

## **TOWARD A LIBERTARIAN FRAMEWORK FOR INDIAN RIGHTS**

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### **INTRODUCTION**

*Coercion is evil precisely because it thus eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another.*

-F.A. Hayek<sup>2</sup>

In the United States, the relationship between the Federal Government and American Indians has long been typified as an elemental conflict of values. The situation is easily caricatured as two belligerents standing sentry opposite one another, the former guarding over an era of unprecedented “global economic interdependence”<sup>3</sup> and the latter desperately seeking a space apart, to live according to once vibrant cultures. But what remains lost in the conflict narrative above is that this purported clash of values was not necessarily inevitable.

Two centuries of coercive policies wrought by the U.S. Government and the courts have played a central role in the systemic and systematic destruction of Tribal institutions. Consequently, Indians have struggled to adapt to the forces of acculturation, and neither the private nor public spheres of Tribal life were spared. Today, America’s Tribal nations find themselves in various states of dependence upon the U.S. Federal Government, both for the recognition of their own sovereignty and in many instances the micromanagement of their Tribal fiscal and social policies as well.<sup>4</sup> To frame the situation of Indian Country in terms of the market, no peoples are so heavily regulated as today’s American Indians.<sup>5</sup> Naturally, no peoples’ economic development has been more hindered.

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<sup>2</sup> F.A. Hayek, *The Constitution of Liberty*, at 71 (U. Chicago Press, 2011).

<sup>3</sup> Thomas Sowell, *Basic Economics*, at 551 (4th ed., Basic Books 2011).

<sup>4</sup> Stephen Cornell, *Remaking the Tools of Governance: Colonial Legacies, Indigenous Solutions in Rebuilding Native Nations: Strategies for Governance and Development*, 57, 60-64 (Miriam Jorgensen ed., U. Ariz. Press 2007).

<sup>5</sup> Katherine J. Wise, *A Matter of Trust: The Elimination of Federally Funded Legal Services on the Navajo Nation*, 21 Am. Indian L. Rev. 157, 168 (1996).

Federal Indian law scholars and American Indian advocates have urgently sought to develop fresh approaches for engaging and educating the Federal Government on matters related to Indian law and Indian rights. Some of the more controversial efforts have used the analytical tools of critical race theory to deconstruct latent racial biases embedded in the foundation of Federal Indian law itself. This article seeks to map a different path by developing a new analytical framework by which to critique Federal Indian law and policy based upon the principles of libertarian philosophy.

In developing this framework, I proceed in three parts: *Part I*, briefly describes the state of Federal Indian Law and explains why there is a need for additional methods of critical analysis within the field. *Part II*, develops the libertarian framework for Indian rights, drawing from the scholarship of libertarian philosophers whose work relates to the frameworks' three pillars: (1) limited government, (2) the role of freedom in securing rights, and (3) the role of markets in securing freedom. *Part III*, offers brief concluding observations and a few thoughts on the path forward.

### **I. TOWARD A NEW FRAMEWORK FOR INDIAN RIGHTS**

Proposing a new analytical framework for Indian rights assumes the need for a new framework due to some extant problem that current models are not addressing in the guarantee of Indian rights. In the field of Federal Indian law, the problem of mounting Tribal losses in the courts has been well documented. One scholar has forthrightly argued that tribes lose in the courts because they do not appeal cases to the U.S. Supreme Court.<sup>6</sup> Another Indian law scholar suggests that tribes lose because the pragmatic concerns of the courts outweigh the interests of the tribe in the minds of Federal judges.<sup>7</sup> While another scholar still suggests, more benignly, that tribes tend to lose in Federal Court because judges simply do not understand the history and complexity of Federal Indian law.<sup>8</sup> The lone commonality between them seems to be the truism that something needs to be done to find new ways of engaging policymakers and the judiciary on Indian issues – ultimately with an eye toward guaranteeing the rights of American Indians.

Yet, it remains to question what exactly should replace the status quo and what tools are necessary to deconstruct Federal Indian policy in such a way that Indian rights can be advanced and protected. In other words, whither the fresh approach? Although it may

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<sup>6</sup> Grant Christensen, *Judging Indian Law: What Factors Influence Individual Justices Votes on Indian law in the Modern Era*, 43 U. Tol. L. Rev. 267 (2012).

<sup>7</sup> Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 Hastings L.J. 579 (2008).

