The Journal of Private Enterprise 34(1), 2019, 87–101

Liberty versus Bureaucracy on Native American Lands

Jordan K. Lofthouse
George Mason University

Abstract
Over the course of American history, a pervasive administrative state has emerged on Native American reservations as the result of unique institutions that govern those lands. The federal trust responsibility and an elaborate web of federal, state, and tribal policies affect the liberties and economic well-being of Native Americans. These unique institutions impose high costs on individual Native Americans when they try to engage in most economic enterprises. This paper explores the complex institutional structure of Native American governance that increases poverty, limits entrepreneurship, and restricts individual liberty on a fundamental level. The pervasiveness of bureaucratic control has also spurred negative forms of political entrepreneurship, eroded the rule of law, and hampered markets from working efficiently.

JEL Codes: D73, P48, H11, H77
Keywords: Native Americans, liberty, political economy, bureaucracy

I. Introduction

Native Americans suffer from disproportionately high rates of poverty and low rates of entrepreneurship. Native Americans own private businesses at a much lower rate per capita compared to other Americans, and the businesses they own produce less income on average than those of all other racial groups (Miller 2001). As of 2010, 28.4 percent of American Indians and Alaska Natives were in poverty, compared to 15.3 percent for the United States. Many of the most impoverished Native Americans live on federally recognized reservations (US Census Bureau 2011). The poverty on Native American lands may be blamed largely on formal governance structures, including inefficient property rights regimes and excessive bureaucratic governance (Akee and Jorgensen 2014; Anderson and Parker 2008, 2009; Cornell and Kalt 2000; McChesney 1990; Regan and Anderson 2014; Russ and Stratmann 2014).

One of the most unique aspects of Native American governance is that a dual bureaucracy of federal and tribal officials has broad discretion in the day-to-day lives of many Native Americans. This paper examines the effects of those unique institutions on Native American liberty, governance, and economic well-being. Native Americans, more than other demographic groups, have had their personal liberties curtailed by the formal institutions that govern them. This paper examines how institutional structures on most reservations limit personal liberty and thus impede economic well-being.

Much of the discussion in this paper is general. Institutions and governance vary between reservations, but there are similarities across most tribes that limit the overall economic freedoms of Native Americans. In section 2, I analyze the emergence of the complex relationship between the federal government, tribal governments, and individual Native Americans. In section 3, I illustrate how bureaucratic institutions that govern Native American reservations tend to limit economic freedoms and raise the costs of private enterprise. I conclude with implications that Native Americans will continue to suffer from systematic poverty as long as the bureaucratic institutions continue to restrict economic liberties and raise the costs of private enterprise.

II. The Emergence of the Administrative State on Native American Lands

One of the most important ways that the federal government and tribal governments interact is through the federal trust system. The modern federal trust responsibility is interpreted as a fiduciary obligation to protect tribal lands and resources, as well as an obligation to enforce federal laws on Indian lands (Bureau of Indian Affairs, n.d.). To understand the federal trust system and other institutions that govern economic life on reservations, it is imperative to understand how those institutions emerged over time. This section details how the federal trust system and the bureaucratic governance structure were formed, and then it examines how the modern system of Native American governance functions in the widest sense.

The two most important congressional acts that shaped modern institutions on Native American lands were the Dawes Act and the Indian Reorganization Act. In 1887, Congress passed the Dawes Act, also known as the General Allotment Act, which allowed the federal government to allot parcels of reservation land to individual Native

Americans. Land that federal officials deemed as "surplus" was sold to white Americans for settlement (Anderson and Parker 2009; Thompson 1997). The Dawes Act stipulated that the federal government would hold allotted land in trust for twenty-five years, meaning that the United States would be legal title holder until individual Native Americans proved that they were "competent" to manage their own land. After the twenty-five-year period, Native allottees would then be given a fee patent, which granted full legal ownership of the land (McChesney 1990). This act was formative for modern federal-Indian relations because it began the federal obligation of holding land in trust for Native Americans.

