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FOREWORD

The American Indian occupies a unique position in American society and law. Although United States citizens, reservation Indians are not subject to the Federal Constitution or to the taxes and regulatory controls of the states in which they live and vote. Although many tribes have formulated their own constitutions and established their own courts, reservation governments are not recognized as fully sovereign entities. And although reservation Indians are characterized at times as wards of the federal government, no consistent standard of responsibility has been established to define and delimit the plenary power of Congress over the entire range of Indian affairs. As the contributors to this symposium indicate, the unique position of the American Indian is deeply affected by the social, economic, and historical context in which the relations between Indians and white America have developed.

At present Indians are among the poorest members of American society. A few statistics help to portray the bare outlines of their situation. Of the 763,000 people who identified themselves as Indians in the 1970 census,[1] 38 per cent had incomes below the poverty line. In the poorest areas of Arizona and Utah this figure reached upwards of 65 per cent, while employment for reservation men, which averaged 18 per cent nationwide, climbed well above the 30 per cent mark in many areas. Death from tuberculosis, dysentery, and accidents occurs four times more frequently among Indians than among the rest of the population. And although educational levels have been rising, the average number of years of schooling for Indians is still from one to three years less than for whites.

The social and economic problems of the Indian do not result only from the greed and duplicity of those who invaded the continent and forced or

1. The census data cited here is derived from U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1970 CENSUS OF THE POPULATION: AMERICAN INDIANS, at PC(2)-1F (1972). The overall population figure does not include the 34,000 Eskimo and Aleut peoples. Since the census survey does not include figures for over half of the more than 280 Indian reservations, the statistics cited here should not be regarded as comprehensive. For a general compilation of Indian survey data see S. LEVITAN & W. JOHNSTON, INDIAN GIVING: FEDERAL PROGRAMS FOR NATIVE AMERICANS (1975). The data on Indian health are drawn from U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, INDIAN HEALTH SERVICE, INDIAN HEALTH TRENDS AND SERVICES (1974).

cajoled its original inhabitants to occupy ever more marginal lands. These problems also result from a long history of inconsistent laws and regulations, ill-conceived policies and contradictory reforms. Initially, federal policy recognized the limited autonomy of Indian tribes while actively encouraging them to adopt white technology and culture. Thomas Jefferson believed that the Indian was uniquely adaptable, and that with the aid of advanced technology, he would create the basis for an indigenous American yeomanry.[2] Whatever its theoretical merits, Jefferson's conception was undermined by a series of social and economic forces. The sudden introduction of modern technology among the tribes created pressures that struck at the bases of Indian social organization: their own society was being destroyed at the same time that the Indians were given no distinct place in American society at large.

In the period from 1830 to 1870, American policy was nominally directed toward the protection of tribal communities, but actually consisted of removing most tribes from the eastern half of the nation and isolating them in enclaves where missionaries and government officers could pursue their goal of "civilizing" the Indian. The establishment of reservations neither abated pioneer intrusion nor government aversion to the existence of separate entities within the body politic. The General Allotment Act of 1887 aimed at breaking up the communal land base of tribal existence by individualizing property holdings. By 1928, when it was evident that allotment had failed as a vehicle for assimilation and economic development, a new federal policy was adopted. Through the Indian Reorganization Act of 1934, the New Deal administration sought to support tribal organization and collective landholding by restricting the alienation of individual allotments, permitting tribes to organize their own governments, and increasing the level of federal support programs. Subsequent programs were directed toward the termination of the special status of tribal communities and the relocation of individual Indians away from their reservations, but these programs have in turn been denounced and partly rescinded by subsequent administrations.