<sup>8</sup> Kevin K. Washburn, *Keynote Address: The Next Great Generation of American Indian Law Judges*, 81 U. Colo. L. Rev. 959 (2010).

not seem obvious, libertarian philosophy actually provides the most comprehensive framework for achieving the widely acknowledged goal of Tribal measured separatism.

Renowned Indian law scholar, Robert A. Williams Jr. defines Tribal measured separatism simply as the ability of Tribal governments to manage their own affairs:<sup>9</sup>

Ultimately, what Indians are seeking from the Court is something much different. They are arguing for a right to a degree of “measured separatism,” that is, the right to govern their reservation homelands and those who enter them by their own laws, customs, and traditions, even when these might be incommensurable with the dominant society’s values and ways of doing things.<sup>10</sup>

As Williams frames the matter, notably, Indian tribes are not seeking an integration into the Federal governmental structure, but a freedom *from* government that will allow them to pen a meaningful new chapter in the American experiment of self-governance. What Indian tribes ultimately want is to be left alone.

Given this basic point of departure, libertarian theory is uniquely positioned to address not only the scope of government, but also the rights that free peoples should enjoy, and the role of markets in serving both as check on government and in helping to secure freedom.

## **II. THE LIBERTARIAN FRAMEWORK FOR INDIAN RIGHTS**

As structured below, the theory behind the libertarian framework for Indian rights rests upon the basic assumption that American Indians have not enjoyed the full benefits of liberty that have been enshrined in the founding principles of the U.S. Constitution<sup>11</sup> and more recently in the instruments of International law.<sup>12</sup> On a basic level, it seeks to envision how the law would change if American Indians were afforded their basic right of liberty or freedom.<sup>13</sup> Critical analyses of the framework can occur along any of its three pillars: (1) that limited government is best able to deliver on the ultimate goal of Tribal measured separatism; (2) that meaningful freedom is necessary in order to secure Indian rights; and (3) that markets are necessary vehicles for securing the Constitution’s blessings of liberty for American Indians.

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<sup>9</sup> See Robert A. Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*, xxxv (U. Minn. Press 2005).

<sup>10</sup> *Id.* at 7.

<sup>11</sup> U.S. Const. pmbl.

<sup>12</sup> United Nations, *U.N. Declaration on the Rights of Indigenous Peoples* Art. 7 (2007).

<sup>13</sup> In the tradition of Hayek, I use the term “liberty” and “freedom” interchangeably.

Before proceeding with an outline of the new framework, I should hasten to add the following caveat: simply because the theory above draws from the work of libertarian scholars, this should not be confused with a full-throated embrace of every conceivable libertarian ideal put forward. Some aspects of libertarian orthodoxy will be more applicable to Indian Country than others. The framework that follows reflects this pragmatic approach to orthodoxy. It is worth noting that such a position is also eminently consistent with the work of most libertarian theorists who en masse embrace the ideal of pragmatism, and argue for the need to implement libertarian ideas incrementally over time.

## **A. Indian Rights and the Role of the State**

The first pillar of the libertarian framework for Indian rights is the principle that a limited government is best able to deliver the goal of Tribal measured separatism for American Indians. On this score, the works of philosophers, Robert Nozick and Frederic Bastiat, are particularly helpful in establishing how limits on government can help to advance the liberty interests and rights of American Indians.

### **1. An Indian View of Utopia**

Harvard philosophy professor, Robert Nozick, is by far the most influential libertarian scholar in the modern era. His classic work, *Anarchy, State, and Utopia*, outlines the basic principles of the “minimal state” starting with two presumptions: 1) individuals have rights, and 2) because of this, they need protection from violation.<sup>14</sup> In turn, Nozick assumes that it is perfectly logical for individuals to freely form associations, or forms of self-government to guard against violations of individual rights.<sup>15</sup> The result is that the association, government, or “minimal state” takes on an objective role that by default becomes the lone “arbiter of correctness” in the adjudication of disputes over rights.<sup>16</sup>

The obvious, initial applications of Nozick’s work to Indian Country are twofold.<sup>17</sup> First, Indian peoples should be afforded the same human rights under the law as everyone else. Second, the ability to protect Indian rights from violation is just as important a right as the general presumption that Indians possess human rights. Naturally, it would be quite hollow to guarantee an individual’s human rights without providing the person some means of protecting them.

