Tribal Self-Government and the Indian Reorganization Act of 1934

The Indian Reorganization (Wheeler-Howard) Act of 19341 (IRA) was, by all accounts, one of the most significant single pieces of legislation directly affecting Indians ever enacted by the Congress of the United States. It has been "equalled in scope and significance only by the legislation of June 30, 1834, and the General Allotment Act of February 8, 1887."2 A major reversal of governmental policy and approach toward Indian affairs was effectuated by the IRA. This Comment will be concerned with the IRA as it affected the concept of tribal self-government, and primarily with those sections providing for adoption of tribal constitutions and organization as chartered business corporations. It will trace the development of tribal self-government through 1934, delve into the Act itself and the objectives behind it, consider whether those objectives have been realized, and suggest a possible role for the IRA and its theory in the future.

I. INTRODUCTION: A BACKGROUND SKETCH

The right of tribal self-government is probably the most basic concept in all of Indian law. It has been consistently protected by the federal courts.3 Indeed, the courts have played such a large role in asserting and reaffirming this principle that, although the right is an inherent part of original sovereignty, the doctrine itself may be said to be judicial. The principle, broadly stated, is that the tribes are "qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty."4 While these inherent powers have been greatly reduced over the years by Congress in the exercise of its power over "commerce ... with the Indian Tribes"5 and by the executive branch through treaty-making, it remains true,

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2. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 84 (Univ. New Mexico ed. undated).
3. On June 30, 1834, Congress passed two acts. One was the last in a series of acts "to regulate trade and intercourse with the Indian tribes," ch. 161, 4 Stat. 729, which set the pattern for Indian-government relationships for the next century. The second created the Department of Indian Affairs, ch. 162, 4 Stat. 735, originally under the War Department, transferred to the Interior Department upon its establishment in 1849, Act of March 3, 1849, ch. 108, § 9, 9 Stat. 395 (codified at 43 U.S.C. § 1451 (1970)). For a discussion of the General Allotment Act, see notes 28-36 infra and accompanying text.
nonetheless, that one looks to the statutes and treaties to discover limitations on, not sources of, tribal power.

The first comprehensive judicial expression of this doctrine is found in John Marshall's opinion in the famous case of *Worcester v. Georgia*. The State of Georgia had for years been doing its best to destroy the Cherokee Nation. It imprisoned a white man living with tribal consent among the Cherokee for violating a state law that required such persons to acquire a permit from the governor. The Supreme Court found this law unconstitutional, holding that the State could not infringe upon the federal power over Indians. The tribes were entitled to exercise their own self-government, to the exclusion of state law, subject only to federal power. Resting his analysis largely on principles of international law, the Chief Justice further recognized that the tribes "had always been considered as distinct, independent, political communities," and that "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection."

While this doctrine of tribal self-government has been recognized and applied by the federal courts, it has not been so highly respected by administrative officials. For more than a century federal administrators failed to recognize the doctrine's implications. This failure was not entirely a result of administrative malevolence, but in large part was due to ignorance of the law, bureaucratic ineptness, and the general confusion of the American frontier. In addition to administrative confusion the nineteenth century witnessed the enactment of many federal statutes that had the effect of seriously diminishing the area within which tribal powers could be exercised. The matters taken from the control of the tribes were those which, in the

9. 31 U.S. (6 Pet.) at 560. It was of the *Worcester* case that President Andrew Jackson is reported to have said, "John Marshall has made his decision; now let him enforce it." H. Greeley, *American Conflict* 106 (1864) (statement attributed to President Jackson by Congressman George N. Briggs). In fact, the State never released the defendant, but left him imprisoned under the unconstitutional law. F. Cohen, *supra* note 2, at 123.
10. See authorities cited in note 3 *supra*.
judgment of Congress, the tribes could no longer safely handle. The vast majority of these enactments applied by their terms to only one tribe or group of tribes; thus it is difficult and inappropriate to generalize about their effects. There were, however, a few major pieces of legislation that applied broadly to all Indians. An example of how seriously these acts limited tribal sovereignty can be seen in the effects of the Major Crimes Act of 1885.

In the case of Ex parte Crow Dog, the doctrine of tribal sovereignty had been applied to produce what many considered an extreme result. The Supreme Court there held that the murder of one Sioux by another on the reservation was not within the criminal jurisdiction of any court of the United States, state or federal, and that only the tribe could punish the offense. The Court, of course, reached the right result in light of the doctrine of original sovereignty. Nonetheless, this result so outraged the public and the Congress that in less than two years the Major Crimes Act was passed. Under the Act original jurisdiction was given to the federal courts over cases involving the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, when committed on Indian land by one Indian against another. To this list, robbery, incest, and assault with a deadly weapon were later added. Usurpation of tribal control over the conduct of its members was no doubt far-reaching because of the consequent authorization of intervention by federal officers when these crimes were committed and discovered. It is worth noting, however, that the mere existence of this legislation reaffirmed the principle of tribal sovereignty. Congressional action resulted from a recognition that unless a federal law was enacted the

13. F. COHEN, supra note 2, at 122. There are many examples, the most important of which are probably the enactments dealing with Indian trade (see 25 U.S.C. §§ 261-64 (1970)) and liquor regulation (see 18 U.S.C. §§ 1154-56 (1970)).


16. The contention that the federal courts had jurisdiction was based not on principles applicable to tribes generally, but on the language of a treaty with the Sioux. Treaty with the Sioux, April 29, 1868, 15 Stat. 685. The Court found that language insufficient and then went on to apply the sovereignty doctrine. 109 U.S. at 567.

tribes would retain control and exclusive jurisdiction over these offenses. Indeed, to the extent that such power has not been taken from them, tribes today continue to exercise control over law and order on the reservation through tribal codes, tribal courts, and tribal police.\textsuperscript{18}

Another event that altered the attitude toward tribal self-government was the cessation of treaty-making between the federal government and the tribes in 1871.\textsuperscript{19} The House of Representatives had no effective control over Indian affairs, which rested exclusively with the President and the Senate under the treaty power,\textsuperscript{20} and opposition to this lack of power was growing.\textsuperscript{21} Attacks on treaty-making were also being voiced from within the administration.\textsuperscript{22} Concepts of assimilation and citizenship began to be pressed by those opposed to treaty-making, particularly those within the administration. Since the close of the Civil War, the House had used this opposition to insert progressively more restrictive wording into Indian appropriation acts.\textsuperscript{23} The culmination finally came in 1871 when the House managed to tack onto the 1872 fiscal appropriation bill the following clause: "Hereafter no Indian nation or tribe... shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty."\textsuperscript{24} Despite this ominous language, tribal sovereignty in terms of powers of self-government continued to be recognized. Treaties were replaced by Indian "agreements," which differed only in that they were ratified by both houses of Congress.\textsuperscript{25} In theory, these private agreements, like treaties, were based on Indian consent. As will be seen, this principle of mutual consent was reaffirmed by the IRA. Thus, while the form of dealing with the tribes was altered in 1871, the actual effect on tribal powers was probably minimal.

There were other more serious restrictions on tribal power in the latter years of the nineteenth century. The decade of the 1890's saw, for example, the development of a policy of Indian education that

\textsuperscript{18} See Commission on the Rights, Liberties, and Responsibilities of the American Indian, The Indian, America's Unfinished Business 56-60 (W. Brophy & S. Aberle ed. 1966) [hereinafter Brophy Commission].

\textsuperscript{19} See Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1970)).

\textsuperscript{20} U.S. Const. art. II, § 2.

\textsuperscript{21} See F. Walker, The Indian Question 11 (1874).

\textsuperscript{22} See 1862 Report Comm'r Indian Affairs 7. See generally F. Cohen, supra note 2, at 17-18.

\textsuperscript{23} See, e.g., Act of March 29, 1867, ch. 13, § 6, 15 Stat. 9 (repealed by Act of July 20, 1867, ch. 34, 15 Stat. 18).

\textsuperscript{24} Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566.

\textsuperscript{25} See, e.g., Act of July 10, 1882, ch. 284, 22 Stat. 157 (Crows); Act of April 29, 1874, ch. 194, 18 Stat. 56 (Utes).
had a severe impact on tribal self-control. For example, an appropriations act authorized the Secretary of Interior to withhold the furnishing of subsistence or rations to any Indian family whose children did not attend school.26 These restrictive practices were compounded by the practice of encouraging the removal of Indian children from their parents and sending them to distant nonreservation boarding schools.27 Such practices resulted in severe deterioration of tribal unity and control over internal domestic affairs.

