

American Indian Self-Determination

The Political Economy of a Successful Policy



by Stephen Cornell and Joseph P. Kalt

Native Nations Institute
for Leadership, Management,
and Policy

The Harvard Project
on American Indian
Economic Development

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Udall Center for Studies in Public Policy,
The University of Arizona

Harvard Project on American Indian
Economic Development
Malcolm Wiener Center for Social Policy,
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Harvard University



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American Indian Self-Determination: The Political Economy of A Successful Policy

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Founded in 1987, the Harvard Project on American Indian Economic Development (Harvard Project) is housed within the Malcolm Wiener Center for Social Policy at the John F. Kennedy School of Government, Harvard University. Through applied research and service, the Harvard Project aims to understand and foster the conditions under which sustained, self-determined social and economic development is achieved among American Indian nations. The Harvard Project's core activities include research, advisory services, executive education and the administration of a tribal governance awards program. In all of its activities, the Harvard Project collaborates with the Native Nations Institute for Leadership, Management, and Policy at the University of Arizona.

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Abstract

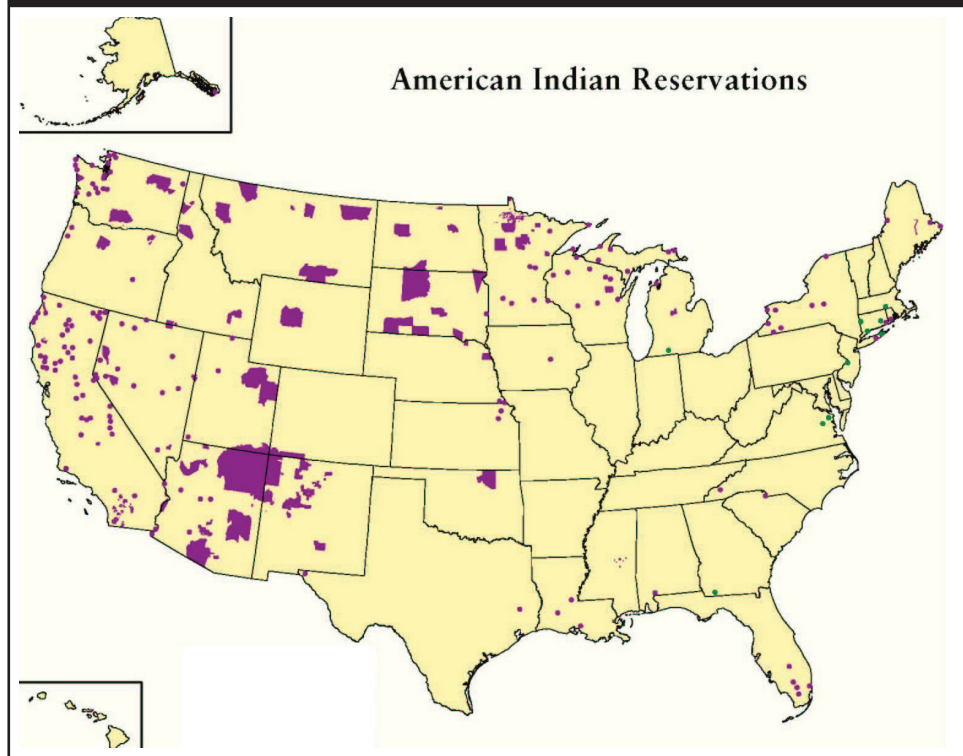
Since the 1970s, federal American Indian policy in the United States has been aimed at promoting self-determination through self-governance by federally-recognized tribes. This policy has proven to be the only policy that has worked to make significant progress in reversing otherwise distressed social, cultural and economic conditions in Native communities. The policy of self-determination reflects a political equilibrium which has held for four decades and which has withstood various shifts in the party control of Congress and the White House. While Republicans have provided relatively weak support for social spending on Indian issues when compared to Democrats, both parties' representatives have generally been supportive of self-determination and local self-rule for tribes. Analysis of thousands of sponsorships of federal legislation over 1970-present, however, finds the equilibrium under challenge. In particular, since the late 1990s, Republican congressional support for policies of self-determination has fallen off sharply and has not returned. This calls into question the sustainability of self-determination through self-governance as a central principle of federal Indian policy.

Context: The Indian Nations

A. Population and Location of Native Americans

The Indigenous people of the United States are commonly denoted as belonging to three primary groups: Native Hawaiians, American Indians, and Alaskan Natives. The latter two groups are the focus of this study. American Indians and Alaska Natives (AI/AN) are generally designated as “Native Americans.” An estimated 4.7 million people in the United States – or about 1.5 percent of the U.S. population – self-identify under official Census categories as American Indian or Alaska Native.¹ Of these, 3.3 million people identify as being of single-race Native American ethnicity. Approximately 1.2 million Native Americans reside on Indian reservations (known collectively as “Indian Country”²) or in Alaska Native Villages. This leaves approximately 2.1 million of those who identify themselves as single-race American Indian or Alaska Native living outside Indian Country and Alaska Native villages.³ These individuals contribute to sizable Native populations in such urban centers as Phoenix, Arizona; Los Angeles, California; Minneapolis, Minnesota; and New York City, New York. The fact that more than half of the 3.3 million single-race Native Americans reside “off-rez” can be misleading: Much of the off-reservation population resides either in communities adjacent to Indian reservations or routinely migrates back and forth between “home” (the reservation) and “off-rez” places of employment and residence.

Under the policies of the United States federal government, 564 AI/AN groups are “federally-recognized tribes.” These tribes are located on more than 300 Indian reservations (Figure 1) and in more than 200 Alaska Native Villages. Reservations range in size from the Navajo reservation (with a resident citizenry of more than 175,000 and a land base about the size of France) to tiny California rancherias (e.g., the Cedarville Rancheria in California consists of 20 acres and reports a population of less than a dozen). Most Alaska Native Villages have populations in the hundreds and operate, effectively, as highly rural municipalities. Together, American Indian reservation lands and lands held in trust for tribes by the federal government comprise approximately 70 million acres.⁴ This total, however, includes non-Indian lands that are located within the boundaries of reservations, and on the order of 14 million of these acres are owned and/or controlled by non-Indians.⁵ When the land holdings of Alaska Native Corporation⁵ and Villages are added, the total area under American Indian and Alaska Native control is approximately 100 million acres. This represents about 4 percent of the land area of the United States.

Figure 1. American Indian Reservations**B. The Legal and Political Status of the Indian Nations**

“Federal recognition” of an Indian tribe constitutes designation of a Native community as a political sovereign within the U.S. federalist system. The origins of this status vary from tribe to tribe. Hundreds of tribes find their federal recognition in international treaties struck between themselves and the United States in the 18th and 19th centuries, with these treaties often taking the form of agreements under which historic Indian nations agreed – albeit, often under military threat and/or subterfuge – to putting themselves under the jurisdiction of the United States in exchange for reservations of land and recognition of their jurisdiction within the boundaries of their reservations. Other tribes have their federal recognition in acts of the U.S. Congress, Presidential Executive Orders, and, in the 20th and 21st centuries, a recognition process overseen by the federal Department of the Interior. The status of the Alaska Native Villages as sub-sovereigns of the United States is rooted in the *Alaska Statehood Act* of 1959 and the *Alaska Native Claims Settlement Act* (ANCSA) of 1971.

