A Checkerboard of Interests: Native American Tribes and the Politics of Land Tenure Reform

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Abstract: People have long disputed over the financial system constructed for indigenous communities and their resulting economic rights within U.S. native reservations. Indigenous tribes themselves remain split concerning the state of their tribal economies. Although scholars have extensively researched the historical component regarding the construction of the financial system we see in place today, very few have focused on the politics and rationale behind certain policy positions of relevant actors in modern-day society. In an attempt to fill this gap, this research paper will focus on answering two key questions: How has public policy shaped the economic and property rights of indigenous nations in the U.S.? And what are the different interests driving the various policy stances of relevant political actors in this issue, including the federal government and indigenous tribes? This will explore more of the driving interests influencing political actors and the dynamic between them in regard to U.S. policy. Looking at data gathered from interest groups, tribal newspapers, public policies, congressional reports, and more, I outline the various stances on proposed solutions to the economic hardship among native communities through the lens of path dependence theory of politics. This research aims to shine a light on the nuances embedded in the contemporary debate of economic self-determination within the Native American reservation system and offer a new framework of understanding through which to look at this issue.

Introduction

The moment European colonizers stepped foot onto the Americas marked the beginning of a long and turbulent history between indigenous tribes and what would later become the U.S. federal government. This is a history characterized by genocide, oppression, and subjugation, as the state and federal governments pursued policies that decimated indigenous populations and their cultures. Although some may argue that the horrific acts of colonization took place hundreds of years ago and bear no relevance to today, it is important to acknowledge this is not the case. For many indigenous communities, history is not so fixed, and the past is not so distant. The actions of the U.S. government still reverberate throughout modern society to this day, both in concrete and abstract ways. Not only do indigenous communities in the United States face decades of compounded intergenerational trauma, but also a system of U.S. policies and court decisions that continue to impede upon their tribal sovereignty and perpetuate poverty and oppression within their communities.

This is particularly evident on native reservations, which suffer extreme amounts of poverty, homelessness, and unemployment compared to the rest of the United States. According to a 2017 U.S. Census Fact for Features sheet, the median household income for Native Americans in 2016 was $39,719 compared to the national average of $57,617. The 2018 U.S. Census data found that Native Americans had the highest poverty rate of the racial/ethnic groups in the country at 25.4%. In 2019, the U.S. Bureau of Labor Statistics published a report that stated Native Americans suffered an unemployment rate of 6.1%, almost
double the national rate of 3.7%. It is clear from these demographic statistics that there is a lack of wealth and economic opportunity within indigenous communities. Why is it that indigenous reservations make up most of the impoverished neighborhoods in the United States? Why do the people that have lived in North America the longest suffer the worst poverty rate within the country? It is in this issue that the reverberations of past historical actions become evident; the current land tenure and financial systems constructed for indigenous communities in the United States have left them economically disadvantaged. For the indigenous tribes who flourished on this land hundreds of years before colonizers came to the Americas and yet suffer the worst poverty rates today, we see how this “historical anomaly has resulted in a situation where... the past devours the future” (Colbert et al. 2016).

This paper will look at why the modern land tenure and financial system for indigenous communities in the United States remains very contested among different groups, and how it contributes to the current poverty rate of native reservations. Drawing on data from interest groups, tribal newspapers, public policies, congressional reports, and more, this paper will focus on answering two key questions: How has public policy shaped the economic and property rights of indigenous nations in the U.S.? And what are the different interests driving the various policy stances of relevant political actors in this issue, including the federal government and indigenous tribes? This is not a new debate since land ownership has been at “the center of virtually every significant interaction between Native and non-natives since the earliest days of European contact with the indigenous peoples of North America” (Mosteller, 2016). Yet, even though this issue can date back hundreds of years, it remains just as important, if not more, to look at the modern politics and interests driving the debates for potential solutions. By looking at the contemporary stances of the relevant political actors, we can build a new conceptual framework through which to understand these issues that highlights the nuances often overlooked within this debate of economic self-determination for indigenous tribes residing on reservations.

A Historical Overview of Native American Policy in the United States

The cornerstone of what is understood as modern “Indian law” are the rulings of the Marshall Trilogy in the early 1800s; these court rulings established the foundation on which the federal-tribal relationship will stand to the day (Fitzpatrick 2021; Khan et al. 2006). The Marshall Trilogy includes Johnson v. McIntosh (1823), the Cherokee Nation v. Georgia (1831), and Worcester v. Georgia (1832). These Supreme Court cases instituted three basic principles: establishment of federal primacy in Indian affairs, exclusion of state law from Indian country, and recognition of tribal governance authority (Fitzpatrick 2021; Fletcher 2014). These principles made void any sale or deal tribes made with other individuals or foreign states, declared tribes as “domestic dependent nations” (Fitzpatrick 2021), and created the framework in which Native Americans were “conceptualized as participating in a ward-guard relationship with the national government” (Khan et al. 2006). Even though these cases stated that states could not impose laws in Native American counties, they did nothing to stop Congress from passing one of the most notorious of indigenous federal policies: the Indian Removal Act of 1830, in which the forced relocation of tribes became most known as the Trail of Tears. Not only were...
thousands of Native American communities forcibly removed from their ancestral lands, but this deprived tribes of “untold billions of dollars worth of capital producing assets, and consigned them to areas of the United States that were considered economically undesirable by the U.S. government and American settlers” (Colbert et al. 2016). Under modern-day international law, the resulting violence and mass casualties constitute genocide against the indigenous peoples in North America by the U.S. federal government (Frymer 2015). However, this act was only one part of a broader, systemic effort by the U.S. government to colonize this community.