Of all pre-IRA legislation, by far the most devastating was the General Allotment (Dawes) Act of 1887.28 This Act authorized the President to parcel tribal land to individual tribal members in “allotments” of 40, 80, or 160 acres. Any surplus land was to be purchased by the Secretary of Interior with proceeds used to further Indian education and “civilization.” Originally, each allotment was to be held in trust by the United States for at least twenty-five years. At the end of this time, or a longer time should it be determined necessary in individual cases, the Government issued a fee patent to the land, free of liens and debts, to the allottee or his heirs. Inheritance was determined according to state law.

The general theory underlying the allotment policy was that an individual Indian who owned his own plot of land would thereby be transformed into a farmer or livestock operator. Presumably, the individual was to absorb European values to go with his new status. Individual ownership plus increased contact with whites was to teach the Indian to be both civilized and self-supporting, one consequence of which would be to relieve the Government of the need for further supervision of Indian affairs and life. Another consequence, of course, was to throw open to whites huge quantities of land previously unavailable.29 There had been earlier allotments under treaties and laws that applied to certain individual tribes,30 but the Dawes Act was the first to subordinate and redistribute land on a wholesale basis.

By all accounts, the allotment policy was a disaster.31 Destruction of the land base had the immediate effect of reducing tribal control of internal affairs to almost a nullity. Further, although the Indian culture was widely diverse from tribe to tribe, nowhere did that cul-

27. See BROYHILL COMMISSION, supra note 18, at 9, 149-51.
29. See, e.g., Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess., at 16 (1934) [hereinafter 1934 House Hearings]; BROYHILL COMMISSION, supra note 18, at 18-20.
30. E.g., Treaty of Sept. 20, 1816, art. 4, 7 Stat. 150 (Chickasaws); Treaty of July 15, 1817, art. 8, 7 Stat. 159 (Cherokees).
ture contain anything to prepare the individual Indian to become a farmer or to assume the incidents of private ownership. Finally, the Act itself made no provision for training or credit.

The allotment era extended from 1887 to 1934, when the IRA ended the practice completely in so far as it applied to tribally owned lands. Publication of the Meriam Report in 1928 caused a significant slowdown of allotment parceling, but by then the damage had been done. Before the dust settled, 246,569 separate assignments of land had been made totaling nearly 41 million acres. The damage in loss of land base was astounding. Between 1887 and 1934 tribal land holdings were reduced from about 138 million acres to only 48 million acres.

During the period preceding the enactment of the IRA there was some recognition that Indians were living in grinding poverty, that Indian health and education were in an abominable state, and that government policies were not working. As early as 1881 books like Helen Hunt Jackson’s crusading A Century of Dishonor had exposed these conditions to public view and made people aware of broken treaties and other unfulfilled promises. But it was not until publication of the Meriam Report that a movement toward change began. The Report is an extremely detailed document, describing and analyzing the entire spectrum of Indian life and the problems of governmental administration of Indian affairs. It brought these problems into sharp focus, and in so doing presaged more than any other work the enactment of the IRA six years later.

The basic position taken by the Meriam staff was that

[the object of work with or for the Indians is to fit them either to merge into the social and economic life of the prevailing civilization as developed by the whites or to live in the presence of that civilization at least in accordance with a minimum standard of health and decency.] If this goal were accomplished, as the staff saw it, there would be no need for further governmental supervision. This position did not imply automatic cultural assimilation, however. The authors of the Report recognized explicitly that many Indians wished to maintain a separate cultural identity, although they also admitted this would

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33. INSTITUTE FOR GOVT. RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION (1928) [hereinafter MERIAM REPORT].
34. BROPHY COMMISSION, supra note 18, at 20.
35. Id.
36. Id.
37. See F. COHEN, supra note 2, at 83.
38. MERIAM REPORT, supra note 33, at 86.
be difficult in so far as the economic underpinnings of the old culture had been destroyed.39

The process of allotment as historically administered was criticized,40 as were other approaches to the "Indian problem":

The work of the government directed toward the education and advancement of the Indian himself ... is largely ineffective. The chief explanation ... lies in the fact that the government has not appropriated enough funds to permit the Indian Service to employ an adequate personnel properly qualified for the task before it.41

The Meriam staff sought to redirect the approach to Indian affairs by development of the social services necessary to enable Indians to reach a level of self-support.

There were many other specific recommendations, among which was the suggestion that "[t]horough mature consideration ... be given to the possibilities of using the corporate form of organization for tribal property that consists of great natural resources which cannot be economically administered or developed in small allotments."42 Although the Report did not recommend corporations as a means of developing Indian community life and civic organization, its recommendations for those aspects of Indian life could be effectuated by utilization of the corporate form.43

The recommendations of the Meriam Report fell short of the broad-ranging goals later expressed by the IRA. For example, decentralization of authority was recommended, but to local Indian agents rather than to the tribes themselves.44 Still, the publication of this work was an event of major importance in the history of Indian affairs and was a significant stimulus in the direction the IRA was later to follow.

II. THE INDIAN REORGANIZATION ACT OF 1934

A. A Brief Legislative History

The Wheeler-Howard Bill, as the originally proposed legislation was known, was entitled an act "[t]o grant to Indians living under Federal tutelage the freedom to organize for purposes of local self-government and economic enterprise."45 The bill represented a sig-

39. Id. at 86-89.
40. Id. at 41-42.
41. Id. at 8.
42. Id. at 462. The Report went on to suggest as "outstanding possibilities" for experimentation with this idea the Klamaths of Oregon and the Menomines of Wisconsin, the most important of the tribes that were later "terminated" in the 1950's. Id. For an explanation of the termination policy, see note 159 infra.
43. See MERIAM REPORT, supra note 33, at 629-45.
44. Id. at 113, 140-54.
45. H.R. 7902, 73d Cong., 2d Sess. (1934), and S. 2755, 73d Cong., 2d Sess. (1934)
significant change in the approach to Indian legislation. Although the original Wheeler-Howard Bill was greatly restructured in the final version that became the IRA, some knowledge of its provisions is useful.

Title I of the Wheeler-Howard Bill, "Indian Self-Government," was the heart of the proposed legislation. In it were set forth the broad principles of self-government and the specific policy goal that "those functions of government now exercised over Indian reservations by the Federal Government through the Department of Interior and the Office of Indian Affairs shall be gradually relinquished and transferred to the Indians of such reservations . . . ."46

The vehicle contemplated for realization of this goal was organization "for municipal and other purposes."47 Title I provided for issuance of charters "granting to the . . . community group any or all of such powers of government and such privileges of corporate organization and economic activity, hereinafter enumerated, as may seem fitting"48 in light of a particular group's experience. Some mandatory charter requirements were imposed, such as a provision delineating membership criteria.49 In addition, optional powers were listed, among which was the power

[t]o organize and act as a Federal municipal corporation, to establish a form of government, to adopt and thereafter to amend a constitution, and to promulgate and enforce ordinances . . . and [to exercise] any other functions customarily exercised by local governments.50

The term "constitution" was not used elsewhere in the bill. Unlike the final Act, which contemplates adoption of a constitution as the principal organizational method, the original bill was centered around the concept of the municipal-type corporate charter. The remainder of Title I established procedures for adopting a charter and enumerated the powers and duties of chartered tribes and of the Secretary of Interior and the Commissioner of Indian Affairs.

[hereinafter S. 2755]. The bill was introduced into the House by Representative Howard on Feb. 12, 1934, 78 CONG. REc. 2437 (1934), and into the Senate by Senator Wheeler one day later, 78 CONG. REc. 2440 (1934). The authorship of the bill is unclear, although the bill was apparently the product of a joint effort by Commissioner of Indian Affairs John Collier and Assistant Solicitor of the Department of Interior Felix S. Cohen.

47. Id.
49. Id., tit. I, § 3. Also specifically required was a provision guaranteeing "the civil liberties of minorities and individuals within the community, including the liberty of conscience, worship, speech, press, assembly, and association." Id. This provision was dropped from the final version. A forcible application of these guarantees on the tribes did not appear again in federal legislation until 1968. Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201-03, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-03 (1970)). See note 159 infra.
Title IV established a federal court of Indian affairs. This court would have taken over original jurisdiction from the district courts in certain matters such as crimes against the United States committed on a reservation and commercial disputes between a tribe and outsiders. Furthermore, the court would have appellate jurisdiction over the tribal courts in those cases in which it would have original jurisdiction. All mention of these special courts was eliminated from the final Act, primarily because the committee members and Indians disagreed, with each other and among themselves, whether they would be a boon or a hindrance to tribal sovereignty.