In short, as Wilcomb Washburn points out, Indian legal history has been characterized by a series of ad hoc policies arising from momentary exigencies and grounded in no clearly articulated set of general principles. American Indian policy thus gives the appearance of a series of geologic strata, each successive layer being supported by but not completely effacing those of an earlier time. The allotment policy may have been overlaid by the Indian Reorganization Act, but allotments that were already formed have continued to exist, subject to federal trust supervision. Tribes whose federal services were terminated have remained subject to the effects of the discredited Ter-

2. B. SHEEHAN, SEEDS OF EXTINCTION: JEFFERSONIAN PHILANTHROPY AND THE AMERICAN INDIAN (1974).

mination Policy even as they seek to be reinstated to their former position. Neither Congress nor the courts have thus far succeeded in reducing the ambiguities and inconsistencies of Indian legal status.

It is, however, well within the power of Congress to alter the legal position of Indian tribes. Courts have consistently recognized that the power granted Congress under the Constitution is extensive in the field of Indian affairs, and wholesale legislative reform has been a preferred instrument for altering federal Indian policy. Recognizing the confused state of current programs and statutes, Congress has established the Indian Policy Review Commission and authorized it to formulate recommendations for possible legislative action. As Congressman Lloyd Meeds, Vice-Chairman of the Commission, points out, the investigations conducted by the Commission's numerous task forces should help to clarify the implications that would stem from the enactment of any federal Indian policies.

Any reconsideration of Indian policy will, of course, have to take into account the contending interests of the basic triad of powers involved in Indian affairs—the federal, state, and tribal governments. New policies must also consider those judicial doctrines on which the participants have come to rely; the conflicting interests of white farmers, ranchers, and environmentalists; and the aims of private corporations and public utilities seeking to utilize reservation resources. No less important is the choice of rationales used by courts to interpret the scope of federal power. The limitations on the power of the federal government vary as the source of that power is seen to rest on the initial right of discovery or conquest, the nature and terms of individual treaties, or the constitutional grant of control over trade and intercourse with the Indian tribes. If the precise range of federal, state, and tribal powers is not clearly articulated for all situations, new legislative programs affecting American Indians will only be as good as their judicial interpretations.

In exploring some of the critical areas of concern in Indian law, the contributors to this symposium focus on several major issues: the exercise of jurisdiction, the control of water and mineral resources, compensation for lost properties, taxation, and education. Several additional issues on which task forces of the Indian Policy Review Commission have worked must also be mentioned: the status of non-reservation and non-treaty tribes, the applicability of the Federal Constitution to tribal proceedings, and the reconsideration of Indian treaties.

Few political groupings in the United States have felt the implications of Mr. Justice Holmes's assertion that "jurisdiction is power" more forcefully than the American Indians. Although tribes had long been denominated "domestic dependent nations" and "semi-sovereign entities," Congress and the courts have been reluctant to recognize too broad a scope of jurisdiction in the councils and tribunals of the reservation groupings. State governments, moreover, asserted that where the federal government failed to act, state

courts were free to move into the legal vacuum. However, in 1958, the Supreme Court, in *Williams v. Lee*, argued that states could exercise jurisdiction over those matters the federal government had left untended only if the state's action did not infringe on the right of the tribes "to make their own laws and be ruled by them."[3] Although the Court initially narrowed its own doctrine by arguing that Congress's power was absolute only where Congress had acted to retain exclusive control,[4] the later holding in *Warren Trading Post Company v. Arizona Tax Commission*[5] reasserted that the field of Indian law was preempted by the federal government as against the states, especially where state control of reservation activities would interfere with federal policies intended to benefit the Indians. These two doctrines—the federal preemption and the furtherance of Indian self-government—have not, however, been fully or consistently explored. The uncertainties about what is meant by tribal sovereignty and the precise bounds of federal, state, and tribal power are most evident in the areas of jurisdiction and resource control.