Another significant policy enacted by the U.S. Congress in regard to indigenous communities is the Dawes General Allotment Act of 1887, which split up Native American reservations into private land parcels and opened them up to white settlers (Frymer 2015). This immediately resulted in “the loss of two-thirds of Indian land” (Frymer 2015). Evidently, many federal policies enacted by Congress contradict and disregard the idea of tribal government sovereignty originally promised to indigenous communities, significantly impacting tribes’ social and economic standing to this day (Khan et al. 2006). Decades later, in an attempt to halt the destructive patterns of the Dawes Act and restore Native American self-government, the Indian Reorganization Act was passed in 1934 (d’Errico 1999; Lofthouse 2019). However, this act still disrupted the life of indigenous tribes in an attempt to “reorganize” them by completely overthrowing their traditional governing systems (d’Errico 1999). The Dawes Act and the IRA became influential in creating the modern federal trusteeship system that continues today (Lofthouse 2019). This brief insight into the history between the U.S. government and native tribes demonstrate how the implemented policies and court decisions “essentially destroyed the original paradigm of economic development in the Americas”, instead replacing it with a system of subjugation and oppression that persists to this day (Colbert et al. 2016).

The U.S. Federal Government, Native Tribes, and the Land Tenure System

Created by the past precedent and policies, the guard-ward relationship between the national government and Native tribes clearly denotes a domestic dependency on the federal government, and this conceptual framework of their relationship has impacted many of the controversies between them later on (Genetin-Pilawa 2015; Khan et al. 2006). In this relationship, the U.S. government, specifically the Department of the Interior, assumes responsibility for tribal land and its assets, tasked with managing, developing, and protecting it for the native tribes (Colbert et al. 2016; Fitzpatrick 2021; Lambert 2016). However, the federal government has grossly and chronically mismanaged these resources for many years.

Existing literature has often pointed out that although Native American tribes have been given “sovereignty” in theory, this is seldom the case in practice. Looking at history, sovereignty granted by the U.S. federal government to Native tribes has not meant self-determination as indigenous peoples expected to receive, but rather dependence on the federal government as its ward (d’Errico 1999; Lyons 2017). In fact, the “doctrine of self-determination inherently comes into conflict with the BIA’s [Bureau of Indian Affairs] trust responsibility” (Lofthouse 2019). This has been codified into precedent through the Supreme Court’s

So how is the federal trusteeship system organized in contemporary society? It is important to note that the federal trust system affects all aspects of economic life within indigenous communities; this key institution defines native property and land rights through bureaucratic control and creates complex legal systems in which the three main political actors, the federal government, state governments, and tribal governments, all converge in native reservations (Lofthouse 2019; Shoemaker 2017). In this system of federal trusteeship, there are three types of land: trust lands, restricted fee lands, and simple fee lands. Trust lands are owned by the federal government and held in trust for the benefit of a certain tribe, restricted fee lands are owned by tribes or individual tribal members but are subject to a restriction against any sales, transfers, or encumbrance, and simple fee lands are completely owned by an individual and are not subject to federal restriction (Fitzpatrick 2021). Data from the 2011 U.S. Census found that roughly 75% of native land is trust land held by the federal government, which turns out to be approximately 56.2 million acres, while only 5% is privately owned by individuals as simple fee land (Lofthouse 2019; Lyons 2017).

<table>
<thead>
<tr>
<th>No. 1 - Trust Land</th>
<th>No. 2 - Restricted Fee Land</th>
<th>No. 3 - Simple Fee Land</th>
</tr>
</thead>
<tbody>
<tr>
<td>Owned by the government and held in trust for the benefit of a tribe</td>
<td>Owned by tribes or individual tribal members, but subject to federal restrictions against any sales, transfers, or encumbrance</td>
<td>Completely owned by an individual and not subject to federal restriction</td>
</tr>
</tbody>
</table>

Table 1: Types of Land in Current Land Tenure System

The effects of previous Native American policies have complicated this already convoluted system through the persistence of extreme fractionation, or co-ownership, of allotted land — land held in trust or a restricted fee status for individual tribal members (Fitzpatrick 2021; Lyons 2017; Shoemaker 2017). Allotted lands were parcelled out to individuals from previous treaties and allotment statutes, and fractionation occurs when “the undivided interest from the original allottees was passed down to multiple heirs” (Fitzpatrick 2021). This is visually represented in Figure 1. Over generations, it is easy to see how the number of co-owners increases exponentially. Fractionation has been found to lead to a phenomenon understood as “checkerboarding” (see Figure 2) in which land with different statuses are interspersed.
with each other, thus causing a lot of jurisdictional challenges that further off-put engagement in entrepreneurial activities (Fitzpatrick 2021).

Land and economic policies provided the federal government an “institutional mechanism that manufactured racially specific outcomes with less public visibility” (Frymer 2015). It becomes clear that indigenous tribes are unable to flourish in the existing system, rather it further ostracizes tribes from mainstream society through lack of economic opportunity from traditional sources of development like banks. A “chronic lack of available capital”, also known as dead capital, has ensued from this convoluted system which has effectively stagnated any economic growth for indigenous communities (Colbert et al. 2016).