After the Wheeler-Howard Bill was introduced in February of 1934, extensive hearings were held in both houses of Congress. As these hearings progressed, it became apparent that disagreement over the effects of the bill was deep. Various suggestions for amendment were made before the Senate Committee, but by mid-May progress had nearly stopped. Fearful that the proposed legislation would not be passed, the proponents took drastic action. The bill was quickly rewritten and all its controversial provisions were discarded. In its new form, the bill was barely recognizable. This new version, as amended, became the IRA. The major objectives and philosophy behind the legislation, however, remained unchanged.

51. Id., tit. IV, §§ 3-4.
52. Id., tit. IV, § 5.
53. Titles II and III were less immediately related to questions of tribal sovereignty. Title II concerned “Special Education for Indians.” The Commissioner was directed to train Indians for jobs through the use of existing or new facilities. An important innovation was the specifically declared policy of promoting the study of Indian culture in Indian schools.

Title III dealt with Indian lands. Most of its provisions were carried over in substance into the IRA. One particularly interesting provision of this Title, however, did not find its way into the final Act. Section 14 would have allowed “classification” of reservation land into units according to economic suitability. It was in effect a zoning enabling provision.

54. Hearings on S. 2735 Before the Senate Comm. on Indian Affairs, 73d Cong., 2d Sess. (1934) [hereinafter 1934 Senate Hearings]; 1934 House Hearings, supra note 29.
55. As Senator Wheeler put it, “The bill as it originally came from the Department had many objectionable features, which were eliminated from it. Many of the Indians throughout the country were opposed to the original bill, and the committee was opposed to it, and amended it . . . as it is now framed.” 78 Cong. Rec. 11124 (1934). The Senate Committee, on May 17, had the new version of the bill before it; and the new bill, renumbered as S. 3645, was introduced Into the Senate on May 18. 78 Cong. Rec. 9071 (1934).
57. Debate in the Congress did not begin until after the introduction of the new bill, S. 3645. The Senate Committee reported out S. 3645 four days after its reintroduction, 78 Cong. Rec. 9221 (1934), and floor debate was taken up shortly thereafter. On June 12, the Senate passed the bill. Id. at 11159. The House began debate on June 15. Id. at 11724-44. By suspension of the rules, the original House bill, H.R. 7902, was laid on the table, and S. 3645 was passed in lieu of H.R. 7902 on the same day, with some variations. Id. A conference committee was formed immediately, and it submitted a report on June 16. Id. at 12981-94. The agreed-upon final version was that
B. The Act's Objectives: An Analytical Look Behind the Scenes

The thrust of the IRA can be gathered from its operative provisions. Every section in some way affects tribal self-government, although obviously not all are equally relevant to this discussion.

Section 1 of the IRA ended the policy of allotment: "No land of any Indian reservation . . . shall be allotted in severalty to any Indian." This provision, while not going directly to self-government, was a key factor in making it possible; it alone assures the Act's historical significance.

Section 4 related to alienation. In general, it prohibited any transfer of Indian land or shares in the assets of tribal corporations otherwise than to the tribe, except that the Secretary could authorize voluntary exchanges of such lands or interests of equal value when it would be "expedient and beneficial for or compatible with the proper consolidation of Indian lands." This provision has had the desirable effect of further strengthening the tribal land base and tribal control over it.

Section 10 set up a revolving fund from which the Secretary of Interior could make loans to chartered corporations for purposes of economic development. This reversed an earlier policy by which loans were made to individual Indians and under which there had been problems in repayment. Under the IRA, loans are made only to the tribes, with individual loans being arranged between the tribe and the individual. Also, section 11 appropriated a small amount of funds to be used for loans to Indians for tuition payment and other expenses in "recognized vocational and trade schools" and in high schools and colleges.

Section 18 provided that the Act would not apply to any reservation wherein a majority of the adult Indians voted against its application at a special election to be held within one year after the Act's which became the IRA. Both houses of Congress approved it on June 16. It was presented to the President on June 18, and was signed on that date.

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58. For a summary of the provisions of the entire Act, see F. COHEN, supra note 2, at 84-85.
63. See 25 U.S.C. § 470 (1970). Tribes borrowing under this provision have maintained a default rate of less than 1%. See Erosion of Rights, supra note 62, at 369.
approval. This section marked a significant change in approach to Indian legislation. Formerly, legislation had been either special, applying by its terms to only one tribe or group of tribes, or general, applying to all Indians without consideration of tribal differences. Through section 18, the IRA became a type of enabling act, giving each tribe the opportunity to determine for itself whether it wanted to come under the Act. There was, however, a major flaw in the approach: a tribe could hold the election only once. If it voted against application, it did not have the option of later reconsideration.

The essence of the IRA lay in those provisions relating directly to tribal organization, viz., sections 16 and 17. The former provided:

Anyone Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws . . . . [Procedure is then established for ratification by members and approval by the Secretary of Interior].

In addition to all powers vested in any tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments . . . .

Section 17 first provided for issuance of a charter of incorporation to a tribe and established procedures for petition and ratification. It continued:

Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate . . .


68. It might still be possible to organize outside the IRA, but IRA funds would not then be available.

69. 25 U.S.C. § 476 (1970). The reasons for the rather unusual juxtaposition of the terms “constitution” and “by-laws” are obscure. All tribes that adopted constitutions pursuant to the IRA also appear to have adopted by-laws. These by-laws may be unnecessary, since, for the most part, they contain governmental provisions that easily could have been written into the constitutions. See, e.g., By-Laws of the Stockbridge Munsee Community of Wisconsin, in CHARTERS, CONSTITUTIONS AND BY-LAWS OF INDIAN TRIBES OF NORTH AMERICA, pt. II, at 112-13 (G. Fay ed. 1967) [hereinafter G. Fay].
business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.\textsuperscript{70}

The purpose of adopting a charter is different than that of adopting a constitution, the charter being oriented more toward business than toward governmental organization.\textsuperscript{71}

Perhaps the prime objective of the IRA, which was crucial to any effective establishment of self-government, was elimination of the 'absolutist' executive discretion previously exercised by the Interior Department and the Office of Indian Affairs. During the hearings, Commissioner of Indian Affairs John Collier presented to the House Committee examples which revealed the vastness of this discretionary power.\textsuperscript{72} Not only had administrative power grown beyond control, but its exercise and the effects of its exercise also changed from year to year, depending on the attitude or whim of a given commissioner. Further, this discretionary power was also exercised by local agency superintendents, a situation that led Senator Wheeler to refer to the local agent as 'a czar.'\textsuperscript{73} So all-encompassing was this power that "the Department [had] absolute discretionary powers over all organized expressions of the Indians . . . [T]ribal councils exist[ed] by [the Department's] sufferance and [had] no authority except as . . . granted by the Department."\textsuperscript{74} Consequently, the IRA sought to eliminate this boundless discretion or at least place a damper on its exercise. "This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs . . . ."\textsuperscript{75}

It was not entirely clear, however, precisely what changes were to be made. Commissioner Collier was the moving force behind the new administrative approach. Of course, as Commissioner, he already possessed broad powers to move the Indian Office in the desired direction. Apparently, however, he was one of that rare breed of administrators who seek actively to undermine their own powers through legislation. To be sure, the Office would not become powerless under the Act. Subsequent developments have shown that it can and will


\textsuperscript{71} Typical charters include provisions on borrowing money, making contracts, and handling funds. \textit{See}, e.g., Corporate Charter of the Lower Brule Tribe of South Dakota, § 5, in G. Fay, supra note 69, pt. I, at 36-37; Corporate Charter of the Lac Du Flambeau Band of Lake Superior Chippewa Indians of the Lac Du Flambeau Reservation, Wisconsin, in G. Fay, supra, pt. II, at 24-25.

\textsuperscript{72} 1934 House Hearings, supra note 29, at 47-48.

\textsuperscript{73} 78 Cong. Rec. 11125 (1934).

\textsuperscript{74} 1934 House Hearings, supra note 29, at 52 (memorandum of Commr. Collier).

