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New Paradigm: Indian Tribes in the Land of Unintended Consequences

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New Paradigm: Indian Tribes in the Land of Unintended Consequences

In the nearly 50 years since the end of the Termination Policy, Indian tribes have aggressively pursued their legal rights and powers to the point where they have reached bedrock. Federal Indian law in 1960 consisted of doctrines concerning tribal sovereignty and federal and state power, some of them dating back to John Marshall, and most of them untested in the political and legal arena. The explosion of tribal activity in the last 46 years has led to the resolution of many questions, and there are few marginal issues left; virtually every major issue remaining on the table goes to the very nature of an Indian tribe. The next few years may well see the resolution of these major questions, and it is up to the tribes to see that they are addressed in the most favorable context.

The scholarly truism holds that federal Indian policy has vacillated constantly between the extremes of assimilation of Indians into the larger society on one hand and the recognition and support of Indian tribal cultural and social integrity on the other, and between federal and tribal power. But a closer look shows more stability. For much of the twentieth century, the relatively brief period of the Termination Policy being excepted, federal Indian policy has followed a consistently pro-tribal trajectory and has been remarkably bipartisan politically, indicating a broad social consensus. The task for the tribes in the future is to maintain that social consensus.

It has been about 80 years since the Meriam Report indicated a fundamental unease with the assimilationist policies of the Allotment Era,[1] 72 years since the enactment of the Indian Reorganization Act,[2] nearly 50 years since the Eisenhower Administration disassociated itself from Termination,[3] about 40 years since Lyndon Johnson called for a new policy that would include tribes in the administration of Indian affairs,[4] and 36 years since the historic Nixon Message to Congress gave rise, and a name, to what is called the modern era of Self-Determination.[5] The 1970s saw a major turnaround in the terminationist Senate Interior

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1. BROOKINGS INST., INST. FOR GOV'T RES., THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam tech. dir., 1928).

2. Wheeler-Howard Act (Indian Reorganization Act), 48 Stat. 984-988 (1934).

3. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 98-99 (Nell Jessup Newton et al. eds., 2005).

4. *Id.* at 100.

5. Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970).

Committee, as Henry Jackson launched the most dramatic decade of pro-Indian legislation in history. Indeed, if one goes back in history the same number of years—80—from the Meriam Report, one lands in the late 1840s, certainly a rudimentary period in federal Indian policy when virtually none of the issues that now comprise Indian policy even existed.

To say this is not to downplay the damage caused or the threat posed by Termination, the equally bipartisan post-World War II policy that sought to bring an end to the federal-tribal political relationship and cast the Indians and their tribes into the mainstream, with no political status and very little, if any, protection of their resources.[6] But despite the strong political impetus impelling it, termination really lasted only about ten years and very quickly lost its popularity, drawing strong opposition from the Indians and their friends (and, not coincidentally, forcing the tribes to strengthen their intertribal institutions while assuming responsibility for their own defense—not a bad result). With the resurgence in the 1960s of the fundamentally pro-tribal federal policies of the previous 40-odd years, and the disappearance from the scene of the proponents of termination, federal recognition of many terminated tribes has been reestablished; tribes not previously recognized by the federal government have been recognized for the first time; power has been transferred wholesale from the federal to tribal governments along a broad range of duties and responsibilities; and tribal governments have gone from being the rubber stamp for the federal government to being the principal policy maker on their reservations.

The rout of federal paternalism can be seen to be so complete that Indian tribes are now at what the modern cliche calls a paradigm-shifting moment. Tribal leadership finds itself at the proverbial confluence of danger and opportunity. They must decide what, if any, further changes should be made to their relationship with the federal government. In deciding the next steps, tribal leaders must define a viable and politically sustainable vision for the role of tribal government both as government and as manager of tribal resources and economic strategy, not only vis-à-vis their tribal constituents, but also as active participants throughout American political, economic, social, and cultural life. Further moves along what appears to be the tribal self-determination spectrum bring tribes and the federal government, whether they see it or not, closer to addressing fundamental issues going

6. Although in *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), the Supreme Court held that tribes continued to possess an unspecified political existence notwithstanding the termination of their federal recognition.

to the very nature and essence of the legal and policy structure that have made possible the survival of tribal governments.