It is axiomatic that sovereignty implies the power to interpret and enforce the laws made by one's own form of government. The federal government has recognized this power in the Indian tribes as often as it has sought to regulate it. The Indian Reorganization Act afforded tribes the opportunity to adopt constitutions and establish their own governmental machinery. But as Russell Barsh and James Youngblood Henderson indicate, the primary concern in federal approval of tribal governments has always been the maintenance, through tribal police and courts, of those cultural precepts and organizational controls that have served the goals of the dominant force. Indeed, as Steve Nickeson's analysis of the Bureau of Indian Affairs demonstrates, the political in-fighting of the federal agency most directly charged with administering federal Indian policy is incomprehensible without an understanding of how the organization of that agency is largely divorced from the interests of those it affects. Given the underlying bureaucratic structure of the agency, Nickeson suggests, the administration of any Indian policy may stray far from its stated goals and procedures.

Although many tribes adopted constitutions—which received the requisite approval of the Secretary of Interior most readily when they followed the form suggested by the Bureau of Indian Affairs—issues such as jurisdictional scope have remained open-ended. Increasingly various state and federal courts have recognized that tribes may not only exercise jurisdiction over civil matters such as contracts,[6] torts,[7] and child custody,[8] but also may enforce

3. 358 U.S. 217, 220 (1958).
4. Organized Village of Kake v. Egan, 369 U.S. 60 (1962).
5. 380 U.S. 685 (1965).
6. *See* Cowan v. Rosebud Sioux Tribal Court, 404 F. Supp. 1338 (D.S.D. 1975).
7. *See* Schwartz v. White Lightning, 502 F.2d 67 (8th Cir. 1974).
8. *See* Fisher v. District Court of the Sixteenth Judicial Dist. of Mont., Civil No. 75-5366 (U.S.

their own statutes against non-Indians who are present on the reservation.[9] Even where a similar statute might not be upheld if applied by state or federal authorities outside a reservation, courts have recognized that such laws might have a legitimate scope and meaning within the context of tribal culture.[10] Indeed, the laws of an Indian tribe have, in some instances, been granted full faith and credit in state court in accordance with the same principles applied to the judgments of territories and states.[11] Such a trend is, however, based on judicial constructions of ambiguous statutes and the courts' own sense of their underlying rationales, rather than on clear legislative precepts that could be given more consistent and uniform application.

To many non-Indians the fact that Indian tribunals might apply different procedures and criteria of liability than white courts—and might even apply these alien standards to non-Indians within their domain—is antithetical to both their sense of justice and their belief in the universal applicability of the standards prescribed by the Federal Constitution. In fact, the Constitution does not apply to reservation Indians.[12] Recognizing that Indians, as American citizens, should be entitled to certain guarantees similar to those embodied in the Constitution, Congress did, however, enact the Indian Civil Rights Act in 1968.[13] This Act repeats many of the provisions of the Federal Bill of Rights and applies them to the proceedings of Indian tribal governments and courts, although it does not make the Federal Constitution and all of its judicial interpretations directly applicable to the tribes.[14] To many Indians the Act is an assault on tribal sovereignty, for it allows an action to be brought in federal court for matters that, in the eyes of its detractors, are solely the concern of the Indians. In fact, the courts have tended to apply full constitutional safeguards to Indian procedures only where the Indians themselves have adopted electoral rules or judicial forms that are identical to those used in state or federal situations.[15] Where a sufficiently high interest exists in

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Sup. Ct., Mar. 1, 1976), in 3 INDIAN L. REP. a-6 (1976); Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975).

9. *See* Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (1975); Long v. Quinault Tribe, Civil No. C75-67T (W.D. Wash., Sept. 2, 1975), in 3 INDIAN L. REP. g-13 (1976); Belgarde v. Morton, Civil No. C74-6835 (W.D. Wash., Aug. 18, 1975).

10. *See* Big Eagle v. Andera, 508 F.2d 1293 (8th Cir. 1975). *But see* State of Nevada v. Jones, Civil No. 8416 (Nev. Sup. Ct., Feb. 20, 1976), in 3 INDIAN L. REP. h-27 (1976).

11. *See* Jim v. C.I.T. Financial Services Corp., 533 P.2d 751, 87 N.M. 362 (1975).