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<sup>14</sup> Robert Nozick, *Anarchy, State, and Utopia*, 118 (Basic Books 1974).

<sup>15</sup> *Id.* at 118.

<sup>16</sup> *Id.*

<sup>17</sup> This article freely uses the term “Indian Country” to denote the territory controlled by Tribal governments as defined in 18 U.S.C. § 1151 (2012).

The third application of Nozick's philosophy for Indian Country squarely addresses the critique that is often levied against libertarian thought in general: that libertarian theory does not adequately handle issues of community, or communal property within its framework. As Nozick's minimal state demonstrates, the basic libertarian presumption of government is that individuals have the ability and the right to freely associate with one another for the protection of rights.<sup>18</sup> Whatever organization or government that results from such a free association has the obligation to enforce its "de facto monopoly" over the enforcement of the rights of individuals.<sup>19</sup> Thus communal property, communal associations, and communal rights need not conflict within a libertarian framework, because libertarian philosophy encourages the free association of individuals. Provided that the minimal state or government enforces rights according to the decisions of the community, there is no conflict between communal rights and libertarian philosophy.

This principle of free association is important because it provides a libertarian foundation upon which to advance the goal of Tribal "measured separatism."<sup>20</sup> As Williams notes above, Tribal measured separatism contemplates a government-to-government relationship between Tribal and Federal sovereigns that guarantees Indians "the right to govern their reservation homelands and those who enter them by their own laws, customs, and traditions, even when these might be incommensurable with the dominant society's values and ways of doing things."<sup>21</sup> Under Nozick's philosophy, this outcome is not only plausible, but preferable. Unlike the current Federal Indian law policy, Nozick's view of "utopia" is that there is no one, best social ideal for everyone.<sup>22</sup> Rather, there are any number of utopias or minimal states/self-governments that may exist when like-minded individuals opt to form associations and governments.<sup>23</sup> To explain the system differently, Nozick's philosophical framework for utopia is actually a framework for utopias – a methodology for implementing diversity, tolerance, and ethics based upon the desires of like individuals to form or join the communities of which they wish to be a part.<sup>24</sup>

For Indian Country, such a framework is profound. Simply put, a libertarian framework of Indians rights assumes that individuals have rights, including the right to freely associate, and that no imposition can be made upon peoples who choose to freely live in

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<sup>18</sup> Nozick, *supra* n.14 at 118.

<sup>19</sup> *Id.*

<sup>20</sup> See Williams, *supra* n.9 at xxxv.

<sup>21</sup> *Id.*

<sup>22</sup> Nozick, *supra* n.14 at 310.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 311 – 312.

community with one another.<sup>25</sup> The common ground between groups of freely associating individuals is the framework of a utopia of utopias itself.<sup>26</sup> Each band of peoples must respect the existence of others because mutual respect and tolerance is what ensures the perpetuity of the system.<sup>27</sup>

## 2. The Libertarian Ethic of Indian Rights

Nozick's ideas provide a sweeping outline for Indian rights based upon libertarian principles. But what Nozick offers in scope, he lacks in detail. In this regard, the contribution of 19th century economist and philosopher, Frederic Bastiat, is of particular importance to a libertarian framework for Indian rights. Bastiat wrote on the heels of the French Revolution of 1789, and in the middle of the European Revolutions of 1848. His pamphlet, *The Law*, provided a concise argument for the rule of law in a free society, even while insurrection and rebellion once again ravaged the streets of Paris.<sup>28</sup>

Bastiat's greatest contribution to philosophy is his ethic of rights and law.<sup>29</sup> The ethic is elegant for its simplicity: law cannot "be used to destroy the person, liberty, or property of individuals or groups."<sup>30</sup> Any violation of this simple maxim is considered a "complete perversion of law."<sup>31</sup> The role of government under Bastiat's principle is to prevent injuries to the rights outlined in his ethic from occurring.<sup>32</sup> When violations of the norm do occur, Bastiat calls the offense plunder – whether illegally wrought by individuals, or lawfully wrought by government.<sup>33</sup> The consequence for violations of Bastiat's ethic include the abolition of all laws permitting legal plunder, and reparations that restore what was taken from individuals – preferably at the expense of the party committing the offense.<sup>34</sup>

In the history of Federal Indian law, it is not difficult to find scores of violations of Bastiat's ethic. The law was repeatedly used as an instrument of coercion not only in undermining Indigenous concepts of identity but also in the abject expropriation of Indian lands.<sup>35</sup> Naturally, Bastiat would interpret these actions as perversions of the law's

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<sup>25</sup> *Id.* at 316.

