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PRIVATE DOLLARS ON THE RESERVATION: WILL RECENT NATIVE AMERICAN ECONOMIC DEVELOPMENT AMOUNT TO CULTURAL ASSIMILATION?

KARIN MIKA*

In October 1992, the Viejas band of Mission Indians¹ announced that its tribe had approved the development of an amusement park to be situated on reservation lands.² The amusement park, dependent upon the investment of non-Indian private dollars, is a type of commercial enterprise gaining popularity with Native American tribes.³ If successful, the park would be an economically positive step for one Native American reservation, and continue the transformation of an unsuccessful separatist economy into one more modern and mainstream.⁴ The park, and similar cooperative economic ventures that are not considered indigenous to Native American culture, may yield the unintended yet inevitable result of assimilating Native Americans into mainstream American society. In an ironic twist, the assimilation resulting from economic enhancement has, in many respects, fulfilled the misguided aspirations of the earliest European colonists.⁵

I. TOWARDS ASSIMILATION

In 1532, Franciscus de Victoria⁶ justified Spanish assimilation of land in the "New World" by asserting his belief that Spain would be advancing

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1. In this article, the term "Native Americans" is used interchangeably with the term "Indians." Although in recent years the term "Native Americans" has come into common usage, statutes, treatises, and other publications still refer to Native Americans as Indians.

2. Jonathan Gaw, *Indians Approve \$250-Million Amusement Park*, L.A. TIMES, Oct. 9, 1992, at B1.

3. For a description of recent commercial developments on reservation lands, see Andrew E. Serwer, *American Indians Discover Money is Power*, FORTUNE, April 19, 1993, at 136. See also *Splashy Park; Indians Hope New Venture Will Ride a Wave of Success*, L.A. TIMES, June 24, 1985, Metro, pt. 2, at 1 (describing park similar to the Viejas project).

4. The term "mainstream" refers not only to the concept of privately owned businesses, but also of the types of businesses that would, theoretically, be considered atypical of Native American culture. For a description of efforts being made toward establishing privately owned Native American businesses, see Janie Magruder, *New Starts for Native Americans*, ARIZ. BUS. GAZETTE, Jan. 21, 1993, at 3.

5. See generally FRANCIS PAUL PRUCHA, *THE INDIANS IN AMERICAN SOCIETY* 1-10 (1985).

6. Franciscus de Victoria was a Spanish theologian, born in the late 15th century, educated at the University of Paris, and, at the time of his prominence, taught at the University of Salamanca in Spain. He was regarded as a theological expert and was consulted by Charles V to give opinions on matters of conscience, such as the validity of Henry VIII's marriage and Spain's involvement in colonizing the New World. It is important to note that while de Victoria justified Spain's colonization, he did so advocating generosity, humanity, and pacificity. See Ernest Nys, *Introduction*, in FRANCISCUS DE VICTORIA, *DE INDIS ET DE IURE BELLI RELECTIONES* 55, 65-72 (Ernest Nys ed. & John Bate trans., 1917).

the Native American civilization. He described Indians as lacking "proper laws or magistrates," control over family affairs, literature, arts, and many of the "necessary" conveniences of human life.⁷ De Victoria believed that Native Americans required a government entrusted to "people of intelligence,"⁸ and perpetuated the commonly held belief that the European invasion of North America was not only justified, but was actually an altruistic measure designed to bring proper civilization to a people regarded by Europeans as "savages."⁹

As a result of this ethnocentric vision, colonial settlers rarely acknowledged Native Americans as having a proper civilization capable of claiming the property on which they resided prior to the settlers' arrival.¹⁰ With the continued migration of Europeans to North America, Native Americans found themselves situated within the confines of a culture that either sought to "civilize" them, or considered their presence a hindrance to colonization.¹¹

From the onset of the European colonization of North America, Native Americans found themselves on the receiving end of a superiority policy implemented by the colonists. If the Europeans were not attempting to show Native Americans the benefits of European ideals, they were enacting measures designed to control the Native American populations, especially when the Native American presence was an obstacle to European land claims.¹² The newly established government of the United States only exacerbated this problem. Shortly after the United States Constitution

7. FRANCISCUS DE VICTORIA, *supra* note 6, at 161.

8. *Id.*

9. European civilization believed Native Americans to be tiny and widely scattered bands of stone-age hunter-gatherers wandering nomadically about the vastness of North America, leading a perpetually miserable hand-to-mouth existence until the more advanced invading culture of Europe came along to show them a better way of life.