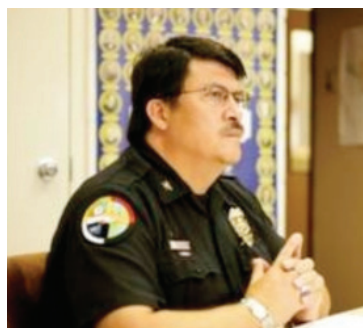
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To be sure, the sovereignty of an Indian tribe or Alaska Native Village is quite limited. But the jurisdictional powers of tribes are quite parallel with those of the fifty U.S. states. Indeed, the federally-recognized American Indian tribes have operated since the mid-1970s under formal policies of *self-determination*.⁷ These translate into extensive powers of internal self-government (Figure 2). Like a U.S. state, tribes are subject to federal law, but operate under their own constitutions, administer their own judicial systems, and implement self-managed tax and regulatory regimes. Vis-à-vis other federal, state and municipal governments, tribes in the current era of self-determination expect and demand government-to-government relations, rather than assuming the earlier role of a dependant subject to paternalistic management by non-Indian governments.

Figure 2. Tribal Powers of Self-Government

Control of Cultural and Religious Affairs
Use of Environmental and Natural Resources
Business Permitting and Regulation
Social Service Provision
education, housing, healthcare, family services
Public Infrastructure
Citizenship Criteria
Law Making and Legislation
Taxation
Civil Law
Criminal Law (Minor Crimes)
Constitutional Form



Political structures of layered sovereigns are central to the U.S. system of government. Nevertheless, while many are familiar with the hierarchy of federal-state-municipal governments within the U.S. framework, the status and genesis of American Indian tribal sovereignty are less widely understood. In contemporary mainstream society, the jurisdictional scope of tribes is often seen as a set of special, “race-based” rights for the Native minority. American Indian tribal sovereignty and the status of tribes as approximate to that of the fifty states, however, originated in the historic standing of American Indian tribes as nations vis-à-vis the policies of Great Britain prior to the founding of the United States, and under the treaties of the United States struck with tribes during the country’s first century. A *treaty*, at its core, is an agreement or contract between nation states; and the United States and its courts continue to recognize historic treaties with Indian nations as such.

The contemporary sub-sovereign status of tribes within the U.S. federal system is also founded on constitutional principles, as well as considerable Con-

gressional legislation found to be consistent with those principles. Article VIII, Section 8, Clause 3 of the *United States Constitution* decrees that: “The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, *and with the Indian Tribes...*.” Indeed, this reservation of powers to the federal government has been key in recent decades in limiting the powers of U.S. states over tribes and, concomitantly, expanding the sovereign authority of tribes. It was instrumental, for example, in the 1980s in U.S. Supreme Court rulings holding that, just as one U.S. state could not dictate to a neighboring state whether gambling enterprises would be permitted, so states could not dictate to their tribal neighbors whether gambling would be permitted on reservations. This principal – to the effect that, while a tribe may be wholly encompassed within a state, a federally-recognized tribe is nevertheless a neighboring jurisdiction (rather than a subservient jurisdiction) – extends well-beyond gambling to such matters as environmental protection, natural resource and endangered species management, labor relations, civil and family law, and much of criminal law and taxation.⁸

Tribes now commonly refer to themselves as “nations.” This does not signify status as nation-states; and tribes lack powers under the U.S. federal system to maintain their own military forces, issue currency, enter into agreements with foreign nation-states, or otherwise exercise powers superior to the federal government. Paralleling the status of a U.S. state’s citizens, tribal citizens are also voting citizens of the United States, subject to federal taxes, laws, and regulations. When working and residing on reservations, tribal citizens are governed by tribal and federal law, and generally are not subject to state law and taxation – just as a resident citizen of, say, Nevada, is not subject to California law and taxation when that Nevadan is in Nevada. By the same token, just as the State of Massachusetts, as owner of one of the largest and most successful gambling businesses in the United States (i.e., the Massachusetts State Lottery), is not subject to taxation on such a business by the federal government or other states, tribal government-owned businesses are free of such taxation. And just as the State of Massachusetts employs its tax and business revenues for state governmental purposes, so too do tribal governments employ their revenues to run schools, build infrastructure, support citizens’ incomes, address social problems, and so on.

C. Economic and Social Conditions

American Indian nations represent an extremely diverse group of societies. Prior to European contact, hundreds of languages were spoken in North America, by hundreds of distinct tribal groups. Economic and social systems, too, varied widely, from the agricultural and trading societies of the Puebloan cultures in what is now New Mexico and Arizona, to the iconic nomadic bison-hunting tribes of the American Great Plains, to the fishing communities of the coasts, and so on. Political systems ranged from the theocratic structures of the Keres, to the effectively parliamentary, multi-branch democracies of the Lakota, to the “presidential” democracies of the Western Apache.⁹

The diversity of Indian societies persists to the present. As noted, Indian nations range from the very small to the quite large in both geography and population. Many reservations are quite rural, while others have become engulfed by major cities (as is the case with many of the tribes in and around Southern California; Seattle, Washington; Phoenix, Arizona; and Minneapolis, Minnesota). Economic systems range from the manufacturing economy of the Mississippi Choctaw in central Mississippi, to the predominantly gaming economy of the Mashantucket Pequot Tribal Nation in Connecticut, to the retail trade economy of the Tulalip Tribes in Washington state. Cultural diversity, too, is marked, with widely varying rates of Indigenous language use (Figure 3), and religious practices that range from the stalwartly traditional to the devoutly Christian.

In terms of standards of material living, for decades American Indians on reservations have been the poorest identifiable group in the United States. Notwithstanding the much publicized growth and success of the casino gaming enterprises owned by many tribal governments, gaming incomes have been concentrated in a relatively small number of tribes near major metropolitan patron populations,¹⁰ and, on average, American Indians residing in Indian Country remain the poorest group in America (Figure 4). Income per American Indian household on reservations in 2000 (the date of the last available systematic data) was \$24,249, compared to \$41,994 for the average U.S. household.¹¹ Not surprisingly, accompanying Indian poverty have been concomitant indicators of social stress – high rates of suicide, ill-health, poor housing, crime, school dropouts, and the like. Recent years, however, have seen sharp absolute and relative economic progress that shows signs of being sustained.

Figure 3. Native Language Use, 2000

Selected reservations with population greater than 1,000

Tribe	Location	Age 18+	Age 5+
Zuni Pueblo	NM	80%	82%
Navajo Nation	AZ/NM/UT	75%	68%
White Mountain Apache Tribe	AZ	73%	59%
San Carlos Apache Tribe	AZ	64%	46%
Mississippi Choctaw	MS	63%	64%
Acoma Pueblo	NM	57%	48%
Crow Nation	MT	54%	50%
Hopi Nation	AZ	54%	52%
Tohono O'odham Nation	AZ	49%	46%
Rosebud Sioux Tribe	SD	28%	23%
Gila River Indian Community	AZ	27%	23%
Oglala Sioux Tribe	SD	27%	23%
Cheyenne River Sioux Tribe	SD	20%	18%
Shoshone & Arapahoe of Wind River	WY	20%	22%
Red Lake Band of Chippewa	MN	15%	14%
Eastern Cherokee Tribe	NC	14%	16%
Confederated Salish and Kootenai Tribes	MT	10%	13%
Fond du Lac Band of Chippewa	MN	10%	9%
Yakama Nation	WA	10%	13%
Oklahoma Muskogee/Creek Nation	OK	9%	10%
Oklahoma Choctaw Nation	OK	8%	8%
Seneca Nation	NY	7%	5%
Blackfeet Tribe	MT	6%	10%
Turtle Mountain Chippewa Band	ND	5%	6%
Puyallup Nation	WA	4%	9%
Osage Nation	OK	3%	6%
All Reservations	---	.7%	.7%