The survival of tribal governments depends on the continuing federal policy of recognizing tribal political existence and giving tribal governmental acts force and effect in the American system. I have argued elsewhere that there seem to be three types of rationale supporting this policy, based on my understanding of federal court decisions and congressional deliberations.[7] The first rationale is that identified by John Marshall in his seminal decisions; that is, the inherent right of a people to govern themselves, grounded in international law and, after the fashion of the day, Natural Law.[8] The second and third rationales are obviously related on some level, and it could plausibly be argued that they are fundamentally the same, although I perceive sufficient difference between them that I continue to regard them separately. One is the cultural distinctness of the Indian tribes from the larger society, a distinctness acknowledged even while the federal government was bending every effort to eradicate it through assimilation and acculturation programs. And the final rationale is the general poverty of the Indian population, serving as the basis for a host of programs and services.[9]

If tribal status finds its political support in this tripod of rationales, as I have argued, then the tribes must question what might happen if one or more of the rationales is no longer so clearly evident to the American public and to the Congress. It may be that the longer tribes remain poor and perceived to be culturally distinct, the longer they will be able to maintain their legal and governmental status, but once they show some success addressing their economic problems, they will be

7. INDIAN SELF-RULE: FIRST HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN (Kenneth R. Philp ed., 1980).

8. Marshall's architecture of subsequent Indian law is found in *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832).

9. Few Indian cultures have, or had, economies similar in any way to American capitalism. Many Indians have expressed pride in their asserted indifference to the profit motive, and, of course, Indians are in some quarters the prototypes of cultural anti-capitalism and are widely admired for it. But the gaming phenomenon seems to undermine this image at the tribal level. And a new generation of Indians will probably address their own economic problems vigorously and resolve most of them, begging the question of the causal relationship between Indian culture and poverty.

On the basis for services issue, Indian advocates make the point that services have their bases in treaties and other mechanisms in which land was sold to the United States in exchange for the promise of various kinds of support. But it is difficult to see social and other services being provided in the future to those Indian communities who have no apparent economic need for them, notwithstanding treaty or other promises. One can expect Indian services to be changed eventually to a needs-based system.

perceived to be neither poor nor "Indian" in the culturally cliched sense in which America still regards Indians. Whether John Marshall's notion of a fundamental tribal right of self-government will be enough on its own to sustain political support for continued tribal existence is anyone's guess, but there is considerable reason for doubt.

While there is still consensus on the tribes' right to self-government, both sides beg the question of what that right is. On the anti-tribal side, the courts have announced doctrines supposedly preventing the states from interfering with tribal self-government and acknowledging tribal power over non-members to protect self-government, while at the same time upholding state tax and regulatory schemes that hamstring tribes and make reservations uncompetitive in the marketplace, and immunizing from tribal power some non-member activities that clearly have an impact on tribal self-government. On the Indian side, self-government is often seen as the asserted or wished-for jurisdiction over everyone on the reservation, with little thought to the political and legal questions that such broad assertions would raise and oblivious to the ominous constitutional doubts lurking in virtually every Supreme Court opinion. Extreme application of the notion of "tribes in the marketplace" seems to involve tribes as governments yet doing business off the reservations while asserting immunity—as governments—from many state and federal laws and taxes.

All of this is to say that the search for a new paradigm in the power relationship between the federal government and the Indian tribes entails much more than merely cutting back federal power and increasing tribal power, however superficially appealing such an exercise might be. It also questions the very essence of what an Indian tribe has come to be in this system, and what it will be allowed to be in the future. An evolved concept of an Indian tribe without the familiar federal control over governmental activity and land use must come from the minds of the Indian people themselves as they pursue their affairs, but it must also be sustainable politically and socially within the American polity.

Establishing and strengthening the powers of Indian tribes over their resources is important, to be sure. But tribal leaders must be aware of the larger context in which tribal powers are asserted in ways not directly related to natural resources. Because of the interrelatedness of the various aspects of tribal power—indeed, tribal political existence itself—one course of action may well put pressures on other tribal powers. The tradeoffs are in many cases not immediately obvious, and there is no indication that tribal leaders are working on a clear notion of what should be in play and what must be preserved at all costs.

