

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>].

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

Introduction

3

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

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).

PART I

FROM SOVEREIGNS TO WARDS

The History of Tribal Nations and the Law

I

The Original American Governments

Babylon, Egypt, and Greece are among the first images conjured by “ancient civilizations.” North America is seldom considered; indeed, North America’s Indigenous inhabitants were widely considered “uncivilized” until the early twentieth century. However, North America had numerous civilizations prior to European arrival. These Indigenous North American civilizations developed complex governance systems, engaged in extensive social planning, and created long-range commercial networks. This chapter explores early American societies.

I.1 THE FIRST AMERICANS

For hundreds of years, Europeans have wondered how Indians arrived in the Americas. In 1590, Fray José de Acosta hypothesized that early humans followed wild game from Asia into the Americas.¹ David Hopkins transformed the idea. Hopkins’ 1967 book, *The Bering Land Bridge*, helped validate the existence of a land bridge linking Asia to North America.² Ever since then, the Bering Strait Theory (BST) has been widely accepted. According to the theory, people crossed the land

¹ *History of the Bering Land Bridge Theory*, U.S. NAT’L PARK SERV., www.nps.gov/bela/learn/historyculture/the-bering-land-bridge-theory.htm [https://perma.cc/AMZ6-XH4D].

² *David M. Hopkins Beringia Award*, U.S. NAT’L PARK SERV., www.nps.gov/subjects/beringia/hopkins.htm [https://perma.cc/3VNB-TY9G].

bridge connecting Russia to Alaska approximately 13,000 years ago.³ More recent evidence casts serious doubts on the BST.⁴

Settlements in the Americas predate the BST. For example, the Cooper's Ferry site in Idaho is 16,000 years old. The archaeological finds at the site include stone tools and butchered animals. People likely reached Cooper's Ferry by migrating from Asia along the coast then traveling down the Columbia River.⁵ Other sites in the present-day United States predate the BST.⁶ But the strongest archaeological blow to the BST is Monte Verde. This Chilean site was inhabited by humans between 14,500 and 18,500 years ago.⁷ These pre-Clovis sites indicate early humans entered the Americas by tracing the Pacific coast, known as the Kelp Highway Hypothesis.⁸ Following the coast is a logical migratory path because early humans had the ability to acquire marine food sources.⁹

Genetics have also undermined the mainstream BST. DNA samples suggest humans entered North America at least 20,000 years ago.¹⁰ Furthermore, DNA indicates three separate human migrations rather than the one-time migration under the BST.¹¹ Most interestingly, the DNA of Indigenous Amazonians is conclusively linked to the DNA of

³ Tia Ghose, *Humans May Have Been Stuck on Bering Strait for 10,000 Years*, LIVE SCIENCE (Feb. 27, 2014), www.livescience.com/43726-bering-strait-populations-lived.html [https://perma.cc/LAQ8-BT9B]; Fen Montaigne, *The Fertile Shore*, SMITHSONIAN MAG. (Jan. 2020), www.smithsonianmag.com/science-nature/how-humans-came-to-americas-180973739/ [https://perma.cc/87YV-MGQT].

⁴ Montaigne, *supra* note 3.

⁵ Lizzie Wade, *First People in the Americas Came by Sea, Ancient Tools Unearthed by Idaho River Suggest*, SCIENCE (Aug. 29, 2019), www.sciencemag.org/news/2019/08/first-people-americas-came-sea-ancient-tools-unearthed-idaho-river-suggest [https://perma.cc/BKX6-EWTJ].

⁶ Jason Daley, *People Were Messing Around in Texas at Least 2,500 Years Earlier Than Previously Thought*, SMITHSONIAN MAG. (July 25, 2018), www.smithsonianmag.com/smart-news/people-were-texas-3000-years-earlier-previously-thought-180969743/ [https://perma.cc/VH2E-MTAM]; Montaigne, *supra* note 3.