**Modern Views on the Current Issue**

While there are clearly issues with the modern land tenure and financial system for indigenous communities, there is not an overwhelming consensus on what should be done in response; the debate around federal trusteeship is as complex and nuanced as the system itself. In fact, many still argue that the benefits outweigh the negatives. Shoemaker highlights three of the current justifications often cited in support of federal trusteeship: enactment of a buffer for preserving tribal jurisdiction on native reservations, enforcement of “anti-alienation rules” for land preservation, and “fairness and the responsibilities associated with the federal government's role as ‘trustee’ over Indian trust lands” (2017). However, many others are now emphasizing the cracks in this reasoning, as recent evidence can now call these benefits into question. Not only are there documented cases of explicit mismanagement and disregard of native resources, but new empirical data has additionally found that more land is leaving the trust system rather than coming into the trust system, meaning that native land is not being preserved as effectively as some may argue (Shoemaker 2017).

However, proposed solutions and alternatives to the current system face almost as much controversy as the system itself. Proposals have often followed two main lines of thought: either completely get rid of the federal trusteeship system to create explicit private property rights for indigenous communities similar to the rest of the country or work to reform the current land tenure system so that it more clearly...
defines private property rights and lowers the risk of engagement in the entrepreneurial market (Lyons 2017). While there is a wide consensus that indigenous tribes must be a part of this decision-making process, native communities themselves remain split regarding what to do about the current state of affairs as well. Some tribes have argued to relax the federal regulations within the trust system so that tribes can develop their own resources and economy, while others strongly believe in the trust system, at least in its original purpose (Lyons 2017). Many tribes are fearful that should the federal trusteeship system end, native land would no longer be protected but subject to privatization (Lyons 2017). There is also the concern of government funding. Many are worried that if the federal trusteeship system were to be completely overthrown, the federal government would have no more obligation to help indigenous communities in the United States.

Regardless of the controversy among the various proposed solutions, there is still a widespread acknowledgment of the issues with the existing financial systems; people generally agree that something needs to be done (Colbert et al. 2016; Lofthouse 2019; Lyons 2017; Shoemaker 2017). Even the U.S. Senate has admitted that “mainstream financial institutions and federal government programs have chronically proven themselves inadequate in providing funding opportunities for economic and community development” at an oversight hearing (Colbert et al. 2016). Many acknowledge that a “one-size-fits-all” solution will likely fail in this situation as well because native tribes are so diverse from each other. This makes widespread institutional change difficult as different native tribes want different things for their land and people. Even though this debate concerns the issues with the land tenure and financial systems, it all still centers around the notion of indigenous sovereignty and self-determination, and solutions must consider this as well. It is for this reason that it is extremely important to include indigenous tribes in the discourse so solutions will “fully reflect their social, cultural, and economic values - their fundamental land ethic - through cohesive, locally defined property structures and concepts of ownership” (Shoemaker 2017). Change must be achieved from the ground up, not through the traditional top-down federal policies often utilized throughout history.

**Path Dependence Theory of Politics**

When looking at this complex system of policies and precedents, path dependence theory may offer a lens to understand why certain political institutions act a certain way. Path dependence theory essentially states that “once a country or region has started down a track, the costs of reversal are very high” (Pierson 2000). This is because of the idea of increasing returns which suggests that processes with increasing benefits can become a self-reinforcing patterned dynamic over time (Pierson 2000; Sydow et al. 2009). This means that political actors generally have strong incentives to stay on a particular path once they start on it. In path dependence, history, or sequences of events, can have a great impact on the pattern that develops. Even relatively small events done by accident can have long and enduring consequences. This notion is often rephrased into the short but concise saying: “history matters” (Pierson 2000; Sydow et al. 2009). This theory posits that “once established, basic outlooks on politics, ranging from ideologies to understandings of particular aspects of governments or orientations toward political groups or parties, are generally tenacious” (Pierson 2000). These
mindsets essentially become path-dependent. This works in tandem with the “learning effect theory” which demonstrates how “the more often an operation is performed, the more efficiency will be gained with subsequent iterations” (Sydow et al. 2009). As these skills accumulate over time, the cost of reversal to an alternative path increases drastically, making it less attractive to switch to new systems (Sydow et al. 2009).

More recent literature has further conceptualized path dependence as a “tapering social process” constituted of three distinct phases: the preformation phase, the formation phase, and the lock-in phase (Sydow et al. 2009). The preformation phase is characterized by a broad scope of action and multiple equilibria (Pierson 2000; Sydow et al. 2009). In this stage, future choices cannot be predicted. Once a certain choice is made, this decision can cause the organization to enter into the second “formation” phase. In the formation phase, “a dominant action pattern is likely to emerge, which renders the whole process more and more irreversible” (Sydow et al. 2009). Here, the cost of reversal from this course of action increases significantly. Phase three is the most constrictive of the path-dependent process, often indicating that the organization has been locked-in. In the lock-in phase, the dominant decision pattern becomes fixed, and actions become fully bound to the path (Sydow et al. 2009). It is important to note that a lock-in “renders a system potentially inefficient because it loses its capability to adopt better alternatives” (Sydow et al. 2009). Even if better, more efficient alternatives are available, a locked-in organization will most likely ignore it and continue to adhere to the dominant decision patterns that produce the same, particular outcomes over and over (Pierson 2000; Sydow et al. 2009).

Increasing returns in path dependence has four major features (Pierson 2000): unpredictability (many potential outcomes), inflexibility (adherence to a pattern), nonergodicity (small events can have large effects), and potential path inefficiency (generates lower payoffs than alternatives in the long run). These characteristics can be seen throughout the tapering social process. It is evident how path dependence can become embedded into a political organization or institution, making it extremely difficult to change. By understanding the mechanisms that lead to self-reinforcing dynamics, it becomes possible to look at “path-breaking”, the process of getting an organization out of its lock-in phase (Sydow et al. 2009). This process of path-breaking is crucial to strategies working on changing existing institutions.