<sup>26</sup> *Id.* at 317.

<sup>27</sup> *Id.*

<sup>28</sup> Frederic Bastiat, *The Law*, (Foundation for Economic Education 1998).

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.* at 25.

<sup>33</sup> *Id.* at 7.

<sup>34</sup> *Id.* at 17.

<sup>35</sup> The following resources provide extensive documentation of the use of law as a tool for control: Ward Churchill, *Kill the Indian, Save the Man: the Genocidal Impact of American Indian Residential Schools* (City Light Books 2004); Vine Deloria Jr., *God is Red: a Native View of Religion*, 271 (Fulcrum Pub. 2003). Robert A. (2013) J. JURIS 208

obligation to prevent violations of rights to persons, liberty and property.<sup>36</sup> In terms of consequence, Bastiat's ethic expressly requires some action on the part of government to rectify any harm that resulted from depriving Indigenous peoples of their right to life, freedom, or property – whether the harm befell communities or individuals.<sup>37</sup>

## **B. The Role of Freedom in Securing Indian Rights**

The second pillar of the libertarian framework for Indian rights is the principle that meaningful freedom is necessary in order to secure Indian rights. The contributions of philosophers, F.A. Hayek, John Locke, and Karl Popper, are especially helpful in understanding how meaningful freedom helps to secure the rights of American Indians.

### **1. Realizing Freedom in Indian Country**

Austrian scholar and Nobel Laureate, F.A. Hayek's analysis of social and governmental institutions focuses extensively on the normative importance of freedom and its role in generating society's moral values.<sup>38</sup> Hayek's overall concept of freedom is expansive, consisting of two co-equal elements that ensure an individual's realization of liberty. First, freedom involves a quantitative assessment of the degree to which individual is free from outside coercion.<sup>39</sup> Second, freedom involves a qualitative analysis of the extent to which an individual can "expect to shape his course of action in accordance with his present intentions, or whether somebody else has power so to manipulate the conditions to make him act according to that person's will rather than his own."<sup>40</sup> Under Hayek's theory, the role of freedom in society is not to guarantee all individuals a particular outcome in life, but to safeguard the ability of individuals "to decide what use we shall make of the circumstances in which we find ourselves."<sup>41</sup>

In light of the primacy Hayek places on freedom, like Nozick, he reduces the role of government to that of a guardian – an institution that must use its power of coercion to protect the private sphere, and to create conditions whereby individuals can pursue their own opportunities with only minimum coercion from the government itself.<sup>42</sup> Hayek's skepticism of governmental coercion is rooted in an epistemological uncertainty about the ability of human beings to anticipate social problems, and address them adequately.

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Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*, 22 (U. Minn. Press 2005).

<sup>36</sup> Bastiat, *supra* n.28 at 4.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> F.A. Hayek, *The Constitution of Liberty*, 5 (U. Chicago Press 1978).

<sup>39</sup> *Id.* at 11.

<sup>40</sup> *Id.* at 13.

<sup>41</sup> *Id.* at 19 – 20.

<sup>42</sup> *Id.*

His solution to the dilemma is the widespread promotion of Liberty. Accordingly, Hayek writes:

Liberty is essential in order to leave room for the unforeseeable and unpredictable; we want it because we have learned to expect from it the opportunity of realizing many of our aims. It is because every individual knows so little and, in particular, because we rarely know which of us knows best that we trust the independent and competitive efforts of many to induce the emergence of what we shall want when we see it.<sup>43</sup>

In other words, government knows relatively little when it comes to prognosticating the human experience – better to leave it up to individuals to chart their own way, while allowing them ample freedom to accomplish their respective objectives.

