

**Aboriginal Self-Government in the United States
A Qualitative Political Analysis**

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Contents

Executive Summary	iii
Preface	vi
Introduction	1
Historical Background	2
Indian Reorganization	3
The "Great Society"	5
Tribal Government Today	6
Requirements for Effective Self-Government	7
Critical Assessment: Power	10
Autonomy	11
Legislative Competence	13
Jurisdiction and Comity	16
Interdelegation	17
Participation	18
Critical Assessment: Resources	19
Real and Human Capital	20
Effective Tax Base	22
Earned Revenue	23
Unearned Revenue	23
External Finance	24
Critical Assessment: Legitimacy	26
Representation	28
Accountability	31
Checks and Balances	32
Political Diversity	33
Fundamental Rights	35
Summary: The American Experience	36
Legal Framework	36
Judicial Dominance	37
Fiscal Insecurity	38
Social Differentiation	38
Political Culture	39
Conclusion: Rethinking 'Government'	40
Notes	41
Bibliography	46

Executive Summary

American Indian tribal governments were originally designed, not by Indians, but by federal officials. They were designed on the model of American municipalities and intended to teach Indians an American brand of civic organization. Although tribal governments have gained greater legal authority and financial resources since the 1930s, they have not changed their structures significantly. Despite the rhetoric of 'tribal sovereignty', moreover, the fact remains that tribal self-government is neither constitutionally nor economically secure.

Not only are American Indian tribal governments reproductions, in miniature, of western institutions, they are poor imitations. Liberal democratic theory emphasizes the importance of having power, resources and legitimacy as conditions of good governance. Tribal governments lack power and resources, and as a result they also lack legitimacy in the eyes of a growing number of Indians. Widespread abuses of tribal power and violations of individual Indians' human rights, condoned by the federal government as internal affairs of the tribes, have further eroded tribal leaders' legitimacy and effectiveness.

There are a number of structural reasons for these weaknesses, in U.S. law, policy, and practices.

Indian tribes are not identified as part of the federal system in the U.S. Constitution, and consequently their right to self-government is not constitutionally protected. Indian self-government relies on a judicial theory ('residual sovereignty') that recognizes the power of Congress to restrict or abolish tribal authority or subject it to the supervisory 'trusteeship' of the Secretary of the Interior.

Tribes' dependence on the federal judiciary to protect and define self-government condemns them to insecurity and uncertainty, since the nature and extent of tribal authority are determined case by case, issue by issue, and tribe by tribe. The shifting sands of judicial decisions undermine effective planning and development, and constantly defending their autonomy through litigation drains tribes of resources.

Tribal governments' shortage of adequate real resources, and the undeveloped and undiversified state of their economies, perpetuate a self-destructive dependence on federal aid, and makes tribal officials more responsive to federal officials than to their own constituencies. 'Soft', short-term, discretionary grants also distort the structure of reservation economies, which

swell and then collapse periodically, and thus appear to prove that Indians are incapable of real development.

The American experiment with self-government has been a success — in its original assimilationist terms. For a century, self-government has promoted the emergence of technocratic and political elites, based on their employment in tribal government and their access to political privileges. This has eroded the social prerequisites for traditional consensus-based politics. Although they adhere to egalitarian ideals, tribes are no longer egalitarian in fact, economically or politically. The colonial struggle, originally between Indians and white Americans, has become internalized.

New movements in American Indian politics are attempts either to challenge or to justify the results of history in terms of traditional values. One side argues that existing tribal institutions are Indian, because they are *run* by Indians. The other side argues that electoral systems are foreign imports and cannot achieve justice. Legitimacy in tribal politics is based on symbolism (Indianness) rather than *results* — which *no one* can deliver, owing to tribes' underlying lack of legal security and economic resources.

Recommendations

1. Aboriginal peoples' right to self-government must be secure in the Constitution of Canada, not dependent on legislation or decisions of the courts. The effectiveness of Aboriginal governments, and their legitimacy in the eyes of Aboriginal people and other Canadians, will turn on their ability to devote their energy to improving the welfare of their constituents — not in asserting, defending, and redefining their legal status. After fifteen years of constitutional uncertainty, Canadians should be particularly conscious of this issue.
2. Aboriginal peoples must have adequate resources of their own — in the form of land and natural resources — to minimize aid dependence and free tribal leaders from political dependence on federal agencies. No Aboriginal government, regardless of the quality and ideals of its personnel, can be accountable to Aboriginal people if its salaries are paid by Ottawa.
3. Aboriginal peoples must enjoy the freedom, time, encouragement and resources to design their own *sui generis* political institutions, through genuinely inclusive, grassroots consensus-building processes. Popular 'ownership' of the process of constitution making is much more important than the technical legal virtuosity of the final product.

4. Mere modification or `reform' of the chief-and-council systems established under the *Indian Act* will suffer from the same weaknesses and generate the same bitter conflicts within Aboriginal communities, as the United States' *Indian Reorganization Act*, which should certainly not be taken as a model. A `reformed' colonial system, despite the very best of intentions, is still a colonial system.

Preface

It is appropriate to begin this report with a clear explanation of what it is *not*. It is not a quantitative analysis of the quality or legitimacy of American Indian tribal governments. Although such a study would be of great value to scholars and Aboriginal activists in both Canada and the United States, it would require time and resources far in excess of what has been available for this exercise. There are virtually no published data on the operations or activities of tribal governments, other than aggregate financial statistics, and few tribes publish their own yearbooks. Comparative studies of tribal government by academics have been few and merely descriptive.

The explanation for this gap is largely methodological. There is no valid, objective way to measure the accountability or legitimacy of a government. Even something that appears quite obvious, such as the existence of democracy or abuses of human rights, can elude objective testing, as I have argued in *Measuring Human Rights*. A better method, I believe, is to survey the opinions of citizens, asking the extent to which they *feel* involved, effective, informed, and secure. They alone have direct experience with their own institutions and can serve as a culturally calibrated measuring instrument. But this is a complex and expensive undertaking. In the context of U.S. tribal governments, it would entail hundreds of questionnaire or interview responses from the members of a wide cross-section of tribes. While desirable, this has not been feasible as part of this project.

By default, then, this report is based chiefly on twenty years of personal experience as a lawyer and development consultant with tribal governments and grassroots organizations in Alaska, Arizona, Montana, Oregon, South Dakota, and Washington state. Although my sense of what has been happening in Indian country necessarily reflects where I have had the opportunity to travel and work, I believe that my observations are broadly representative of conditions nationwide, and I have tried to make my own values and beliefs as explicit as possible. If others consider my assessment too harsh, it may be because they have been to places I have not, and I would welcome more examples of the exceptions to the general critique I have posed here.

Aboriginal Self-Government in the United States

A Qualitative Political Analysis

by Russel Lawrence Barsh

Introduction

There are nearly 300 `tribal'ⁱ governments operating in the United States today, as well as 140 tribal court systems, with at least nominal responsibility for 5 per cent of the nation's land area and a million of its citizens. Like their Canadian counterparts, U.S. tribes must contend with extreme poverty — one Indian family in four lives below the official poverty line. U.S. tribes must also manage a large, intrusive white population, the results of federal policies at the beginning of this century aimed at opening reservations for white settlement. Today, nearly half the population of reservations is non-Indian; on some reservations the figure is over 90 per cent. Although they are a long-established part of the U.S. administrative system, tribes lack the legal security being sought by the Aboriginal peoples of Canada. They rely on practice and precedent, not a constitutional accord, for their defence against political encroachments.

This report has been prepared to provide the Royal Commission on Aboriginal Peoples with a concise analysis of the United States' 60-year-old experiment with tribal self-government. It is concerned with how tribal governments actually behave, rather than what U.S. law says they have a right to do.ⁱⁱ Unfortunately, there have been few critical published studies of politics on individual reservations, and national statistics on the contemporary finances, activities and performance of tribal governments do not exist. Without extensive field research, it will not be possible to provide a rigorous quantitative evaluation of tribal government success — for example, how well tribes have been able to improve reservation living standards, or how often they have become embroiled in abuses of human rights. Instead, this report must remain largely qualitative, based in large part on observations made over the past twenty years as a tribal lawyer and consultant.

American Indian tribal governments were based from the start on western models. No real effort was made to build on or incorporate elements from traditional tribal institutions or values. Accordingly, this report focuses on whether they are effective in western terms, compared with similar but non-Aboriginal parliamentary systems. After showing that American Indian tribal governments perform poorly against this standard, and explaining why they have been unable to meet all their own expectations, I will argue briefly why western models *cannot*

achieve genuine Aboriginal self-determination. A thorough comparison of western and Aboriginal conceptions of politics is beyond the scope of this report and will not be attempted, however.ⁱⁱⁱ

Historical Background

American Indians always had their own forms of government, and in the early period of contact with Euro-Americans (until the 1870s) many of them modified their traditional political systems to make them more effective in defence against whites. Some of the formalization of the Haudenasaunee (Iroquois) League in the 1600s can be attributed to this cause, as can the vast Plains Indian alliances of the mid-1800s.^{iv} The so-called Five Civilized Tribes adopted constitutions modelled closely on the U.S. Constitution in the 1820s, because 'progressive' elements among these tribes believed it would help them prosper — and so it did, until their lands became too well developed and valuable for Americans to ignore.^v In other cases political changes were forced on tribes by the invading power. As early as the 1600s, the Pueblos of Arizona and New Mexico were reorganized by Spanish missionaries and explorers into vassal-states with autocratic 'governors', and the British colonies in New England organized 'tributary' Indians on reservations, with chiefs and judges appointed by colonial officials.^{vi}

In the 1870s, the United States launched a campaign to assimilate Indians culturally. It was a great social experiment and depended on direct political control of tribes' internal affairs. Indian agents on reservations appointed Indian policemen and judges to enforce wide-ranging social regulations, covering every aspect of Indians' personal life from clothing and hairstyles to religion. Councils of carefully selected leaders were also convened occasionally to ratify government decisions, such as the distribution or sale of reservation lands.^{vii} At the same time, individual Indians began taking advantage of government policies encouraging commercial farming and ranching, and by 1900 many of them had become economically independent — even relatively wealthy.^{viii} This emerging Indian middle class, often in alliance with traditional leaders and educated Indians,^{ix} began to form their own tribal councils and business organizations, including Granges, stockmen's associations and, on the west coast, fishermen's unions. By 1910, these grassroots Indian organizations were competing openly for power with the councils and judges controlled by the Indian Office. On some reservations this forced the Indian Office to organize or recognize more 'representative and somewhat more independent tribal committees.'^x

Under federal law, however, the final decision was still made by Indian agents and could not be appealed to the courts.