While extensive research has been done regarding the history of Native American public policy and the structure of the current land tenure and financial systems, there is a notable gap concerning the current politics surrounding the issue, especially regarding the political interests driving the current policy positions around federal trusteeship and the financial system for native communities. This paper seeks to add to the existing research by focusing specifically on the present-day interests driving the relevant political actors and the dynamic between them in regard to proposed solutions. It will do so through the lens of path dependence theory, looking to see if the current land tenure system has reached the “lock-in” stage and is path-dependent. In doing so, this paper will build a more comprehensive understanding of the actors and interests in play regarding Native American economic rights, perhaps offering a new framework of understanding through which to look at this issue.
Methodology

In order to gauge the current stances and driving interests of the political actors in the discourse surrounding federal trusteeship and the land tenure system, I will conduct a qualitative study on data gathered from the key actors’ recent actions, reports, publications, legislation, etc. There are eight key actors in the modern debate on the land tenure system: National Congress of American Indians, Native American Rights Fund, Indian Land Tenure Foundation, U.S. Congress, U.S. Supreme Court, U.S. presidential administrations, U.S. Bureaucracy, and small non-state and non-indigenous actors (like think tanks, journalists, etc.). These key actors can be divided into three main subsets: indigenous actors, the U.S. federal government, and non-state and non-indigenous actors. As indigenous tribes are too small by themselves to push for major political change, all of the major actors in this subset are big interest groups. The non-state and non-native actors include think tanks, scholars, and journalists. Though this group does not have much political power in the discourse (as will be discussed further later on), one particular actor highlighted in the data was the Cato Institute.

<table>
<thead>
<tr>
<th>Indigenous Actors</th>
<th>Federal Government Actors</th>
<th>Non-Native/State Actors</th>
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<tbody>
<tr>
<td>National Congress of American Indians (NCIA)</td>
<td>Senate Committee on Indian Affairs</td>
<td>Think tanks, academics, journalists, etc.</td>
</tr>
<tr>
<td>Native American Rights Fund (NARF)</td>
<td>House Committee on Natural Resources</td>
<td>Cato Institute</td>
</tr>
<tr>
<td>Indian Land Tenure Foundation (ILTF)</td>
<td>Subcommittee on Indigenous Peoples of the United States</td>
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<td>Presidential Administrations</td>
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<td></td>
<td>Trump</td>
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<td></td>
<td>Biden</td>
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<tr>
<td>Bureaucracy – Department of the Interior</td>
<td>Bureau of Indian Affairs</td>
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<tr>
<td>Bureau of Land Management</td>
<td>Bureau of Trust Funds Administration</td>
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<td>Supreme Court</td>
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Table 2: Key Political Actors in Discourse Around Land Tenure Reform

In regard to the federal government, I look at all the stances and interests of all three branches. However, it is important to note that I do differentiate the presidential administrations from the bureaucracy. Although these are closely intertwined, the bureaucracy has always had a more direct relationship with indigenous tribes than the presidents. As such, they have distinct histories with the indigenous people in the United States. Within the bureaucracy, the study will specifically look at the Department of the Interior, as well as the Bureau of Indian Affairs, Bureau of Land Management, and Bureau of Trust Funds Administration. For presidential administrations, this paper will research the actions and stances of Obama, Trump, and Biden. Regarding the U.S. Congress, the paper will not only look at specific legislation being proposed but specialized committees as well. This includes the Senate Committee on Indian Affairs and the House of Representatives Subcommittee for Indigenous Peoples in the United States. Data was collected from policy updates, annual reports, press releases, amicus briefs, executive orders, policies and legislation, testimonies, court opinions, news articles, presidential proclamations and memorandums, policy reports, and more. The data collected is relatively recent. With some exceptions, most of the data generally ranges from 2015 to 2021. These exceptions are past presidential administrations (i.e., Obama), as well as major court cases, both at the federal level and the Supreme Court, and pieces of legislation. In all the collected data, I look for any indications of the political actor’s stances, beliefs, or interests in the discourse. Some guiding questions include: what are they supporting? What are they arguing for? What programs are they implementing? What cases do they represent in court or which cases do they write an amicus brief for? What policies and actions are being proposed? What type of documents are they publishing or promoting.
to the public? Answers to these questions will aid in showcasing the current state of the debate today.

There are three hypotheses going into data collection. Firstly, the current land tenure and federal trusteeship systems within the U.S. federal government are path-dependent and are generally resistant to change. This will be tested through the four main features of path dependence: unpredictability (demonstrates the beginning of the tapering process), inflexibility (adherence to a pattern), nonergodicity (small events can have large effects), and potential path inefficiency (generates lower payoffs than alternatives in the long run). Secondly, the land tenure and federal trusteeship systems have reached the lock-in phase and are potentially inefficient in their ability to adopt better alternatives. By comparing the sequence of events that lead to the current land tenure system, it becomes possible to see if it has followed the three phases in the path dependence process. Lastly, native tribes are too internally divided to agree on one common path of action, and thus cannot pool enough political power to push for change within the federal government. In this, I am looking to see if there is a lack of consensus among indigenous tribes regarding the course of action in this debate.