\textsuperscript{75} 78 Cong. Rec. 11125 (1934) (remarks of Sen. Wheeler).
exercise much power, often to the detriment of its constituency. 76
And the Commissioner himself, in a memorandum to the House Committee, said, “The bill does not bring to an end, or imply or contemplate, a cessation of Federal guardianship . . . . On the contrary, it makes permanent the guardianship services, and reasserts them . . . .”77 He sharply distinguished between these “guardianship services,” which he sought to retain, and administrative absolutism. Commissioner Collier’s goal was to move toward the elimination of the Office of Indian Affairs in its present capacity and he hoped that it would “ultimately exist as a purely advisory and special service body [as is] the Department of Agriculture [vis-à-vis] American farmers,”78 a goal as yet unrealized.

Throughout the hearings there were repeated statements evidencing the desire to trim administrative power. Those concerned with Indian affairs well recognized the futility of attempts at tribal self-government as long as this power remained unchecked. Such “unlimited and largely unreviewable exercise of administrative discretion . . . . [had] been one of the chief sources of complaint”79 by Indians. The Commissioner attempted to assure those concerned that it was “the chief object of the bill to terminate such bureaucratic authority by transferring the administration of the Indian Service to the Indian communities themselves.”80 But such assurances were not enough to assuage the fears of those opposed to excessive bureaucratic control. The problem was that the original bill on its face retained broad governmental powers to review and even to veto tribal actions.81 An attorney who belonged to the Omaha Tribe of Nebraska, testifying against the original bill, brought this problem into sharp focus.82 He expressed concern not only about past bureaucratic authority but also about the proposed continuance of that authority. As justification for his fears, he cited a case holding that there was no judicial review of departmental exercise of discretionary powers, generally on the theory that the decisions of the Secretary of Interior were made final and conclusive by various federal statutes.83 But the real prob-

76. See generally Erosion of Rights, supra note 62.
77. 1934 House Hearings, supra note 29, at 20.
78. Id. at 22.
79. Id. (memorandum of Commr. Collier).
80. Id.
82. 1934 House Hearings, supra note 29, at 152 (statement of Thomas Sloan).
83. Id., citing Red Hawk v. Wilber, 39 F.2d 293 (D.C. Cir. 1930) (decision of Secretary regarding distribution of allotted lands of Indian dying before issuance of patent held not reviewable by court). The doctrine remains alive in Indian law. See, e.g., Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967) (discretionary action of Secretary approving amendments to tribal constitution held not reviewable even under the Administrative Procedure Act).
lem, as he saw it, was not high level exercise of these powers. Rather, 
"[t]he trouble with the actual administration of affairs is that the Secret ary himself does not exercise [these] authorities; they are exercised by superintendents who are not in sympathy with the Indian. . . ." The result was that the local agents, by exercising these statutory authorities, had obtained nearly absolute control over all aspects of Indian life. This sad fact, combined with general unavailability of judicial review, produced much of the existing agony. If the Act could change this, it would accomplish much.85

Prior to the IRA, formulation of policy respecting Indian affairs generally was made without consultation of the tribes concerned. The IRA sought to alter this approach so that "in the future the Indians would be consulted and their views followed, if feasible, in the formulation of new policy." The importance of this new approach is difficult to overemphasize. "Even when the [Indians are not properly consulted] . . . the very acceptance of the philosophy of consent and conference is a restraint on arbitrary administrative action. An administrator who is aware that his thinking will be subjected to the careful scrutiny of the Indians and their friends will be inclined to review [new programs] most carefully." Until foundering on the rocks of "termination" in the 1950's, this new approach proved its over-all worth. The IRA did not, however, accomplish all that was promised toward granting autonomy to the tribes. Even under the final Act, the Secretary was empowered to review many actions of the tribal governments, and still retains close control over tribal government. The rationale for this federal control was that at the time of the adoption of tribal constitutions and charters under

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84. 1934 House Hearings, supra note 29, at 152.
85. An interesting suggestion was forwarded by a representative of the Mission Indians of Southern California: "We believe that if a direct, simple method of recalling or removing or transferring the superintendent were present, most all of the ills to which the Indians are subjected would be removed." 1934 House Hearings, supra note 29, at 261. Discussion surrounding this presentation revealed that local agents or superintendents could be continued in office almost indefinitely by the commissioner, apparently on the theory that such tenure was necessary to their job security. The tribes had no right to remove the agent; they could do no more than request transfer.
87. Id. at 491-92. Commissioner Collier, who, as usual, had anticipated the new approach, held nearly a dozen conferences throughout the country in early 1934 to propose and explain the bill to Indians and to hear their suggestions and criticisms. See F. COHEN, supra note 2, at 84.
88. See note 159 infra.
89. See BROPHY COMMISSION, supra note 18, at 22; M. PRICE, supra note 86, at 493.
the IRA, most Indians had had little experience in managing their own affairs. In large part, of course, this was true of the generation of Indian leaders in the 1930's primarily because of the application of administrative authority in harsh form during the preceding years.

The sponsors and supporters of the IRA saw in it a major change in the pattern of Indian governance. It would be incorrect, however, to assume that constitutional self-government was a new phenomenon in Indian affairs in an historical or legal sense. A survey of the Indian legal experience suggests that the IRA was really resurrecting and revitalizing older forms and concepts.

C. The Prior Indian Legal Experience and the Effect of the IRA

The origins of the concept of tribal autonomy and of the inherent right to self-government have previously been discussed. Case law has established that in the absence of congressional action this right includes not only the power to adopt and operate under a form of government of the Indians' choice, but also the power to do such things as regulate domestic relations of tribal members, levy taxes, regulate property within tribal jurisdiction, and administer justice. If all of these powers already existed, why then was it necessary to enact legislation "granting" to the tribes the power to organize for purposes of self-government and to exercise these individual powers? This inquiry becomes even more pertinent when one considers the history of tribal political organization.

The first federal constitution on the American continent was probably the Great Binding Law, or Ne Gayaneshagowa, of the Iroquois League, developed during the fifteenth century. This constitution established a government subject to public opinion. One purpose of this loose confederacy was self-protection. The war-making power was exercised only on approval of the governing council.

In accordance with the concept of federalism, this council had no

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92. BOPHY COMMISSION, supra note 18, at 35.
93. See text accompanying notes 3-9 supra.
96. See Burt v. Wright, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906).
98. See Ex parte Crow Dog, 109 U.S. 556 (1883).
99. The Iroquois League was also known as the Five Nations, and consisted originally of the Seneca, Cayuga, Onondaga, Oneida, and Mohawk tribes. The League became the Six Nations with the admission of the Tuscarora in 1724. PAKER ON THE IROQUOIS (W. Fenton ed. 1968); C. COLDEN, THE HISTORY OF THE FIVE NATIONS (1858 ed.).
100. C. COLDEN, supra note 99, at xx.
101. Id.
power to interfere with internal affairs of the various member tribes. The highly developed confederacy of the Iroquois foreshadowed in many respects the federal system in the United States.

Probably the best known early Indian constitutions were those of the so-called Five Civilized Tribes, especially that of the Cherokee Nation, first adopted in 1827. The Cherokee constitution was reduced to writing as early as 1839. So amazing was this document that one court was prompted to say of it, more than a half century later:

[F]or more than half a century it has met the requirements of a race steadily advancing in prosperity and education and enlightenment so well that it has needed, so far as they are concerned, no material alteration or amendment, and deserves to be classed among the few great works of intelligent statesmanship which outlive their own times ... . And it is not the least of [these] successes ... that the judiciary of another nation are able, with entire confidence in the clearness and wisdom of its provisions, to administer it ... .

Although the Cherokee constitution was perhaps the most outstanding example, there were many others, less well known. The writing of Indian constitutions under the IRA is therefore no new thing in the legal history of this continent ... .

It is, of course, not essential that a tribe or any group of people have a written constitution before they can govern themselves. The right to self-government exists as well in tribes whose organizational structure may have been based on ancient custom or tradition. Certainly all the tribes were not politically developed to the same degree, and therefore some were less able than others to put into practice their inherent governmental powers. Nonetheless, these powers existed in all the tribes.

Indian tribes seem also to have been regarded as corporate bodies for some purposes prior to enactment of the IRA. In at least one instance there had been specific incorporation by legislative act.

102. The Five Tribes were the Cherokee, Chickasaw, Choctaw, Creek, and Seminole nations. See A. Josephy, supra note 9, at 107.


106. Cohen lists sixty-five tribes for which written constitutions or other organic documents were recorded in the Interior Department prior to 1984. F. Cohen, supra note 2, at 129 n.59.

