due to clouded title and obstructed the capacity of municipalities to issue municipal bonds. The combination of threats of violence against the tribes, economic uncertainty, and the loss of the State's legal control over tribal lands in Maine gave the State significant incentive to resolve the claims expeditiously.

As a result, the overall settlement embodied two general goals: (i) forever end Maliseet, Passamaquoddy, and Penobscot land claims in Maine; and (ii) ensure that the state would have jurisdiction over all facets of Wabanaki affairs with few exceptions. There has been consistent litigation, conflict, and animosity between tribal and state leaders for much of the past forty-plus years.

While the Wabanaki and the State continually locked horns over the extent to which the Nations here retained their sovereignty and the ability to self-govern, tribal nations elsewhere have seen dramatic improvements in terms of government infrastructure, the delivery of programs and services, and economic development.

The socioeconomic data and disparities listed earlier from the Harvard report illustrate hallmarks of under-developed economies. Such underdevelopment typically leads to greater demand on state and local governments to provide resources to support families in need, the elderly, and children. In contrast, the Harvard report noted that, elsewhere in Indian country, "[t]he most notable consequence of federal policy in the Self-Determination Era has been to give tribes the opportunity to—and the responsibility for—providing services to their citizens. Improved economic conditions under self-determination) have resulted in tribes heavily augmenting their governmental budgets with their own funds."[62]

Tribal governments are generally responsible for providing or paying for the full range of services and functions that are expected of any competent state and local system, including fire departments, police officers, courts, public works,

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58. *Id.*

59. Task force to Amend the Maine Act to Implement the Indian Land Claims Settlement, Civil Jurisdiction Example: The Regulation of Natural Resources (General Principles) (Sept. 12, 2019), https://legislature.maine.gov/doc/3188 [https://perma.cc/5M6K-MPGQ] (first quoting S. Rep. No. 96-957, at 14; H.R. Rep. 96-1353, at 14; and then quoting S. Rep. No. 96-957, at 13).

60. *See, e g.*, Joseph G. Gousse, *Waiting for Gluskabe: An Examination of Maine's Colonialist Legacy Suffered by Native American Tribes Under the Maine Indian Claims Settlement Act of 1980*, 66 ME. L. REV. 535, 547 (2014).

61. *See id.* at 546.

62. KALT ET AL., *supra* note 16, at 12.

parks and recreation, housing, education, and environmental protection. As a consequence of self-governance programs and governmental development, tribes no longer look to the federal government for approval of every major decision they wish to make. The result of this is that self-governing tribes can often streamline decision-making and respond to community needs faster and more efficiently than the federal government or state and local neighbors. Dozens and dozens of tribal self-governance success stories are well-documented.

Regardless of how one wants to cut up the data and compare and contrast the Maine Settlement Acts with federal Indian law, it is clear that the Wabanaki Nations have been held back in their pursuit of self-governance and in the implementation of their own communities' visions of self-determination and economic development.

When my Uncle George strove for equality, he did not envision stagnation and obstructed access to federal programs designed by federal and tribal leaders to enhance and protect public health and safety for his people.

There must be acknowledgement that the current framework, the status quo, was considered a win for the State of Maine. State officials celebrated MICSA as among the most restrictive jurisdictional arrangements imposed on tribes at the time. For those that wanted to see the stagnation and the lack of opportunity in Tribal communities, they succeeded spectacularly. For those that wish for a brighter future for Wabanaki children, where they can self-determine their own futures, while speaking their languages, on their own lands, then we must look to the words of Congress for direction.

Congress left the door open to jurisdictional agreements, in the form of changes to the Maine Implementing Act, which can be enacted for purposes of amending the Settlement Act's jurisdictional framework. This can be a pathway to recognize inherent Wabanaki sovereignty and restore access to federal Indian laws.

There have been two substantive changes to the Maine Implementing Act over the past several years. They are significant, yet not nearly enough. One included changes to allow Passamaquoddy and Penobscot to implement criminal jurisdiction under the Violence Against Women Act (VAWA).[63] It took roughly nine years from the time this jurisdiction was available elsewhere in Indian country until it came to Maine and yet they *still* only apply to two of four tribes in the state.[64] The State of Maine fought Penobscot's prior efforts to implement VAWA and prevented more than a million dollars in federal funds from coming into the state to make communities here safer.

After years of suffering through brown, yellow, and often foul-smelling water delivered to Passamaquoddy Tribe at Sipayik by a state-regulated utility, last year the Tribe took matters into its own hands and fundamentally changed how drinking water is regulated on Passamaquoddy lands. The Tribe organized a rally, received hundreds of pieces of testimony, and ultimately accomplished a total enhancement

63. L.D. 766 (129th Legis. 2020); *see also* Nina J. Ciffolillo, *Legal Barriers to Tribal Jurisdiction over Violence Against Women in Maine: Developments and Paths Forward*, 73 ME. L. REV. 351, 356 (2021).

64. Ciffolillo, *supra* note 75, at 356.

of the Tribe's regulatory and civil powers with respect to drinking water.[65] To get there, we needed to navigate a series of state and local disagreements over who can regulate the digging of a well on tribally owned lands and survive literal decades of mistrust over water that routinely looked and smelled like the swamp it came from. After all of that, we convinced the State that the Tribe needed the ability to regulate its own drinking water. They agreed, and the Settlement Act was changed accordingly.

The problem is that these are just two, narrow examples. Two examples that required the expenditure of significant tribal resources and which, prior to resolution, cost the state untold sums of federal grant dollars. There are many who are beholden to the words of the Settlement Act and the Maine Implementing Act as though they were etched in stone on Mount Sinai and brought down to Augusta and Washington, D.C., to be a permanent part of human history. In reality, Congress expressly invited the parties to amend the agreement in the future.

That is the goal. To recognize all of the harm, conflict, and resource drain that has come from the Settlement Act and to chart a new path to prosperity for Wabanaki communities and their neighbors. The countless success stories from around Indian country show that Maine is not really different. There's no real reason that the Wabanaki Nations must remain underdeveloped, with nothing but hopes and dreams for a brighter future.

No, we deserve equality and a chance to build a brighter future for us and our neighbors.

This is what Uncle George would have wanted.

65. L.D. 906 (130th Legis. 2022).