Indian Reorganization

The movement for genuine tribal self-government received a boost, ironically, from the First World War, in which at least 20,000 Indians served.^{xi} Returning Indian veterans did not hesitate to challenge the tyranny of the Indian Office and joined white reformers in advocating unrestricted citizenship for all Indians, achieved in 1924. Meanwhile the Indian Office was studying proposals to organize local governments on Indian reservations as a method of teaching citizenship skills, but it pursued this idea only selectively, on a few reservations.^{xii} In 1933, President Franklin D. Roosevelt appointed a prominent white reformer, John Collier, as Commissioner of Indian Affairs. With the stated aim of "emancipating" Indians from the Indian Office, which he likened to a colonial empire, Collier forcefully persuaded Congress to authorize *all* Indian communities to adopt their own constitutions and to govern themselves. This was the *Indian Reorganization Act* of 1934, or IRA.^{xiii} Whatever Collier's motivations, Congress expected this measure to be temporary and transitional — a training scheme, rather than a permanent transfer of political power. Indeed, within ten years Congress began holding hearings on legislation to wind up Indian tribes' affairs.

Despite Collier's liberal vision, moreover, the IRA provided that the adoption and amendment of tribal constitutions, as well as many tribal decisions concerning land and finances, would remain subject to a veto by the Indian Office. Collier's employees used this residual power to impose a highly standardized *form* of government on the tribes, so that the immediate effect of the program was to abolish *existing* councils on many reservations — many of them designed by Indians themselves — and replace them with new institutions that were even more clearly subject to Indian Office control. The result was bureaucratic standardization and a reaffirmation of federal power, rather than liberation. Indeed, not only did many tribal leaders denounce the IRA, but Collier's own legal adviser, Felix Cohen, began criticizing the program publicly when he left government service in the 1950s.^{xiv} Each tribe was allowed to vote on whether it would 'accept' the IRA, and, despite threats by Collier that a 'no' vote would jeopardize their land rights, one-third rejected it. Federal officials subsequently made no legal distinctions between IRA and non-IRA tribes, however, nor was any distinction made when the courts heard cases challenging

the scope of tribal jurisdiction. Most non-IRA tribes adopted the same forms of government as IRA tribes and are subjected today to the same kinds of federal supervision.^{xv}

The IRA did more than standardize tribal political structures and regularize the administrative relationships between tribal governments and the federal government. It further concentrated power, *within* the Indian community, in the hands of Indians who could read and write and remain on good terms with federal bureaucrats. Some IRA councils were taken over by successful Indian business people who had money to invest in gifts and campaigning, while others were dominated by former Indian Office employees and landless or unemployed Indians, who secured their power by restricting or nationalizing private Indian farming, ranching and fishing.^{xvi} In either case, control of the tribal council became a new way of consolidating or redistributing Indian power and resources, swiftly undermining what remained of traditional political mechanisms. Control of the tribal council, in turn, was contingent on negotiating financial aid, preferences, and political endorsements from the Bureau of Indian Affairs (BIA), which reinforced informal federal control of day-to-day tribal decision making. Even well intentioned councils were forced to 'agree' to culturally inappropriate social programs, or to the sale of minerals, water, and fisheries, as the price for continued good relations with the BIA.^{xvii}

The "Great Society"

Until the 1960s, tribal councils had little real power except to approve and help carry out BIA social programs. Moreover, although IRA tribes were authorized on paper to establish their own tribal court systems, courts continued to be appointed and managed by the BIA on most reservations and enforced federal regulations rather than tribal codes.^{xviii} This changed dramatically in 1965-1975 when, as part of the expansion of federal social programs under President Johnson's Great Society policy, federal financial aid to Indian reservations increased several-fold.^{xix} Tribal bureaucracies grew rapidly, and tribes assumed direct administrative control of reservation courts, schools, clinics and other facilities. Federal courts ruled that tribes had full power to tax and regulate reservation economies, without any interference by the states.^{xx} The BIA embarked simultaneously on a campaign of urging tribes to lease and develop their minerals and power resources,^{xxi} with the result that tribal governments found themselves flooded with money and power. Like developing countries during the same period, they invested in a lot of what John Kenneth Galbraith calls "symbolic development" — airports and modern

administrative buildings — as well as bureaucracy, police and prisons.

A second turning point was reached in 1975, when Congress enacted the *Indians Self-Determination Act* (ISDA). ISDA simply authorized two federal departments (Interior, including the BIA, and Health and Human Services) to *subcontract to tribes* the routine administration of their existing Indian social programs. Policies would continue to be made by the cabinet, and funding would depend on annual appropriations by Congress, however. Tribes gradually assumed the field-level operation of nearly all Indian programs and services under ISDA, but ultimate control remained federal. Then funding levels began to decline in the 1980s, squeezing tribes between growing responsibilities and dwindling resources. Environmental concerns put a brake on reservation mineral exploitation, further reducing tribal finances, while growing citizen activism on reservations (both white and Indian), together with fiscal conservatism in Washington, put greater pressure on tribal governments for accountability and effectiveness. At the same time, tribes lost a significant part of their taxing and regulatory powers in decisions by an increasingly conservative Supreme Court. This may help explain why tribes today are so enthusiastic about casino gambling — they have been left with few alternatives to pay for basic operations.

Tribal Government Today

Two major points emerge from this historical summary. The Indian tribal governments we see today evolved by gradually taking control of federal government programs and institutions, not by elaborating a distinctly Indian alternative to the Euro-American political system. They continue to be part of the federal administrative pyramid and to depend on federal aid and approval. While tribal employees are mainly Indian, decision making is still influenced by non-Indian officials, and tribal institutions are, at best, modifications of western models. As a corollary point, the flow of power and resources continues to be top-down from Washington, D.C., rather than bottom-up from the Indian people themselves.^{xxii} This invites oppression and corruption and tempts tribal leaders to follow the advice of the BIA, rather than their own voters. Although conscientious tribal leaders often struggle to resist federal influence and adopt an independent policy line, they can be frustrated easily: federal officials withhold aid or refuse co-operation and blame *them*, undermining their legitimacy with tribal voters and ending their careers as reformers.

Are American Indians nevertheless better off for having *some* kind of self-government, however imperfect? Unquestionably so, in *material* terms, judging from the fate of the tribes that were 'terminated' in the 1950s and placed under state governments. With their tribal lands sold, cut off from federal aid, and neglected by state agencies, these tribes' economies soon collapsed.^{xxiii} On the other hand, the complex web of federal Indian regulations and administration has probably been a significant deterrent to reservation investment and growth.^{xxiv} Hence while the federal-tribal relationship has been protective, it has also been limiting. The same may be true in socio-cultural terms. Racism and discrimination continue to be problems in areas surrounding Indian reservations.^{xxv} Tribal self-government has helped shield Indians from this kind of mistreatment and has perpetuated the ideas of nationhood and cultural identity at a time (the 1960s to the 1990s) when the majority of Indians have grown up with the same mass media as their neighbours. To the extent that tribal government has been structurally western or American, however, it has deterred the evolution of genuine indigenous institutional adaptations to contemporary realities. It has also made Indian leaders assume responsibility for policies actually made by federal agencies.

This has arguably produced two serious problems for future Indian self-determination:

1. *Tribal self-government itself has become a force for cultural assimilation.* Traditional decision making and dispute resolution have given way to western methods, habituating Indians to authoritarianism, majoritarianism, and inequality. Technocratic elites have been formed, and their political power is well entrenched. It will be difficult to reorganize tribal society along less western lines, should tribes ever attempt to do so.
2. Struggles over individual Indian rights and dignity, formerly with federal officials, are now directed at tribal leaders. *Political conflicts have been internalized within the tribes themselves.* To the extent that tribal leaders have been unable to resolve these conflicts satisfactorily, or have responded with repressive measures, there is a tendency for Indians to lose confidence in their own ability to govern themselves efficiently and fairly. Political self-confidence, already eroded by the experiences of colonialism, poverty, and the residential school system ('boarding schools'), is being undermined further by the apparent weakness and corruption of tribal governments.

Requirements for Effective Self-Government

For centuries, western philosophers and political scientists have struggled over definitions of 'effective' or 'democratic' government. Without entering into the debate,^{xxvi} which has intensified in the wake of the recent waves of democratization in Eastern Europe and Africa, it is necessary here to explain the evaluative framework used in this report. I have started from the premise that to be *effective* — to make things happen — any government must, *at a minimum*, have adequate *power, resources, and legitimacy*, terms I have defined for this purpose as follows:

1. *Power* is the legally recognized authority to act, including legislative competence (the right to make laws) and jurisdiction (the right to resolve disputes). It may arise from the constitution, from national legislation, from court decisions, or even from custom. The key issue is whether *other* governments and institutions recognize and respect what is done, in actual practice. Claims to 'sovereignty' are meaningless if they are mere claims that cannot be exercised.
2. *Resources* comprise the physical or economic means of acting, in particular financial resources, but also information, technology, human resources (skilled and healthy people), and the natural resources needed for security and further economic growth. Resources are needed to use power and satisfy the needs and expectations of citizens. Key issues include the nature of the fiscal and trade relationships among governments, which affect both control and adequacy of resources.
3. *Legitimacy* refers to public confidence in and support for the government. Legitimacy can arise from the way leaders are chosen, the extent to which they respond to public wishes, whether they succeed in satisfying public expectations, and whether they respect human rights. Legitimacy enhances resources and power; in its absence, leaders must work against public resistance and expend more power and resources to get things done, if at all.

Within this framework, it is possible to imagine situations where one or two of these conditions are missing. A government that enjoys great legitimacy, but *lacks power or resources*, can accomplish little and remains largely symbolic — especially if it is competing with other political institutions that *do* wield substantial power and resources. This has been the fate of 'traditional' tribal governments in both the United States and Canada. Their legitimacy sustains them, but usually their members maintain parallel allegiances to elected parliamentary tribal councils because they alone can provide material benefits.

The opposite side of this coin is represented by governments that have power and resources, *without legitimacy*. To maintain themselves, such regimes must be repressive. They must use their political assets to combat the public interest, rather than serving it. This describes the dictatorships (or 'authoritarian' regimes) that have arisen among relatively wealthy industrialized countries in the past few centuries. On the international stage they have been independent, even dominant, while at home they were at war with their own people. They have often been able to raise material living standards, but only at the expense of personal freedom and security.

Where a government has some power, but is short on both resources *and* legitimacy, it is likely to become oppressive *and dependent*. This is the situation of developing countries today and is associated with 'neocolonialism'. It also describes most American Indian tribes under the current legal framework. To maintain itself, the regime must seek resources from other governments. In return, these benefactors become the real decision makers, imposing wide-ranging conditions on continued aid, fresh investments, and the rollover of debt. External dependence makes governments more responsive to their foreign creditors than they are to their own citizens. This erodes whatever legitimacy they still have, accelerating the need for repressive domestic measures. While a resource-rich regime may succeed for a time in smothering dissent with social welfare expenditures, an externally dependent regime must give priority to satisfying its creditors, speeding its downfall. External debt in developing countries has brought down not only dictatorships but also the democracies that replaced them.^{xxvii} A revolutionary or reform-oriented regime quickly loses legitimacy when it abandons its domestic programs in order to meet its creditors' demands. I believe this has also been the main reason why reforms are rarely sustained on American Indian reservations.