**Data: Indigenous Actors**

Regarding the major indigenous interest groups in this political discourse, it is important to note that the National Congress of American Indians (NCAI), Native American Rights Fund (NARF), and the Indian Land Tenure Foundation (ILTIF) are very collaborative with each other. These actors work together on a lot of different projects and initiatives as they all focus on the same issues, just with slightly different approaches. The NCAI and NARF even co-created the Tribal Supreme Court Project, which seeks to “strengthen tribal advocacy before the U.S. Supreme Court by developing new litigation strategies and coordinating tribal legal resources and to ultimately improve the win-loss record of Indian tribes” (Tribal Supreme Court Project). This indicates strong support that there is some underlying consensus regarding certain issues of the current land tenure system between indigenous tribes and the federal government.

The NCAI and NARF are fairly similar in regard to their stance on the current land tenure system. All the data gathered from their most recent publications, initiatives, and actions suggests that these two interest groups still support the federal trusteeship program. They are not proposing any new or alternative systems, but rather focus on reform within the federal trust responsibility. In their 2019 Policy Update, the NCAI stated that “this management process must be modernized to align with and support principles of tribal self-determination and self-governance” (NCAI 2019). The NARF differs from the NCAI in its slightly more aggressive approach to dealing with the federal government. One of NARF’s main organizational values is to hold the government accountable, stating on their main website, “The current federal policy of tribal self-determination has led the U.S. Congress to allow tribes more control over their land and resources. But this does not necessarily address or make up for centuries of federal inability or unwillingness to properly account for and manage billions of dollars of tribal trust funds and assets” (NARF). Yet, NARF has still actively fought in court to put more land into trust status, representing indigenous communities in cases including *Akiachak Native Community, et al. v. Department of Interior, et al.* (2006), and *Oneida v. Village of*
Hobart (2020). Although both the NCAI and the NARF still stand by the original meaning of the federal trust system, all their actions are geared towards holding the federal government accountable and pushing for more indigenous self-determination.

<table>
<thead>
<tr>
<th>Political Actor</th>
<th>Data Highlights</th>
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<tbody>
<tr>
<td>NCAI</td>
<td>“More broadly, NCAI urges Congress to support legislative reforms that provide greater efficiency in trust resource management, enable better economic returns on trust resources, and foster an increased role for tribal nations in how trust resources are managed.” (2019 Public Testimony)</td>
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<td></td>
<td>“As demonstrated below, Carson has effectively created two classes of tribal nations and has overburdened tribal, federal, and state resources in generating unnecessarily conflict over the restoration and retention of tribal homelands and consequently impeded economic development. Accordingly, NCAI strongly urges Congress to end this turmoil by enacting a congressional bill to the Indian Reorganization Act (IRA) which reaffirms the Secretary of the Interior’s (Secretary) authority to restore tribal homelands for all federally recognized tribal nations.” (Testimony at Congressional Hearing for H.R. 3752, 2019)</td>
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<td></td>
<td>“NCAI strongly opposes any Congressional amendments, regulatory changes, or other means to diminish, alter, or abolish the current provisions established in the federal procurement system allowing Native Americans to create economic development for the benefit of their respective native communities.” (NCAI OPPOSITION TO SEC. 642 OF H.R. 4160; 2016)</td>
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<tr>
<td>NARF</td>
<td>“NARF” represents the Turtle Mountain Chippewas, Chippewa Cree, White Earth Band of Minnesota Chippewa, and Little Shell Chippewa Tribes in this case against the federal government for misappropriation and mismanagement of their tribal trust fund; the protective judgment fund.” (2020 Annual Report)</td>
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<td></td>
<td>“On November 17, the Tribes, represented by NARF, filed a federal lawsuit against the United States Department of Interior and the Bureau of Land Management over the leasing of the K1 permit across federal lands. The lawsuit was filed because the United States failed to honor the treaties and take a hard look at the impact the pipeline will have on tribal communities.” (2020 Annual Report)</td>
</tr>
<tr>
<td>ILTF</td>
<td>“Land within the original boundaries of every reservation and other areas of high significance where tribes retain aboriginal interest are in Indian ownership and management” (ILTF Mission Statement). The data collected from Congress included both specific, major pieces of legislation and the actions of the two committees regarding indigenous affairs: Senate Committee on Indian Affairs and the House Subcommittee for Indigenous Peoples of the United States (under the Committee of Natural Resources). The committees seemingly recognize the economic issues Indigenous communities face as the result of the current land tenure system but have generally responded by increasing federal funding to native tribes. This is evident in the most recent FY22 appropriations bill. Chairman Brian Schatz of the Senate Committee on Indian Affairs stated in a press release, “Under the FY22 appropriations bill, Native communities will see billions more in well for anyone, including the Federal government. Efficient, consolidated management of allotted land will enable landowners and tribal communities to take greater control of their future while reducing the administrative burden on the U.S. government.” (2019 Annual Report)</td>
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Table 5: Indigenous Actors

The ILTF differs from the NCAI and NARF a little in their ultimate organizational goal: “Land within the original boundaries of every reservation and other areas of high significance where tribes retain aboriginal interest are in Indian ownership and management” (ILTF Mission Statement). They are the only interest group to clearly express they want all native land to be under native ownership, which differs from land being held in trust for native communities. The ILTF ultimately pushes for tribes to fully own their ancestral land, asserting:

“Land within the original boundaries of every reservation and other areas of high significance where tribes retain aboriginal interest are in Indian ownership and management.” (ILTF Statement)

“ILTF is a Certified Native Community Development Financial Institution (CDFI) providing alternative loan options to Native nations for tribal land acquisition projects. Founded by the Indian Land Tenure Foundation, ILTF understands the unique needs and challenges of doing business in tribal communities.” (2019 Annual Report)

Although the ILTF is aiming for land ownership, they still would prefer for land to be in trust if not fully owned. They have not proposed radical systemic changes. In this, the ILTF still works within the current land tenure system.