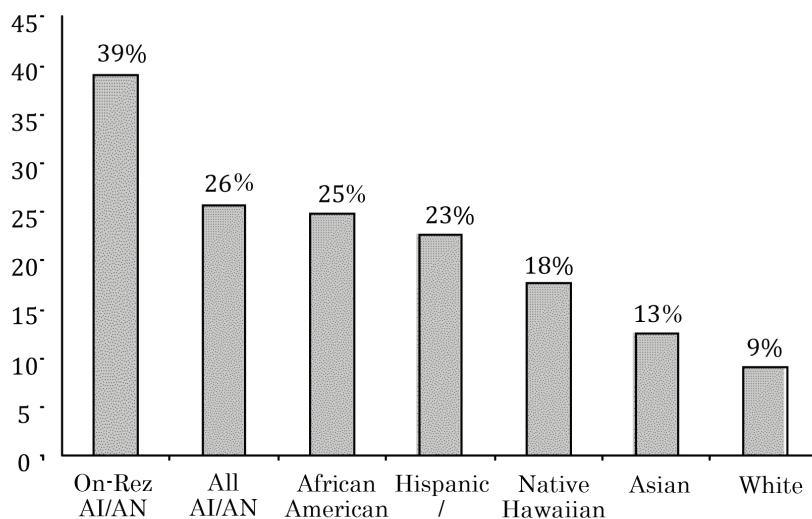
Source: U.S. Census 2000, Summary File 3; percentage of the reservation population speaking a language other than English in the home.

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Figure 4. Poverty Rates by Ethnicity, 2000

Percent in



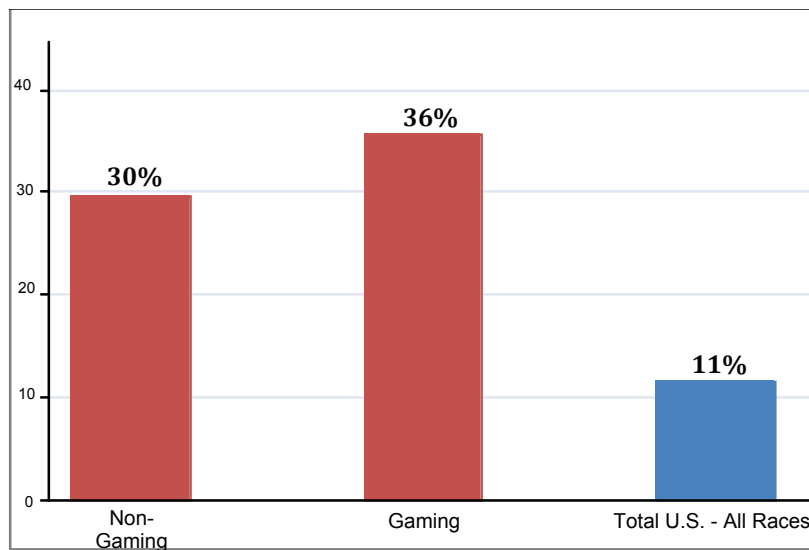
Source: U.S. Census 2000 Brief, issued May 2003; U.S. Census, 2000, as reported in Jonathan Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses*, The Harvard Project on American Indian Economic Development, January 2005.

Although per capita incomes of Indians on reservations remain less than half the U.S. average, the per capita income of American Indians on reservations has been growing approximately three times more rapidly than the United States, as a whole since the early 1990s. This holds true for both tribes with much-publicized casino gambling and for non-gaming tribes (Figure 5). This burst of economic development is starting from a low base, but is manifesting itself in improving social conditions and other indicators of development. Housing is improving; educational attainment through at least high school is approaching par with the U.S. average; health measures such as infant mortality, deaths due to accident, infectious disease rates, and tuberculosis show sharp trends toward improvement.¹² Particularly in tribes with substantial tribal government-owned gaming or other business revenues, the switch from federal administration to tribal administration is being manifested in investment in long-neglected infrastructure, as streets, water

systems, schools, health clinics, and the like are rapidly being upgraded.¹³ Below, we investigate the policies and reasons that underlie this turnaround in the economic and social conditions in Indian Country.

Figure 5. Percent Change in Real On-Reservation Per Capita Income: 1990-2000

All reservations; excluding Oklahoma Tribal Statistical Areas



Source: Taylor and Kalt, *op. cit.*

Roots of the Social, Economic, and Political Renaissance of Indian America

A. Isolating Causal Factors

Data on economic conditions in Indian Country as a whole are sparse, coming in ten-year increments with the U.S. Census. The rapid economic growth seen in Figure 5 covers the 1990s. Numerous case studies indicate that both the surge in economic development and the improvement in areas such as

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housing, education, and health, which became evident in the last decade of the 20th century, have continued into the present decade¹⁴—albeit interrupted when the worldwide recession took hold in Indian Country as it did elsewhere in 2008.

The development boom that is underway in Indian America raises the question of where it has come from. While the answer to that question is, of course, exceedingly complicated and involves strands of politics, economics, social change, and the like, the development boom is not the product of massive or even substantial infusions of resources from the national government of the United States. In fact, federal U.S. budget spending on Indian affairs peaked in real dollars in the mid-1970s – approximately coincident with the advent of the major legislation in Congress that made tribal self-determination the core principle of U.S. Indian policy.¹⁵ By the early 2000s, the U.S. Commission on Civil Rights labeled the spending levels in Indian Country a “quiet crisis.”¹⁶ The Commission reported that while American Indians were marked by the most severe poverty in America and had suffered treaty violations and other forms of deprivation over the centuries at the hand of the federal government, governmental spending in Indian America was dramatically and disproportionately below levels of funding provided to other groups in the United States and the general U.S. population. Salient statistics from the Commission’s findings are shown in Figure 6.

Figure 6. Federal Spending on Indians and Indian Affairs

	All Areas	Health	Housing	Crime & Justice	Education	Rural Develop.
AI/AN	\$3000 per capita (in 2000)	\$2535 per capita (in 2003)	+8.8% (1998-2004)	80% of comparable non-Indian areas	.2% of USDoeD\$; schools at 50%-60% of non-Indian	<.003% of USDA\$
All U.S.	\$4500 per capita (in 2000)	\$5065 per capita (in 2003)	+54% (1998-2004)	See above	See above	See above

Source: U.S. Commission on Civil Rights, 2003

In short, the rapid changes and development progress we see in Indian Country is not the product of injections of resources from outside governments. Importantly, research also consistently finds that the economic, social, and political transformation that is occurring across the Indian nations is not the product of cultural change, or at least is not the product of the cultural assimilation of Native Americans into non-Indian society and norms. Thus, for example, performance in both the economic arena and in public administration is positively correlated with natural measures of *lack* of cultural assimilation, such as rates of Native language use (which are strongly related to adherence to traditional Native religious and associated cultural practices).¹⁷

Research by the Harvard Project on American Indian Economic Development and others points to the major changes in federal policy toward Indian nations that constitute the era of self-determination as the central causal factor explaining why it took until the latter 20th century for significant and sustained development progress to take hold in Indian Country.¹⁸ Prior to the 1970s – indeed into the 1980s – the Indian nations of the United States were subjected to essentially uniform, one-size-fits-all policies and micro-administration by federal agencies and agents. Tribal governments generally operated under boilerplate constitutions that had emanated from the federal government in the 1930s.¹⁹ What self-rule there was on reservations typically took the form of advising and complaining about decisions and policies under the control of the federal Bureau of Indian Affairs (“BIA”) and similar federal agencies tasked with administering life on reservations, under policies and programs applied on a roughly common basis across all tribes.²⁰

With its start marked most saliently by the passage in 1975 of the *Indian Self-Determination and Education Assistance Act* (US Public Law 95-638), the era of formal policies of tribal self-determination began with halting steps. The vast majority of tribes embarked on strategies of meaningful self-rule under conditions of stark poverty, utilizing externally designed governmental systems,²¹ lacking meaningful experience in business and governmental decision making among the living population, and bearing legacies of federally-imposed systems of education. By the second half of the 1980s, however, self-determination had become a widespread and systematic restructuring of tribal governments and their relations with the federal government. This restructuring has acquired a name as the “nation building” movement. It is being manifested by wholesale changes in tribal institutions and policies as the Indian nations themselves rewrite their constitutions, generate increasing shares of their revenues through their own taxes and business enterprises, establish their own courts and law enforcement systems, remake school curricula, and so on, across the panoply of functions commonly associated in the United States with state governments.