It is my thesis that American Indian tribal governments today are at a substantial disadvantage compared with the state and federal arms of the American political system, for the following reasons:

1. Tribal governments have *less power*, and what power they have is insecure — that is, it fluctuates frequently and unpredictably with new court rulings and is subject to complete extinction by Congress at any time. Tribes lack complete jurisdiction over their territories and lack any kind of direct participation in national decision making.
2. Tribal governments are overdependent on federal aid for their basic resources, and this

aid is highly conditional, discretionary and unpredictable, fluctuating greatly among tribes and over time. Tribes have been forced to respond by overdrawing their natural resources, in so doing *increasing* their long-term dependency.

3. Tribal governments' legitimacy was weak to begin with because of their historical evolution from federally imposed institutions and has been weakened further by their inability to satisfy Indians' basic needs, by their external dependence and, in many cases, by abuses of power, all of which have been aggravated by power and resources problems.

This is admittedly a *western* framework of analysis. An analysis from an *indigenous* viewpoint (or from a culturally Micmac, Anishnabe or Dene viewpoint) might be easier, since it would be far more obvious that contemporary American Indian tribal governments fail to represent or achieve indigenous values such as consensus, reconciliation, family integrity, respect for individuality, or egalitarianism, however much they may claim to do so.^{xxviii} They are of western design and functions and form component parts of a wider western political system, together with the federal and state orders of government. No one should expect them to behave like traditional tribal governments. It is reasonable, however, to expect that they work effectively as western governments.

Ideally, of course, Aboriginal governments should be effective in national politics *and* culturally appropriate. In the case of American Indian tribal government, cultural issues have emerged historically as an afterthought, not in the original design of tribal institutions but as a reaction to their weakness. Culture is an issue today in tribal politics because tribal governments have been relatively ineffective. Indigenizing existing tribal institutions or replacing them with more culturally appropriate ones is advanced as a remedy, when the problem is not that tribal governments are based on *western* models, but on *bad* western models. The choice should not be between existing structures, which are plainly western, and anything that is 'Indian', but between effective western models and effective Aboriginal models. Neither is currently on the table, however, except in the broadest philosophical terms. I will return to this later. For the time being, my premise will be that a system of Aboriginal self-government must *at least* be effective as a component part of the national political system, which is western in form, regardless of its internal cultural orientation.

Critical Assessment: Power

American Indian tribal governments have *less power* than the state and federal governments, and their power is *much less secure*, limiting what they can do, as well as the efficiency and consistency of what they do. Tribal legislative competence and tribal court jurisdiction are not as broad as the states' and have been determined by court rulings rather than constitutional or legislative provisions. As a result, the scope of tribal power has been in continuous dispute and subject to frequent changes. Furthermore, tribes' right to self-government and even their *legal existence* are subject to modifications or extinction by Congress, which is rendered more dangerous because Indian tribes lack any direct representation or formal participation in national decision making. It is indeed a tribute to the energy and tenacity of tribal leaders, both in public relations and lobbying, that self-government has not eroded faster or farther.

The general principle, to be found in contemporary Supreme Court decisions, is that Indian tribes retain all powers of self-government that have *not been relinquished by treaty* or extinguished expressly by *federal legislation* and that are not "*inconsistent with their status as Indian tribes*."^{xxix} Scholars refer to this as 'residual sovereignty' — in other words, tribes retain everything that has not yet been taken away. In Canadian terms, it is a 'full box' from which Congress takes things from time to time. In addition, the 'inconsistent with status' test means that the *courts* occasionally take something out of the box, so that its contents continue to diminish. Indeed, it is in danger of becoming an *empty* box, which only Congress can refill.

Autonomy

Fundamental to the right to self-government or self-determination is power to define the community concerned, determine its membership, and design its constitution and system of government. According to court rulings, American Indian tribes have these rights as elements of their residual sovereignty. In actuality, these powers are exercised by the federal government.

An Indian tribe enjoys self-government only if it is 'recognized' as an Indian tribe by the Secretary of the Interior, who publishes an annual list. Any dispute over a group's right to be listed is decided by the Interior department itself, under criteria requiring proof of the group's genealogical, cultural, and political continuity since its earliest historical contacts with Europeans.^{xxx} The existence of a treaty is no longer sufficient, in itself, to establish eligibility. Thus far this razor has been used chiefly against very small or landless tribes, but the Interior

department maintains that all tribes could, in principle, be required to meet these standards. Even if a group has been listed, and has satisfied the Interior Department that it is an Indian tribe, Congress has the power to extinguish its legal existence and rights.^{xxxii} Tribal existence, in the legal sense, is therefore granted and lost at the discretion of federal officials and legislators.

Moreover, self-government is not a constitutionally entrenched right of all existing or recognized tribes. It has evolved slowly from legislation, court rulings and administrative practice. Although most recent presidents, from Nixon to Bush, have reaffirmed a commitment to maintaining a government-to-government relationship with tribes, the Supreme Court still refers to this as a matter of policy, not basic law.^{xxxiii} Congress is free to change it, and does change it frequently — not at present by abolishing the right altogether, but by limiting its exercise in certain particulars, as for instance in the *Indian Gaming Regulatory Act* of 1988. Indeed, the Senate has recently discussed so-called 'New Federalism' legislation that would require tribes to prove that their governments are democratic and accountable. Whether or not that is an appropriate condition to place on continued self-government, it is something that Congress plainly would have the power to do.

The issue of tribal membership has been no less sensitive in the United States than in Canada. Defining membership is undoubtedly one of the most important attributes of self-determination, since it goes fundamentally to the social and cultural identity and character of the community. In principle, membership decisions are governed by tribal law and are not subject to review by federal courts, even on grounds of discrimination.^{xxxiii} Every tribe has its own constitutional standards for eligibility and procedures for reviewing individual applications; elements include ancestry, 'blood quantum', birthplace and residence, in various combinations. Tribal standards had to be approved first by the Secretary of the Interior, however, and this explains the priority ordinarily given to 'blood quantum'. The federal government itself is not bound by tribal standards, moreover, and has its own criteria for determining whether individuals are eligible for federal Indian programs and services.^{xxxiv} Tribal members can be denied federal benefits if, for example, they reside off-reservation or were 'adopted' without being required to prove their 'Indian blood'. Since tribes rely so heavily on federal aid to maintain basic community services, they hesitate to admit members who do not add to their fundable 'service base'.

Like membership criteria, all tribal constitutions and amendments must be approved by

the Secretary of the Interior. This is required explicitly by the 1934 *Indian Reorganization Act*; in the case of non-IRA tribes, it is presumed to be a condition of continued recognition by the Interior department. The review process is entirely discretionary, and, until 1988, the Secretary did not even have to make his decision within a fixed length of time. No tribe has ever overturned a veto in the courts, and it is doubtful that many would even attempt such legal action, since antagonizing the Secretary can have far-reaching effects on funding and services. It is not surprising, then, that despite the great diversity of indigenous cultures in the United States, there is little difference among tribal constitutions. In an unpublished study nearly ten years ago, I found no statistically significant correlation between differences in tribal constitutions and 'culture areas'. What *did* explain most of the variation in tribal constitutions was *the year they were initially approved* — that is, changing policy in Washington.

Legislative Competence

Thus, tribal constitutions are remarkably uniform, with minor variations unrelated to cultural factors. Each of them contains a list of legislative powers — similar in form to sections 91 and 92 of the *Constitution Act, 1867* — which was selected from an inventory of about thirty powers originally supplied by federal government lawyers. Some tribes included most of them, others just a few. The legislative powers provisions of 140 tribal constitutions are summarized in Table 1.^{xxxv} Three preliminary observations can be made. Many of the basic^{xxxvi} functions of self-government are mentioned explicitly in a very small number of tribal constitutions. Where they are mentioned, they are often subjected expressly to the approval of the Secretary of the Interior. Some are also limited expressly in their application to Indians, or to lands owned by Indians. Thus, for example, 83 per cent of the tribes have an enumerated power to tax, but within that group, 77 per cent must obtain the Secretary's approval of their tax regulations, and 7 per cent are constitutionally restricted in what or who they can tax. Despite the fact that the Supreme Court has referred to taxation as an "inherent" power of tribal self-government,^{xxxvii} it may be limited by individual tribes' own constitutions — and of course can be modified by Congress.

Internal tribal disputes over the legislative competence of their councils are generally settled (if at all) by tribal courts, which can afford to take a liberal view of the matter.^{xxxviii} Controversies over the scope of tribal powers generally arise from their application to non-Indians, property or businesses owned by non-Indians, State-chartered municipalities, or

predominantly non-Indian settlements located within reservations. The Supreme Court has grown increasingly restrictive in its views on tribal authority since the 1970s, ruling that tribes lack regulatory powers over lands owned by non-Indians (including navigable rivers that flow through reservations) and any non-Indian communities that may have evolved historically within reservations' boundaries.^{xxxix} Since most reservations today are checkerboards of Indian-owned and non-Indian lands, and have large non-Indian populations as well, this undermines tribes' ability to adopt effective plans for wildlife and soil conservation, commercial land use, and environmental protection. This also poses problems for routine law enforcement, since the identity of the owner of the land where an offence occurred determines whether the tribe has power to regulate or prosecute it.

Similarly, the courts have held that while tribes have competence to tax non-Indians and non-Indian business activities on reservations, they do *not* have competence to *shelter* non-Indians from state taxes — for example, by selling them untaxed consumer goods.^{xl} Tribes (or any tribally-licensed Indian businesses) must collect all state taxes from non-Indian customers and remit them to the state. The only exception is where the tribal tax rate is equal to or higher than the prevailing state rate; the tribe may then simply collect its own tax. This rule, which deprives tribes of the same territorial taxing authority enjoyed by the states, impairs tribes' ability to use tax rate management as a tool for attracting investment, competing for business, or subsidizing favoured industries.

Perhaps the most important limitation on tribal competence is the comprehensive federal management of Indian tribal lands and resources, which is justified officially as an exercise of 'trust responsibility' for Indians.^{xli} 'Trusteeship' is a hold-over from nineteenth-century theories of Indians' supposed cultural backwardness and need for supervision; since the 1880s, Indian lands have been characterized as owned, not by the tribes themselves, but 'in trust' for them by the United States. Until the 1970s this meant that federal officials negotiated mining, logging and agricultural leases and conducted conservation projects subject only to tribal 'disapproval' of proposed actions. Recent legislation entitles tribes to assume these functions, though under federally-approved tribal policies.^{xlii} The federal government is still authorized to impose a special tax on Indian resource income for its services, however.