In order to ensure their survival, tribes must redirect their attention in an unsentimental and realistic way to the legal and political costs and benefits of each possible course of action. In the present situation, too much attention is being given by the scholars, lawyers, and policy analysts to idealized theories of tribal sovereignty with little or no regard for the actual context, and this scholarly malpractice is having a tremendous effect on tribal thinking and on the Indians' own national organizations. Among the issues that must be addressed candidly are:

> (1) How to continue cutting back on federal power in favor of tribal power without jeopardizing the all-important Plenary Power/Supremacy Clause federal protection of tribes from the states;
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> (2) How to strengthen, not weaken, the doctrine of the Plenary Power of Congress on the subject of Indian affairs to protect tribes not only from the states but from a hostile federal judiciary while proposing a set of political (or legal, if that is conceivable) standards by which to judge the exercise of the Plenary Power;
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> (3) How to forestall a constitutional showdown over the issue of the rights of resident non-members, which is clearly a preoccupation of the federal judiciary;
>
> (4) How to develop a coherent theory of "tribes in the marketplace" that allows the marketing of tribal resources, labor, and sovereignty without inviting a crippling backlash.

I. THE PLENARY POWER OF CONGRESS: THE BASIS OF TRIBAL POWER WITHIN THE SYSTEM

Perhaps the most commonly misunderstood doctrine in Federal Indian law is that of the Plenary Power of Congress on the subject of Indian affairs, a doctrine about which a great deal of scholarly ink has been spilled, often in a breathlessly naive manner. The doctrine emerged from *United States v. Kagama*,[10] in which the power of Congress to create federal jurisdiction over crimes on Indian reservations was challenged. *Kagama* is read by scholars as an affirmation of broad federal power over Indian tribes, which it certainly was; in 1886, it could hardly have been unnoticed that the federal government exercised broad powers over Indian tribes.

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10. 118 U.S. 375 (1886).

Scholarly criticism of *Kagama* has been directed to the fact that the Major Crimes Act[11] being challenged and upheld by the Court involved a profound federal interference into internal tribal affairs, and it surely did. But as a matter of constitutional interpretation, *Kagama* dealt with constitutional doctrines that did not involve the powers of Indian tribes: Separation of Powers, the Doctrine of Enumerated Powers, and the distribution of powers between state and federal governments. The Court in *Kagama* basically washed its hands of federal Indian law and conceded the field to the Congress on its own behalf and that of the state governments with its declaration that Congress's power on the subject of Indians is plenary, that is, no longer tethered to a requirement that Congress specify exactly what Enumerated Power was being exercised in any given piece of Indian-related federal legislation. One is not struck by the Court ever agonizing over the constitutional basis for Congress's power over Indians, but in *Kagama* the green light was given clearly. And the issue to be decided in the case was not whether criminal jurisdiction on Indian reservations should be lodged in the federal government or the tribes; it was whether the federal government or the State of California should have jurisdiction. Constitutionally, and in the *Kagama* case, the tribe was not even a contender, nor was the tribe there to assert a claim to jurisdiction.

Kagama, then, gives Congress plenary power on the subject of Indians, shutting out the states and the other two branches of the federal government. It does not "give" Congress plenary power *over* the Indians, that is, power to interfere in tribal internal self-government. That question was assumed but not addressed by the Court, and one can speculate that, had it been addressed, the *Kagama* Court would not have found a constitutional basis for protecting tribal power from that of the Congress. One hopes in vain for the scholars who are preoccupied with *Kagama* to advance a plausible and real-world constitutional theory that would provide a basis for protection of the tribal right of self-government from either the states (without reference to the Supremacy Clause) or the Congress. The Constitution, being an allocation of powers among the People, the States, and the three branches of the Federal Government, does not include tribes as internal "players." One might expect that the scholars who point triumphantly to *Talton v. Mayes*[12] would understand that the power of Indian tribes, not having been derived from the U.S. Constitution, is evidently not protected by it either.

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11. Act of Mar. 3, 1885, § 9, 23 Stat. 362.

12. 163 U.S. 376 (1896) (holding that tribal powers are not derived from the Constitution nor delegated by Congress).