107. F. Cohen, supra note 2, at 129.

108. Leyes del Territorio de Nuevo Mexico 1851, at 418-19 (incorporation of certain Pueblos).
Further, if the term "corporation" is used in the broader sense of designating an identifiable group of people to whom a legal personality is affixed, then it becomes clear that tribes have often been assigned a corporate status. For example, there were federal statutes authorizing suits by injured persons against tribes whose members had committed various depredations. Under these statutes liability was tribal only; no liability was imposed on individual members. The distinction between the tribe and its members had also been emphasized in cases involving property rights and other common-law legal rights.

The question of tribal capacity to sue and be sued, in the absence of statutory authority, also appeared occasionally. Where a tribe was recognized as a distinct political community or even as a political subdivision, it was immune from suit unless it had consented thereto, following the general rule of sovereign immunity. Moreover, when the tribe was immune, it was held that tribal officers could not be sued on tribal obligations.

Whether a tribe could bring suit without statutory authorization was a more difficult question, although probably answered in the affirmative. Cases in which tribes were parties to the suit have been entertained by the courts, apparently without any question of standing or capacity being raised. In any case, the objectives of such a suit could have been obtained through a representative suit brought by individual tribal members.

Thus, the powers and capacities "granted" to Indian tribes by the IRA had, in large part, previously existed. This fact has been recognized by those who have closely examined the Act. Commentators have said, for example, that "the constitutions [adopted pursuant to the IRA] add to, but do not detract, from, the powers of an Indian tribe..." But precisely what was added? The answer is


110. See Gritts v. Fisher, 224 U.S. 640 (1912) (individual Cherokees had no rights in land vested in tribe); Fleming v. McCurtain, 215 U.S. 56 (1909) (grant of land to Cherokees under treaty was to tribe as such, not to the then members). See generally F. Cohen, supra note 2, at 183-94, 287-347.


112. Thebo v. Choctaw Tribe, 66 F. 372 (8th Cir. 1895) (suit not maintainable against tribe without clear congressional authorization). See also United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940) (tribe also immune from cross-claim without congressional authorization).

113. Adams v. Murphy, 165 F. 304 (8th Cir. 1908).


115. See, e.g., Fleming v. McCurtain, 215 U.S. 56, 57 (1909), a suit in equity by and on behalf of some 13,000 "persons of Choctaw or Chickasaw Indian blood and descent." M. Price, supra note 86, at 492.
that the IRA apparently added nothing in terms of specific substantive powers. From this, however, it does not follow that the IRA accomplished nothing. As previously noted, the mere fact that Congress was willing, with the blessing of the Interior Department and the Indian Office, to enact such a statute signified an abrupt change in policy. Because of this policy change the tribes were able, at least temporarily, to coordinate effectively their organizational efforts and to use these powers for their benefit.

Furthermore, the IRA can be said to have had a stabilizing effect on tribal powers. This effect is more significant in light of the erosion of these powers that had taken place during the previous century. The IRA reaffirmed the principles of tribal self-government. Better organizational machinery could now be worked out through proper definition or limitation of tribal powers in the constitutions and charters. Finally, the mere act of organizing to write an organic instrument in the form of a constitution may have been a stimulus for more effective government, especially if the tribes could be assured that their efforts would not be undermined by arbitrary administrative action.

D. Experience Under the IRA

During the two-year period within which tribes could accept or reject the IRA, 258 elections were held. In these elections, 181 tribes (129,750 Indians) accepted the Act and 77 tribes (86,565 Indians, including 45,000 Navajos) rejected it. The IRA also applies to 14 groups of Indians who did not hold elections to exclude themselves. Within 12 years, 161 constitutions and 131 corporate charters had been adopted pursuant to the IRA. The experience of these tribes has been as varied as the tribes themselves. It is difficult to determine whether this experience has on the whole been beneficial. Such a judgment would depend on a great variety of factors, including previous political and organizational experience, available resources, and abilities of tribal leaders. For this reason, it would be unrealistic to pronounce a single judgment on the efficacy of the Act.

117. Id. at 493. This stabilization, alas, could not last. See generally Erosion of Rights, supra note 62; note 159 infra.
118. See note 65 supra.
119. T. Hass, Ten Years Tribal Government Under IRA 3 (U.S. Indian Serv., Tribal Relations Pamphlets 1947) [hereinafter Hass]. This figure excludes tribes in Alaska and Oklahoma, which were brought under the Act automatically.
120. Id.
121. Id. It is not clear why elections were not held since the Act appears to require them. 25 U.S.C. § 478 (1970).
122. Id., Table B, at 21-30. There are also some tribes that have accepted the IRA but operate under constitutions adopted previously, and other tribes not under the IRA which nevertheless operate under constitutions. Id., Tables C & D, at 31-34.
Indeed, the diversity of experience suggests the presence of a minor paradox: the IRA seems to have led directly to both advances and reverses in tribal development.

The constitutions and charters themselves vary considerably, especially with respect to the forms of government adopted, "ranging from ancient and primitive forms in tribes where such forms have been perpetuated, to models based on progressive white communities."123 Likewise, the powers vested in the tribes through these documents "vary in accordance with the circumstances, experience, and resources of the tribe."124 On the other hand, there are provisions which appear in most constitutions in nearly identical terms.125 Most governments established under the IRA, unlike federal and state governments, have no provision for the separation of powers. The governing body is the tribal council, and in many instances it acts in a legislative as well as executive capacity.126 The council members, acting either in their capacity as elected political officials or as directors of the tribal corporation, also manage the common resources of the tribe.127 While it is often assumed that such a unification of powers is undesirable, most tribes have operated well under a unified system.

The law and order codes adopted by the various tribes reveal much about their approach to government. Tribes or other self-governing Indian groups generally have adopted codes, although some instead use regulations promulgated for that purpose by the Secretary of Interior.128 The character of these codes differs profoundly from that of state penal codes. Tribal codes typically delineate forty or fifty offenses,129 whereas state codes, exclusive of local ordinances, often list hundreds or even thousands of offenses.130 The tribal codes generally do not contain the catch-all provisions, such as vagrancy and conspiracy, so common in state codes.131 Punishment under tribal codes has traditionally been much less severe, seldom exceeding imprisonment for six months even for such offenses as

123. F. COHEN, supra note 2, at 130.

124. Id.


126. See, e.g., Revised Constitution and By-laws of the Oneida Tribe of Indians of Wisconsin, art. III, in G. FAY, supra note 69, pt. II, at 84.


130. For example, in the Michigan statutes there are more than 3000 offenses calling for punishment.

131. Federal Courts, supra note 12, at 156.
In fact, except for stating a maximum penalty, tribal penal codes often leave wide discretion in the tribal court to adjust penalties to circumstances of both the offense and the offender. The form of punishment traditionally has not been imprisonment but rather forced labor for the benefit of the victim or the tribe. Finally, the tribal codes are generally available to the members and are widely read and discussed.

Those in most direct contact with the IRA and the tribes operating thereunder give perhaps the best indication of tribal experience. The June 1939 issue of *Indians at Work* was devoted entirely to Indian reorganization, and contained many short pieces by tribal council members and federal field agents. Every article was full of praise for the IRA and encouragement for the future. Failures were attributed to lack of experience with self-government. An example of the kind of promise held out by the IRA can be found in Commissioner Collier's lead editorial, which quoted a letter from an Indian leader:

"Before the fact of Indian organization, of Indian democracy under the Reorganization Act, can be an accomplished one, the Indians must come to the point of identifying themselves with the organic documents which are now theirs. They must come to the point of caring intensely, of speaking out, if necessary of fighting, for what comes to them at first as an inert possession."

Typical was an article by Willie George, Chairman of the Tribal Council of the Shoshone-Bannock tribes of the Fort Hall Reservation:

Since we have organized under this Reorganization Act, the council is doing things for the people. We had organized councils before, but they were different. For one thing, the people are listening to the council as they never did under the old system. And then, the council has certain powers in handling the affairs of the reservation which it never had before ....

Since the Indians took up the new Reorganization Act, the council has taken over a lot of work that the Agent used to do for them.

132. *Id.*. Kidnapping, although a serious crime, has not been added to the list of crimes taken from tribal jurisdiction. See note 17 *supra* and accompanying text.


134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*
Not everyone, however, agreed with this optimistic assessment. In 1945 a bill to repeal the IRA was introduced in Congress. This bill simply provided for the repeal of the IRA and its amendments and the disposition of unexpended funds. No indication was given concerning the fate of existing constitutions and charters. In the brief hearings held on this bill, the Senators' questions and other testimony demonstrated how poorly the IRA was understood. The committee members repeatedly found it necessary to refer questions for clarification to Commissioner of Indian Affairs William A. Brophy and former Assistant Solicitor Felix S. Cohen. These hearings show that Indians on the same reservation had conflicting opinions on the IRA.