Like state governments, furthermore, Indian tribes are subject to *general* federal legislation^{xliii} and cannot make laws inconsistent with federal laws. As a result, tribal

governments *share* legislative power with the federal *and* state governments; they have *exclusive* competence only over Indian lands and communities, to the extent that they do not conflict with federal enactments. Changing patterns of land ownership on reservations, and the growth of federal regulatory programs, have meant a gradual shrinkage in the scope of tribal competence. Limiting the scope of tribes' taxing power furthermore means that the *structure of reservation economies* is influenced by federal and state tax codes, as much or more than tribal policies. And while tribes have gained an important administrative role in the management of their own minerals and other resources, the Secretary of the Interior, as 'trustee', may still disallow tribal resource management policies.

Jurisdiction and Comity

Like legislative competence, the jurisdiction of tribal courts is subject to territorial limitations and federal supremacy. Since 1958, the rule has been that tribal courts have exclusive jurisdiction over disputes among Indians arising on the reservation, except with respect to certain federal crimes, where the offender may be prosecuted by the tribe *and* the federal government, concurrently. State courts have the authority to reach inside the reservation to the extent that this does not "infringe upon the right of the Indians to govern themselves", for example, in matters involving only non-Indians, or non-Indian lands and property.^{xliv} This is a difficult test to apply with any consistency or certainty, and the Supreme Court itself has admitted that it can do no more than weigh the facts in each specific case.^{xlv} Thus, for example, the Supreme Court has held that some tribes have much broader power to conserve fish and wildlife than others — apparently based on its sense of the importance of hunting and fishing to their economies.

The most important restrictions on tribal jurisdiction today are *personal* or *racial* rather than *territorial*. The Supreme Court held in 1978 that tribes lack inherent criminal jurisdiction over non-Indians and, in 1991, extended this exemption to Indians who are not members of the same tribe.^{xlvi} Congress swiftly overturned the second ruling, but the first still stands. Consequently, tribes may apply only 'civil' sanctions (such as compensation and restitution) to try to control the conduct of non-Indians on reservations. Criminal measures are applied only to Indians. Thus while federal, state and municipal jurisdiction applies to everyone and everything located within certain boundaries, tribal jurisdiction depends on the race of the offender and the race of the owner of property. Tribes are treated more like country clubs, in this respect, than as

governments.

An important aspect of the effectiveness of local jurisdiction in the American political system is *comity*, or the extent to which courts in one state must respect and enforce the judgments of courts in other states. Tribal court decisions have gradually achieved comity through practice and precedent; they are *legislatively* entitled to comity only in the case of child-custody orders.^{xlvii} On the whole, though, it would be fair to say that tribal courts have gained the respect of the state courts at the same time as they have lost much of their jurisdiction on the reservations. Compared to the 1960s, tribal courts may be less able to reach all reservation activities and disputes, but they can be more confident that their orders will be enforced by other courts.

In summary, it can be seen that state and tribal jurisdiction are overlapping or *concurrent* in many respects. In disputes involving any non-Indians or non-Indian property, tribal courts proceed with caution, and federal court rulings offer little reliable guidance. This legal confusion has been aggravated by 1950s-era federal legislation placing *some* reservations, in *some* states, under concurrent state jurisdiction for *some* purposes. The allocation of responsibility between state and tribal courts on these reservations continues to generate a great deal of federal litigation.^{xlviii} The point to be emphasized is that not only is tribal jurisdiction limited to certain persons and property within the reservations, but *no one is ever certain how extensive it is, and this differs from state to state.*

Interdelegation

To avoid these problems of competence and jurisdiction, a growing number of tribal governments are negotiating jurisdictional *compacts* — intergovernmental agreements — with neighbouring states. Congressional approval is required, by the Constitution, for any compacts made among the states, and it is not clear whether this would limit the authority of states and tribes to make similar arrangements. Congress has given blanket approval to state-tribal compacts regarding child custody, but there is no general legislation yet on this question.^{xlix} Agreements on topics as wide-ranging as tax revenue sharing, wildlife management and criminal jurisdiction have nonetheless been made and are reducing the confusion and inefficiency of jurisdictional disputes in some states. A notable example is the so-called Centennial Accord of 1989 in the state of Washington, a framework agreement that commits the state and all 27 Indian

tribes within its borders to annual consultations, with the aim of negotiating agreements on all matters of mutual concern.

While these intergovernmental agreements will eventually restore some of the effectiveness of tribal governments, by *co-ordinating* state and tribal activities, they cannot cure the underlying problems caused by limited tribal competence and jurisdiction. State governments lack constitutional authority to *delegate* any of their powers to tribes or authorize tribal governments to do anything not permitted by their own constitutions or federal law. Agreements cannot enlarge tribal power; they can only improve the efficiency of use of existing power.

Participation

Since the powers of tribal governments can be modified by special federal Indian legislation, and must moreover be exercised subject to general federal legislation, tribes should naturally demand a role in relevant federal decision making. This has not happened, in large part because of demographic factors. American Indians constitute one per cent of the U.S. population and do not constitute a majority in any state or federal electoral district.¹ Absent special constitutional provisions, such as have been under negotiation recently in Canada, it is unlikely that any member of Congress will ever 'represent' Indians or Indian tribes. Tribes nevertheless do maintain active lobbies at the Capitol, focusing their efforts on Indian legislation and on the Senate and House committees devoted to Indian affairs.ⁱⁱ Without a vote, however, what do they have to trade? Tribal lobbyists generally have their greatest impact in the following areas:

1. 'Pork-barrel' projects — that is, federal capital spending on Indian reservations, such as dams and buildings, that will spill over into the neighbouring state economies and thus enjoy state support.
2. The reorganization of existing federal Indian aid programs and competition with other Indian tribes for larger shares of aid, but with little ability to increase the *total* amount of aid.
3. Exempting Indian tribes from the regulatory provisions of new laws, or including Indian tribes (with states and/or cities) among the beneficiaries of new domestic spending programs, with highly varying degrees of success.

The key concern here is the *efficiency* of tribal lobbying. State governments and their citizens are directly represented in Congress — Indian tribes must participate in federal decision making as 'interest groups', like environmentalists, the pharmaceutical industry, and the

plumbing trade. Tribal leaders have been skilful persuaders, but they cannot promise large numbers of votes or campaign contributions in the next federal election. They have succeeded in blocking some dangerous bills, such as proposals in the 1970s to abolish treaty fishing rights in the Pacific northwest, but only at great expense and effort. Apart from the 1978 *Indian Child Welfare Act*, they have *not* been able to win any enlargement or clarification of tribal competence or jurisdiction.

Critical Assessment: Resources

Legal power is meaningless without adequate economic resources to use it effectively. No modern-day democracy can ignore the demands of its citizens for adequate schools, accessible health care, or a chance to find meaningful employment. Social and economic development cannot be stimulated without at least some amount of public expenditure. The free market may be able to supply public necessities, such as health clinics and highway networks, but few individual citizens can pay for them. Taxation, and either public use or redistribution of wealth, have become an indispensable responsibility of modern governments. But even in a libertarian or minimalist society that did nothing other than make and enforce laws to protect the rights of citizens, the cost of legislators, police, judges, and jails would not be inconsiderable. Only in a very small, culturally homogeneous and resource-rich society with great equality and few social problems can we imagine government succeeding by talk alone.

These observations are especially relevant in a discussion of the United States which, despite its capitalist ideology, taxes and spends as extensively as any other industrialized country.ⁱⁱⁱ Not only does the national government subsidize 'distressed' regions through special aid programs, but states and cities use public expenditures and tax shelters to compete for private investment and business relocations. In this political environment, Indian tribes must also compete to make their economies productive and competitive, and this cannot be done by decree. Tribes need financial resources to manage their real capital (land and natural resources) and improve their human capital (Indians' health, life expectancy and skills), so that they can promote growth and eventually become self-sustaining economically. Few tribes retain much natural wealth, however, and most tribal economies depend chiefly on federal aid to provide employment and pay for basic services. This has put tribal governments in a no-win situation, where they develop their remaining resources without jeopardizing their federal aid — much like

the welfare trap faced by individuals. What is worse, delays in strengthening tribal economies threaten a brain drain, as average educational levels among Indians have risen much faster than the number of reservation jobs for the past twenty years. Individual Indians must continue to choose between material welfare and participating in self-government.

Real and Human Capital

In superficial terms, American Indians are land-rich, compared to other Americans and Aboriginal people in Canada. Reservations contain nearly five per cent of the country's total land area, as well as perhaps a tenth of its hydrocarbon reserves, a third of its uranium, and parts of most major river systems. Two-thirds of the tribes do not have significant energy resources, however, or commercially valuable forests. Some are still chiefly agricultural, and many see little hope except in tourism. The point is this: very few tribes have a natural resource grubstake to launch their economies, and far fewer have *renewable* resources that can be depended upon for more than a generation or two. Despite their relative size, U.S. reservations are resource-poor, like most reserves in Canada. Even apart from environmental considerations, most are not sufficiently endowed to pay for their immediate human needs *and* for growth by liquidating their real assets.

Most Indian land claims in the United States were litigated under the 1946 *Indian Claims Commission Act* and fully paid in the 1970s and 1980s. The compensation paid totalled nearly one billion dollars; but this was less than one per cent of the capital value of the land tribes had lost by fraud, confiscation or imposed treaties, and Congress and the Interior department were careful to ensure that most of the claims money was either distributed to individual Indians — as per capita payments, which were quickly spent on consumer goods — or used to offset the cost of federal programs and services.^{liii} I emphasize this to make the point that American Indians did *not* use their outstanding claims as leverage to regain land or obtain an adequate capital fund for the future. The most valuable capital resource they had — a legal claim to a large part of the country — was converted into net one-time transfers of less than \$500 per Indian. Tribes today must plead for aid of about one billion dollars yearly — less than the value of an annuity on what they lost.

Every nation must build its economy on technology rather than raw materials, if it is to survive in the long term. This is particularly true of small societies. Raw materials eventually run

out, and global competition and substitution keep their prices low and declining even if resources are renewable, like crops, trees and fish. Competition today is based on value-added, and Indigenous peoples cannot escape this. On the contrary, many indigenous scholars and political leaders argue that this is exactly where indigenous societies can excel, drawing on their traditional knowledge, skills and creativity. They have given community-controlled education and health increasing priority in their own budgets and in fiscal negotiations with Congress. Although Indian health conditions are still poor, educational achievement has improved markedly since the 1960s, with the growth of tribal community colleges a decisive factor.^{liv}

Realizing this potential fully will require sustained investment in reservation health, nutrition, family services and education, which in turn will require a substantial financial investment over the next several decades. Failure to make the effort will reinforce a cycle of poverty and poor employability. But this financial need exceeds what most tribes can draw from their own capital resources.