The Dawes Act was meant to both assimilate Native Americans into white American culture and to transfer desirable lands to white settlers (Akee, Jorgensen, and Sunde 2015; McChesney 1990). Due to the Dawes Act, large amounts of Indian-controlled land were lost, dropping from approximately 138 million acres in 1887 to about 48 million acres in the early twentieth century. Those lands were lost mainly through coerced land sales, voluntary land sales, foreclosures, and delinquent tax payments (Newton 2005; Miller 2006). Allotment through the Dawes Act did little to improve the economic conditions for Native Americans, and there is evidence that it may have made them worse off in the short term. For example, child mortality increased significantly in families who received allotted lands from 1887 to 1934 (Hacker and Haines 2005). Some scholars have condemned "privatization" through allotment as a detrimental policy, but allotment was not a true privatization scheme. The complex structure of property trusteeship meant that the definition of property rights was incomplete. Because the federal government retained considerable rights over the land, the social gains that would have been possible through privatization were largely dissipated (McChesney 1990).

In 1928, the Institute for Government Research commissioned a study, later called the Meriam Report, that criticized the Bureau of Indian Affairs' performance during the allotment era. A few years after the report came out, John Collier became the Commissioner of Indian Affairs. Collier was ardently anti-allotment and drafted new legislation based on the findings of the Meriam Report. Collier then persuaded Congress to pass his bill, which became the Indian Reorganization Act of 1934 (McChesney 1990).

The Indian Reorganization Act has become the foundation of the modern system of tribal governance. First, the act allowed Native

Americans who held full legal title to their land to retain the title. Second, the act ended allotment and allowed the federal government to hold land in trust indefinitely. Even today, many Native Americans are subject to trust constraints over alienation, leasing, and encumbrance if their land was still in trust when the Indian Reorganization Act was passed. Third, the act restored some tribal properties that were within the original reservations (Mika 1995; McChesney 1990; Anderson and Lueck 1992).

During the late nineteenth and early twentieth centuries, allotment and the federal trust system did not enhance the social welfare of Native Americans because it destroyed the informal land rights that Native Americans had for generations. The federal government's attempt to impose alternative institutions with different values, morals, and rules caused Native Americans to suffer economically for generations (Anderson and Parker 2009; McChesney 1990; Roback 1992; Carlson 1981; Williamson 2011).

From the 1940s to the 1960s, Congress abolished some Indian reservations and removed governmental power from many tribes (Walch 1983). Beginning in the 1960s, the Civil Rights Movement persuaded many federal officials to reverse previous policies, allowing tribes to have more "self-determination" over their own governance. Congress passed the Indian Civil Rights Act of 1968 and the Indian Self-Determination and Education Assistance Act of 1975, but despite those laws, the Bureau of Indian Affairs (BIA) has become highly involved in the management of resources through the federal trust (Allen 1989).

Under the modern trust system, four types of land ownership have emerged: tribal trust lands, allotted trust lands, restricted fee lands, and fee lands.

- On tribal trust lands, the federal government holds the title to any parcel of land, and the land is allocated and managed by both the tribal government and federal bureaucrats. Individuals may only use a parcel of this land if both federal and tribal officials allow them to. Only the federal government can sell tribal trust lands. Tribal trust lands comprise about 45 million acres (Miller 2006).
- Allotted trust lands are held in trust by the federal government for individual Native Americans and their heirs. Allotted trust lands comprise about 10 million acres (Miller 2006).

- On Native American lands classified as restricted status or restricted fee, an individual Native American holds the title to a parcel of land, but the Secretary of the Interior must approve any alienating or encumbering of that land (BIA, n.d.).
- Fee lands are owned outright by individual Native Americans and are not held in trust.

Today, the BIA and tribal governments have a complex relationship, and their interactions are often ill-defined and convoluted. Nominally, the BIA and tribal governments have a government-to-government relationship, where the BIA has a duty to consult with the tribes. In addition to the consultation responsibility, the BIA oversees the trust obligations to "protect tribal property and resources" (BIA 2000). The relationship is complex because the BIA is not meant to interfere with tribes' internal affairs under the doctrine of self-determination, yet the BIA also must fulfill the trust responsibility, which means that it must consistently interfere in the control, management, allocation, and divestment of tribal lands and other resources.