In opposition to the Act, Peter Red Elk of the Pine Ridge Sioux, who claimed to represent a majority of the tribe, stated that "[t]here is no more authority in the tribal council because of the IRA . . . . The superintendent is the one who has all the authority. It is a fact that under the [IRA], all authority the Indians previously had has now been taken away." Peter Red Elk charged that the vote taken on application of the IRA was invalid because "[m]embers of the tribe who never voted were fraudulently signed up as though they were in favor of the act." Another complaint was the alleged discriminatory distribution of tribal funds by the superintendent "in favor of the mixed bloods to the exclusion of the older full blood Indians . . . who are asking for a repeal of the IRA."

Moses Two Bulls, a member of the tribal council of the Pine Ridge Sioux, disagreed strongly with Peter Red Elk and testified to the accomplishments resulting from organization under the IRA. He explained, for example, the operation of the tribal cattle business. Capital came initially from IRA loan funds and the leasing of tribal lands. Cattle were purchased, raised, and marketed, with the goal of eventual tribal self-support. Employment of tribal members had grown. "We have tried to make a program which will benefit the whole tribe . . . . Before [the IRA], it was the superintendent and his representatives [who controlled the programs] . . . . Under this

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142. E.g., Hearings on S. 978 Before the Senate Comm. on Indian Affairs, 79th Cong., 2d Sess. 4, 15 (1946) [hereinafter 1946 Hearings].
143. Id. at 7.
144. Id. The Pine Ridge vote was taken on October 27, 1934. Of a voting population of 4075, 2264 voted: 1169 for, 1095 against. A constitution was approved on January 15, 1936; no charter had been ratified. Haas, supra note 119, Table A, at 19, Table B, at 22. Vine Deloria, a Sioux, has said of Sioux politics that "a ten-vote margin . . . is a landslide victory." V. DELORIA, CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 29 (Avon ed. 1969).
145. 1946 Hearings, supra note 142, at 7. Peter Red Elk did not document his charges. His over-all testimony reveals his fear that the Indians would lose their allotted private lands and his desire to keep his, despite the fact that § 8 of the IRA, 25 U.S.C. § 468 (1970), prohibited any such confiscation.
146. 1946 Hearings, supra note 142, at 12-18.
law, the Indians are able to try a program for themselves and make it stick..."

Senator Wheeler asked if Moses Two Bulls was in favor of the IRA. In response to this question and to the earlier testimony of Peter Red Elk and other critics, he stated: "Yes. We are just getting started. It is only 10 years old. How long did it take the United States Government to form a perfect organization? It takes time... A man comes here and says this law is not good, after 10 years. That is too short a time." 148

There are numerous other testimonials to the success of the IRA. 149 It would seem that advances under the Act have outnum­bered shortcomings. In any case, the fact that some tribes may not have benefited from the Act does not justify blanket condemnation. One philosophy underlying the IRA was flexibility and consideration of differences among tribes. This philosophy was to be implemented by allowing the tribes to choose to be under the Act and to vary their governments and economic organizations. It is precisely this flexibil­ity that sets the IRA apart from all previous major Indian legislation and justifies its continuation.

A by-product of the IRA has been better control and management of tribal property. Under the earlier allotment policy the tribal land base was consistently diminished through the parceling of land to individual Indians; consequently, management of land use was difficult. Even after the IRA land management remained a problem on some reservations because of the earlier parceling. 150 However, IRA funds have been used to reacquire much of this previously allotted land. Out of the renewed land base such developments as livestock cooperatives and tribal farming enterprises have arisen. 151

To be sure, the IRA has not worked perfectly. One major short­coming has been the Act's inability to fulfill the promise of shifting to Indians the control of Indian affairs. The reasons for this failure are diverse, although a major factor has been bureaucratic attitude. As one report noted:

The [IRA] illustrates how a law intended to strengthen tribal governments and to give the people responsible business experience through making their own decisions has in fact actually increased federal control over them... [E]very constitution adopted under the statute requires the Secretary of the Interior to review nearly all

147. Id. at 13.
148. Id.
149. See, e.g., J. Collier, ON THE GLEAMING WAY 144-49 (1962) (the remarkable economic development of the Apache Tribes under the IRA); V. Deloria, supra note 144, at 141.
150. Haas, supra note 119, at 8-9. For a discussion of the results of allotment, see text accompanying notes 32-36 supra.
151. Id.
ordinances in various categories, notably those which define and punish offenses. Similarly, every [IRA] charter subjects to such approval almost the entire amount that a tribe can spend or make contracts for.

This refusal to allow Indians to learn by trial and error may have had warrant in the 1930's at the time the first constitutions were adopted, for most tribes then had little knowledge of how to conduct a modern government and transact business in corporate form. Indeed, the corporate charters provided that the controls could be removed as the tribe gained experience, but in most instances the restraints still remain, continuing to be imposed when new charters are adopted.

This policy probably stems from the widespread belief among the [Bureau of Indian Affairs] staff that as "guardian" or "trustee," the Bureau itself must make the vital decisions. . . . [This idea] will continue to hamper tribal self-development until legislation or strong executive direction dispels the doubts of Bureau employees.152

The IRA has encountered less subtle opposition from other quarters. Even in the earliest stages of its history, Indians were not the only persons concerned with the IRA. A small, white propaganda machine existed in Muskogee, Oklahoma, the center of approximately 100,000 Indians of the Five Civilized Tribes. This group had access to the news media, and it issued periodic charges that grossly misrepresented the Act and attributed fabricated statements to Commissioner Collier.153 Through these charges ran the theme that the Act was a product of Moscow being put over on the Indians by the Roosevelt Administration and that it was an "inhumane, unconstitutional, and un-American scheme."154 A story based on "information" supplied by this group appeared in the New York Herald Tribune on April 4, 1934.155 Under the headline "Commissioner of Indian Affairs Urges Tribesmen of Oklahoma To Accept Soviet Type of Rule," the story contained lies, distortions, and prophecies of horror, hardly conducive to acceptance of the IRA. Investigation revealed that this group had a substantial self-interest in defeating the IRA. The allotment policy had reduced Oklahoma Indian landholdings from 15 million acres to 1½ million acres and had destroyed the tribes' ability to be self-supporting.156 Seventy-two thousand members were totally landless. If the law remained unchanged, most of the remaining land would soon shift to white ownership, presumably to some members of this group. The impact of such groups on the tribes' ability to

152. BROPHY COMMISSION, supra note 18, at 34-35.
154. Id. at 179.
155. Reprinted in id. at 180.
156. Id. at 183-84.
function effectively under the IRA, to say the least, has been less than beneficial.

In other respects, tribal governments are not unlike governments everywhere, and suffer from defects in no way unique. Problems include "lack of leadership, lack of interest of the members, administrative incompetence, nepotism, too short terms for elective officials, insecure tenure of employees, factionalism, insufficient funds, inadequate tax resources, and inability to remove the causes of crime and of juvenile delinquency." Not all tribes have been plagued with these problems, of course; but where these problems exist, government is weakened. The IRA could not eradicate the underlying human factors. As stated above, lack of money is a significant problem. While funds are often available for a variety of programs involving education, housing, or health, funds are not so easily obtainable for business credit, jobs, land purchasing, and tribal administration. Finally, congressional actions have also had a profound impact on tribal self-government under the IRA. Chief among these is the "termination" policy of the 1950's, which set as a goal the abolition of tribal government and the Indians' special status and which substantially undermined much of the progress made under the IRA.

157. BROPHY COMMISSION, supra note 18, at 37.

158. The Johnson-O'Malley Act, 25 U.S.C. §§ 452-54 (1970), from which many funds come, authorizes appropriations for "the education, medical attention, agricultural assistance, and social welfare, including relief of distress" of Indians. 25 U.S.C. § 452 (1970). These expenditures are made through a process of contracting between the Secretary of Interior and the states or their political subdivisions, who in turn apply the funds for the purposes indicated. Evidently there is no dollar limit on authorized appropriations.

Section 10 of the IRA, 25 U.S.C. § 470 (1970), authorized a revolving loan fund of 10 million dollars, increased in 1961 to 20 million dollars. These funds go directly to the tribes to be used for economic development, but always subject to the discretion and control of the Secretary. Expenditures under this provision are generally believed to have been too low. See BROPHY COMMISSION, supra note 18, at 22. For the tribal record in repayment of these loans, see note 62 supra.