History is not wanting in examples of congressional plenary power being used to deprive Indians of their resources and to interfere in their internal self-government, but, in terms of the constitutional issue, all of that historical record is somewhat beside the point absent a constitutional limitation that has not as yet made its appearance.[13] And the plenary power will always be used in a complex context of competing interests, some of which are adverse to those of the Indians. But state power is pre-empted as long as Congress acts legitimately within its power. To some degree, this formulation begs the question for those who see some actions of Congress *over* Indians as exceeding the plenary power. And that is why most present scholarship is unhelpful. It should be directed at developing a theory and a set of standards by which the exercise of the plenary power can be judged and perhaps limited rather than merely railing against its very existence. At this stage of the game, the interest of the judiciary is more on individual rights and the powers of the states than it is on the effect of the plenary power on Indian tribes.

On balance, and especially in the last 80 years, the Plenary Indian Power of Congress has created a zone within which tribal governmental status can be recognized by the federal government, and within which tribes enjoy protection from state power. The concept of federal recognition of an Indian tribe is a key element of the continued effective political existence of tribal governments, and the scope of that recognition—that is, the measure of the powers of tribes that will be given effect in the American system—is the key to the tribal future.

Tribes see themselves as sovereign, as does federal law, and tribal members subject themselves to tribal law.[14] But self-recognition, the assertion of sovereignty, is only part of the equation. A complete and effective assertion of sovereignty—by any nation, not just an Indian tribe—also requires recognition outside the sovereign entity by other governments. For Indian tribes in the United States, recognition by the federal government is the essential step entailing recognition of their governmental character and acts and recognition by state and local governments required by the Supremacy Clause.

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13. One wonders if history would have been different had the Court decided *Kagama*, on, say, War Power grounds, to keep the peace on Indian reservations. Under a continued regime of Enumerated Powers, would the Allotment Policy and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), not have happened, or had a different outcome?

14. One is obliged to argue that tribes, like other nations, should have governmental power over non-citizens, i.e., non-members, within their geographic jurisdiction. Some nations do not offer citizenship to any resident aliens and suffer international criticism as a result. Tribes do not offer membership to ineligible residents.

The importance to Indian tribes of federal recognition is difficult to overstate. It provides the Supremacy Clause shield that not only protects them from state power, but it also requires the states to recognize their governmental character and carves out a juridical space within which tribal powers can be exercised. On a practical level, it is the triggering mechanism that allows for the actions of tribal governments to be given effect throughout the vast mechanisms of the American system—laws to be respected, contracts to be made and enforced, mutual obligations of all kinds to be defined and given credence, full faith and credit or comity to be accorded. And it is not only the fact of federal recognition that is important, but its scope as well. What is the measure of tribal powers that Congress intends to recognize and allow to be effected within the American system?

The emotions of tribal advocates, the author included, recoil at the notion that tribal power is in any way dependent on the "whims" of Congress, although for the past 80 years the whim of Congress has been generally supportive of tribal governments. But the historical stakes are the continued existence of Indian tribes as governments and Indian societies as distinct societies in the real world, and, unless tribal notions of sovereignty are to remain self-referential and abstract, not to say "platonic," one looks in vain for an effective means of recognizing tribal political existence other than federal recognition.[15]

In designing a new paradigm for the distribution of power between the federal government and Indian tribes, both tribes and the Congress need to understand that they are negotiating within a much larger context. An apparent reduction of federal power in favor of tribes may also raise a host of questions regarding the impact of increased tribal powers on the states and on affected non-members. For a number of years, the country has been embroiled in constitutional battles involving the distribution of power between the federal government and the states, on the one hand, and between Congress and the Judiciary on the other. Thus, a New Paradigm in the Federal/Indian trust relationship must be designed in light of this larger struggle, and the tribes and Congress must take care that in reducing federal power over tribes they do not also test the limits of Congress's plenary power and jeopardize tribal Supremacy Clause protection. Given that the Supreme Court has repeatedly expressed its own Indian policy by trying to limit tribal powers to trust land and tribal members, the possibility looms of a major shift in federal Indian law doctrine. Short-sighted legal scholars have

15. In *McLanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), Justice Thurgood Marshall characterized tribal sovereignty as a platonic backdrop to the federal acts, including treaties, defining the scope of tribal government power in the American system.

tended to be preoccupied with the possibility, or even presumption, that a limitation on congressional plenary power by the courts will be, or should be, in favor of tribal power. This is like expecting the Court in *Kagama* to hold that Congress could not pass the Major Crimes Act because it infringed on tribal power. Given the expressed Indian policy of the courts in recent years, it is much more likely that the plenary Indian power of Congress, if it is limited by the courts, will be limited in favor of the states.