⁷ Ann Gibbons, *Oldest Stone Tools in the Americas Claimed in Chile*, SCIENCE (Nov. 18, 2015), www.sciencemag.org/news/2015/11/oldest-stone-tools-americas-claimed-chile [https://perma.cc/HQF7-J4P9].

⁸ K. Kris Hirst, *Kelp Highway Hypothesis*, THOUGHTCO. (updated July 20, 2019), www.thoughtco.com/kelp-highway-hypothesis-171475 [https://perma.cc/C5E5-FF57].

⁹ Montaigne, *supra* note 3.

¹⁰ *Id.*

¹¹ *Native American Populations Descend from Three Key Migrations*, UCL NEWS (July 12, 2012), www.ucl.ac.uk/news/2012/jul/native-american-populations-descend-three-key-migrations [https://perma.cc/DNM8-XZA4].

Indigenous Australians and Melanesians.¹² The language of the native inhabitants of Easter Island, off the coast of Chile, is also more closely related to Polynesian language groups than Indigenous South American languages.¹³

Although Australasian DNA and artifacts from Monte Verde proffer the possibility of an ancient oceangoing voyage, most archaeologists reject this idea.¹⁴ Instead, most experts believe humans crossed from northern Asia into the Americas. Proponents of the Kelp Highway Hypothesis, however, do believe watercrafts were used to follow the shoreline – which would have extended much farther into the Pacific Ocean thousands of years ago.¹⁵ According to the hypothesis, people sustained themselves by collecting the ample food resources along the coast. After entering North America, the earliest people on the continent would have been able to avoid group conflicts by simply moving to unclaimed lands.¹⁶ This begs the question: Why did the very first Americans migrate south so rapidly?

The answer may never be known, but the Americas' earliest arrivals had the same inquisitive minds as contemporary humans. Hence, people may have merely been eager to explore uncharted lands.¹⁷ Whatever the reason, science has made clear that the ancestors of American Indians did not all enter North America simultaneously. What's more, Indians were developing civilizations at similar rates as people in other parts of the world.

1.2 EARLY NORTH AMERICAN CIVILIZATIONS

Ancient civilizations, such as Sumer in Mesopotamia, are well-known. Sumer formed around 4500 BCE.¹⁸ Watson Brake, located in northern Louisiana, has been inhabited since approximately 4000 BCE, and by the

¹² Michael Price, *Earliest South American Migrants Had Indigenous Australian, Melanesian Ancestry*, SCIENCE (Mar. 29, 2021), www.sciencemag.org/news/2021/03/earliest-south-american-migrants-had-australian-melanesian-ancestry [https://perma.cc/A7KF-XCK4].

¹³ *Easter Island*, ENCYCLOPEDIA.COM, www.encyclopedia.com/places/australia-and-oceania/pacific-islands-political-geography/easter-island [https://perma.cc/QBQ8-6Y74].

¹⁴ Montaigne, *supra* note 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Joshua J. Mark, *Sumer*, WORLD HIST. ENCYC. (Apr. 28, 2011), www.worldhistory.org/sumer/ [https://perma.cc/3PLU-YKS8].

year 3500 BCE, Watson Brake's inhabitants began constructing mounds. There is evidence of minor agriculture, but Watson Brake's residents subsisted primarily from marine life,¹⁹ as well as deer, turkey, and small mammals.²⁰ However, no evidence of long-distance trade or other commercial activity has been discovered at Watson Brake.²¹

Around 2000 BCE, Poverty Point became North America's first great trading center. Poverty Point is located in northeastern Louisiana along Macon Ridge. The elevated ridge kept Poverty Point residents dry despite the site's proximity to major waterways. These waterways served as natural infrastructure to facilitate commerce, and Poverty Point was a vibrant commercial hub. Although Louisiana does not contain an abundance of natural stones, more than seventy tons of rocks and minerals were transported to Poverty Point during its existence. These include both stone in its raw form and premanufactured goods such as spear points, soapstone bowls, and jewelry. Items made their way to Poverty Point from as far away as Iowa and the Appalachian Mountains.²²