Effective Tax Base

Most North American governments — national, regional, and local — rely on taxes to maintain basic operations and services. Taxation has two important advantages over other means of financing public actions. Tax collections are relatively stable from year to year, and rates can be used to help stabilize business activity and ensure future revenue. Taxation also involves citizens directly in paying for the activities of their government and can be a powerful incentive for them to take elections seriously and demand strict accountability from government officials. Of course, no one likes to pay taxes, and poorly designed tax systems can retard economic growth or increase the distress of the poor. Indian tribes have avoided general income or sales tax systems, preferring to tax only a few key foreign industries (mining or logging companies) or consumer goods sold mainly to outsiders (cigarettes and liquor). This is popular with tribal members, but these undiversified tax systems are relatively unstable and less able to emancipate tribes from their present heavy reliance on federal aid.

Most tribes' effective tax base is very small, moreover. Private business activity is limited, generally as a result of poor location, lack of adequate infrastructure, and a discouraging regulatory environment.^{lv} Most Indian-owned land is unproductive. Reservation residents tend to spend most of their income in neighbouring off-reservation communities — so that most of the

tax potential from Indian consumer spending goes to the states.^{lvi} Recapturing this leakage through the development of on-reservation retailing and services has been a primary objective of many tribal governments' planners, but this is hampered by tribes' limited ability to supply infrastructure needs and investment capital. It is a self-perpetuating cycle: tribes' lack of a secure fiscal base means they cannot stimulate the growth of a taxable private sector. There are also political factors at work. Tribal governments' overall weakness has made them reluctant to support privately owned Indian businesses, for fear of political competition. They tend to prefer tribally-owned ('parastatal') enterprises, which necessarily require outside investors. Little attention has been paid, on most reservations, to the creation of a good private business environment, as opposed to attracting large external investments.

Earned Revenue

Tribal governments' preference for direct control of enterprises has meant the emergence of a wide variety of tribal parastatals, chiefly since the 1960s, ranging from mining, forestry and fish processing to manufacturing and tourism. Manufacturing — which has benefited from plant relocations, federally subsidized infrastructure projects (industrial parks), and preferential federal procurement policies, especially in military procurement — has become the fastest growing sector of the Indian economy, producing everything from pencils and camouflage tents to computer chips and car parts. Many of these have been established under 'turnkey' contracts, with management and ownership passing gradually to the tribal government from a group of external investors. Tribes make profits from many of these enterprises, using them to pay for tribal government operations and services. Without entering into the debate about whether privatization would result in greater profitability — or, indeed, whether some of these enterprises have been attracted only by promising them low-paid non-union workers and regulatory loopholes, as has happened throughout the Third World — it should be sufficient here to emphasize that *parastatal-led development is undiversified*. If tribes put all their eggs into one or two baskets — albeit very large and very promising baskets — they are extremely vulnerable to changes in market conditions.

This is what Zambia discovered when world copper prices collapsed a decade ago, and what Alaska and Alberta learned when world petroleum supplies expanded after the oil shocks. No government can remain stable, effective, or independent as long as it finances itself from a

small handful of industries. When world markets are strong, it may seem as if parastatal-financed governments are prospering compared with governments still dependent on foreign aid. When markets change, however, governments dependent on industries affected adversely by the change will find themselves overextended, in debt, and seeking aid.

Unearned Revenue

What was just observed about undiversified economies applies with even greater force to tribes that still rely on revenue from the lease or sale of their natural resources by the BIA. Although a majority of tribes have tried to increase their share of the proceeds of resources by creating parastatals to develop and market them, many simply depend on rent from federally negotiated leases of petroleum and timber land. To a great extent, this is not a matter of contemporary tribal choice, but a hold-over from the days (from the 1880s to the 1950s) when nearly all reservation mining and logging was federally controlled. Indians were little more than passive beneficiaries of the income, which was often divided per capita rather than going to the tribe. Many tribes gained control of their resources in the 1970s, only to discover that the BIA, in its enthusiasm to 'develop' Indian reservations, had left them with a legacy of long-term leases. Some tribes, like the Crow and Northern Cheyenne, launched costly court battles to break these agreements, but others were unable to do so. They are not only undiversified, and thus insecure economically, but trapped at very low rates of return.

The message for Aboriginal peoples is the danger of embarking on self-government with a backlog of economically crippling commitments. This is a particular concern in areas still subject to claim, in which the lands ultimately transferred to Aboriginal governments may already be burdened with leases and concessions. This is problematic not only in the sense of reducing the new government's development options, but also because the new government may be tempted to rely on the income rather than building a more diversified, dynamic and secure economic base.

External Finance

Most reservation economies are small, undiversified and unstable, with substantial leakage to neighbouring states. This forces them to depend on federal aid for between 50 and 80 per cent of their employment and an even larger share of basic human services.^{lvii} At the same time, tribal

economies' weakness means that federal spending has very little impact. Indian personal income from transfer payments (welfare) and subsidized employment is mostly spent somewhere else, so that the major financial impact of each aid dollar is to *state* economies. This maintains a cycle of poverty and dependence, in which the tribes demand more aid while the states demand that it be *of a form* that will pass through reservation economies, rather than being capitalized. Since Congress integrates tribal and state objectives, the total level of federal aid is almost irrelevant. No matter how much is spent, it is designed to leak through to the states. Tribal members see their personal welfare rise and fall with annual aid levels, but see little evidence that any jobs are being created from internal reinvestment. This is much more than a fiscal problem. It undermines Indians' confidence in their own governments' ability to achieve real economic change and reinforces a view of tribal leaders as little more than 'grant-writers'.

Federal Indian spending is very *low-quality* aid, in the terms now used by Third World development economists. Some of the chief reasons for poor quality are the following:

1. The amount of aid received by each tribe is not based on need according to a fixed formula. Tribes compete for a limited amount of funding for short-term 'projects', and federal government decisions on the distribution of aid are completely discretionary.
2. Aid programs vary annually in total amount, eligibility and objectives and are not tied to any long-term policies or projections of need. Competition among tribes and between tribes and states leads to annual struggles to redefine and redirect each program.
3. Most aid is directed at personnel costs (salaries, training) and at research and 'demonstration', rather than capital requirements (equipment, technology) or maintaining sound programs once they have been developed.
4. Each tribe must compete separately for dozens of specialized categories of aid every year, each with its own distinct requirements for eligibility, objectives, and accounting. Tribes budget according to the variety of aid sources available, rather than the current needs and desires of tribal members.
5. Total funding is far below need. Many tribes receive either no aid for certain social programs or scarcely enough to recoup the expense of administering the aid received.

Renewing federal financial assistance from year to year requires a considerable investment of paperwork and lobbying, resulting in the growth of top-heavy tribal bureaucracies devoted to clerical work and accounting, rather than governance. The discretionary,

unpredictable character of federal aid moreover frustrates any long-term planning or long-range capital development, while subjecting tribes to fluctuating federal social policies. Priority is given consistently to short-term welfare and employment programs, which can maintain the relationship between federal and tribal bureaucrats indefinitely. Aid dependence endows tribal bureaucracies with a strong self-interest, antagonistic to that of tribal members. There are about 18,000 federal bureaucrats involved in managing Indian services, which in turn employ thousands of tribal bureaucrats and support one-third of all reservation jobs. This is a powerful force against change.^{lviii}

Congress continues to create additional, increasingly specialized tribal aid programs (e.g., elder care, drug and alcohol abuse, child abuse, environmental training), but their accountability requirements have grown faster than the total resources available. Most recently, Congress approved a "Self-Governance Demonstration Program", allowing thirty selected tribes to receive a portion of their federal aid in a lump sum, rather than a large number of separately negotiated grants and contracts.^{lix} Some of the experimental tribes have already complained that the total funding provided is inadequate and insecure and still bears substantial administrative costs. Indeed, the effect of this program is to shift legal responsibility for the quality of human services to tribes, without providing any guarantee of adequate resources. Tribes remain dependent, while federal costs and liability are minimized.^{lx}

Critical Assessment: Legitimacy

Without legitimacy, even the wealthiest and most powerful tribal government would be little better than continued federal paternalism. Popular mobilization, participation and commitment make a government responsive to people's needs and bring all social resources into the service of public action. Even the wisest and most benevolent regime cannot energize an alienated and excluded society. And no regime can pretend to be wise and benevolent if it disregards the beliefs of its citizens. European colonialism was often justified on the ground that more advanced nations were better able to tell backward ones what was 'for their own good'. Legitimacy was misguidedly sought in science — for example, the widespread use of anthropologists by British colonial officials and U.S. Indian administrators earlier this century — or the recruitment of black and brown people into the colonial service. But science, sensitivity and race do not make regimes legitimate, and they certainly do not satisfy the aspirations of

disenfranchised peoples.

Legitimacy and 'democracy' are not synonymous. In western terms, democracy suggests a particular combination of institutions — elected representatives, competing political parties, independent judiciary — that has resulted, historically, in increasing the legitimacy of the absolutist monarchies that preceded them. Other arrangements may also sustain legitimacy, in the context of other political cultures. There is no *a priori* basis for doubting the legitimacy of the Hopi *kikmongwi* system or the Haudenasaunee League, although elections are foreign to both of them. Legitimacy must be ascertained from the actual *results* of a regime, not its form. As suggested below, we must look to both *objective* factors, such as the extent to which expressions of popular wishes cause changes in official policy, and to *subjective* ones, such as the extent to which citizens express confidence in their leaders — and in their own ability to bring about changes when necessary.

American Indian tribal governments bear a heavy burden from their past. They evolved from federal colonialism, a gradual and federally supervised evolution, and do not represent revolutionary alternatives or grassroots initiatives. Their legitimacy has been weakened further by their continuing fiscal and political relationship with the federal government, by their apparent lack of genuine policy independence, and by their failure to achieve more progress in satisfying Indians' basic human needs. Tribal governments' power and resources have grown since the 1960s, but they have done little to increase their legitimacy. On the contrary, some of the first institutional changes made during this period involved strengthening tribes' potential repressive apparatus — police, courts, and jails. Representative processes were *not* improved in most instances, and tribes successfully opposed the application of the *Bill of Rights* to most of their activities.^{lxi} As predicted by one team of scholars, "[Indian] Agency paternalism [was] replaced by tribal paternalism".^{lxii}

In the 1970s, Indian tribes began to experience what students of Latin American politics call 'crises of legitimacy'. Plainly the most dramatic example was the occupation of Wounded Knee, on the Pine Ridge Indian Reservation, by the American Indian Movement, in response to a crackdown on political dissidents *by the tribal council*.^{lxiii} Many other reservations suffered confrontations over the next ten years, often in response to mining projects approved by tribal officials in disregard of popular opinion. Northern Cheyennes came to blows over a petroleum lease. Colvilles protested a molybdenum mine, and Navajos staged major protests against

evictions from the site of a massive coal mine.^{lxiv} On other reservations, there were conflicts over gambling casinos, taxes, ballot-box stuffing and corruption. The common theme was frustration with the non-responsiveness and illegitimacy of *tribal* officials. Although tribal governments have grown more cautious, and the worst violence has subsided, the underlying *structural* causes of legitimacy crises remain largely unresolved.