Lenore A. Stiffarm & Phil Lane, Jr., *The Demography of Native North America: A Question of American Indian Survival*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 23, 24 (M. Annette Jaimes ed., 1992). See also D'Arcy McNickle, *Indian and European: Indian White Relations from Discovery to 1887*, in *THE RAPE OF INDIAN LANDS* 2 (Paul W. Gates ed., 1979).

10. An exception seems to be a provision in the Northwest Ordinance that states:

The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

DOCUMENTS OF AMERICAN HISTORY 128, 131 (Henry Steele Commager ed., 7th ed. 1963) (citing The Northwest Ordinance, art. 3).

However, even at the time it was enacted, colonists already had designs on the full expanse of the North American continent. See Ward Churchill & Glenn T. Morris, *Key Indian Laws and Cases*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 13, 13 (M. Annette Jaimes ed., 1992).

11. See generally, U.S. Commission on Human Rights, *A Historical Context for Evaluation*, in *NATIVE AMERICANS AND PUBLIC POLICY* 13, 19 (Fremont J. Lyden & Lyman H. Legters eds., 1992) [hereinafter U.S. Commission on Human Rights].

12. *Id.*

was adopted, the U.S. government passed the Trade and Intercourse Act of 1790.¹³ The Act placed control of the negotiation of all Indian treaties¹⁴ and disposition of Indian land solely in the hands of the federal government.¹⁵ One of the purposes of the Act was an "orderly" advance of the frontier which promoted "civilization and education" among the Indians.¹⁶

By 1823, the federal government's official policy toward Native Americans was paternalistic in nature, overtly working to assimilate the Native Americans into what the government considered mainstream culture. In *Johnson v. M'Intosh*,¹⁷ Justice Marshall affirmed this assimilation policy when, after describing Native Americans as "fierce savages, whose occupation was war,"¹⁸ he commented that they should be "deemed incapable of transferring the absolute title [of their land] to others."¹⁹ With these words, Justice Marshall validated land constraints enacted over Native Americans and seemingly cast the United States government's role with respect to Native Americans as that of a guardian over a somewhat unruly and incorrigible ward.

While assimilation into mainstream culture seemed a pragmatic mechanism both to advance Native American civilization and to make them more amenable to the occurring colonization, the perception of Indians as too primitive and unsophisticated to assimilate expeditiously often created ambiguities in terms of official policy.²⁰ Consequently, two conflicting policies emerged. The first was that Native Americans would be encouraged to form self-ruling governments in geographical areas isolated from the non-Indian population.²¹ The second was that the federal government would control all Native American affairs, even among tribes that were encouraged to engage in self-rule.²² From the time of the

13. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (codified at 25 U.S.C. § 177 (1983)) [hereinafter Trade and Intercourse Act].

14. It is important to note that the Trade and Intercourse Act did not disallow treaties. Rather, Indians could not engage in any land transaction without government approval. See Ward Churchill & Glenn T. Morris, *Key Indian Laws and Cases, in THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 13 (M. Annette Jaimes ed., 1992).

15. The Trade and Intercourse Act states: "No purchase, grant, lease, or conveyance of lands, or of any title of claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution . . ." Trade and Intercourse Act, *supra* note 13. Although the statute makes no specific reference to individuals conveying lands to other individuals, the Supreme Court has interpreted the statute to apply to individual members of the reservation. See *Franklin v. Lynch*, 233 U.S. 269 (1914).

16. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* 2-3 (1962).

17. 21 U.S. (8 Wheat.) 543 (1823).

18. *Id.* at 590.

19. *Id.* at 593.