For Indian Country, the application of Hayek's work is both troubling and self-evident. Given that an entire Federal bureaucracy to regulate the affairs of Indians has existed in some form or another since the Nation's founding,<sup>44</sup> Hayek's work suggests that Indians have never enjoyed the type of freedom from coercion that is essential for securing liberty.<sup>45</sup> A second application of Hayek's work involves his definition of qualitative freedom. Since the advent of the Congressional Plenary power doctrine over Indian affairs in the late 1880s, American Indians have always lived under the watchful eye of the Federal Government – a higher power wielding the absolute authority to make laws, rules and regulations on behalf of Indian Nations with relative impunity.<sup>46</sup> Even in its best light, the current state of freedom for most Tribal nations remains a myth inscribed by the hand of a jurispathic Court.<sup>47</sup>

## **2. Indian Rights, Locke, and a Surprising Defense of Native Title**

Where Hayek views freedom through a normative lens based on the values it creates in society, Enlightenment era philosopher, John Locke, takes matters further by attacking some of the foundational principles used by the courts to restrict the realization of liberty among American Indians.

It should first be noted, however, that Locke is not an obvious ally of Indian Rights, libertarian or otherwise. His writings about slavery are ambiguous but would seem to

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<sup>43</sup> *Id.* at 29.

<sup>44</sup> See today's *U.S. Bureau of Indian Affairs*, <http://www.bia.gov/> (accessed June. 16, 2013).

<sup>45</sup> Hayek, *supra* n.38 at 11.

<sup>46</sup> See *U.S. v. Kagama*, 118 U.S. 375, 379-380 (1886)

<sup>47</sup> See Williams, *supra* n.9 at 21.



preclude American Indians from the ranks of those upon whom he would endow with the inalienable right of freedom. One particularly troublesome passage reads as follows:

This is the perfect condition of slavery, which is nothing else, but the state of war continued, between a lawful conqueror and a captive: for if once compact enter between them, and make an agreement for a limited power on the one side, and obedience on the other, the state of war and slavery ceases as long as the compact endures.<sup>48</sup>

What is clear from the passage is that Locke understood slavery as a continuation of war that could be justified on the basis of hostilities occurring between two lawfully warring parties.<sup>49</sup> Of course, the tacit acceptance of slavery in any form is an obvious affront to modern notions of international human rights.<sup>50</sup>

Locke's *Second Treatise of Government* begins with a basic presumption of equality and an attendant prohibition against harming the "life, health, liberty, or possessions" of others.<sup>51</sup> In addition to these now ubiquitous rights, Locke also leaves individuals room to form general associations to protect their rights – associations he describes as a commonwealth.<sup>52</sup> In sketching the outline of the civil society, Locke takes particular issue with plenary power, dismissing the absolute monarchy as an arcane institution that is inconsistent with civil government.<sup>53</sup> In turn, Locke concludes that a government can only be legitimate if it was founded with the consent of the people over which it would rule.<sup>54</sup> As a result, under Locke's civil society, conquest alone is an insufficient basis for claiming power.<sup>55</sup> While the idea was radical in its day, the example Locke used to illustrate his point remains especially poignant some 300 years later. In discussing governmental attempts to seize power and property by virtue of conquest, Locke likens the attempt to the folly of a robber invading a home and demanding just title to the estate.<sup>56</sup> Incredulity is apparently timeless.

The application of Locke's contribution to a libertarian framework of Indian right is relatively forthright. Locke outlines principles of freedom that are objectively correct and

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<sup>48</sup> John Locke, *Second Treatise of Government*, 17 (Hackett 1980).

<sup>49</sup> For an additional perspective of Locke's "hypocrisy" see James Farr's seminal essay *So Vile and Miserable an Estate: The Problem of Slavery in Locke's Political Thought*, 14 *Political Theory* 2, 263-289 (May 1986).

<sup>50</sup> See United Nations, *U.N. Declaration on the Rights of Indigenous Peoples* Art. 8 (2007).

<sup>51</sup> Locke, *supra* n.48 at 8-9.

<sup>52</sup> *Id.* at 48.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 91.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

relevant to today's administration of governance. Second, his view of plenary power as an especially pernicious evil is important for disclaiming it as inconsistent with modern notions of governance.<sup>57</sup> And, finally, while it is not at all clear that Locke had Indian title and Indigenous land rights in mind when he sketched his robber-claiming-just-title analogy, the truth of his assessment is powerful for its prescience. Locke makes this inference plain when he argues elsewhere that, even when a conqueror obtains power in a "just war," he still "has not yet thereby a right and title to their possessions."<sup>58</sup> In this way, Locke's railings against invading forces demanding title to conquered lands<sup>59</sup> becomes something that Indian Country can embrace – even if there are aspects of Locke's views that are inconsistent with contemporary values of Indigenous human rights. By viewing Locke through this lens, the result is a rehabilitated view of Locke that co-opts his perspective from the confines of its age.