Representation

Most tribal governments today are republican in form (Table 2), headed by an elected legislative council. The number of council seats and terms of office vary widely. Some councils are districted, so that each councillor represents a different part of the reservation, but it is more typical for the entire membership to vote for each council seat. Although some tribes still have meetings of a general council made up of all tribal members, it usually serves only as a backup to elected officials.^{lxv} The chief executive (chairperson or president) may be elected by the council from among its members, or elected directly. In some tribes, the chief executive and other officers are servants of the council, while in others they form a cabinet (executive committee) that is authorized to govern when the council is not in session. Many different *specific forms* of representation can be found, but there are two constants: (1) election of tribal legislators and/or officers, and (2) rule by the majority in elections and decision making.

These constants are not consistent with the real social structure or traditional political cultures of most tribes. Families still form the basic and essential social unit of most tribes, and they are often concentrated in different parts of the reservation. Many reservations are also multi-ethnic, containing of a number of tribes or fragments of tribes that were consolidated by federal officials a century ago and frequently still maintain some of their distinctness and competition. An effective system of 'representation' should ensure that family and ethnic diversity are reflected in the composition of the council. This can be achieved in some instances by using a carefully crafted scheme of districting, but a geographical subdivision of the tribe can rarely be a precise copy of its social subdivision. The fact that a majority of tribal voters may reside off-reservation poses additional problems for any geographical scheme of apportionment. It is common, then, for the largest families and ethnic groups to dominate the council, giving smaller social groups no meaningful role in decisions.

Liberal social theory assumes that self-interest is an *individual* phenomenon and that

elections will therefore produce in a legislature a neat statistical representation of the diversity of viewpoints among the populace. This assumption is false in western societies, and even more false in Aboriginal societies. Elected legislatures reflect only large concentrations of opinion, not the true diversity of the nation, especially where the number of political parties is small and there is no provision for proportional representation of all parties.^{lxvi}

Traditional Aboriginal governments usually provided for a *balance of power* among social groups (families, clans or confederated tribes). This requires the direct representation of each constituent group *and* decision making by consensus, or something very near to consensus. The same principle has been invoked, of course, with respect to the design and reform of the Canadian Senate: to preserve a balance among all the constituents of Confederation, each should be represented directly and enjoy either a veto or, at worst, an equal voice. Majority rule makes decision making easier and faster, of course, but it is dangerous wherever the majority has the power and inclination to use its advantage systematically against minorities. Constitutional rights are supposed to check this sort of thing, but they depend in turn on the independence of the judiciary from the majority. Representation is arguably far more powerful a weapon against repression than civil rights.

There are difficulties with electoral processes of a more general nature, unrelated to differences among cultures. Elections 'work' only if voters are educated about their political system, informed of their choices, free from threats or intimidation of any kind, and free from dependence on particular candidates. In impoverished areas, this is rarely the case. Most serious is the problem of dependence. Where voters depend on incumbent office holders for jobs, protection from a rapacious bureaucracy, or even for getting them to the head of the line for welfare payments, no amount of social theorizing can cure the fact that incumbents can use their position to buy votes. American Indians are especially vulnerable because of the extent to which federal aid, negotiated and distributed by *tribal* officials, dominates the economy. It is in individuals' self-interest to re-elect incumbents who obtain large federal grants and can be relied on to share them with their friends. In effect, the rational voter favours continued colonialism and dependable corruption. African scholars refer to such regimes as *clientelist*. They thrive in societies with minimal economies and powerful foreign 'friends'. Free political choice is impossible under these circumstances and can reappear only once economic dependence is overcome.

Accountability

It can be argued that the representativeness of office holders is not as critical as their responsiveness and accountability once in office. A majority of tribal constitutions provide two specific mechanisms for accountability: recall and referendum (Table 2). Voters dissatisfied with council action can, by petition, force new elections or submit an issue to a direct popular vote. In principle, these could be powerful and even adequate weapons against unresponsive tribal officials. They are used frequently, to the extent that the average term of office, in many tribes, has been a year or less. The *effective* use of recall and referendum provisions *to shape public policy*, rather than simply giving vent to voter frustration, depends fundamentally on the accessibility of complete information about government actions and the transparency of government decision making. If citizens cannot ascertain *what* their government is doing, or *how* decisions are being made and *by whom*, they have no choice but to remain silent or, in a spirit of precaution, sack the entire government every few months just for good measure. I would maintain that most political activity on reservations in recent years has been of the latter variety.

Tribal constitutions generally do not recognize citizens' right of access to tribal records or their right to attend decision-making meetings. Many councils do not hold public hearings before taking action, and tribal members have been ejected forcefully from council sessions for asking questions of their representatives. On one Montana reservation, leases of tribal land were concealed, on the advice of tribal lawyers. Many tribes publish bound law codes and gazette all their decisions, but this is not generally required by federal law or tribal constitutions. As noted earlier, the *Bill of Rights* does not apply to tribes, except through the 1968 *Indian Civil Rights Act*, which can be invoked only on a writ of *habeas corpus*. As a result, tribal members must rely on the tribes' own court systems to ensure fair political processes, but few tribes have an independent judiciary. It is paradoxical that *openness* in government, which is taken for granted by most North Americans, is frequently lacking in tribal regimes. If indeed "sunlight is the best disinfectant", as the Supreme Court noted in an early press censorship case, American Indians are at great risk.

The Navajo Nation offers an excellent case study of these issues. The council is apportioned geographically by 'chapters', which reflect the geographic distribution of Navajo clans. Chapters enjoy a degree of local autonomy over grazing and land-use questions and have

strong formal organizations and leadership.^{lxvii} The political vitality of the chapter system was unable to prevent the emergence of a 'strongman' in the late 1960s, however, because of his ability to marshal financial aid and political support from Washington. He was able to satisfy the electorate while concealing his self-dealing and blaming problems on his political opponents and the federal government. It took the rise of a Navajo political reform movement and a violent election to remove him from office — and prosecution on criminal charges by the new tribal administration to keep him out of office.^{lxviii} Cases like this resulted in a Senate investigation of tribal government corruption nation-wide, but tribal leaders dismissed it as a racist witch hunt, and there were few changes. Regardless of its motivations, the Senate investigation addressed a real and continuing problem.

Checks and Balances

The genius of Haudenasaunee government was an elaborate system of checks and balances, which helped inspire the tripartite structure of the U.S. Constitution. It was not an entirely novel idea to American colonists, however, since the British parliamentary system involved a bicameral legislature and an independent judiciary. In light of this shared tradition of checking tyranny with countervailing forces inside the state, it is ironic that most contemporary tribal governments lack this mechanism entirely.

Elected tribal councils are unicameral,^{lxix} and the chief executive lacks a legislative veto. The closest parallel to the double-decision mechanism in U.S. and Canadian government is the scheme of concurrent general and elected councils, found among about a fifth of the tribes. The same issue can be discussed by both councils, but the decision of the general council is binding. This is an effective check only where the electorate is small and geographically concentrated, so that it is feasible for the opponents of a position to convene a general council in time to block or reverse the actions of the elected council.

Since the United States has a much longer history than Canada of submitting constitutional questions to judicial review, it may also be surprising that judicial independence is rare in tribal governments.^{lxx} Judges have typically been appointed and removed at pleasure by tribal councils and have no constitutionally defined authority to review the lawfulness of legislative or administrative actions. Their ability to protect individual rights or the integrity of the political process is therefore limited. Tribal leaders have frequently criticized judicial

independence as elitist, and therefore culturally inappropriate, with the implication that elected councils are democratic and should not be subjected to outside scrutiny. Tribal judges are organized nationally and have evolved into a lobby for fair and independent courts, but the extent to which this will be reflected in tribal constitutional reform remains to be seen.

Political Diversity

Freedom of political opinion, freedom of speech, and the right to vote are exercised most effectively through *organized* action. This is why political parties, trade unions and women's groups play a critical democratic role in developing countries, and why their scarcity is one of the major problems in American Indian tribal politics. Few parties have ever formed on Indian reservations; council races are customarily non-partisan, officially, while in actuality they are dominated by two factors: family and personality. This means that the real ideological and cultural differences among candidates remain largely implicit, and election campaigns are personalized rather than policy-oriented. Some explanation may be found in the familiarity of all small communities — there is no need to intellectualize political positions when everyone has been together since childhood. This is an overstatement, however. Familiarity may reach issues of trust and personal honour, but not the level of detailed knowledge and opinion required for decision making on specific issues. Candidates need to be challenged to reveal their own thinking. Without formalizing platforms or philosophies, moreover, it can be difficult to maintain government accountability.

There is another reason for the avoidance of political parties in tribal elections. Like their counterparts in the Third World, tribal leaders have argued that party pluralism leads to disunity. The *real* enemy, they contend, is outside the community — the federal government, state governments, white racists, faceless corporations, other Indian tribes. Unity is necessary for self-defence; hence the organizers of any formal political opposition are guilty of treason. With this line of argument, tribal incumbents have many times discredited the members of dissident political groups. Reservation unions have similarly been discouraged, and in many cases prohibited, on the ground that they are run by outside agitators and would undermine the necessary political monopoly of the incumbent council.

Distinctive tendencies have not disappeared from tribal politics, but they remain somewhat amorphous — and virtually invisible to outside observers. Nearly every reservation has

its Tories (entrepreneurs and bureaucrats) and its Grits (professionals and educated unemployed), as well as a traditional religious tendency (often youth and elders) and any number of competing western churches. Not formally organized, and usually unnamed, they are nonetheless readily identified with specific leaders. While this presents an external facade of unity, and reduces the danger of open confrontations, it also mystifies the real bases of political disagreement and policy choice within the tribal government. For example, all tendencies may cloak themselves publicly in the guise of Indian traditionalism, while promoting entirely inconsistent aims. This is not because they are confused about traditional culture; they have never openly confronted the question of conflicts between western and traditional values. The dispute remains implicit, hence ambiguous and unresolvable.

The absence of an explicit policy debate may be acceptable within traditional political systems, which were designed to negotiate rough consensus among families that were living in much the same way and had closely related interests. Tribes have been undergoing socio-economic changes and differentiating into rich and poor, employed and jobless, Christian and traditional, privileged and powerless. At the same time they have adopted western parliamentary systems based on elections and the rule of the majority, rather than consensus. Objectively, there is no longer the egalitarian, compromisory basis for decision making on a basis of implicit trust, and formalization of competing theories and proposals is necessary for voters to exercise real choices. Howsoever much we may regret the change in tribal social realities, they demand a commensurate change in political processes. Only the restoration of social equality could avoid this conclusion.