Within the BIA, the Office of Trust Services mainly deals with land-related trust issues, since the federal government holds the title to most Indian lands. Some of the office's main responsibilities regard "acquisition, disposal, rights-of-way, leasing and sales, and [assistance] in the management, development, and protection of trust land and natural resource assets." Other responsibilities include real estate services and the management of natural resources, such as mineral, forests, irrigation, and electricity (Office of Trust Services, n.d.).

The BIA implements its policies through an organizational structure that is typical of federal bureaucracies. The Director of the BIA oversees four offices: Indian Services, Trust Services, Justice Services, and the regional offices. Each of those offices is managed by a Deputy Bureau Director. The Office of Indian Services oversees federal welfare payments and provides advisory services to tribal leaders. The Office of Trust Services oversees the federal government's trust responsibility. The Office of Justice Services manages the BIA's law enforcement program. Each of the twelve regional offices has its own Regional Director, who reports directly to the BIA Deputy Director-Field Operations. Those regional offices help execute the federal government's policies and responsibilities, except for education, law enforcement, and high-level administration.

Within the BIA's various offices, specific divisions focus on economic development, workforce planning and control, and management of natural resources, among other responsibilities (BIA 2015).

The organizational structure of tribal governments is similar to that of states or counties. Nearly all tribes have formed their own governments, which legislate civil and criminal laws, impose taxes, determine tribal citizenship, regulate certain activities, and exclude persons from tribal lands. Under the Indian Reorganization Act of 1934, the federal government allowed tribes to adopt constitutions or other governing documents. Most tribes have governments modeled on the federal system of dividing powers between a legislative, executive, and judicial branch. The legislators and chief executive are elected in most tribes, but there is a relatively large amount of diversity in tribal constitutions. For example, some tribes, like the Navajo Nation, have an unwritten constitution. Other tribes are theocracies or operate under corporate governance structures. For tribes with written constitutions, some have adopted an indirectly elected chief executive in a parliamentary-type system, while others have adopted a directly elected chief executive in a presidential-type system (Akee, Jorgensen, and Sunde 2015). Congress granted tribes more authority to create and administer their own programs and services through the Indian Self-Determination and Education Assistance Act of 1975 and the Tribal Self-Governance Act of 1994. Before those acts were passed, the BIA administered most of those programs and services (BIA, n.d.).

States also have authority over Native American lands in some instances. For example, Public Law 280, implemented in the 1950s and 1960s, forced some reservations to turn over their judicial systems to their respective state governments. Some tribes, however, retained their own judicial systems (Anderson and Parker 2008). In addition, the Indian Gaming Regulatory Act of 1988 requires that state governments and tribal governments negotiate a compact for certain types of gambling and gaming. States can block certain casinos and other gaming on Native American lands if the state government refuses to agree to a compact, as was seen in California for many years. In general, however, the ability of state governments to regulate and tax Native Americans is relatively limited (Akee, Spilde, and Taylor 2015; Regan and Anderson 2014; Roback 1992; Akee, Jorgensen, and Sunde 2015).

III. Effects of the Administrative State on Native American Lands

The unique institutions that govern Native American lands tend to impose high costs on economic enterprises, limit entrepreneurship, and restrict individual liberty on a fundamental level. These institutions also facilitate negative forms of political entrepreneurship, erode the rule of law, and hamper markets from working efficiently.

A. Native American Institutions Restrict Economic Liberty and Facilitate Discrimination

Although the intricate arrangement of tribal, state, and federal governance is meant to secure property rights and the rule of law, Native American lands often lack robust private property rights and a systematic application of the rule of law (Anderson and Parker 2009). Through the land trust system, the BIA and local tribal governments have wide discretion because of the complex system of property rights and bureaucratic management of the land.