### 3. Popper's Deconstruction of Plenary Power

To briefly recap, Hayek established the normative importance of freedom in society. Locke outlined the importance of its operations. And British philosopher and economist, Karl Popper's work in *The Open Society and Its Enemies* presents an interesting polemic on the dangers of freedom's antithesis, the centralization of power.<sup>60</sup>

Popper observes that, while centralized, plenary power may exist as a legal fiction, it is nonetheless a myth in reality because of the numerous institutional mechanisms necessary to exert power over the subject.<sup>61</sup> Popper further argues that an "open society" must implement "checks and balances"<sup>62</sup> to ensure that institutional frameworks can be reformed to reflect democratic principles.<sup>63</sup> Regarding the actual implementation of institutional reforms, Popper advises that any bureaucratic and policy modifications be made through "piecemeal engineering."<sup>64</sup> Given the penchant for grand plans to fail, he argues that society is better off performing a sort of social triage to address the most pressing problems of the day, and implementing policy solutions to address those issues first.<sup>65</sup>

Popper's work is relevant to the libertarian framework for Indian rights in several ways. First, Popper ably demonstrates that centralized, absolute power, or plenary power as it

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<sup>57</sup> *Id.* at 48.

<sup>58</sup> *Id.* at 93 – 94.

<sup>59</sup> *Id.*

<sup>60</sup> Karl R. Popper, *The Open Society and Its Enemies Vol. 1*, 48 (Princeton U. Press 1966).

<sup>61</sup> *Id.* at 121-122.

<sup>62</sup> *Id.* at 122.

<sup>63</sup> *Id.* at 127.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

is framed in Indian law, is little more than a myth.<sup>66</sup> Though Congress may pass laws affecting Indian affairs, it takes the complicit work of the Executive Branch to carry out the legal mandate and the active effort of the Judicial Branch to conjure up legal justifications for the preservation of plenary power as a principle of Federal Indian Law. But, even where systems have come to be morally askance of modern notions of justice, Popper offers the simple reminder that in free societies, institutions can be reformed by “the people” through the implementation of “checks and balances” on the system.<sup>67</sup> Assuming Congress has plenary power over Indian affairs, the enthymeme Popper suggests is that Congress also has the authority to reform the system of Indian rights so as to comport with a contemporary understanding of freedom, justice, and equality. Similarly, while courts may continue to enforce the racist language of their 19th Century precedents,<sup>68</sup> institutional frameworks and moral aberrations of law can be updated through the institutional checks and balances of the legislature in cooperation with the executive to reflect current understandings of justice.<sup>69</sup>

Last, even when reforming governmental institutions is a desirable goal, Popper suggests an incremental approach to the process – or what he calls “piecemeal engineering.”<sup>70</sup> Given the various experiments in Federal Indian policy – ranging from the General Allotment Act, which decimated the tribal land base,<sup>71</sup> to the era of Termination, which sought to end the status of American Indians as wards of the Government,<sup>72</sup> it seems obvious if not safe to say that major programs aimed at Indian Country tend to do more harm than good. In fact, many recent policy successes related to Indian Nations have been relatively modest in scope, indicating that measured legislation to specific policy issues is perhaps the better route.

### **C. The Market and Indian Country**

The final component of a libertarian framework for Indian rights is the principle that markets are necessary mechanisms for securing the benefits of liberty, thereby providing the meaningful freedom that is necessary in order to secure American Indian rights. Though there are many contributions to consider, the works of Adam Smith and Hernando De Soto are both crucial for a thorough understanding this principle of the new framework.

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<sup>66</sup> Popper, *supra* n.60 at 121-122.

<sup>67</sup> *Id.* at 122.

<sup>68</sup> See Williams, *supra* n.11 at 100.

<sup>69</sup> Popper, *supra* n.60. at 127.

<sup>70</sup> *Id.* at 158-159.

<sup>71</sup> William C. Canby, Jr., *American Indian Law in a Nut Shell*, 22 (West 2009).

<sup>72</sup> *Id.* at 27-30.