B. Tribal Self-Government and the Reasons for Development Progress

Not only is the pace of development remarkable, but also its character in the current era of federal policies of self-determination is dramatic compared to what preceded it. The Tohono O'odham Nation outside of Tucson, Arizona, for example, funded, built, and now operates the first either Native or non-Native elder care facility to achieve the highest level of federal quality rating for health care provision. The Citizen Potawatomi Nation ("CPN") in Oklahoma has engaged in constitutional reform over the last two decades that has resulted in a judicial system of trial and appeals courts that function at a level of sufficiently high quality such that it has attracted tens of millions of dollars of capital to the Nation's business enterprises and induced a neighboring non-Indian township to opt into the Potawatomi system and out of the State of Oklahoma system for its municipal court services. While a number of tribes operate well-known casino gambling and related resort enterprises, less well-known are the tribes, such as the Chickasaw Nation, whose Chickasaw Nation Industries provides program management, information technology, technical and administrative support, medical and dental staffing, aviation and space technical support, construction, manufacturing, property management, and logistics to government and commercial clients. A number of tribes across the United States have organized themselves, their education systems, and their allocation of resources so as to reverse decades of language loss to the point that the childhood population on some reservations now utilizes Native language at a higher rate than the adult population (see, for example, Figure 3 above).

These and many, many other examples were essentially unheard of prior to the era of self-determination.²² Indeed, it is difficult to imagine such pattern-breaking accomplishments in the era in which federally-recognized tribes and their affairs were managed as *de facto* federal programs. In fact, the Indian nations that have not adopted the nation building strategies of taking programs and policies over from the federal government are uniformly marked with little to no signs of development progress.²³ Both the nature and reasons for this success mirror those applicable to state and local governments elsewhere in the United States and internationally. Just as some state/provincial and local governments have performed better than others under the devolution to them of powers and functions of the national government, so have some Indian nations performed better than others. At the same time, however, the overall pattern of results in Indian Country is quite positive, and the reasons lie in the facts that local decision making and administration (1) improve accountability and (2) allow on-the-ground programs and policies to better reflect local values. Consider, for example:

Overall Economic Growth: As shown in Figure 5, above, per capita incomes among Native citizens on reservations have been growing rapidly. The same pattern is seen in household incomes. Over 1990-2000, real Indian household incomes on reservations without gaming grew 33 percent, and grew 24 percent on reservations with gaming. By comparison, for the US as a whole, real median household income grew only 4 percent during the entire decade of 1990-2000. As noted, this pattern of differential economic performance appears to have continued through to at least the current worldwide recession.

Industrial Performance: Statistical research on 75 tribes finds that, among those tribes that have employed contracting and compacting to take over control of timber management, each high-skilled position that is transferred from federal BIA forestry to tribal forestry results in a productivity increase of 38,000 board feet of timber output, and the price received in the marketplace for that output rises by 4.5 percent. This is accomplished within “allowable cuts” (i.e., maximum sustainable harvest levels) and with the quality of logs harvested held constant. The result is hundreds of thousands of dollars per year in additional income for the typical reservation forestry operation.²⁴

Business Performance: Growing numbers of cases of business success in Indian Country are well-documented. Leading cases include:

- The Winnebago of Nebraska Tribe’s Ho-Chunk, Inc. and its conglomerate of dot-com, financial service, construction, consulting, and retailing businesses now yields more than \$100 million a year in revenues. Over the last decade, reservation unemployment has been lowered from around 70 percent to the point where every reservation citizen able and willing to work has a job. Company earnings are systematically plowed back into the community, and Ho-Chunk, Inc.’s non-profit arm is now building an entire town from scratch.²⁵
- The Tulalip Tribes’ creation of the municipality of Quil Ceda Village and the Village’s heavy investments in otherwise-absent municipal infrastructure and services are the source of value upon which a thriving commercial center is built. In the process, the Tribes have become the second largest employer in the county where they are located, north of Seattle, Washington.²⁶
- In the late 1970s, the material assets of the Citizen Potawatomi Nation (noted above) consisted of 2½ acres of trust land, \$550 in the bank, and an old trailer that served as the tribal headquarters. Today, CPN’s assets include a bank, a golf course, a recently-opened casino, restaurants, a large

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discount food retail store, a tribal farm, a radio station, and more than 4,000 acres purchased by the Nation. CPN eschews per capita payments and, instead, channels its resources into services for citizens – from health care to educational and child development support, from a pharmacy to an award-winning small business development program. The directory of CPN businesses lists scores and scores of private citizen businesses, and CPN is the economic engine of the Shawnee, Oklahoma region.²⁷

Program Performance: For many years, the BIA in the U.S. Department of the Interior has been widely regarded by pundits and researchers alike as the worst-run federal agency.²⁸ It has recently been successfully sued for billions of dollars in monetary damages for its mismanagement of funds and gross neglect of its trust responsibilities pursuant to its mishandling and failure to account for more than a century's collection and putative investment of monies collected through its leasing of Indian minerals and other real property on behalf of Indians as its trust clients.

In addition to the improved management of now-tribally-run forestry operations noted above, social service delivery shows systematic improvement under tribal government control. The National Indian Health Board, for example, finds in research on 83 tribal health facilities that measures of patient satisfaction improve markedly under contracting and compacting relative to federal Indian Health Service ("IHS") management. Under self-governance compacting, for example, 86 percent of programs report that waiting times – a common measure of the ability of health care providers to effectively serve their patients – improved upon tribal assumption of management responsibility, and none reported a worsening of waiting times. Tribes still served by the IHS were less satisfied with the quality of their health care than tribes under contracts, and the latter were not as satisfied as those operating under compacts (where local discretion is generally highest). The number and integration of programs and facilities in operation, the prioritization of preventative programs, and total payments collected from third parties were higher in those Indian nations that managed their own health care programs.²⁹ Similar patterns are found in policing: Tribal assumption of management of reservation policing under contracting and compacting results in tribal citizens reporting systematically greater satisfaction with the police service they receive.³⁰

In sum, federal promotion of tribal self-government under formal policies known as "self-determination" is turning out to be, after a century or more of failed efforts to improve the lives of the U.S. indigenous people, the only strategy that has worked. In so doing, the strategy is improving the well-

being of its poorest and, arguably, historically most oppressed and disempowered people. As such, however, it raises questions regarding its political origins and stability: Put into full force by the mid-1970s, why has the federal policy of self-governance for Indian nations survived as long as it has? While it certainly accords with the demands of vocal Native leadership and activists – and one would be hard-pressed to find a federally recognized tribe that would choose to go back to the era of federal management of tribal affairs – at no more than 1.5 percent of the U.S. population, the Indian voice in national U.S. politics is miniscule. Moreover, with the strong push by Indian nations to control their own affairs and to be free of, particularly, state government authorities, the tribes have been pushing hard against state interests as Indian governments build economies and governments that move jurisdiction, tax bases, and program funding out of state government hands. Then, too, the general electorate in the United States is demonstrably ill-informed as to Indian affairs, with non-Indians having virtually no knowledge of the legal rights of tribes and many seeing “real” Indians as “gone.”³¹ We now turn to an exploration of the political economy underlying the U.S. federal government’s current policies of self-determination through self-government by Indian tribes.