Data: Federal Actors

Overall, all branches of government sought to uphold the current land tenure and federal trust systems. There has been no proposal for significant change on the governmental side. If anything, the federal government has devoted more efforts to making the federal trust responsibility and system more efficient. However, there is a slight variation between the branches regarding indigenous communities.

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federal dollars, the Indian Health Service will have the budgetary certainty it needs to provide quality health services to its beneficiaries without interruption, and proven Native American housing programs will be extended” (Senate Committee on Indian Affairs, 2021).

There were only two relatively recent pieces of legislation that impacted the land tenure system for indigenous communities: the American Indian Probate Reform Act (AIRPA) of 2004 and the Indian Trust Asset Reform Act (ITARA) of 2016. AIRPA affects trust and restricted fee land as it is “intended to limit fractionation, keep land in the hands of the Indian children of the owner, and encourage the drafting of wills” (NCAI 2006). ITARA established the Trust Asset Demonstration project which “empowers tribes to develop plans for trust asset management with tribal objectives and priorities” (NCAI 2016). This piece of legislation allows tribes more freedom to manage their land without gaining further approval from the Secretary of the Interior.

### Table 4: Federal Government Actors

<table>
<thead>
<tr>
<th>Political Actor</th>
<th>Data Highlights</th>
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<tbody>
<tr>
<td>Congress</td>
<td>- However, Congress’s recent allocation of billions of dollars in infrastructure resources to help Native communities recover from COVID-19 – including the largest ever investment in Native-owned programs in history through the American Rescue Plan Act – changed the game. (Sen.)</td>
</tr>
<tr>
<td>Presidential Administrators: OBAMA</td>
<td>- &quot;This order establishes a national policy to ensure that the Federal Government engages in a fair and lasting government to government relationship with federally recognized tribes in a more coordinated and effective manner, including by Helen ensuring that no tribal rights are usurped. There is an order to establish the White House Council on Native American Affairs (Couns.). The Council shall issue a national policy on the use of resources available to tribal communities. (Executive Order - Establishing the White House Council on Native American Affairs, 2013).&quot;</td>
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<td>- &quot;The 350,000 acre goal was surpassed! Today, President Obama signed the law that establishes the Natives American Lands Act, which opens up more than 350,000 acres of Bureau of Land Management and U.S. Forest Service lands to the U.S. Department of the Interior to plan and federal trust status for six Nevada tribes. The tribes will use their newly acquired lands to expand housing, provide economic development opportunities and promote cultural activities for their tribal members.&quot; (White House Press Release, 2016)</td>
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<td>TRUMP</td>
<td>- &quot;In September 2019, Trump officially withdrew the federal government’s longstanding legal battle for the Navajo Water Supply Project by expressing the federal government’s support for the Navajo Nation’s water supply project. (White House Press Release, 2019)&quot;</td>
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<td>- &quot;Against the fierce protests of the Navajo Nation, the Trump administration has deported several Navajo leaders on tribal ancestral homelands to build a president’s ineffective border wall, in violation of the federal trust responsibility.” (Navajo Nation Tribe Government, 2020)</td>
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<td>BIDEN</td>
<td>- &quot;The President’s Memorandum of November 5, 2020 (Tribal Consultation) requires each agency to prepare and periodically update a detailed plan of action to implement the policies and directives of Executive Order 13725. This memorandum reaffirms the policy announced in that memorandum.” (Executive Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2020)</td>
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As expected, there are variations in the past three administrations’ relationships with indigenous communities. To quickly summarize them, I will point out two major actions across the Obama, Trump, and Biden administrations: the White House Council on Native American Affairs (WHCNA) and their nominations to Secretary of the Interior. Obama established the WHCNA in 2013, and he subsequently held the annual Tribal Nations Conference to meet with native leaders and discuss the important issues and goals of the year. In Executive Order 13647, Obama asserts, “The Council will seek assistance across the government and other agencies, and offices to coordinate the development of policy recommendations to support tribal self-governance and improve the quality of life for Native Americans, and shall coordinate with the United States Government’s engagement with tribal governments and their communities” (2013). The Council and annual conference were not continued during Trump’s administration, until the very last year of his term. Although
Trump reinstated the WHCNA in his last year, he did not hold any Tribal Nations’ Conferences. Almost immediately into his term, Biden restored the WHCNA and just held his first Tribal Nations Conference in November of 2021.

Looking at the presidents’ nominations to be head of the Department of the Interior, Biden is the first president in American history to nominate an indigenous politician to this position. He nominated former congresswoman Deb Haaland, and she currently serves as Secretary to the Interior. Both Obama and Trump before Biden had non-native politicians serving in this position. However, it is important to note that the two people that Trump nominated, Ryan Zinke and David Berhardt, both came under federal investigation for various conflicts of interest. This did not happen for Obama’s nomination, and thus far has not happened to Secretary Deb Haaland.

In an effort to gauge the most current interests and stances in the discourse, all the data gathered for the Department of the Interior is centered on the actions taken by the current Secretary of the Interior Deb Haaland. In the first year of Biden’s administration, Secretary Haaland has made strong efforts to uplift and address the issues facing indigenous communities in the United States. She created an interagency initiative to protect access to indigenous sacred sites (DOI 2021), formally enacted a process of removing derogatory names from federal lands (DOI 2021) and established the Secretary’s Tribal Advisory Committee (STAC) which institutes “a mechanism for Tribal leaders to engage in routine and robust conversations directly with Secretary Deb Haaland” (DOI 2021). However, Secretary Haaland also issued SO 3400, effectively simplifying the land-into-trust process for indigenous tribes. By re-delegating “the authority to review and approve applications to place land into trust to the Bureau of Indian Affairs regional directors”, S.O. 3400 makes land-into-trust decisions much less complicated and reduces unnecessary delays (DOI 2021). It makes it easier for tribes to acquire land in trust, helping with issues like fractionation and checkerboarding.