The high volume of long-distance trade transformed Poverty Point into North America's first city. While most early Americans were still nomadic, hundreds of people resided at Poverty Point throughout the year. Hundreds of people living together in relative harmony requires a governance structure, so the governance structure at Poverty Point had to be sophisticated. There is no other way to explain the construction of the massive mounds there. The largest mound is 72 feet tall, 710 feet long, and 660 feet wide.²³

These mounds were constructed solely with Stone Age tools and human muscle – this required moving approximately 15.5 million baskets filled with soil.²⁴ Constructing each of the mounds at Poverty Point took roughly twenty-five generations. A significant degree of

¹⁹ Rebecca Saunders, *Watson Brake Archaeological Site*, 64 PARISHES (updated Feb. 18, 2022), <https://64parishes.org/entry/watson-brake-archaeological-site> [<https://perma.cc/U798-26RN>] (“Fish, mussels, and aquatic snails were the mainstays of the diet.”).

²⁰ Lori Tucker, *Ouachita River Mounds: A Five Millennium Mystery*, FOLKLIFE IN LA., www.louisianafolklife.org/LT/Articles_Essays/ouachita_mds.html [<https://perma.cc/GS2Z-M4LK>].

²¹ Amélie A. Walker, *Earliest Mound Site*, ARCHAEOLOGY MAG. ARCHIVE (Jan.–Feb. 1998), <https://archive.archaeology.org/9801/newsbriefs/mounds.html> [<https://perma.cc/3Z6S-KJVM>].

²² *Poverty Point*, UNESCO, at 5–6, www.crt.state.la.us/dataprojects/archaeology/povertypoint/assets/poverty-point-pdf-1.03.pdf [<https://perma.cc/J7Z9-RV6R>].

²³ *Id.* at 10.

²⁴ *Id.*

planning and social organization is required to orchestrate a project of this magnitude. For example, people cannot simultaneously procure food and build mounds. This means Poverty Point's inhabitants understood the concept of division of labor. Moreover, designing a multi-generation project without written plans requires incredible vision and communication skills.

Commercial reach and its grand earthen mounds made Poverty Point culturally influential.²⁵ Thus, people visited it for both economic and spiritual reasons. On the economic front, Poverty Point's comparatively large population provided increased opportunities for trade.²⁶ On the cultural front, people were likely mystified by the sizable mounds and associated this with divine power. The exact nature of spiritual and other cultural influence is difficult to discern due to the absence of written records; nevertheless, Poverty Point was undoubtedly a gathering place. Its great plaza appears to be a large ceremonial site, containing circles more than 200 feet across and postholes over two feet in diameter.²⁷

By the year 600 BCE, Poverty Point was no longer a significant city. No Indigenous North American society would match Poverty Point's grandeur for another thousand years. However, this does not mean societies completely vanished from the continent after the decline of Poverty Point. The archaeological record shows multiple cultures continued thriving elsewhere on the continent. For example, Snaketown, near modern-day Phoenix, emerged around 300 BCE but would not reach its peak until approximately 1000 CE. The Hopewellian culture also began to take shape during the year 200 BCE, which would eventually produce several significant cities.²⁸

The Hopewell culture gave rise to the largest and most significant pre-contact North American site, Cahokia, located just across the Mississippi River from present-day St. Louis, Missouri. Cahokia formed around the year 700 CE. Its population was likely around 1,000 people at this time, but by 1000 CE, Cahokia's population exceeded 40,000 people. This means Cahokia was larger than most European cities of the era, including London and Paris. This large population was extremely cosmopolitan as DNA evidence reveals approximately one-third of Cahokia's

²⁵ *Id.* at 2.

²⁶ *Id.* at 9.

²⁷ *Id.* at 8.

²⁸ TIMOTHY R. PAUKETAT & KENNETH E. SASSAMAN, *THE ARCHAEOLOGY OF ANCIENT NORTH AMERICA* 427 (2020).