The Sustainability of a Pro-Minority Policy

A. Introduction and Observations

It is our hypothesis that the survival of the U.S. federal policy of Indian self-determination through self-governance over the last four decades is rooted in a double appeal that it has for both the general electorate and their U.S. Congressional and Executive Branch representatives. Stated directly, self-determination has had enduring appeal to both American political liberals and conservatives, albeit for substantially different reasons. Indian self-determination accords with the views commonly found on the liberal, or “left”, end of the U.S. political spectrum (e.g., as represented by federal officials elected as representatives of the Democratic Party), which support relatively strongly the civil rights of ethnic minorities and often see it as proper that such minorities be compensated for past-wrongs committed by the majority society. At the same time, for the conservative, or “right,” end of the U.S. political continuum (as more often embodied in the Republican Party), the descriptions above make it clear that Indian self-determination and self-governance hold appeal because of their strong components of “bootstrapping” self-sufficiency and self-reliance. Moreover, from the conservative perspective, these policies are attractive in so far as they constitute local, albeit indigenous, communities taking authority away from the federal government and devolving authority to local government.

The policy history set out below finds that Indian self-determination has quite consistently garnered bi-partisan support. Indeed, the key self-determination legislation in the 1970s (i.e., Public Law 95-638) was first passed during the presidency of Republican Richard Nixon and emanated directly from an Executive Order of President Nixon. It was signed into law by Republican President Gerald Ford. However, the antecedents of these actions are seen in prior moves by Democratic administrations and are found in the radical left, militant political activism of the distinctly Native version of the civil rights movement of the 1960s. Analyzing the party affiliations of the sponsors of Congressional legislation introduced to (a) improve conditions among Indian communities through increased federal spending and (b) promote tribal self-determination in the U.S. House and Senate over 1973-2010, we find that Republican legislators are decidedly tilted toward the latter. Democratic legislators are disproportionately represented in the Congressional support for spending on Indian affairs.

B. Evolution of the Federal Policy of Self-Determination

The U.S. federal government's policy of self-determination through self-governance by American Indian nations has evolved and changed over the last forty years. Yet, at its core it has been consistently predicated on two principles: (1) providing greater control to tribal citizens and their governments in planning, designing, implementing, and controlling the public affairs of their respective tribes; and (2) maintaining the trust relationship between the federal government and American Indian tribes.³² The policy of self-determination, by extension, entails explicit federal promotion of government-to-government relations between tribes and the other governments in the U.S. system. It also entails minimization of the historically pervasive presence of the federal government and its trustee agents in the institutions of tribal governance, the provision of public services to Native Americans, and the selection, design and implementation of economic and community development plans and projects. At the same time, however, the federal government's role is structured in a formal, legislatively and judicially enunciated "trust obligation." Under this doctrine, the federal government is duty-bound as protector of financial and natural resource assets, which are held in trust on behalf of tribes and individual Native Americans. In particular, through the trust relationship, the federal government continues to have responsibility for economic development via regulation, including protection of the inalienability, of tribal trust lands.

U.S. policy recognizes that, as trustee on behalf of Indian Tribes, the federal government has an explicit, fundamental interest in furthering those poli-

cies that promote the social and economic health and well-being of Native American communities.³³ As noted, from the advent of the reservation system in the late 1880s until the latter half of the 20th century, the governance of American Indian nations was largely under the direct control of the U.S. federal government.

Whether originally via the War Department in the 19th century or eventually via the BIA and other federal agencies, the federal government was largely responsible for deciding, implementing, and controlling the economic, political, and social decisions confronting Indian nations and their citizens.³⁴ As discussed above, by any measure, this approach led to continued socio-economic deprivation amongst tribes and their citizens and, thus, failed to meaningfully satisfy the federal government's trustee responsibilities for the well-being of Native Americans and failed to meet the objectives of tribal self-sufficiency and socio-economic well-being. Policy change began in the late 1960s and early 1970s. The substantive meaning, as reflected both in formal acts and proclamations and in the actual course and conduct of federal policy, of the federal interest in tribal self-determination is now expressed as tribal self-governance and economic self-reliance.

The move toward policies of tribal self-determination began in the 1960s with the passage of the *Economic Opportunity Act* of 1964. This Act sought to address poverty by seeking to empower those subject to economic and social deprivation to control their own affairs. As it related to Native Americans, the effect was to bypass the traditional federal bureaucracy by placing federal monies directly in the hands of tribal governments, thus giving tribal governments and other tribally based organizations control over the resources in question.³⁵

Out of this and related experiences (such as the *Elementary and Secondary Education Act* and the *Manpower and Development and Training Act*), President Lyndon Johnson gave explicit description to the change in the federal government's operational role in the affairs of tribal governments. In his message to Congress in March of 1968, he proposed "a [Federal] policy of maximum choice for the American Indian: a policy expressed in programs of self-help, self-development, and self-determination."³⁶ In acknowledging the socio-economic hardship facing tribes and their citizens, the President's address both affirmed the United States' interest in the affairs of Native Americans and began to change how the United States carried out that interest. In particular, the President's message called for greater tribal control over the plans and decisions which impact the daily life of tribes and their citizens. Actually implementing such policies, after many decades of other

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governments – federal, state and local – effectively controlling the public affairs of Indian tribes, proved to be an arduous process.

The drive for Indian self-determination reached a turning point in 1970 when Indian political activists staged a sit-in and took over the U.S. Department of Interior's Indian Affairs offices in Washington, D.C. These activists represented federal policies and officials as legacies of European colonialism, and demanded recognition of tribal sovereignty over local reservation affairs. President Nixon affirmed the federal interest in tribal self-determination in his Special Message on Indian Affairs (July, 1970).³⁷ The statement underscored the federal government's trust responsibility, while altering the focus and mechanisms of U.S. policy in meeting that responsibility. The substantive thrust of President Nixon's enunciation of federal policy was for there to be a shift in responsibility for the control over public programs to tribal governments, their agents, and the citizens they represent under the precept that local self-rule (in this case by self-governing Indian tribes) would be better able to promote the federal government's trust responsibility for the socio-economic well-being of tribal citizens.

Specifically, President Nixon, in acknowledging the special relationship between Indians and the federal government, rejected the extremes of both Federal paternalism (i.e., excessive control over the affairs of tribes by non-tribal citizens and governments), and Federal termination (i.e., the termination of tribes as self-governing units within the U.S. system of multiple layers of government and termination of the trustee relationship that emanates from the "solemn obligations"³⁸ entered into by the U.S. government). As posed by the President's address, the question was not whether the federal government had an interest in the affairs of American Indian tribes, but rather "how that responsibility can be best fulfilled."³⁹ The answer adopted by the federal government was and remains self-determination through self-governance and economic self-sufficiency.