12. *See* Talton v. Mayes, 163 U.S. 376 (1896); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Tom v. Sutton, Civil No. 75-1551 (9th Cir., Mar. 10, 1976), in 3 INDIAN L. REP. e-21 (1976).

13. Pub. L. No. 90-284, tit. II, §§ 201-03, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-03 (1970)).

14. *See* Jacobson v. Forest County Potawatomi Community, 389 F. Supp. 994 (E.D. Wis. 1974); Tom v. Sutton, Civil No. 75-1551 (9th Cir., Mar. 10, 1976).

15. Rosebud Sioux Tribe v. Driving Hawk, Civil No. 76-1077 (8th Cir., Mar. 5, 1976), in 3 INDIAN L. REP. d-1 (1976); Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 96 S. Ct. 1436 (1976); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973).

furthering Indian culture, the courts have not deemed the case proper for the application of strict constitutional requirements.[16] Further litigation may, therefore, establish the Act as a primary vehicle for the preservation of tribal laws and procedures. But the ever-present possibility that federal courts may override tribal decisions when they appear too foreign stands as a constant check on the full development of practices the Indians regard as authentically their own.

Like jurisdiction, control of reservation resources is permeated by ambiguous legal implications and conflicting interests. Rivers that traverse reservation lands are also used for non-Indian irrigation and power projects; fish that live their mature lives in one part of a watercourse must have access to another part if they are to propagate themselves; coal and oil that lie buried beneath tribal domains become important elements of national and international economics. Legitimate interests may exist on both sides of an issue, and often moral arguments of equal weight come into direct conflict with one another.

Control of water resources in particular brings to the fore contending interests and policies. William Veeder forcefully argues that the waters in the Yellowstone River Basin, which have been sought by energy companies for use in the extraction of reservation coal deposits, belong exclusively to the tribes whose legal rights the federal government must not fail to preserve. Monroe Price and Gary Weatherford, in their analysis of Navajo water rights, demonstrate that a tribe nevertheless may be forced to bargain away its asserted resource rights because of the need for short-term benefits that could be lost in the course of lengthy and expensive litigation over their full legal rights. Even where legislation has been passed to compensate Native Americans for land and minerals, constant pressures may exist to reduce the ostensible gain. Arthur Lazarus, Jr. and Richard West, Jr. detail the complexities of the largest such compensation program undertaken by Congress, the Alaska Native Claims Settlement Act of 1971.[17]

The role of state governments in Indian affairs takes on special importance in disputes over taxation and regulatory controls. Reservation Indians are required to pay federal income taxes, but state governments have tried various tactics to subject them to state revenue laws as well. If, as Chief Justice Marshall once said, the power to tax is the power to destroy,[18] the power to subject tribes to state taxation may be the power to destroy absolutely. Given

16. *See* Howlett v. Salish and Kootenai Tribes, Civil No. 75-1478 (9th Cir., Jan. 22, 1976), in 3 INDIAN L. REP. 3-10 (1976); Crowe v. Eastern Band of Cherokee Indians, 506 F.2d 1231 (4th Cir. 1974); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); Daly v. United States, 483 F.2d 700 (8th Cir. 1973); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973); Yellow Bird v. Oglala Sioux Tribe, 380 F. Supp. 438 (D.S.D. 1974). *But see* Martinez v. Santa Clara Pueblo, Civil No. 75-1615 (10th Cir., Aug. 16, 1976).

17. 43 U.S.C. §§ 1601-24 (Supp. III, 1973).

18. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819).

their poor economic status and uncertain legal rights, reservation Indians might be hard put to maintain their societies and governments in the face of additional tax burdens. But if taxation by the states threatens organized reservation life, tribal taxation of non-Indian businesses operating on reservation lands may, as Carole Goldberg suggests, constitute a legitimate vehicle for developing tribal revenues. As in the case of water rights, however, the need to balance Indian taxing efforts with more immediate economic and political exigencies takes on as much importance as the question of the overall legality of an Indian taxing program. Similar problems also emerge when state and county governments attempt to apply construction, zoning, and other regulations to reservations, thereby threatening the competitive edge and governmental autonomy tribes need in order to attract capital and jobs to areas where Indians will have an opportunity to benefit from them.

Most of American Indian law has grown out of questions relating to the status of reservation tribes and property. But a substantial number of Indians no longer live on reservations, and many tribal groupings have never received federal recognition. Between 1960 and 1970 the number of Indians living in urban areas doubled, and nearly half of all Indians now live in metropolitan regions.[19] Large numbers of Indians, including most of those who live in the eastern United States and possess no treaties with the federal government, remain ineligible for federal benefits. Non-reservation Indians pose two distinct legal problems: how are such concepts as "tribe" and "Indian" to be defined for various federal purposes, and to what extent are those Indians who live off-reservation entitled to participate in benefits primarily accorded reservation dwellers? The former question has raised complex issues concerning the circumstances under which reservations cease to exist, the status of plaintiffs seeking compensation before the Indian Claims Commission, the nature of federal responsibility to a non-recognized tribe, and eligibility for preferential federal hiring based on percentage of Indian blood. Non-reservation Indians have been ruled eligible for the same welfare benefits accorded reservation residents as long as they live "near their native reservation, and . . . maintain close economic and social ties with that reservation."[20] Unresolved are the definition of "near" and the precise rights of urban Indians. Congress and the courts are faced with resolving the status of tribes that, for whatever reason, never signed treaties with the federal government, yet retain some tribal identity, and the status of individual Indians who have left their reservations to seek a livelihood elsewhere.

Indeed, the very nature of the treaties that were signed with Indian tribes

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19. U.S. BUREAU OF THE CENSUS, *supra* note 1. On urban Indians generally see E. NEILS, RESERVATION TO CITY: INDIAN MIGRATION AND FEDERAL RELOCATION (1971); THE AMERICAN INDIAN IN URBAN SOCIETY (J. Waddell & O. Watson eds. 1971).

20. Morton v. Ruiz, 415 U.S. 199, 238 (1974).

remains open to question. Courts have generally deferred to the power of Congress on the issue of treaties, even refusing to invalidate those that were clearly obtained by fraud or duress.[21] Some commentors, including Vine Deloria, Jr., argue that tribes should be regarded as "contractual sovereignties" whose autonomy for many functions is guaranteed by their original treaties.[22] Others argue that revitalizing the treaty form will complicate issues more readily handled by direct legislation. One point, however, is clear: without greater clarification of the status of existing treaties and federal willingness to honor the terms of prior agreements, it will be impossible to establish a climate of mutual trust in Indian-white relations.

Finally, programs designed to increase the availability and quality of Indian education raise important legal problems. As Daniel Rosenfelt indicates, the financing of Indian schools is often tied up with federal programs that also benefit nearby white schools. In the past, monies intended for Indian schools have been siphoned off to support school districts with few Indian students. More precise regulations and more carefully guarded administration will be necessary to ensure that benefits actually reach their intended recipients.

There has been an uneven trend toward greater self-determination by Indian tribes in recent years, but the conceptual and political bases of federal Indian policy remain clouded, confused, and contradictory. Where once whites coveted the yellow gold of the Black Hills, now they covet the black gold of the Yellowstone Basin. And as always, the simple imposition of statutory remedies is complicated by a unique history that brings the problems of necessity, fairness, and legal constancy sharply to the fore. The purpose of this symposium is to clarify the implications that might follow in the wake of any attempt to restructure federal Indian policy, and to help establish criteria on the basis of which Indians and whites can reach greater accord on their common legal problems.

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21. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902). *See also* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 CALIF. L. REV. 601 (1975).

22. V. DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 141-86 (1974).