The Supreme Court of the United States has a reputation for making it extremely difficult for cases regarding land and breaches of trust to reach the Supreme Court. As such, there are only two major cases concerning indigenous communities in the past 12 years. In 2009, the Supreme Court decided the case of Carcieri v. Salazar. In this ruling, the court effectively limited which tribe could acquire land under trust status to be only those recognized by the U.S. Federal Government in 1934 (Carcieri v. Salazar. 2009). This decision was devastating for many tribes seeking to acquire more trust land, and all the major interest groups, NCAI, NARF, and ILTF, focused on overturning this precedent. The other major court case was McGirt v. Oklahoma in 2020. This represents an interesting moment in court history, as the Supreme Court actually steps away from precedent. In this case, the Supreme Court rejects Oklahoma’s proposed disestablishment of the native reservation home to the Creek Tribe based on grounds of demographics and historical practices. In the court opinion, Justice Gorsuch asserts that “courts have no proper role in the adjustment of reservation borders… and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives” (McGirt v. Oklahoma, 2020).
Data: Non-State & State Actors

Of all the actors with a stake in the debate around the federal trust responsibility and land tenure system, the non-natives and non-state actors occupy the smallest space. These actors are often journalists, academics, think tanks, etc. that advocate for a specific stance regarding the land tenure system, but they do not have much political power. However, the data indicates that although they occupy the smallest space in the debate, they hold the most radical view. The non-state and non-native actors included in this research all advocate for the total abolition of the federal trust responsibility and land tenure system. Instead, they argue the government should implement individual property rights for indigenous communities. For example, Chris Edwards at the Cato Institute wrote in a recent blog post: “The fundamental issue is the lack of individual property rights on reservations, which undermines incentives for investment and entrepreneurship” (Edwards 2021). It is important to recognize that this idea is not a popular opinion among the other actors, both indigenous and government. There was also no evidence to show that these non-native and non-state actors were working with any of the other actors in the discourse. Instead, the actors are more known to collaborate with each other, as Chris Edwards frequently references Naomi Schaefer Riley.

Table 5: Non-State & Non-Native Actors

<table>
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<tr>
<th>Political Actor</th>
<th>Data Highlights</th>
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<tr>
<td>Think Tank</td>
<td>- The proposed Democratic spending plan would provide $25 billion more in subsidies for America’s Indian programs. Education, health care, and other services on reservations have been appallingly mismanaged for decades. New subsidies may help but they won’t get at the core problems resulting in reservations being among the poorest places in America (Chris Edwards at the Cato Institute, 2021)</td>
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<td>Journalist/Academic</td>
<td>- “There is no doubt that white settlers devastated Indian communities in the 19th and early 20th centuries. But it is our policies today—driving Indian ownership of their land, refusing them access to the free market, and failing to provide the police and legal protections due to them as American citizens—that have turned reservations into small third-world countries in the middle of the richest and freest nation on earth.” (Naomi Schaefer Riley’s book “The New Trail of Tears: How Washington Is Destroying American Indian.” (2015))</td>
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Data Analysis and Discussion

The first hypothesis looks at if the current land tenure and federal trusteeship systems within the U.S. federal government are path-dependent and are generally resistant to change. Pierson (2008) described the four main characteristics of path dependence as unpredictability (demonstrates the beginning of the tapering process), inflexibility (adherence to a pattern), nonergodicity (small events can have large effects), and potential path inefficiency (generates lower payoffs than alternatives in the long run). According to the body of data collected, there have been no major changes since the inception of the modern land tenure system through the Indian Reorganization Act of 1934. There have been some major reforms and actions, such as the Indian Trust Asset Reform Act (2016) and the precedent set by McGirt v. Oklahoma (2020), but in essence, the system has remained the same. No alternatives are being seriously considered among the major political actors, suggesting that the land tenure system is inflexible. The struggles of fractionation, checkerboarding, poverty, etc. in indigenous communities indicate the system’s inadequacy, and the lack of reform and change demonstrates path inefficiency of federal trusteeship over native tribes. Both unpredictability and nonergodicity reference the history of the system. Looking back to the origins of “Indian law” in the United States, there was a lot of unpredictability and variation in the actions of the federal government. The Marshall Trilogy in the 1820s recognized tribal governance authority, yet Congress still passed the Indian Removal Act in 1830 which denied tribal self-determination and devastated indigenous communities. Fifty years later, Congress enacted the Dawes General Allotment Act of 1887 that continued to decimate indigenous peoples and their cultures, but then, after another
forty years, they passed the Indian Reorganization Act of 1934 which is meant to overturn the Dawes Act and rectify its wrongs. There were about 100 years of push and pull between variations of “Indian law” until the system finally began to adhere to a pattern that became reinforced over time. This supports that the land tenure system was unpredictable and nonergodic, as these early events eventually led to the formation of the system in place today. Therefore, the data support my first hypothesis.