The fundamental problem, of course, as we will see below, is the apparent and persistent connection between land ownership and governmental power on Indian reservations.

II. THE UNIQUE NATURE OF TRIBAL GOVERNMENTS

As I have asserted elsewhere, Indian tribal governments have unique characteristics found nowhere else in the American system of governments.[16] Briefly, they are:

- tribes are often major landowners within their jurisdictions;
- tribes have unique constituencies;
- tribal resident constituencies are disproportionately in poverty;
- tribes have special and intensified responsibilities vis-à-vis cultural and community integrity and preservation;
- tribal powers vis-à-vis the federal government are ill-defined and in a constant state of flux.

Tribes as Governments and Landowners

State and municipal governments own land, of course, and, in some cases, state governments in particular may own substantial amounts of land. But no non-Indian government owns the high proportion of land within its jurisdiction that many tribal governments do. And the proportion of tribal land ownership, along with the historical cliche that individual entrepreneurship is somehow "un-Indian" and contrary to traditional notions of Indian communal economies, has tended to put Indian tribes in the position of being active participants—"players," to use the slang term—in their own economies

16. COMM'N ON STATE-TRIBAL RELATIONS. AM. INDIAN LAW CTR., INC., HANDBOOK ON STATE-TRIBAL RELATIONS (1982).

and of having unique responsibilities to bring about economic development.

To be sure, state and local governments in America support economic development through the structures of their tax and regulatory codes and policies and often through direct subsidies and investments. And these governments not uncommonly profit from the marketing of government-owned property and resources such as oil and gas, minerals, and timber. In some cases, non-Indian governments are even more active in the marketplace, most recently through state-run lotteries but historically through state-run liquor stores, banks, and other commercial ventures. In historical context, the difference between these state roles and those of the tribes is that, in the case of the states, the existence of a complex private economy is assumed, whereas in the case of tribes it has been assumed that the tribe would take the lead in creating and sustaining the local economy.

One of the byproducts of this essential difference between tribal and state governments is that the role of government we have become accustomed to in the case of state government has become blurred in the case of tribal governments. State governments act on the economy one step removed (ideally); that is, directly, but not as a participant. As they establish revenue and regulatory policy, they are expected to balance economic interests with other public interests, so that the end result, while paying due attention to the economic needs and interests of the state, is a balance of interests resulting from a complex legislative process. In the case of tribal governments, however, the tribe is often largely dependent on revenue from tribal, not private, economic activities (meaning that, contrary to the popular notion that tribes are not taxed, in fact they are in a sense subject to a virtually 100 percent tax on themselves). To a large extent, tribal tax codes have not been developed over the years because the tribe took its money out more or less as dividends, rents, or leases and there was virtually nothing else taxable on the reservation. Similarly, regulatory policies that in essence would apply only to tribal enterprises until recently were developed with little notion of general application or balancing of social interests, and the need for tribal revenue tended to drive the policymaking process in the regulatory area as well.

The development of Indian reservation economies has always hinged on three types of opportunities: (1) development and use of Indian natural resources, (2) economic use of the Indian people themselves (i.e., as tourist attractions, producers of arts and crafts, and as a labor force), and (3) marketing tribal governmental powers.

Until about the 1960s, tribal natural resources were put into production in large part with the tribe acting as landowner, leasing land

for mineral development or grazing, for example. Beginning in the 1960s, as tribes began to use their virtually dormant governmental powers, they explored other means of development that would give them a larger share of the proceeds and greater control over the development process; they also began to look at the use of their taxing and regulatory powers to affect developments previously bound strictly by the terms of a lease.

Tribes can be eloquent on the subject of their labor force and their high rates of unemployment. In fact, though, what is known about reservation labor force characteristics and capabilities seems not to figure significantly in economic development strategies, and continuing apparently high rates of substance abuse, coupled with inferior educational systems, have handicapped tribal economic development based on labor force.