A compelling illustration can be found among the Oglala Sioux, in South Dakota. What might best be characterized as a Tory-traditional conflict evolved in the early 1970s, centred on the efforts of a small agrarian settlement — Wounded Knee — to assert greater autonomy from the tribal council. After intervention by the American Indian Movement in 1973 led to violence, AIM and traditionalist groups fielded candidates in tribal council elections, with explicit platforms. While this made the internal divisions among Oglalas more apparent, it also mobilized greater participation in council elections and led to the election of traditionalist governments committed to specific reforms — with AIM as a coalition partner. What had long been implicit in Oglala politics became explicit, increasing choice and accountability. Similarly, the downfall of Peter MacDonald, the Navajo Nation strongman, was attributable to the formal mobilization of

traditionalist sentiment, and the Colvilles of Washington state have a reform party with Catholic roots. The explicit *will* emerge eventually, hastened, I believe, by recent shrinkage in federal Indian aid. As aid flows dwindle, tribal leaders will find it impossible to shift the blame for failure to the federal government — it will be obvious that they themselves are responsible for policy. This will intensify the domestic policy debate on reservations.

Fundamental Rights

It is axiomatic, in western political theory, that the protection of civil rights is the final check against repression should electoral processes fail. This assumes the constitutionalization of rights and the maintenance of an effective and independent judiciary. Indians on reservations are protected, in principle, by *two* sets of civil rights: the federal *Bill of Rights*, as applied specially to tribal governments by the 1968 *Indian Civil Rights Act*, and the tribal 'bills of rights' found in many tribal constitutions. Tribal rights provisions usually simply parallel the federal *Bill of Rights*, although many also include economic rights, such as the right to share equally in tribal natural resources and economic development. As far as I can determine, these interesting 'economic equality' clauses have not been enforced by the tribal courts, although they would seem to be one of the best weapons against abusive majority (or minority) rule and official corruption.

Since most tribes lack an independent judiciary, tribal bills of rights are not very meaningful. Likewise, federal judicial review of tribal government action is limited to *habeas corpus*, so that abusive actions involving individual property, employment, and the environment (for example) are immune from scrutiny. This situation leaves supreme and virtually undivided power with tribal councils and makes it all the more essential that councils be genuinely representative, transparent, and accountable. While there has been growing congressional interest since the 1960s in making tribal courts more 'professional', Congress has never concerned itself with the integrity of tribal representative processes. Court reform has a formal lobby within Indian society — the tribal judges. Legislative reform, by contrast, is opposed by tribal leaders as an assault on tribes' 'sovereign right' to design their own constitutions, as if they had ever really been free to do so.

The most dangerous failure in tribes' protection of civil rights, ironically, may be with respect to the large number of non-Indians who now live on reservations. Tribal governments

generally contend that these people are unwelcome intruders and cannot be trusted to play any role in tribal governments. They are not allowed to vote, and only in rare instances are they permitted to attend tribal meetings or serve on tribal court juries. Tribal courts are powerless to protect them as a racial or cultural minority. The result has been a growing fifth column of anti-tribal agitation inside many reservations, which can attract more serious attention from Congress and civil rights activists than openly racist anti-treaty groups. Tribal governments' failure to protect the rights of individual Indians creates dissension and disillusionment in the community, but failure to respect non-Indians' basic rights can be a prelude to further erosion of tribal 'sovereignty' by the courts and Congress.

Summary: The American Experience

The weaknesses of American Indian tribal governments are products of a variety of institutional problems inherent in U.S. Indian law and policy. Revising the IRA, or entrenching a right to self-government in the U.S. Constitution, would not be a sufficient cure. Tribes have also been weakened by their fiscal relationship with Congress, as well as by *internal* changes that have been brought about, ironically, by the experiment with self-government itself.

Legal Framework

Indian tribes are not identified as part of the federal system in the U.S. Constitution, and consequently their right to self-government is not constitutionally protected. Indian self-government has evolved from the *judicial* principle of residual sovereignty, but this has an unpleasant corollary: the plenary power of Congress to empty the box of tribal powers or to abolish tribal governments altogether. Tribes must also contend with the negative side of the trust responsibility doctrine, a benevolent-seeming modern manifestation of the White Man's Burden. It gives tribes a basis for blaming federal officials for all mistakes, and results occasionally in compensation for the worst cases of federal mismanagement of Indian resources. On the other hand, this trust doctrine is used to justify federal administrative supervision of tribal governments, supervision that is discretionary and usually unreviewable.

In summary, then, American Indian tribes' legal powers are always subject to supervision, further erosion and extinguishment, *as if they were meant to be only temporary*. Tribal governments have never escaped the 'school for citizenship' policy. American presidents may say

they *respect* Indian tribal governments as often as they like, but the legal principles enforced by the courts are still colonialist.

Judicial Dominance

Tribes' dependence on the federal judiciary to protect *and define* self-government condemns them to insecurity and uncertainty. No judge dares to craft an entire legislative scheme from a single controversy. As long as the nature and extent of tribal authority are determined case by case, issue by issue, and tribe by tribe in the courts, it is like a jigsaw puzzle where most of the pieces are missing and, to make matters more confusing, some of the pieces on the board can be replaced at random intervals. The whole picture never emerges, never stabilizes. Long-term planning and development are impossible on such shifting and uncertain ground. Tribal governments appear ineffective, when the real problem is that too much basic decision making is left to the federal courts.

The United States has never made a firm commitment to the future of tribal self-government, and tribal leaders know this. No effort is being made to constitutionalize self-government or secure legislation to define it comprehensively, because tribal leaders expect the worst if they ever open up such questions. This continuing insecurity is a reflection of the fact that Americans have never accepted Indians as political equals and that tribes themselves have never campaigned for such recognition. The U.S. tribal movement has been isolationist and satisfied with short-term benefits.

Fiscal Insecurity

Tribal governments' shortage of adequate real resources, together with the undeveloped and undiversified state of their economies, perpetuates a self-destructive dependence on federal aid. Federal bureaucrats and tribal bureaucrats share a common interest in the continuation of aid flows. Their cultures and thinking merge, and tribal officials take their directions from Washington, rather than their own electorates. `Soft', short-term, competitive and discretionary federal money also distorts the structure of reservation economies, which swell and then collapse periodically with each new aid package, teaching Indians that *they will always fail to achieve lasting progress*. At the same time, tribal leaders deflect criticism and avoid responsibility by blaming federal agencies for failures.

The United States has always found it easier to *buy* ethnic peace than to resolve ethnic conflict structurally, in new power relations. This can be seen not only in the lavishing of aid on Indian tribes, at a time when they still lack any real autonomy or participation, but also in the federal response to the most recent wave of racial violence in the cities. With its somewhat weaker economy, Canada has not pursued such a strategy to the same extent and has sought constitutional solutions instead. Someday, the United States may also be too poor to buy time with aid. Indian aid has shrunk every year since 1980 in real terms, stimulating some real grassroots democratic initiatives on reservations.

Social Differentiation

The U.S. experiment with self-government began in the 1880s, with Indian police and judges, and can now be declared a success, of sorts, *in its original assimilationist terms*. For a century, self-government has promoted the emergence of technocratic and political elites, based on their employment in tribal government and their access to political privileges. This has eroded the social prerequisites for traditional consensus-based politics. Although they adhere to egalitarian ideals, tribes are no longer egalitarian in fact, and tribal councils are just as much occupied with redistributing wealth as state governments. Yet tribal leaders oppose electoral and legislative reforms on the grounds that they would create disunity and inequality! This contradiction is fundamental to understanding why tribal society has become an obstacle to its own political emancipation. The conflict between rich and poor — originally a colonial conflict between Indians and white Americans — has become internalized. The problem now is among kinsmen, and therefore much more difficult to address. It is generally not even reflected in political parties, for fear of disrupting the illusion of unity.

As a problem internal to tribal society, this must be overcome by internal means. Traditional religious movements have been especially effective since the early 1970s, and there are signs of the emergence of Christian, environmental, and women's movements as well. These are all ways of identifying the enemy as *within* the tribe, rather than in Washington, and they will grow more widespread and obvious. While painful, such conflicts are an inevitable legacy of the imposition of majority-rule, elitist political schemes.

Political Culture

The changes taking place in American Indian politics today are in large part an attempt to challenge, or justify, the results of history in terms of traditional values. One side argues that existing tribal institutions *are* Indian: they are run by Indians and were designed by Indians, at least in some respects. The other side argues that tribal electoral systems are foreign imports and cannot achieve equality and balance in society. Two points deserve emphasis. Whatever legitimacy remains in tribal politics is based upon symbolism (Indianness) rather than results (which *no one* can deliver). Traditionalism is a critical and growing political force, but there is no revolution. Why?

Traditionalism has not translated Indian values into twentieth-century institutions or policies. Traditionalists elected to tribal councils differ only marginally in policies and programs. They still have to deal with federal aid, the BIA, the vagaries of federal court rulings, and the growing social divisions within tribes. Their policy options are limited by structures beyond their control. Their vision, and the vision of the tribal electorate, may also be limited by the absence of functioning alternative models for generations. The choice at present is not between two alternative programs, but between Indian ideals and a Western program.

Conclusion: Rethinking `Government'

Earlier in this report I deferred the issue of values and provisionally adopted a western framework of analysis. This is an appropriate point to return to that issue. American Indian government is relatively ineffective, compared to other western-style governments in the United States and Canada. It was not designed to be effective, and has gained only a little power as a result of social programs in the 1960s and 1970s. U.S. tribal leaders seem committed to *improving* this model by asking Congress for more power and more resources. They no longer appear to be asking, "What is tribal government for?" There is an implicit assumption that it *is* for power and resources — and only secondarily for legitimacy, which is to be presumed, because Indians are running it.

The starting point should be the principle of self-determination. Rather than thinking of capturing or modifying existing institutions, we should begin by defining our *ultimate* social objectives. It may be feasible to steer existing institutions in that direction; or, they may have to be scrapped. What is important is taking a longer-term view and escaping the tyranny of the

politics of marginal adjustments. But this may be possible only after the right to make these choices has been genuinely guaranteed. Such is not the case in the United States, but it may soon become true in Canada.

For tribal peoples everywhere, government was an *enabler*, instead of a *regulator*. Its function was to maintain conditions of safety and equality by teaching values, resolving disputes, and preserving a fair distribution of basic resources. Social 'control' was unthinkable and considered evil; any attempt to engineer society was ignored or led to the emigration of dissident families and clans. The basic problem, I believe, is that tribal governments are maintained by federal fiat. Indians must obey or (by leaving) cease to be Indians, in the view of the law. They cannot create, dissolve, or divide their governments at will. Existing tribal schemes are inevitable, for as long as Congress tolerates them. The ultimate dissent — forming *new* societies and new governments — is unavailable. Indians must make the best of what they have, and this gives tribal and federal officials an inordinate amount of power over them.

The ultimate question, is *power over whom?* Indians need power to combat outside interference with their families and their cultures, to maintain a protected space within which they can explore their own way of developing and growing. They do *not* need this much power over one another, within communities. If the growth of social inequality could be arrested, tribes would need very little internal power at all. But the whole conception of tribal self-government in the United States is one of *governing Indians*, rather than shielding them by *governing the tribes' relationships with non-Indians*. On the contrary, tribes focus their diplomacy on *increasing* federal responsibility for their affairs through aid. This condemns Indians to be doubly victimized.