These federal interests were made particularly explicit with the passage of the aforementioned Public Law 93-638 – the *Indian Self-Determination and Education Assistance Act* of 1975. At the core of the Act's provisions were procedures by which Indian tribal governments could contract with the BIA and the IHS for those funds that would have otherwise been used by the respective federal agencies to provide public services to federally recognized tribes. In so doing, Public Law 93-638 continued, via federal legislation, the transition of the federal government and its agents from its heretofore ubiquitous and dominating role as actual service provider and reservation-governing decision-maker to program advisor and advocate for tribal self-governance and greater tribal control over public programs.

As noted by the Act in its declaration of intent and as codified in the U.S. Code: “The Congress declares its commitment to the maintenance of the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy that will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable governments, capable of administering quality programs and developing the economies of their respective communities.”⁴⁰

The Act thus served, and continues to serve, to formalize and codify the underlying principles of the United States’ policy of self-determination for American Indian tribes, while acknowledging the federal government’s continued interest in the well-being of tribes and their citizens, as well as the continuing federal role as protector of tribal lands and other resources held in trust on behalf of tribes and individual Indian citizens.⁴¹ As shown by Figure 2, Public Law 93-638 gave rise to a host of subsequent federal legislation that expanded or otherwise refined the transfer of control over tribal governmental institutions and public services from federal agents to tribal governments. This included Public Law 106-260, enacted in August, 2000 and known as the *Tribal Self-Governance Amendments* of 2000. The Act, while affirming the trust responsibility of the United States to tribes and Native Americans, recognized the “special government-to-government relationship with Indian tribes, including the right of Indians to self-governance.”⁴²

Federal interests in tribal self-determination through tribal self-governance are now codified in a wide array of federal legislation that provides for “treatment as state” status for federally recognized tribes. “Treatment as state” provides that, just as states have federally recognized authority to carry out federal responsibilities under federal legislation, tribal governments can administer federal policies and requirements arising under legislation ranging from the federal *Clean Water Act* to the legislation creating the federal program of Temporary Assistance for Needy Families (“TANF”).⁴³

Similarly, numerous federal programs have and do promote tribal economic self-sufficiency and effective self-government with explicit federal financial and technical support. Examples range from the programs of the U.S. Small Business Administration to the United States Department of Justice’s Of-

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Office of Community Oriented Policing Services program for the support of tribal and other jurisdictions' law enforcement systems.⁴⁴ Most recently, the so-called federal "stimulus package" provides explicitly for support of tribal governmental endeavors that promote economic development, public infrastructure investment, and other components of effectively governed communities.

The federal interest in government-to-government tribal relations is similarly embodied in federal legislation, and has been repeatedly enunciated and reaffirmed through to the present in presidential proclamations. These include not only President Nixon's original Special Message (see above), but also Presidential Orders such as President Clinton's original call for government-to-government protocols and policies (subsequently reaffirmed by President G.W. Bush).⁴⁵ President Obama has similarly reaffirmed the government-to-government precepts in continuing to operate under his predecessors' proclamations and in appointing a liaison for Indian policy in his White House Office of Intergovernmental Affairs. The establishment of government-to-government relationships in the era of self-determination has also been manifested at the state level, as states have adopted and/or followed policies of government-to-government interaction between themselves and the federally recognized American Indian tribes they neighbor.⁴⁶ Increasingly, when encountering other governments, tribes carry out their on-the-ground responsibilities through interlocal agreements and compacts. These are common, for example, in areas such as cross-deputization of law enforcement officials and tax collections.⁴⁷

The public policy effect of the federal policy of self-determination for federally recognized American Indian tribes has not only been greater control for tribal citizens and their governments over the management of tribal affairs, but greater control over the institutions of governance—all with the attendant overriding goal of better meeting the federal government's interest in and obligations to the promotion and ensuring of tribal socio-economic development and well-being.⁴⁸ In short, federal policy has been aimed specifically at placing tribal governments in the capacity previously occupied by the federal government, i.e., as the agent by which tribal citizens can choose, design, implement, and enforce those policies and functions deemed necessary to create an environment in which public affairs and private commerce can flourish. As we have seen, while problems remain and legacies of past social and economic stress are prominent, policies of self-determination have spurred development progress in Indian Country.

C. Sources of Support for Indian Self-Determination in the U.S. Congress

The foregoing brief history highlights the bi-partisan strands in the federal policy of tribal self-determination. It is not plausible that the origins and staying power of this policy are the product of a broad, direct, and large political influence of tribes and/or Indian people. Not only is the Native voice weak within the maelstrom of American politics, but it is geographically spotty. Only in Alaska, Oklahoma, and New Mexico do Native Americans amount to more than 10 percent of the electorate; in 37 states the Native population is less than 2 percent of the state citizenry. The vast majority of U.S. Congressional Districts do not encompass Indian reservations, and 19 states have no federally-recognized tribes within them.

To be sure, there are some well-known instances in which the Indian vote has been important, perhaps even determinative, of electoral outcomes. In the case of the election of Senator Timothy Johnson (Democrat) of South Dakota by 524 votes in 2002, for example, the Indian vote on some reservations was so concentrated at more than 90 percent in favor of Johnson that ultimately unsubstantiated concerns of electoral fraud were raised by the media. Similarly, a concentrated Indian vote played a role in 2000 in the removal by less than 2,300 votes of Senator Slade Gordon (Republican) of Washington state, long seen as hostile to Indians for his Senate votes and for his prior, long-running engagement as an opposing attorney in Pacific Northwest tribes' assertions of treaty fishing rights. While newsworthy, these cases stand out precisely because they are so rare.

It is true that the party affiliation of the Native electorate is predominantly Democratic,⁴⁹ and discussions in the mainstream media commonly portray support for American Indians as a liberal cause. These perceptions, however, miss more subtle strains of support and influence. Late Senator Barry M. Goldwater of Arizona, frequently cited as "Mr. Conservative," and the Republican presidential candidate in 1964, is still remembered by tribes in Arizona as a strong and early supporter of nascent pushes by tribal leaders for economic self-sufficiency and local tribal self-rule. The legacy in which Republicans are seen as strong supporters of tribal sovereignty persists in the state, with a former chairman of the Hopi Tribe, one of Arizona's most traditional, serving in 2008 as the national chairperson of Indians for (Republican presidential nominee John) McCain. In fact, Senator McCain served as chair of the Senate Committee on Indian Affairs in 1995-96 and 2005-06, and was regarded by tribes as generally quite strong in his support for poli-

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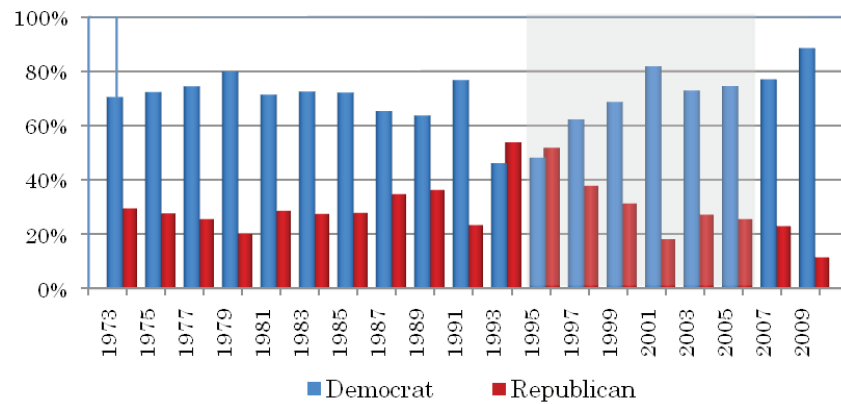
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cies of self-determination (even if he was seen as less supportive on issues of federal spending on Indian matters). The Committee was also chaired over 1997-01 and 2003-05 by Senator Ben Nighthorse Campbell, Democrat-turned-Republican from Colorado and, himself, the only American Indian (Northern Cheyenne) to serve in the Senate in the era of self-determination. Tellingly, the federal legislative foundations of tribal self-determination, including Public Law 95-638 and strengthening amendments, have remained intact in those periods over the last several decades in which Republicans have held majorities of one or both houses of Congress.