The most dramatic change in tribal economic development has been in the marketing of tribal sovereignty, beginning with smokeshops in the early 1970s and continuing with the tsunami of gaming. The term "marketing sovereignty" makes many people uncomfortable, of course, and has done so since the days when Indian country was known, in Felix Cohen's phrase, as "lawless sanctuaries." Even today, state governments readily characterize reservation economies as "untaxed" and "unregulated," meaning untaxed and unregulated by them, where they would not similarly characterize the differing tax and regulatory policies of neighboring states—even those marketing their sovereignty to create economic incentives.

But there is really no reason for tribes to be defensive about the term; it merely means the use of governmental powers to create economic incentives through tax and regulatory policy, governmental subsidies, and investments. Various "free trade" initiatives throughout the world now seek to limit the practice of marketing national sovereignty with varying degrees of success and subject to considerable criticism, but internationally the practice has historically been widespread. In America, marketing state sovereignty is perhaps more American than apple pie. It is a part of the genius of the American system and continues to be an important feature of the American political and economic system. It is not for tribes disingenuously to deny they are marketing their sovereignty when they clearly are. Instead they need to defend the practice as a legitimate tool of economic development. The problem with marketing sovereignty is that not all ways of doing it are equally beneficial; tribes must develop criteria by which they can determine which possible sovereignty-marketing devices may be too costly in environmental, political, or social terms to be worth the hoped-for economic benefit.

Of the 560-odd tribal entities in the nation, relatively few have the immediate prospect of solving their economic problems and becoming self-sufficient solely through the development of their natural resources. Although it is commonplace to point to federal trusteeship as the main barrier to this form of tribal economic development, there is a need to specify exactly what features of federal trusteeship have this effect other than vague references to bureaucratic delays. The current fashion is to look at a model of tribes in the marketplace, free to make their own land use decisions and be the sole judge of risks and benefits.

Even the most pragmatic tribal advocate rankles at the use of the term "incompetence" as a rationale for the limitation on the rights and powers of tribal and individual Indian landowners. But to see a new paradigm clearly, one must put aside the notion of incompetence and put aside the implication that the Bureau of Indian Affairs has superior judgment to that of the tribes when it comes to making decisions about Indian resources in the marketplace. But preoccupation with simply cutting back federal powers can distract from other consequences.

With tribes and individual Indians in the marketplace with full control of their resources, inevitably there will be winners and losers. It is unlikely that a new paradigm will impose on the federal government a continuing liability for economic decisions over which it has no control, so neither the tribes nor individual Indians are likely to be held harmless. Historically, both Allotment and Termination posed as policies to set the Indians free from federal domination; both succeeded in setting a number of Indians free of their land. Thus, society as a whole, the Indian community nationally, and affected tribes and individuals must be prepared to pay the price for unsuccessful ventures. To say this is not to be pessimistic; it is only acknowledging that, no matter how many tribes and individuals successfully manage their property, some won't, and there will be consequences to bear.

Tribal land is a patrimony and, under the present policy regime, the measure of tribal jurisdiction is tied up with land ownership status. The consequences of tribes and individual Indians diving into the marketplace with their resources could be severe legally, economically, and socially.

Tribal Constituencies

Tribal constituencies are unique in three respects relevant to the nature and essence of tribal governments. First, unlike state and local governments, tribal governments often have a substantial non-resident constituency, i.e., enrolled tribal members who do not live on the reservation but have a continuing stake and may have substantial

political rights in tribal affairs either by virtue of federal or tribal law. This non-resident constituency can play a major role in tribal policy making.

Second, tribes have, in varying degrees, resident non-member (i.e., "non-citizen") populations who must be seen as a part of the tribal constituency. The question of tribal civil jurisdiction over these populations is still unresolved; the federal courts have shown an intense and increasing interest in protecting them and they can complicate tribal policy making by complaining to the State or to Congress when they feel their interests are being deleteriously affected. They are a tribal constituency in the sense that, in tribal policy making, their views must be taken into account. And it must be noted that this non-member resident population is composed of both Indians and non-Indians.

Third, a disproportionate share of the resident tribal population is composed of poor people. Gaming and other economic activities have brought some—in some cases substantial—financial benefit to tribes themselves and created some jobs, but despite the slow growth of an Indian middle economic class, Indian reservation populations continue to be among the poorest in the nation. Where federal, state, and municipal governments address issues concerning the poor as part of a complex policymaking and balancing process, the interests of poor people play a much more prominent part in the tribal political process, and the difficulty of bringing about real improvement for this part of the population has a continuing effect on tribal politics.