Notes

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ⁱAs used in this report, 'tribal governments' refers to institutions formally recognized by the United States government, chiefly organized by, or in co-operation with U.S. federal officials in the 1930s — not to pre-invasion, Aboriginal or 'traditional' political systems.

ⁱⁱFor a detailed analysis of U.S. law see Cohen, *Handbook of Federal Indian Law*; for an excellent summary, see Sanders, *Aboriginal Self-Government in the United States*.

ⁱⁱⁱBut see Barsh, "The Nature and Spirit of North American Political Systems".

^{iv}Jennings, *The Ambiguous Iroquois Empire*.

^vStrickland, *Fire and the Spirits*; Reid, *A Law of Blood*.

^{vi}Kawashima, *Puritan Justice and the Indian*.

^{vii}Hagan, *Indian Police and Judges*. Also see Foster, *Being Comanche*, for a detailed study of the effects of this policy on one tribe.

^{viii}Iverson, *The Plains Indians*; Barsh, "The Substitution of Cattle".

^{ix}Compulsory Indian education included several special colleges such as Carlisle, as well as purely technical and vocational schools. When the Society of American Indians, an association of Indian professional people, organized in 1911, it attracted 500 members, including lawyers, physicians, nurses, teachers, and ministers.

^xShepardson, *Navajo Ways of Government*; Fowler, *Arapahoe Politics*.

^{xi}Barsh, "American Indians in the Great War".

^{xii}Barsh, "Progressive-Era Bureaucrats". It was customary until the 1930s to refer to the federal government's Indian agency as the Indian Office rather than the Bureau of Indian Affairs.

^{xiii}There is an extensive literature on the background of the IRA and a continuing debate over whether it was successful. See, for example, Kelly, "Indian Reorganization Act"; Mekeel, "An Appraisal"; Washburn, "A Fifty-Year Perspective".

^{xiv}Cohen, "The Erosion of Indian Rights".

^{xv}For example, the Navajo Nation, by far the largest tribe, and the Yakima Nation, with one of the largest reservations after the Navajo, have no written constitutions, but the federal government treats them as if they were operating under IRA constitutions.

^{xvi}Barsh, "Plains Indian Agrarianism".

^{xvii}For example, catastrophic livestock reductions on the Navajo reservation in the 1930s (Kelly, *The Navajo Indians*; and Boyce, *When Navajos Had Too Many Sheep*) and the flooding of Indian farmland for reclamation and power projects (Lawson, *Dammed Indians*).

^{xviii}These 'Courts of Indian Offences' differed little from the courts appointed by Indian agents in the 1870s. Barsh and Henderson, "Tribal Courts".

^{xix}Barsh and Diaz-Knauf, "The Structure of Federal Aid".

^{xx}For example, *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *United States v. Mazurie*, 419 U.S. 544 (1975).

^{xxi}Ambler, *Breaking the Iron Bonds*; Barsh, "Indian Resources".

^{xxii}The recent spectacular growth of gambling revenues on some Indian reservations has weakened federal top-down influence but strengthened *tribal* top-down control, since tribal governments operate the casinos and distribute the income. This means that families and individuals on these reservations have gained neither more economic independence nor more political leverage.

^{xxiii}See United States, American Indian Policy Review Commission, Task Force Ten, *Report on Terminated and Nonfederally Recognized Indians*; Lurie, "Menominee Termination".

^{xxiv}United States, Presidential Commission on Reservation Economies, *Report*; United States, American Indian Policy Review Commission, Task Force Seven, *Report on Reservation and Resource Development and Protection*.

^{xxv}United States, Commission on Civil Rights, *Liberty and Justice for All*; United States, House of Representatives, *Anti-Indian Violence*.

^{xxvi}Leading views include Lipset, *Political Man*, and Dahl, *Polyarchy*; for a recent review, see Arat, *Democracy and Human Rights*.

^{xxvii}Arat, *Democracy and Human Rights*; Barsh, "Democratization and Development".

^{xxviii}Barsh, "The Nature and Spirit of North American Political Systems"; Boldt and Long, "Tribal Traditions"; Costo, "Forms and Uses of Tribal Government"; and Pandey, "Tribal Council Elections".

^{xxix}Cohen, *Handbook of Federal Indian Law*, pp. 241-246; also Townshend, "Congressional Abrogation".

^{xxx}Paschal, "The Imprimatur of Recognition".

^{xxxi}*Menominee Tribe v. United States*, 391 U.S. 404 (1968).

^{xxxii}See, most recently, *Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989); and earlier, *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), and *Williams v. Lee*, 358 U.S. 217 (1959).

^{xxxiii}*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

^{xxxiv}These federal criteria need only be 'reasonable' with respect to the purpose of rationing Indian benefits. *Morton v. Ruiz*, 415 U.S. 199 (1973).

^{xxxv}George Fay's *Charters, Constitutions and By-Laws* remains the only printed compilation of tribal governing documents. My personal files of recently amended constitutions have been used to update Fay's texts where possible, but some changes have undoubtedly been missed. In the author's professional experience, however, attempted amendments to reduce the role of the secretary have not been looked upon favourably.

^{xxxvi}Such as, for example, land use planning, commerce, health, safety, family law and the protection of children.

^{xxxvii}*Merrion v. Jicarilla Apache Tribe*, as discussed and distinguished in *Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989).

^{xxxviii}Under the 1968 *Indian Civil Rights Act* and the *Martinez* decision, federal courts can review the lawfulness of tribal government actions involving tribal members only when someone is in physical custody — for example, where a person detained in the tribal jail contends that the tribe has no competence with respect to the offence charged.

^{xxxix}*Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989); Scott, "Controlling Land Use".

^{xl}See *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); Barsh, "Issues in Federal, State and Tribal Taxation".

^{xli}On the origins of this legal doctrine, see Cohen, *Handbook of Federal Indian Law*, pp. 220-228; and O'Brien, *American Indian Tribal Governments*, pp. 257-266.

^{xlii}Most relevant here are the 1975 *Indian Self-Determination Act*, the 1982 *Indian Mineral Development Act*, and the 1990 *National Indian Forest Resources Management Act*. The management of fisheries and freshwater resources was not the subject of specific

federal Indian legislation, and Indian tribes successfully fought the states for control of these resources through litigation in the 1970s.

^{xliii}There is a special judicial exception to this rule with respect to federal income taxation of lands or natural resources owned by Indians or Indian tribes. In all other respects, however, federal taxes apply equally to reservations.

^{xliv}The source of this test is *Williams v. Lee*, 358 U.S. 217 (1959).

^{xlv}Barsh, "Is There Any Indian 'Law' Left?"

^{xlvi}*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Duro v. Reina*, 110 S.Ct. 2503 (1991).

^{xlvii}See, generally, Robert, "The Enforcement of Judgments".

^{xlviii}This was Public Law 280, enacted in 1953; see Goldberg, "Public Law 280".

^{xlix}In the 1978 *Indian Child Welfare Act*.

^lAmerican federal electoral districts are much larger than Canadian parliamentary ridings, with nearly ten times as many electors, so that even the largest Indian tribe — Navajo, with close to a quarter-million residents — could not form a majority.

^{li}Bee, "The Washington Connection"; O'Brien, *American Indian Tribal Governments*.

^{lii}It can be observed here that the combined federal-state tax system is slightly regressive, rather than progressive, with income, and that a smaller share of the national budget is devoted to social needs like health and education than in (say) Canada, Germany or Japan. American citizens *expect* their government to provide them substantial benefits, even though they take more and give less to the poor than almost any other democracy.

^{liii}Barsh, "Indian Land Claims Policy".

^{liv}United States, Department of Education, *Indian Nations At Risk*; Indian Health Service, *Indian Health Conditions*; Johnson and Taylor, *Prevalence of Chronic Diseases*.

^{lv}United States, Presidential Commission on Indian Reservation Economies, *Report*; American Indian Policy Review Commission, Task Force Seven, *Report on Reservation and Resource Development and Protection*.

^{lvi}See Barsh, "Issues in Federal, State and Tribal Taxation," for estimates of the magnitude of this effect.

^{lvii}Barsh and Diaz-Knauf, "The Structure of Federal Aid", based on federal data from 1980. Tribal budgets are not published and are generally treated as proprietary information, so that fiscal structure must be inferred from federal inputs and reported personal income.

^{lviii}Castile, "Federal Indian Policy and the Sustained Enclave".

^{lix}See United States, Senate, Select Committee on Indian Affairs, *Tribal Self-Governance Demonstration Project Act*.

^{lx}It should be understood that elected tribal leaders' tendency not only to accept funding from such sources but also to promote the creation of additional, narrow federal funding windows is understandable as an act of fiscal desperation — like the willingness of some tribes to make a business of burying other peoples' toxic wastes. A tribal landfill in western New York recently caught fire, releasing toxic material and highlighting this kind of last-ditch economic enterprise. Barsh, "The Challenge of Self-Determination".

^{lxi}Christofferson, "Tribal Courts' Failure"; Jeffrey, "The Indian Civil Rights Act"; United States, Senate, Select Committee on Indian Affairs, *Tribal Court Systems*. Challenges to tribal government action are considered to be barred generally by the doctrine of sovereign immunity. McLish, "Tribal Sovereign Immunity".

^{lxii}Basehart and Sasaki, "Changing Political Organization." See also Costo, "Forms and Uses of Tribal Government"; Robbins, "Upper Skagit...Indian Reorganization Act Governments".

^{lxiii}United States, Senate, Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs, *Occupation of Wounded Knee*. Many volumes have been written on this confrontation, but these hearings are unique in presenting the views of the tribal government, along with those of AIM and Sioux opposition political parties.

^{lxiv}This was prior to and separate from the crisis over relocation of Navajos from reservation lands ordered returned to the Hopi Tribe. See, generally, Jorgensen, *Native Americans and Energy Development*; Lopach, *Tribal Government Today*; Robbins, "Navajo Energy Politics".

^{lxv}That is, with authority to disapprove actions already taken by tribal elected officials or a business committee. Few general councils have separate and exclusive legislative competence. See Table 2.

^{lxvi}Ironically, tribal districting schemes designed to achieve balance among localized social or ethnic groups were challenged as a violation of the 'one man, one vote' principle. See *White Eagle v. One Feather*, 478 F. 2d 1311 (8th Cir. 1973), rejecting such a challenge as "imposing external values" on the tribes.

^{lxvii}Shepardson, *Navajo Ways of Government*.

^{lxviii}For an overview of such cases see U.S. Senate Select Committee on Indian Affairs, Special Committee on Investigations, *Final Report*.

^{lxix}With only one exception, a hold-over from the adoption of the U.S. Constitution as a model by the so-called Five Civilized Tribes in the early nineteenth century.

^{lxx}Precedents have been established on some reservations as a matter of practice. Few tribal court opinions are published, however, and it is impossible to say how consistently tribal councils now abide by adverse court orders.