We can investigate the nature and relative strength of bi-partisan support for tribal self-determination policies by examining patterns of such support in the U.S. Congress. Very few legislative measures on Indian affairs have gone to roll call votes in the U.S. House or Senate over the last several decades. Public Law 95-638, itself, was approved by voice vote. We can capture support for relevant legislation, however, in the records of legislative sponsorship. Over 1973-2010, there have been 151 sponsors of 41 combined House and Senate legislative proposals supporting or expanding tribal self-determination. Over the same period, there have been 2,405 sponsors of 305 legislative measures aimed at improving conditions for American Indians, typically through increased spending on health, education, housing, and the like.

Social Spending: Focusing first on relative support in Congress for spending on American Indian social conditions, Figure 7 shows the percentages of legislation sponsors coming from the Democratic Party (in blue) and the Republican Party (in red) over 1973-2010. Except for the mid-1990s, there is a clear pattern of considerably more support from Democrats than from Republicans.

Figure 7. Support in the U.S. Congress for Improving American Indian Social Conditions, 1973 - 2010



Note: "Support" is measured as the frequency of sponsorship of legislation on American Indian social conditions. Republican majority in Senate, 1981 - 86; Republican majority in both Houses, 1995 - 2006; otherwise Democrat control of both Houses.

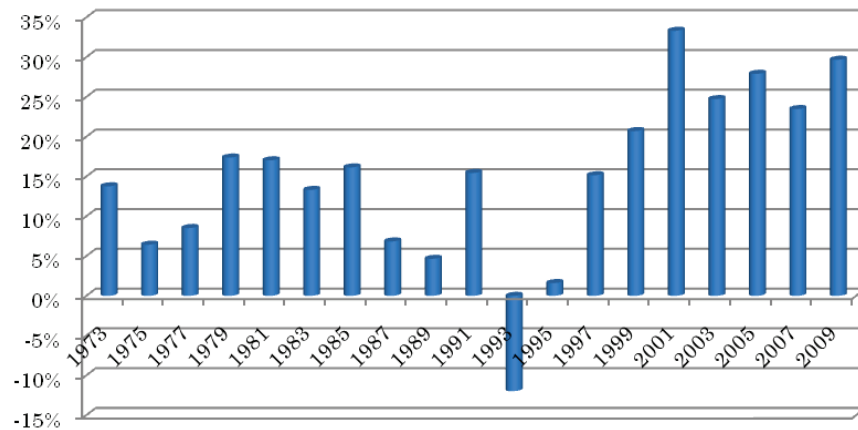
Over the entire period of 1973-2010, Democrats made up more than a majority of the U.S. House and Senate, accounting for 55.6 percent of the combined membership. Thus, we might expect the share of legislation sponsorships by Democrats to outweigh that of Republicans, even if there were no difference between Democrats and Republicans in their support for spending on American Indian social conditions. Such equality of support is not borne out in the data. Figure 8 shows the amount of legislative support coming from Democratic legislators relative to the support expected if sponsorship were proportionate to overall Democratic membership in the House and Senate. Overall, party-proportionate support by Democrats would be 55.6 percent; actual support exceeded this by 18.1 percentage points.

In short, there is strongly disproportionate Democratic support for spending on American Indian social conditions. By the same token, there is disproportionately low support for such spending among Republicans.

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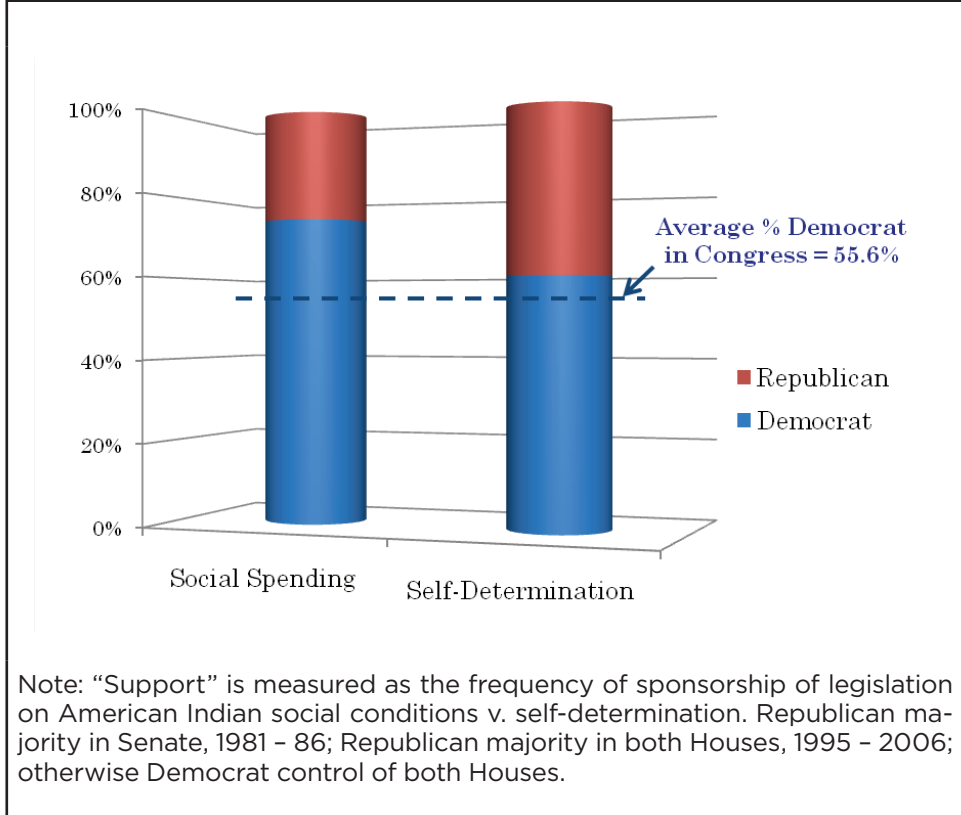
Figure 8. Disproportionate Democrat Support in the U.S. Congress for Improving American Indian Social Conditions, 1973 – 2010



Note: "Disproportionate Support" is measured as the frequency of sponsorship of legislation on American Indian social conditions relative to the party share of total Congressional representation. Republican majority in Senate, 1981-86; Republican majority in both houses, 1995-2006; otherwise Democrat control of both houses.

Self-Determination: The smaller number of Congressional legislative measures concerning tribal self-determination over 1973-2010 (an average of about one per year) makes year-to-year comparisons of relative party support problematic. Thus, in Figure 9 we show aggregate Democratic and Republican support for policies of tribal self-determination over the period, and compare the pattern to the relative aggregate support for social spending on American Indian social conditions. There is a clear pattern consistent with the hypothesis that Republicans find self-determination more worthy of support than social spending. While there is slightly more Democratic support relative to Republican support in the case of tribal self-determination, the pattern is considerably closer to proportionate to party membership of the U.S. House and Senate. The greater balance in support for self-determination provides at least some explanation for its longevity as the cornerstone of federal Indian policy.

