Introduction

North America's Indigenous inhabitants had effective governments long before European contact. Tribal institutions facilitated commerce, incentivized production, and punished crimes. Indigenous institutions enabled tribes to thrive for centuries. But by the latter half of the nineteenth century, tribes were forced onto reservations, and reservations remain among the poorest areas in the United States. A 2010 Senate Hearing noted that Indians were the majority population in eight of the ten poorest counties in the United States though Indians comprise approximately 1 percent of the United States' population.[1] The hearing also noted that the unemployment rate on Indian reservations was 50 percent.[2] The United States Census Bureau reported in 2023 that Indians have the highest poverty rate in the United States.[3] And while Indians are often omitted from crime data, the existing evidence shows they are victims of violence at higher rates than any other group.[4] Tribes face myriad other social problems.

[1] *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affs.*, 111th Cong. 2 (2d Sess. 2010) (statement of Sen. Byron L. Dorgan, Chairman, S. Comm. on Indian Affs., U.S. Sen., N.D.).

[2] *Id.*

[3] EMILY A. SHRIDER & JOHN CREAMER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-280, POVERTY IN THE UNITED STATES: 2022, at 5 (2023), www.census.gov/content/dam/Census/library/publications/2023/demo/p60-280.pdf [https://perma.cc/46VY-AY2Z].

[4] NAT'L INST. OF JUST., U.S. DEP'T OF JUST., FIVE THINGS ABOUT VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN (May 2023), www.ojp.gov/pdffiles1/nij/249815.pdf [https://perma.cc/G5HY-FUUV].

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Tribes continue to struggle socioeconomically because the United States fails to treat tribes as governments. While the federal government has embraced a policy of tribal self-determination since 1975, it denies tribes full territorial sovereignty. Instead, the rules governing tribal land are a hodgepodge of tribal, state, and federal law. Determining which law applies can take years of costly litigation. Court decisions on tribal governance are often highly fact-specific, so precedent provides little predictive value. As a result, Indian country is mired in legal uncertainty. This uncertainty creates socioeconomic problems, from crime to poverty. For example, no rational business wants to operate on a reservation where its tax bill is unknown; ambiguity reigns over whether a breach of contract claim needs to be filed in tribal, state, or federal court; and which police to call in the event of a crime depends on whether the perpetrator and victims are Indian or not.

This book argues that treating tribes as governments is the solution to the problems facing Indian country. Treating tribes as governments means displacing the outmoded body of federal Indian law that currently reigns over Indian country with tribal law. In order for this to occur, tribes must be liberated from the inefficient federal bureaucracy that only applies on tribal land and tribes must be able to apply their laws to all people on their land. A corollary of this is that states must be prohibited from exercising jurisdiction over Indian country absent tribal consent. With this autonomy, tribes will be able to enact laws that reflect their values.

Recognizing this degree of tribal autonomy may seem radical; however, there is precedent for it. First of all, tribes are the original American governments. An increasing body of evidence shows tribal governments functioned effectively centuries before European arrival and well after. Moreover, tribal sovereignty is recognized in the United States Constitution and numerous treaties, which the Constitution names as "the supreme Law of the Land." The earliest jurisprudence on tribes recognized tribes as autonomous entities. Although early court decisions contain derogatory depictions of Indians, the jurisprudence recognized tribes as governments and tribal lands as free from state law. Federal policy since the 1970s, as well as contemporary international law, is designed to foster tribal self-government. The argument for tribal autonomy is further bolstered by the evidence demonstrating that increased tribal autonomy leads to improved tribal welfare.

Better outcomes resulting from increased tribal control should be no surprise. Local governments can better respond to the needs of their community than distant governments. Indeed, this is one of the key premises behind the United States' federal system. Honoring tribes' long-established

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sovereignty simply adds to America's federalism. Tribal sovereignty merely gives individuals more choices. And if tribes are allowed the freedom to innovate, they can serve as models or islands of liberty.

0.1 DIVISION OF THE BOOK

Part I traces Indian history from long before European contact to 1975. This part discusses the archaeological evidence revealing complex civilizations in North America centuries before 1492. After discussing precontact Indian societies, Part I then moves to early European contact. Spain's treatment of the Indians was often cruel; however, relations between the tribes and France and Britain were more complex. By playing one European power off against another, tribes were able to acquire European items through market exchanges and, in the process, transformed their cultures. Next, Part I examines Indians' role in events leading to the American Revolution. The remainder of Part I traces the development of federal Indian policy from the founding of the United States to the present era of tribal self-determination.

Part II examines the problems facing Indian country today. Although the United States has an avowed Indian policy of tribal self-determination, the federal government continues to employ paternalistic policies. Part II provides examples of federal paternalism costing tribes billions of dollars. A symptom of federal paternalism is federal bureaucracy, and Part II explores the unique federal regulations that apply exclusively within Indian country. The remainder of Part II explains how diminished tribal jurisdiction incentivizes crime and hinders tribal economies.

Part III proposes treating tribes as domestic nations as the solution to the problems presented in Part II. This means reaffirming tribal sovereignty over tribal lands, that is, recognizing tribes' inherent right to govern their lands free from outside interference. In a similar vein, Part III suggests that the United States reconsider the legal rationale underlying federal Indian law. As chronicled in Parts I and II, the foundations of contemporary federal Indian law are at odds with basic notions of human dignity.

0.2 A NOTE ON TERMINOLOGY

"Indian" is used in this book rather than "Native American" for three reasons. One is many tribes prefer Indian. For example, several tribes have "Indian" in their names such as the Southern Ute Indian Tribe, the

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Mississippi Band of Choctaw Indians, and the Seneca Nation of Indians. Indian is also a legal term – Title 25 of the United States Code is "Indians." Finally, all persons born in the Americas are "Native Americans." Thus, Indian is used predominantly throughout the book, occasionally interspersed with "Indigenous." Indigenous is not widely used in the United States legal system; however, the term is common in international law.

"White" will often be used to describe Americans prior to the twentieth century. The United States government was almost exclusively composed of whites during much of this period. Moreover, Americans referred to themselves as white in relation to Indians. To illustrate, Secretary of War Henry Knox's 1789 Report on the Northwestern Indians, states:

> In examining the question how the disturbances on the frontiers are to be quieted, two modes present themselves, by which the object might perhaps be effected; the first of which is by raising an army, and extirpating the refractory tribes entirely, or 2dly by forming treaties of peace with them, in which their rights and limits should be explicitly defined, and the treaties observed on the part of the United States with the most rigid justice, by punishing the whites, who should violate the same.[5]

Accordingly, white will be used to refer to Americans during the eighteenth and nineteenth centuries.

The terminology governing Indian lands is complex. "Indian country" is a legal term, defined by 18 U.S.C. § 1151 as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Historically, Indian country meant lands beyond the frontier and then lands west of the Mississippi River.

[5] *Report of Henry Knox on the Northwestern Indians, June 15, 1789*, *in* DOCUMENTS OF UNITED STATES INDIAN POLICY 12 (Francis Paul Prucha ed., 3d ed. 2000).

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