The land trust system significantly raises the transaction costs for using property. For example, either tribal or allotted lands held in trust by the BIA are subject to BIA regulations, which increases the time and monetary costs of engaging in economic enterprises. In many cases, the BIA must grant permission to change land use, to make capital improvements, or to lease lands. The trust system means that individuals or tribes cannot sell those lands or use them for loan collateral (Anderson and Parker 2009). Land-use decisions for tribal trust lands are even more complex than for individual trust lands because tribal trust land faces both BIA trust constraints and additional tribal controls that restrict leasing or other uses. For example, both BIA agents and tribal agents must approve any development or divestment of tribal trust land, including the construction of houses or business (Anderson and Lueck 1992).

In addition, a peculiar phenomenon called "fractionation" has emerged on allotted trust lands, and it affects roughly a quarter of Indian land. Under the Dawes Act, the federal government allotted parcels of land and held it in trust for allottees and their descendants. Fractionation occurs when hundreds or thousands of these descendants co-own a parcel of allotted land, but they do not own any distinct area of that land; they own a percentage share of that land. This significantly raises the transaction costs of using a piece of allotted trust land because the owners must agree on any course of action. The American Indian Agricultural Resource Management Act of 1993, the Indian Land Consolidation Act of 2000, and the American Indian Probate Reform Act of 2004 were all meant to reduce the high transaction costs of leasing allotted trust land that suffers from fractionation. Prior to those laws, unanimous consent of the co-owners was required to lease allotted trust land. Despite those laws, bureaucratic oversight of allotted trust land maintains relatively high transaction costs (Anderson and Lueck 1992; Russ and Stratmann 2014).

Because a large portion of Native American land is held in the trust system, the liberty of individual Native Americans is inherently limited. On some reservations, such as those in the Southwest, very little land was allotted, meaning that tribal trust land makes up the majority of those reservations. Other reservations in the Northern Plains, Rocky Mountains, and Pacific Northwest were allotted to a much higher degree. Those allotted lands are still held in trust by the federal government, but they are much less subject to tribal bureaucracies (Carlson 1981). When federal and tribal agencies have the power to decide who has access to land and how that land will be used, those bureaucracies inherently suppress individual freedom. In recent years, some scholars and Native American leaders have called for more market opportunities on Indian lands. Arguments for more laissez faire policies have been met with polarized opinions.

Not only is individual freedom limited under federal and tribal bureaucracies, but it also becomes subject to the political whims of those in power. Native American reservations rely, to a large degree, on centralized economic planning because of the peculiar nature of their property rights. When a society is dependent on central planning and bureaucratic allocation, the small minority in power will often impose their preferences on others (Hayek 2007). The small minority may include the bureaucrats who make the centralized decisions, or it may be another concentrated interest group that has persuaded the bureaucrats in power.

Bureaucratic allocation of resources necessarily indulges one person's preferences over others. Economic planning by government officials, no matter the scope, is inherently discriminatory because it "involves deliberate discrimination between particular needs of different people, and allowing one man to do what another must be prevented from doing. It must lay down by a legal rule of how well off particular people shall be and what different people are to be allowed to have and do" (Hayek 2007).

Buchanan (1991) argues that "favoritism, discriminatory treatment (both positive and negative), and arbitrary classifications" will emerge from socio-political systems that force people into dependency relationships with bureaucrats. An arbitrary class distinction can arise when a dependency relationship is introduced. Markets minimize bureaucratic discretion, but formal and informal institutions must allow for dispersed private ownership of property and enforcement of contracts to allow markets. Without private ownership and the enforcement of contracts, bureaucrats make allocation decisions based on their own preferences, not on the most preferred outcomes of the individuals under their jurisdiction.

The Navajo Nation is one of the most bureaucratic and most restrictive reservations. The Navajo experience shows how entanglement between bureaucratic governance and private interests can restrict individuals from enjoying basic economic freedoms that other Americans enjoy nearly every day, such as owning real estate or starting a business. For the Navajo Nation, the degree of development and which lands will be developed have always been bureaucratic decisions on the part of federal and tribal agents. Bureaucratic decisions determine the degree of desired development, where development will occur, and who will benefit from such development. Political corruption has been an issue with the Navajo Nation in the past, mostly in the form of rent seeking (Anderson and Lueck 1992). In the Navajo Nation, federal and tribal officials have focused mainly on mineral resource development, but this development may only provide a short-term respite from perpetual poverty. Energy resources can negatively affect economic growth indirectly when politics and institutions do not channel those resources in economically productive ways (Campbell and Snyder 2012).