## 1. Building the Service Economy in Indian Country

The major contribution of Scottish economist, Adam Smith's *Wealth of Nations* to the libertarian framework for Indian rights is its emphasis of service-based economies as a means of generating wealth.<sup>73</sup> Smith's philosophical point was that freedom could not be realized apart from the economic capability of living one's life how one would. For the service economy, this meant that individuals with even the least of skills could still perform some service, and that a number of individuals could provide goods or produce services much more efficiently when working in concert.<sup>74</sup> Smith reasoned that wealth spreads in the service economy by allowing people of the "lowest ranks" to participate, earn a wage, and live life on their own terms through economic freedom.<sup>75</sup> The economy itself operates out of the simple desire of an individual to procure a profit without the need for command-control systems of production.<sup>76</sup>

Regarding the role of government in the process, Smith limits government to three very specific functions: protecting citizens from violence, guarding against injustices, and establishing institutions for the general public benefit.<sup>77</sup> Perhaps unsurprisingly, Smith was also highly skeptical of various schemes for taxation, arguing that taxes should take as little as possible from citizens beyond the necessary expenses for the operation of government.<sup>78</sup> Smith was particularly concerned about the potential of taxes to bankroll bloated bureaucracies, to stifle innovation and discourage entrepreneurship, and to create opportunities for public corruption.<sup>79</sup>

Smith offers several important applications for the libertarian framework of Indian rights. First, Smith outlines the importance of developing a Tribal service-based economy as a means of generating wealth for American Indians.<sup>80</sup> While strides have been made in recent years to promote economic development on the reservation, most Tribal nations have lagged behind. According to the Harvard Project on American Indian Economic Development, American Indian reservations are consistently among the "poorest identifiable" groups in the U.S.<sup>81</sup> And while the Indigenous private sector has made impressive gains, Indian entrepreneurs are still hampered by the process of starting small businesses on the reservation due to the institutional absence of "basic

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<sup>73</sup> Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, 9 (Harvard Classics 1988).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 15.

<sup>76</sup> *Id.* at 19.

<sup>77</sup> *Id.* at 446.

<sup>78</sup> *Id.* at 478.

<sup>79</sup> *Id.* at 478 – 479.

<sup>80</sup> *Id.* at 9.

<sup>81</sup> Harvard Project on American Indian Economic Development, *The State of Native Nations*, 7 (Oxford U. Press 2008).

zoning ordinances, land use plans, physical infrastructure, and streamlined leasing arrangements.”<sup>82</sup>

Second, Smith’s theory suggests the need to develop business friendly environments in Tribal communities. The service-based economy is premised upon the opportunity for quite nearly anyone to perform a service and earn a wage.<sup>83</sup> As the modern economy has grown more complex in the production of goods, Indian nations have been hampered in participating in the market due to the dizzying array of regulations that serve as barriers to entry created by Federal and state governments alike. As a result, Tribes have struggled to create conditions that are “conducive to business within their nations.”<sup>84</sup> But as Smith’s descriptions indicate, such a climate is necessary in order to attract investment capital, grow tax revenue from businesses, and improve the quality of life in Indian Country.<sup>85</sup> In order to develop Smith’s service-based economy, Tribal nations must be allowed to provide a climate in which they can grow.

Third, Smith suggests the importance of the private sector in promoting freedom. While the point may seem stark, command-control economics have not worked in Indian Country because they stifle the opportunity for individual entrepreneurs to provide unique services.<sup>86</sup> By contrast, private sector Indian entrepreneurs tend to contribute to the local economy through tax revenues, the retention of human capital, and most importantly by providing jobs in the community.<sup>87</sup>

Finally, Smith’s model suggests that a Tribal nation should exercise restraint and take as little as possible from its citizens.<sup>88</sup> Tribal Nations, like modern governments, can be easily tempted to enact stifling tax policies in order to provide any number of services for Tribal members. But Smith’s insight was that the latent snares of taxation (bloated bureaucracies, stifled innovation and entrepreneurship, and public corruption) all pale in comparison to a simple tax scheme that funds only the most essential services while providing for a maximization of opportunity for the citizenry.<sup>89</sup>

## **2. Reviving the Reservation: De Soto on Dead Capital**

Where Smith sketched the outline of a vibrant service-based economy, economist, Hernando De Soto’s study of the “informal economy” provides many lessons for the

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<sup>82</sup> Smith, *supra* n.73 at 129.

<sup>83</sup> *Id.* at 15.

<sup>84</sup> Harvard Project on American Indian Economic Development, *supra* n.81 at 128.