The second hypothesis was that the land tenure and federal trusteeship systems have reached the lock-in phase and are potentially inefficient in their ability to adopt better alternatives. As the first and second hypotheses are very closely related, it is logical for the data to also support this hypothesis. Since evidence has shown that the current land tenure system is path-dependent, it must also mean that it has reached the third and final stage of organizational lock-in. The sequence of events leading up to the solidification of the land tenure system mirrors the tapering social process of path dependence: the preformation phase, the formation phase, and the lock-in phase. Since it is evident the system is locked-in, the question becomes: when exactly did it gain such a deterministic character? When did the dominant action pattern solidify within the Native American policy? Although hard to definitively pinprick, I argue this critical tipping point occurred around the time the Indian Reorganization Act of 1934 was enacted by Congress.

The IRA of 1934 was the last major piece of legislation to significantly change the federal trust responsibility and land tenure system in U.S. history. This is the foundation of the system still in place today; there have been no notable changes since then. After the IRA of 1934, the decision pattern gained a deterministic trait in that all suggested action and reform revolves around the current federal trusteeship and land tenure systems. Because of this, even if better, mutually beneficial alternatives were suggested, it would be very unlikely for the system to adopt them.

The last hypothesis stated that native tribes are too internally divided to agree on one common path of action, and thus cannot pool enough political power to push for change within the federal government. The gathered data did not support this hypothesis. It found that there is a widespread consensus among indigenous communities that the federal trust responsibility and the resulting land tenure system should remain in place. This is not to say that all native tribes think the same about these issues; each tribe is distinct in its own ways and beliefs. Rather, the mindset seems to revolve around the sentiment that the system is “better than nothing”. A large majority of tribes like the federal protection the land tenure system offers them, even if they recognize the government is not necessarily fulfilling their side of the deal within the federal trust responsibility. Tribes worry that without some sort of federal protection, what little land they do have left would be privatized and then completely taken away from them. This explains why the major indigenous interest groups fight for the same causes as they represent their communities’ values and beliefs. Yet, it remains unclear if tribes truly do believe in the original purpose and validity of the modern land tenure system, or simply if they do not know of any other viable alternatives and choose to stick to what they do know.
Conclusion

Land and land ownership remain a central issue for indigenous self-determination. To better understand the discourse around land tenure reform and the federal trust responsibility, it is critical to look not only at the history of the system in question but also the current interests driving the debate today. This research sought to look at why this “historical anomaly” in which Native communities suffer disproportionately from high rates of poverty has led to a situation where the “past devours the future” (Colbert et al. 2016). Path dependence theory demonstrates that it is because the past really has devoured the future. The data gathered supports that the current land tenure system is path-dependent, making it very rigid. Because the deterministic action pattern of the land tenure system has been reinforced for nearly 90 years, it will be extremely difficult to push for significant reform or change; the cost of reversal from this path is too high. It has become so inflexible that it remains extremely difficult for the system to adopt new alternatives, even if those alternatives would provide better returns for the actors in the long run.

Nonetheless, the institution’s path dependence should not dissuade current and future actors from seeking change. Under this repetitive dynamic, change becomes difficult but not impossible, and the knowledge of a system’s path dependence can help shape reform efforts to better address these dynamics moving forward. It is very important to recognize that Native American tribes are not a monolith; tribes all have different interests and needs from each other, and, within these tribes, ideas among individual members regarding the land tenure system differs as well. One of the major shortfalls of the existing land tenure system is that it does not account for the variation of needs among the hundreds of indigenous tribes in the United States.

Future policy proposals and reforms cannot constitute another “one-size-fits-all” solution, rendering it absolutely critical that native communities have a central voice in all future action.

To learn from history, all the major policies that resulted in the creation of the current system have relied upon top-down change. In a path dependent environment, effective top-down change is made almost impossible as the system will always seek to sustain the current path. Because of this, future efforts for change should consider utilizing more of a grassroots, or bottom-up, method. Change and new ideas will not originate or succeed from within the current system, but must be pushed for on the outside. The core of this debate really revolves around tribal self-determination and sovereignty, and all future efforts must keep this in mind. The current model of tribal sovereignty has been determined and controlled by the federal government since its earliest conceptions in America, but this model has ultimately failed indigenous tribes. A lot of work must be done in reimagining what that tribal self-determination and sovereignty means in praxis. What does a land tenure system look like in modern society that promotes a positive and sustainable peace among indigenous communities in the U.S.? Vision of new structures and institutions will be critical in ensuring future efforts for change do not just circle back to this same system that may be inefficient but is comfortable. Whether or not future efforts focus on simply reforming the current system or pushing for completely new structures, it is important for any and all efforts to center the needs of the native communities the land tenure system directly impacts.
It is important to recognize the limitations of this research, of which there are a few. This was by no means a comprehensive study of every single publication or action the major political actors took in the last couple of years. Due to restraints of time and labor, I was only able to gather data from what was publicly available on the internet. Although I attempted to collect well-rounded, primary data for each political actor, it is entirely possible I missed some things. As such, the data cannot be statistically representative of the conclusions it has drawn. This research was also overwhelmingly qualitative, which has limitations in itself. Qualitative research risks the subjectivity of the researcher and may contain some bias.

Now that it is established the land tenure system is path-dependent, it remains important to continue researching methods of “path-breaking” as this is an area scarcely studied (Sydow et al. 2009). Other areas of future research include looking into what factors influence the likelihood of an actor, whether it be an organization or individual, to hold a particular stance in this debate, as well as studying the variation of views and opinions amongst the different native tribes regarding the land tenure system and what factors influence these differences. This research paper only touched on the tip of the land tenure system iceberg, and I hope future research will continue the exploration of this very complex, yet critical system in modern-day society.

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