B. Bureaucratic Governance Creates Social Waste and Spurs Negative Political Entrepreneurship

Within heavily bureaucratic institutions such as Native American reservations, markets cannot fully emerge. Buchanan (1991) argues that a market system is beneficial specifically because an "economy that is organized on market principles effectively *minimizes* the number of economic decisions that must be made *politically*." In a market system, it is not necessary for politicians or bureaucrats to allocate the available supply among potential demanders.

Political allocation and management of resources increases bureaucratic discretion and creates social waste. Discretion can be problematic for several reasons. Bureaucratic allocation is necessarily subject to the discretionary direction of a bureaucratic agency that does not exist under market organization. This discretion leads to dependency on a bureaucracy. As public choice theory suggests, bureaucrats will allocate resources to exercise their discretion to maximize their utility.

The federal land trust presents a large barrier to a real estate market on reservations, and without a market for land, federal and tribal bureaucrats cannot engage in economic calculation to allocate land to its mostly highly valued uses (Mises 1990). The current system of bureaucratic allocation imposes artificially high transaction costs on people who would like to use trust land for economic development or other entrepreneurial activities.

Wide discretion allows bureaucrats to become political entrepreneurs. DiLorenzo (1988) argues that "the essence of political entrepreneurship is to destroy wealth through negative-sum rent-seeking behavior." All bureaucrats are subject to interest-group pressures, but bureaucrats who become political entrepreneurs try to increase the demand for their services, which usually comes in the form of wealth transfers. Wagner (1966) argues that "bureaucracies have strong incentives to promote and stimulate a perceived need for their activities—every bureaucracy is a vigorous lobbyist." Bennett and DiLorenzo (1985) argue that political entrepreneurs often benefit themselves through tax-funded politics. Government officials can stimulate the demand for their services by giving taxpayer money to special interests. Special interest groups then aid the government officials by lobbying, campaigning, registering voters, and conducting other forms of partisan politics.

With such large amounts of bureaucratic discretion, many people have learned that they can benefit through a perverse type of entrepreneurship in the form of rent seeking. Political rent seeking is not economically productive, but redistributive. In many cases, political entrepreneurs and rent seekers have found ways to persuade bureaucrats for grants rather than increasing the stock of goods and services. Federal and tribal discretion over resource allocation and monetary handouts has created and perpetuated Native American dependency on government handouts rather than economically productive activity (Swimmer 1989).

When Native American communities are more closely linked with off-reservation economies, they experience higher qualities of life and engage in more entrepreneurship. When tribes are isolated or cut off from outside communities, they have limited ability to spend their income or otherwise engage in mutually beneficial exchange. For tribes that are more integrated with off-reservation economies, Native Americans experience higher individual incomes, employment, and quality of life, as well as lower rates of alcoholism (Swimmer 1989). In many cases, tribal governments directly own or manage many businesses on reservations, which sets up a system for political entrepreneurship rather than economic entrepreneurship. Economic entrepreneurship is less likely to take place in the presence of bureaucratic control or incomplete private property rights.

C. Bureaucratic Governance Erodes the Rule of Law and Hampers the Entrepreneurial Market Process

Under the rule of law, a government limits its authority to fixed rules that limit politicians and bureaucrats from taking ad hoc action. The rule of law implies that legal rules are generalized and apply equally to everyone. Under arbitrary government, however, government officials have the power to use their discretion as they wish to achieve particular ends (Hayek 2007).