<sup>85</sup> *Id.* at 129.

<sup>86</sup> Smith, *supra* n.73 at 19.

<sup>87</sup> Harvard Project on American Indian Economic Development, *supra* n.81 at 129.

<sup>88</sup> Smith, *supra* n.73 at 478.

<sup>89</sup> *Id.* at 478 – 479.

internal development of the Tribal, service-based economy and its utilization of capital in the process. According to De Soto, dead capital exists when there is no system for converting physical assets into capital through the process of securitized lending.<sup>90</sup> The problem he identifies in many developing nations is the absence of a formal property system – rendering the benefits of the price system, and the communicative effects of pricing all but muted.<sup>91</sup> His solution is to formalize property systems through implementation of processes for recording title.<sup>92</sup> Only when property rights are formalized can property owners enjoy a property’s potential value<sup>93</sup> and its integration into property systems, thereby providing for more efficient property transactions,<sup>94</sup> better accountability in business dealings,<sup>95</sup> the fungibility of assets,<sup>96</sup> and the actual protection of transactions through formal record keeping.<sup>97</sup> To state matters simply, formal property systems provide a number of checks that allow for property to be meaningfully owned, and potentially used as capital.<sup>98</sup>

De Soto’s observations about dead capital are very much a reality in Indian Country though not necessarily for the reasons that he describes. While the private property system is robust, the problem of dead capital in Indian Country stems from the regulation of a trust lands system that makes it difficult to alienate and develop Indian lands.<sup>99</sup> In sum, dead capital is, bizarrely, alive and well in Indian Country due to Indian trust lands that remain unavailable for capitalization.<sup>100</sup>

The result of dead capital on Indian lands is a fairly stark inequality that leaves American Indian trust lands on the outside of the American property rights system looking in. Far from enjoying meaningful ownership, the complicated Indian land tenure system has had the effect of merely providing Indian landowners with a right of occupancy, leaving them unable to enjoy the full benefits of capitalization and securitized lending that meaningful property rights are supposed to convey. In sum, while Indian lands may have

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<sup>90</sup> Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, 40 (Basic Books 2000).

<sup>91</sup> *Id.* at 47.

<sup>92</sup> *Id.* at 46 – 47.

<sup>93</sup> *Id.* at 50.

<sup>94</sup> *Id.* at 52.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 61.

<sup>98</sup> *Id.* at 62.

<sup>99</sup> Harvard Project on American Indian Economic Development, *supra* n.81 at 101.

<sup>100</sup> For more information on the Indian trust lands system see Judith V. Royster, *The Legacy of Allotment*, 27 *Ariz. St. L.J.* 1 (1995).

“potential value,” in large part, the lands’ value remains only a potential because of burdensome Federal alienability and land use restrictions.<sup>101</sup>

### **III. FINAL THOUGHTS**

This article has attempted to sketch the outline of a libertarian framework for Indian rights. While there are contributions to be gleaned from a number of libertarian thinkers, the works above provide a foundation upon which the model can be developed and to which additional contributions can be added over time.

The basic argument, however, remains the same: that American Indians, like many Indigenous populations around the world, have not enjoyed the full benefits of liberty that have been guaranteed to them under the law. In proceeding under this assumption, it will be helpful to undertake future analyses and critiques through envisioning how the law might change if American Indians were afforded their basic right of liberty.

The three pillars or principles of the framework provide opportunities to conduct critical analyses in the evaluation of how American Indian liberty has been curtailed in each of the three major themes: (1) that a limited government is best positioned to deliver the goal of Tribal measured separatism; (2) that meaningful freedom is necessary in order to secure Indian rights; and (3) that markets are necessary vehicles for securing the benefits of liberty for American Indians.

As the framework is considered by Indigenous and libertarian scholars, I expect that analyses of the Indian land tenure system under the third pillar, along with critiques of the current Federal Indian law framework under the first pillar, will be particularly important departure points for future scholarship.

I began this brief missive with a quotation from Hayek. His cautions against coercion remain an important reminder both of the way in which American Indians have been treated and the work that remains to be done in order to ensure that future generations can enjoy the benefits of liberty that were denied to their forbearers. For governments, Hayek’s words offer an important reminder that Tribal nations are not merely tools for their own ends.

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<sup>101</sup> De Soto, *supra* n.90 at 50.