Some elements of current new paradigm thinking contemplate the restoration of tribal jurisdiction over the entire reservation regardless of land ownership or tribal membership on the theory that for other governments these factors are not considered. But the reservations most in need of unitary public policy making are those governments with the most checkerboarded land ownership patterns and the highest proportion of resident non-members. Other governments in the American system whose authority is not based on membership and land ownership also are obligated to recognize the citizenship of all resident citizens and accord them full political rights. Restoring full geographic jurisdiction to tribal governments within the reservation boundaries virtually assures a constitutional showdown with a Supreme Court whose misgivings have been made abundantly clear—a showdown the tribes would be well advised to avoid with this Supreme Court.

Tribes as Cultural Curators

It is not in the political interest of tribal governments to tie their political existence too closely to cultural preservation. One is reminded

of the argument made in the Northwest fishing litigation that tribal fishing should be limited to the technology of the 1850s when the treaties were signed. The right of other governments to exist is not based on an implicit expectation that they will maintain a static culture. At the same time, tribal governments do have a responsibility to consider the impact of various possible public policies on the culture of their people. Unlike larger units of government whose cultural basis is more or less taken for granted, tribal governments are the conservators of cultures that are threatened on a daily basis.

Gaming has already had an enormous cultural impact. New paradigms of tribal economic and governmental activities must also be assessed insofar as they put additional pressure on Indian cultures.

Tribal Power in a State of Flux

Federal and state power are allocated and defined in the U.S. Constitution and, although their relationship ebbs and flows historically, their fundamental existence is guaranteed. Tribal power also ebbs and flows, but there is no permanent constitutional reference point around which arguments can be made, nor is there a constitutional guarantee that tribal power will be recognized at all. In other words, there is no irreducible minimum of tribal power in the American system. So a New Paradigm must be developed that is mindful that the limb on which tribal governments sit can break.

III. CONCLUSION

The process of finding a new paradigm for tribal government and its relationship with the federal government entails, at some level of consciousness, a reexamination of these and perhaps other attributes of tribal governments to determine which are to be deemed essential—either by the Indians themselves, by the federal government, or by the society at large. The relationship of tribal governments to Indian cultural and community identity is probably an essential characteristic of a tribal government, for example, although tribes should not promise cultural stasis. The absence of residency as an absolute requirement for tribal membership may be essential to most tribes—who value their inclusiveness and recognize the need for some members to leave the reservation to make a living—although residency already plays a significant role in the membership criteria for some tribes.

Other attributes listed above, however, are either not essential to the notion of a tribal government—one hopes their constituencies will not or need not always be poor—or are in some sense among the very

characteristics being called into question by the New Paradigmists. Some might argue, for example, that tribal governments need not be major landowners within their jurisdictions (or that land ownership should be irrelevant) or major economic players in the reservation economy. The connection between land ownership and jurisdiction is problematic and involves very important tradeoffs.

The Indian Reorganization Act provided for section 16 governments and section 17 corporations for the purpose, by some accounts, of encouraging tribes to separate resource management and business from politics. Given the centrality of tribal resources to economic development on some reservations, it seems chimerical to suppose that a measure of politics will not follow the power to determine resource use wherever it goes. One of the common themes of tribal political theory of today is concerned with mechanisms to separate the political and economic activities of the tribes, but the most that can be hoped for in this regard is at the level of sound management, leaving managers to run businesses while holding them accountable.

By the same token, various ideas have been put forth regarding the definition of the resident tribal constituency that would attempt to accommodate the interests of non-members. Over the past 30 years, great strides have been taken to accord non-members various forms of participation in public agency boards, and the continued viability of cooperative intergovernmental relations between tribes and state and municipal governments may help to forestall a constitutional showdown over the interests of resident non-members.

In the final analysis, tribal governmental status in the American system and the ability of tribes to enter the American economy more aggressively are founded on extremely complex bundles of rights and concepts that, for the most part, have not been articulated clearly, have not been tested thoroughly legally or politically, and in many respects are interrelated. Those who are advising the tribes, and the tribal leaders themselves, are deep in the Land of Unintended Consequences. They would be well advised to act with great caution as they choose the next few steps along the spectrum of tribal self-determination.