Native American reservations fall largely under arbitrary government control because there is little stability or predictability in the way that federal and tribal bureaucrats fulfill their objectives when it comes to land trust issues or other public policies. Economic development on reservations has been limited largely due to legal and political uncertainty and complexity. There are at least three ways in which this uncertainty and complexity harms economic outcomes First, the federal trusteeship of Indian lands and other legislation make it difficult for individual trust land owners or tribes to decide whether to develop resources. Second, tribes have a difficult time attracting outside investors because of the uncertainty associated with tribal legal institutions. Third, federal and tribal agencies have demonstrated repeatedly that they do not manage resources to maximize the welfare of Native Americans (Regan and Anderson 2014).

Potential entrepreneurs or developers must navigate a labyrinth of federal and bureaucratic laws and regulations rooted in the dual bureaucracy. For example, non-Native Americans may be subject to tribal or federal taxes when engaging in economic transactions with a tribe or its members on a reservation. Those overlapping jurisdictions and various taxation schemes raise the transaction costs and opportunity costs of conducting economic enterprises on tribal land or with tribal agencies.

Uncertainty is especially prevalent on reservation lands because of the common law sovereign immunity doctrine. This doctrine makes tribes immune from suit unless Congress explicitly gives authorization. Thus, if a tribe-owned business violates the terms of a contract, non-Indians may have a difficult and costly time arbitrating the contract violation. Non-Indians can contract directly with a federally chartered tribal corporation or agency, which may allow some legal protection. The complexity and uncertainty of contract enforcement and long-term property rights security means that engaging in commercial transactions on Native American land can be unappealing and costly (Gover and Stetson 1988).

The dual bureaucracy of federal and tribal control presents a large cost for potential entrepreneurs. Because costs of market entry are high, many reservations have a strong informal economy that provides an important source of income for many Native Americans. For example, the Navajo Nation has a robust informal economy that operates through familial ties or near tourist destinations that are not regulated by either bureaucracy. Some common informal enterprises include selling homemade food or handmade crafts near tourist areas. The bureaucratic constraints that impose high costs on potential entrepreneurs have forced entrepreneurial action into the informal sector (Rosser 2005).

Even though many Native Americans are attempting to engage in entrepreneurial profit opportunities, the federal and tribal bureaucracies can intervene in the formal and informal sectors, which distorts the way they people engage in mutually beneficial exchange. One of the main concerns of bureaucratic interference into market processes on Native American lands is that government actions may spur unintended and undesired market adjustments. Those unintended consequences may create outcomes that are worse than those that would have emerged in a free market (Kirzner 1985).

Not all regulations or market interventions will necessarily harm people participating in the market. However, policy decisions made by either federal or tribal officials will distort the way the people would have otherwise engaged in mutually beneficial exchange on the market. Government officials make policy decisions without the entrepreneurial profit incentive. Entrepreneurs are important for human well-being because they discover previously unknown goods and services that enhance human welfare. When government regulation or other interventions impede the entrepreneurial discovery process, they also impose deadweight welfare losses upon the economy. Thus, on Native American lands that are subject to a wide array of regulations and interventions from the dual bureaucracy, Native Americans face an especially hampered market economy where entrepreneurial discovery is severely limited.

IV. Conclusion

Due to the current system of property rights and bureaucratic governance on reservations and other trust lands, Native Americans face high costs when trying to engage in private enterprise. For example, federal and tribal officials have wide discretion in deciding who gets access to tribal land and how that land will be used, among other powers of regulation, such as licensing. The unique institutions of the federal land trust and overlapping bureaucracies restrict economic freedom, erode the rule of law, facilitate discrimination, and hamper market efficiency.

With constraints on private property ownership, Native Americans have a more difficult time engaging in mutually beneficial exchange, compared to other Americans. The institutions that govern Native American lands hamper entrepreneurial action, thus limiting the discovery of new goods and services that could improve the well-being of Native Americans. Native Americans will continue to suffer from systematic poverty while bureaucratic institutions and the federal land trust continue to impede private enterprise.

Better-defined and better-enforced private property rights, as well as reductions in bureaucratic red tape, may provide more opportunities for mutually beneficial exchange, entrepreneurship, and innovation. The current governance and land management structures, however, make it difficult to engage in almost any commercial operation. Only a fundamental shift in the property rights and governance regimes will allow Native Americans to have the same economic liberties that other Americans have.

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