Two thirds of all Indian enterprises are now financed through private sources. U.S. BUREAU OF INDIAN AFFAIRS, DEPT. OF INTERIOR, AMERICAN INDIANS AND THE FEDERAL GOVERNMENT 16 (1965).

159. The concept of termination was first embodied in H.R. Con. Res. 108, 67 Stat. 312 (1953), which reversed, as a matter of policy, most IRA principles. The policy was partly carried out by Public Law 290, Act of Aug. 15, 1953, ch. 505, 67 Stat. 590, as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1970), which conferred general jurisdiction over civil causes and criminal offenses in "Indian Country" on the states of California, Minnesota, Nebraska, Oregon, and Wisconsin. Tribes within these states no longer exercise governmental functions independent of the state. Other states were granted authority to assume such jurisdiction by affirmative act, although since 1968 tribal consent has been required. See 25 U.S.C. §§ 1321-22 (1970). A series of special acts "terminating" certain tribes followed. See generally Hearings, Joint Commns. on Interior and Insular Affairs, Subcomm. on Indian Affairs, 83d Cong., 2d Sess. (1954) [hereinafter Termination Hearings]; BROPHY COMMISSION, supra note 18, at 179-213; V. DELORIA, supra note 144, at 60-82.

Another action by Congress, which undercut tribal independence, was Title II of
In sum, the most that can be said with certainty about the impact of the IRA is that the experience of tribes exercising self-government under the Act has been mixed. Since the termination years, it is difficult to determine whether there has been a net gain or loss in tribal advancement under the Act. As one writer has stated,

Under the [IRA] during the 1930’s tribes were finally beginning to move . . . .

In the 1950’s and early 1960’s tribes had to spend all of their time defending their lands and treaty rights from the whims of the terminationists. Little was done to develop the reservations because all energies went into saving them from obliteration. Finally in the 1960’s . . . funds began to become available for capital improvements . . . .

In the end it must be concluded that the experience of the tribes under the IRA has been positive. The Act provided a powerful stimulus to tribal governmental organization and in many cases so strengthened that organization as to enable continued development despite fluctuations in administrative policy.

III. WHAT FUTURE ROLE FOR THE IRA?

Such self-governing entities as tribal corporations will very likely play an even more significant role in future tribal development than they have in the past. Yet, the techniques by which future tribal development will occur remain unclear. At the present time, there exists in Indian affairs a fundamental dilemma. On one side, there is the fact that after more than 300 years of subjection to white influence, Indians to a very large degree maintain a cultural identity separate and apart from the American mainstream. Recent movements such as “Red Power” indicate that this identity distinction is likely to continue. Tribes continue to demand greater political, economic, and cultural freedom from governmental control. There is everywhere expressed by Indians a deep-rooted fear that the termination policy of the 1950’s will return. As one Indian group recently stated,
“Indian tribes nearly unanimously wish to retain exclusive jurisdiction vis-à-vis the states, over their own affairs.”

Concurrently, however, Indian groups are making increased demands on the states for services, especially in the areas of education and welfare. It is here the dilemma arises. The states may not continue to tolerate a situation that may require them to perform these services and at the same time forces them to recognize the special status that may free tribes from state taxation and such controls as conservation regulations. It has been suggested that “tension between tribal and Western culture will pose an increasingly difficult challenge to Federal Indian law.” The fundamental challenge of the future is to discover means by which existing laws and forms can be used to anticipate these problems and to plan intelligent solutions. It is submitted that the corporate form of organization, in both political and economic contexts, is a device particularly applicable to the resolution of these problems. First, the majority of tribes are presently incorporated under the IRA. Where such corporate organization exists, it seems to be the logical focal point for developmental efforts. Tribes not currently incorporated should face no insuperable difficulties in organizing since several of these unincorporated tribes are already organized around a tribal constitution. While incorporation under the IRA may not be available for these tribes, they may be able to incorporate under state law if they have not already done so.

Of even greater importance for future advancement is the corporate form’s potential as a developmental tool for nonreservation Indians. Urban Indian groups, of course, cannot incorporate under the IRA. Yet, the corporate form can also be utilized by these groups. The bulk of this discussion has dealt only with organized tribes, which today, for the most part, means reservation Indians.


164. See United States v. Rickert, 188 U.S. 432 (1903); Makah Indian Tribe v. Clallam County, 73 Wash. 2d 677, 440 P.2d 442 (1968).
167. See text accompanying notes 119-20 supra.
168. See note 122 supra and accompanying text.
169. See note 65 supra and accompanying text.
But perhaps half of the Indian population in the United States is neither on reservations nor within any officially recognized group or tribe. Most nonreservation Indians live in large cities, often in ghetto areas, although a few groups remain in small communities on the East Coast. Urban Indians are too often ignored in studies. Problems of cultural identity and economic misfortune are not easily left behind on the reservation. Indeed, there is much evidence to the effect that these problems often become worse upon moving from the reservation to the city. The ideas presented here should be adaptable to nonreservation Indian groups seeking to advance economically and simultaneously to retain their "Indianness."

It would be tempting to try to prescribe some broad economic plan for Indian development using the IRA as a spring board. Such a venture would be a foolhardy, if not an impossible, task. There are more than 500 individual tribes, Native villages, and other recognized Indian communities or units in the United States today, as well as numerous urban and local Indian groups. This number itself suggests the unlikelihood of any one scheme fitting the needs of all these groups and individuals. The problem is further complicated by the profound differences that exist among various Indian cultures and subgroups. For example, reservations range in size from the one-acre Strawberry Valley Rancheria in Yuba County, California, to the 15 million-acre Navajo reservation that extends into three states. The historical experiences among tribes have been even more varied, ranging from the wealth-conscious tribes of the Pacific Northwest.

171. Brophy Commission, supra note 18, Tables 1 & 2, at 215-18. The figures for 1960 show a total of 523,591 Indians. Of these, 344,951 are within or adjacent to "units," i.e., those for whom the Bureau of Indian Affairs provides some direct services. The many qualifications placed on available figures make precise calculations of percentages "on" or "off" reservations impossible. The Census Bureau's definition of "Indian" further compounds the matter. See id. at 215. It is unlikely that an accurate count could ever be made.

172. Id. at 11.

173. For example, the Brophy Commission expressly limits its primary concern to "members of tribes, bands, and communities so recognized by the United States." Id. at 11.


175. The term "Native" here refers to Alaska Natives, i.e., all aboriginal peoples of the Alaska territory.

176. A. Josephy, supra note 9, at 359, lists 284 separate Indian land units and 35 groups of other types of "public domain" allotments. This is exclusive of Alaska Native villages. The Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 11(b)(1), 85 Stat. 697, lists 209 Native villages.

177. A. Josephy, supra note 9, at 369.

to the impoverished bands of the Great Basin;\textsuperscript{179} from the deeply religious and peace-loving Pueblos of the Southwest\textsuperscript{180} to the powerful Iroquois League of the East.\textsuperscript{181}

Furthermore, the needs of tribal groups vary significantly because of differing legal and administrative experience. The legislative acts discussed above are mainly of the type applying broadly to all Indians. These, however, represent only a small fraction of Indian legal history. There are literally thousands of statutes, treaties, opinions of the Solicitor or Attorney General, and judicial decisions relating to Indians.\textsuperscript{182} The overwhelming majority of these apply to only one tribe or only one group of tribes.\textsuperscript{183} Thus, even aside from the vast cultural divergence, there are wide variances in the levels from which future economic and legal development must begin.

No single model can be proposed for Indian development. Instead the developmental schemes must be related to specific groups. Ideally, the architects of these schemes will come from within the tribes or groups themselves. Only in this manner can the concepts of self-government and self-determination envisioned by the IRA become a reality. Consequently, this discussion will be limited to consideration of a legal form on which to build. The specific examples cited are simply meant to illustrate possible extensions of these legal ideas.