**Figure 9. Support for American Indians in the U.S. Congress:
Social Spending v. Self-Determination, 1973-2010**



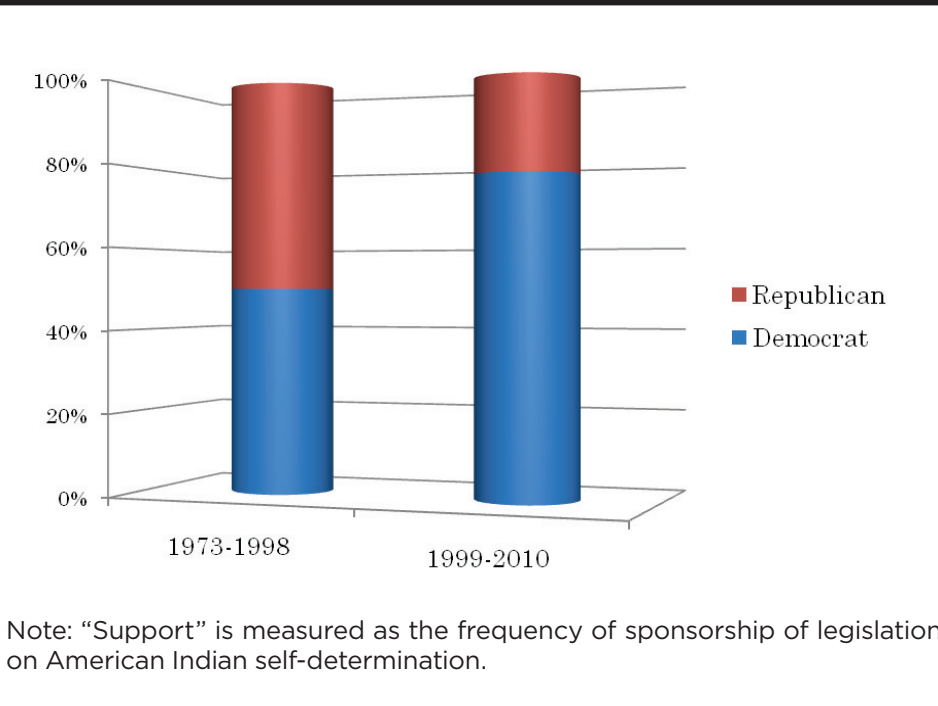
There is some evidence of a time trend in the patterns of Congressional support for both social spending on Indian affairs and tribal self-determination. Consider Figure 8, above. Each year since 1999, the disproportionality of Democratic support for improving American Indian social conditions is higher than in any year prior to 1999. Concomitantly, Republican support is disproportionately *lower* in each year since 1999 than in any prior year. With regard to Republican support for self-determination, in Figure 10 we compare the period prior to 1999 to the period of 1999-2010. While the sample size for the latter period is small, the results are suggestive of a shift in Republican support for self-determination. Despite the fact that, at 49 percent, the Republican share of overall Congressional membership was higher during 1999-2010 than over 1973-2010 (42 percent), it has been Democrats that are providing markedly disproportionate support for tribal self-determination. In the earlier period of 1973-1998, Democratic membership out-

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numbered Republican membership, but support for self-determination was split equally between the two parties: The Republican share of overall Congressional membership over 1973-98 was 42 percent, but fully half of the sponsorships for self-determination came from Republicans. Thus, support for self-determination was disproportionately Republican.

Figure 10. Support for American Indian Self-Determination in the U.S. Congress: 1973-1998 v. 1999-2010



Conclusion and Thoughts on the Future of Political Support for Tribal Self-Determination

The United States has had a tumultuous history of dealing with the first inhabitants of its claimed territory. Policies have swung from treaty-making and alliances to attempted military subjugation. Over the last forty years or so, the nation has followed policies known as tribal self-determination. This enables the hundreds of American Indian nations in the United States to exercise powers of self-government akin to those of each of the fifty states. Today, like the states, the Indian nations routinely operate and serve their citizens through their own constitutions, law and judicial systems, social programs, and resource management and regulation regimes.

The results of federal policies of self-determination must be judged an overall success in terms of their impacts on the economic, social, cultural and political status and well-being of the Indian nations. Many prior decades of federal management of virtually all tribal affairs found American Indians on reservations to be the most distressed populations in the United States. Under self-determination, these conditions are, overall, being abated, sometimes at astoundingly high rates. Sustained economic growth has taken hold and is closing income gaps between Native Americans and the rest of U.S. society. Although still distressing, health, housing and education are generally on the upswing. Culturally and politically, self-determination has clearly empowered the Indian nations to assert themselves, and has enabled Native communities and their governments to begin to break long-standing patterns of dependency and second-class status.

The era of federal support for tribal self-determination through self-government has enjoyed notable stability. Evidence from patterns of support in the U.S. Congress indicates that this is, in part, because of the ability of self-determination to appeal to both liberals and conservatives. From a liberal perspective, self-determination clearly contains an element of support for human rights and decolonization for Indigenous people. From a conservative perspective, self-determination is manifested in self-sufficiency, reduced dependency on the U.S. federal government, and devolution of formerly federal authorities to local governmental units. This bi-ideology, bi-partisan appeal of self-determination has thus far allowed it to last through multiple changes in party control of the federal government. This is critical in so far as, on its own, the political influence of Native Americans could not plausibly be sufficient to sustain the self-determination framework.

As we look to the future, there are signs of instability in the support for self-determination. The rising economic and political clout of Indian nations are often seen as threats at the local level to non-Indian governments. Although beyond the scope of this study, this is raising inter-jurisdictional conflicts, often resulting in litigation. The general trend of outcomes in the U.S. courts has been a reining in, rather than an expansion, of tribal sovereignty over the last fifteen to twenty years.⁵⁰ In Congress, too, there are signs of change. Most particularly, the oft-noted⁵¹ evolution of the Republican Party away from its libertarian strains and toward more aggressive support for social policymaking aimed at promoting particular conservative social norms and structures is suggesting a trend away from the Indian self-government movement. We might well predict that the next change to Republican control of the U.S. Congress will signal an end to policies of self-determination.

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⁷ As codified in the *Indian Self-Determination and Education Assistance Act* of 1975 (US Public Law 95-638). See below for further discussion.

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¹² SONN at 221, 370.

¹³ See SONN.

¹⁴ See the 102 case studies of the *Honoring Contributions in the Governance of American Indian Nations* (Honoring Nations) program of the Harvard Project, at http://www.hks.harvard.edu/hpaied/hn_main.htm.

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⁴⁷ SONN at Chapter 4.

⁴⁸ See, for example, *Rebuilding Native Nations*, *op. cit.* at Chapter 3.

⁴⁹ Rave, Jodi, "Group leads effort to protect Native voters," *Missoulian*, October 31, 2008, <http://groups.yahoo.com/group/NatNews/message/47968>, accessed May 19, 2010; MacPherson, Karen, "American Indians flex political muscle," *Post-Gazette*, February 1, 2004, <http://www.post-gazette.com/pg/04032/268085.stmm>, accessed May 19, 2010.

⁵⁰ SONN at 42.

⁵¹ Many of the analyses in this regard may be tainted by the political views of the authors, but the trend is well documented, See, for example, Ceaser, James W. and Busch, Andrew, *Red Over Blue: The 2004 Elections and American Politics* (Lanham, MD York: Rowman Littlefield, 2005); Edsall, Thomas B., *Building Red America* (New York, NY: Basic Books, 2006).