The corporate form of organization lends itself to use in tribal development, since it is "tribal" in its very nature. Incorporation creates a recognizable legal entity around which to focus community goals, be they making money or providing services to members. Moreover, these goals are more easily effected by the use of the corporate form. Prior discussion has emphasized the unique flexibility of the IRA.\textsuperscript{184} This feature should be capitalized upon, and tribes originally voting against application of the Act should be permitted to reconsider. Moreover, forceful removal of much administrative discretionary power may be necessary to allow proper development.\textsuperscript{185}

\textsuperscript{179} A. JosEPHY, supra note 9, at 123-29.
\textsuperscript{180} Id. at 146-80. See also C. KluckHOHN & D. L. EIGHTON, THE NAHAO (Natural History Library rev. ed. 1962); F. WATERS, BOOK OF THE HOPI (Ballantine Walden ed. 1969).
\textsuperscript{181} See authorities cited in note 99 supra.
\textsuperscript{182} In 1940, "more than 4,000" had been counted. Ickes (Secretary of Interior in the Roosevelt Administration), Foreword to F. COHEN, supra note 2, at xix. Dozens and even hundreds more occur each year, a fact revealed simply by scanning through various issues of the American Indian Law Newsletter.
\textsuperscript{183} See, e.g., authorities cited in note 66 supra.
\textsuperscript{184} See text accompanying notes 69-75 supra; text preceding note 150 supra.
\textsuperscript{185} See notes 147-48 supra and accompanying text. More than one Indian leader has called for a "leave us alone" law. E.g., V. DELORIA, supra note 144, at 33-34. A recent enactment in this direction was § 601 of the 1968 Civil Rights Act, 25 U.S.C. § 1331 (1970), which changed the law concerning tribal employment of legal counsel. Although
Suggestions for greater utilization of the corporate form by Indian tribes have appeared before. Continuation of tribal corporations, now organized under state law, was recommended as the best method for disposing of the property of terminated tribes. More recently, the use of corporations has been a key factor in the Alaska Native Claims Settlement Act. The use of the corporate form in this Act illustrates its current applicability to Indian problems. Few of the Act's objectives could have been accomplished without the use of corporations. Two levels of corporate entities are provided for. Section 7 of this Act divides the State of Alaska into twelve geographic regions based on common heritage and coinciding with certain existing Native associations. Each of these is to establish a Regional Corporation to conduct business for profit, and details of the corporate structure are set out. Section 8 requires that the Native villages receiving land under the Act incorporate Village Corporations. Both the Regional and the Village Corporations are to be organized under state law. Elaborate provisions are also set forth to govern distribution of funds and land.

The significance of the corporate concept in this Act is reflected by section 19, which revokes the existence of all reservations in Alaska. Thus there is a transformation from an old to a new way of thinking. Chartered corporate business entities rather than the old-style reservations are to assume the control of community life through the direct participation of community members.

Other successful tribal projects include such widely varied efforts as the Gila River Reservation Model Cities Program, industrial parks in various Arizona reservations, "buy Indian" federal contracting, road building and construction in southwestern reservations, the manufacture of fishing boats on the Colorado River Reservation, the Mescalero Apache ski resort, and experiments in vegetable growing at Fort Yuma. Many of these successful projects presumably stem in part from the tribes' existence as corporate entities chartered under the IRA.

One example deserves special mention as a model of harmonious co-existence between a modern economic enterprise and the traditional cultural and value systems. On the Yankton Sioux Reservation government approval for such employment is still required, it is now deemed to have been given unless specifically denied within ninety days. This enactment changes the original position of § 16 of the IRA, 25 U.S.C. § 476 (1970).

186. Termination Hearings, supra note 159, at 242.
188. The Act itself, at § 11(b)(1), lists 206 separate villages subject to the Act, with provision for additions.
in South Dakota, there is a factory that manufactures electronic
components.  

191 The work routine of this factory is highly unusual. Each employee sets his own work schedule. He works as long as he wants, when he wants. At the end of the month he is paid for the amount of work that he has done. There are no white man's efficiency experts. Despite its uniqueness, the enterprise has worked. Not only have the tribal members retained their cultural identity in the presence of this modern facility, but the factory's work has been highly respected by midwestern electronics firms subcontracting with it. Recently there has even been an expansion to enable the Santee Sioux across the river in Nebraska to participate. The dilemma posed by the desire to retain cultural identity and at the same time to enjoy economic advancement apparently has been resolved here through use of the corporate form.

Other techniques using corporate organization are possible. An experiment now being tested on the Salt River Reservation in Southern Arizona involves contracting between the state or local governments of Arizona and a tribe.  

192 The tribe provides services for its members, using funds from the Office of Economic Opportunity and other sources. It also contracts with the State of Arizona for such services as water and sewerage. This experiment appears to have been working well. It should be noted that the tribe involved is the Papago, one to which a long history of special legal rules apply. Nonetheless, it would seem that other tribes incorporated under the IRA or state law are ideal for this kind of experimentation.

Another striking example of the use of modern business techniques in tribal enterprise is that of the Jicarilla Apache tribe in New Mexico. The once powerful Apache entered the twentieth century as a lethargic, defeated people. Yet "in the past generation the Apaches have transformed themselves [into] a modern cooperative commonwealth, which has prospered by dealing in oil, gas and timber leases, sheep and cattle."  

194 This transformation has come about through use of their corporate status under the IRA and application of modern business techniques.

The development began with a small loan of $85,000 from the federal government. In part, this money was used to acquire land. Individuals also reconveyed landholdings to the tribe, further

191. A more complete account appears in S. Stein, supra note 161, 124-26.
193. The IRA itself reflects some of the Papagos' special status. In the Act and amendments there are special provisions affecting only the Papago Tribe. See 3 of the IRA, as amended, 25 U.S.C. §§ 463 to 463c (1970). See also 1974 Senate Hearings, supra note 54, at 33-51.
195. Id. at 41.
strengthening the land base. From this, holdings in sheep and cattle were expanded, leading to the marketing of beef and wool. Oil and gas deposits were discovered and exploited, along with timber, through leasing arrangements. Tourism was promoted through the selling of hunting and fishing licenses. The tribe even financed a motion picture.196

Tribal wealth has increased markedly. Between 8 million dollars and 12 million dollars has been invested by the tribal corporation and is producing income.197 Another 8 million dollars is due from the federal government in settlement of old land claims. The tribe operates a 1 million dollar scholarship fund. In 1971, approximately $100,000 was received through hunting and fishing alone. The tribal land itself, of course, is not valued, but it produces revenue through the previously mentioned leases. The tribe also operates a small factory, the Jicarilla Apache Tribe Industries.

The guiding principle throughout this development is modern business techniques, adapted to the tribal form. The tribal council performs the major planning functions, assisted in part by an Albuquerque bank. It should be noted that despite the tribal development, the individual members are by no means rich. Individual family income averages $4,000.198 This is supplemented somewhat by freedom from such things as state property taxes and by availability of such services as medical and dental care and some subsidized housing. But the prospects for the future are bright. The relative desolation a generation earlier emphasizes the tribe's economic growth and convincingly demonstrates the potential of tribal development based on modern business techniques.199

One writer has suggested that corporations may be a vehicle by which urban Indian groups may gain economic development and retain cultural identity.200 Some urban Indian centers are already incorporated as nonprofit organizations.201 The next step is to combine the resources of tribal corporations under the IRA and the urban centers, forming corporations "for developmental purposes in which both reservation and non-reservation people participate . . . to ex-

196. Id. at 19.
197. Id. at 46.
198. Id.
199. Id.
200. V. DELORIA, supra note 144, at 258-59.
plore ideas of development outside either reservation boundaries or urban centers."

It is suggested that

[where ordinary white corporations serve to produce income from capital invested, corporations ... [under] the new Indian scheme ... will serve to coordinate community life. Earnings will be used to provide services ordinarily received from various governmental agencies. As economic independence becomes greater, independence in other areas of life will follow. Indians can thereby achieve a prosperity not seen since the landing of the white man.]

IV. CONCLUSION

The parallel between tribalism and incorporation has been suggested. It is not unreasonable to suggest therefore that the Indians' long history of tribalism as a way of life makes corporate organization a particularly appropriate means of modern Indian development. The experiences discussed above show that the corporate form is indeed amenable to Indian ways of business operation. It is also very possible that continued use of corporate organization will facilitate a greater cross-cultural understanding in our society. Tribes and other Indian groups can thus absorb the corporation, whether chartered under the IRA or state law, as a useful tool for accomplishment of the desired ends.

We shall learn all these devices the White Man has.
We shall handle his tools for ourselves.
We shall master his machinery, his inventions,
    his skills, his medicine,
    his planning;
But we'll retain our beauty
And still be Indian.

202. V. Deloria, supra note 144, at 229.
203. Id.
204. See text preceding note 184 supra.
205. "In the corporate structure, formal and informal, Indian tribalism has its greatest parallels and it is through this means that Indians believe that modern society and Indian tribes will finally reach a cultural truce." V. Deloria, supra note 144, at 224-25.
206. Poem by David Martin Nez, in S. Steiner, supra note 161, at 131.