20. See McNickle, *supra* note 9, at 8.

21. *Cf. id.*

22. The ambiguity of policies toward Native Americans is demonstrated in early Supreme Court decisions such as *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia* 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Justice Marshall seems to define Native American relations with the federal government as the following: Native American sovereignties are autonomous political units over which the federal government has sole

American Revolution to the early 1800s, the United States seemed to vacillate between non-interference and aggressive policies geared towards eradicating Native American culture.²³

Two hindrances to both assimilation and colonization developed by 1830. First, states east of the Mississippi River began objecting to Native Americans residing within their state boundaries.²⁴ Second, colonists moving westward complained that Native Americans living in western territories impaired the rate of westward expansion.²⁵ The government acted on both quandaries with the presumption that it had jurisdiction over all Indian tribes and lands to do what it determined was best for the future of the United States.²⁶

In order to placate the eastern states, Congress enacted the Indian Removal Act.²⁷ This Act was intended to open up more land for eastern

jurisdiction; however, due to the savage nature of Native Americans, the federal government is obligated to act as a guardian over Native Americans and what occurs on their lands.

As time went on, the extent of the guardianship, the degree of autonomy, what the respective obligations are, or where one could assert or enforce rights became unclear. *Ex parte Crow Dog*, 109 U.S. 556, 571-72 (1883), muddied the waters even further by stating that Indian tribes (and not the federal government) had the jurisdiction to punish for crimes committed on reservation lands. In 1885, when Congress passed the Major Crimes Act, this concept of complete autonomy was watered down to an extent, but left ambiguous exactly how much autonomy reservations would be allowed to have in prosecuting crimes committed within the reservation. See ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 284-289 (3d ed. 1991) (commenting on the ambiguities of the Major Crimes Act).

23. Justifying the aggression, it has been commented,

In the colonial period, it had been taken for granted that Indians would accept European ways and incorporate them into their own lives. They needed only the opportunity; and missionaries, educators, and statesmen labored mightily to make this opportunity clear and visible to the Indian people. Many strong souls, rapt in their vision of the beatitude of European institutions, accepted martyrdom at the hands of what seemed callous and unworthy savages (actually, men who valued life in their own way who pursued quite different objectives) to bring Europe into the New World. As the colonial period closed, the mood changed. Possibly there were still as many men who believed Indians could be educated—that is, civilized—but their numbers were swallowed up in the waves of population that rolled westward after independence had been won. Moving westward, meant progress, growth, greatness "The American solution [to the problem of the savage] was worked out as an element in an idea of progress, American progress. Cultures are good . . . as they allow for full realization of man's essential and absolute moral nature; and man realizes this nature as he progresses historically from a lesser to a greater good, from the simple to the complex, from savagism to civilization The Indian was the remnant of a savage past away from which civilized men had struggled to grow. To study him was to study the past. To civilize him was to triumph over the past. To kill him was to kill the past."

McNickle, *supra* note 9, at 8 (quoting ROY HARVEY PEARCE, *THE SAVAGES OF AMERICA* 48-49 (1953)).

24. See *id.* at 9-10.

25. See U.S. Commission on Human Rights, *supra* note 11, at 19-20.

26. It should be noted that the United States *took* jurisdiction over Native Americans. Even if it is arguable that the federal government had jurisdiction over Native Americans within the thirteen colonies by virtue of the American Revolution, it is unexplainable how laws were extended to cover Native American nations that were situated in territories outside what was considered the United States.

27. 4 Stat. 412, ch. 148 (codified as amended at 25 U.S.C. § 174 (1988)). This act gave the president (at the time, Andrew Jackson) the authority to negotiate with eastern Indian tribes to voluntarily move to western territories. See THEODORE W. TAYLOR, *THE BUREAU OF INDIAN AFFAIRS* 12 (1984).

settlers and "relocate" Indians east of the Mississippi to western territories.²⁸ Although the Act prescribed equivalent land trades, Native Americans had no right to reject any offer or stay on their lands.²⁹ In fact, tribes that attempted to stay were ultimately removed to western lands by force.³⁰

In order to control the spread of Native Americans in the western territories, the government designated boundaries in the western territories within which Indians could live, and subdued any Native American objection by force.³¹ Finding that the boundaries were insufficient to meet the colonists' demands for land, the government subsequently relegated all Indian tribes to government selected and supervised "reservations."³² These reservations became separate legal sovereignties within the United States, Although the reservations maintained their own tribal governments, they did not have the authority of actual separate nations.³³

As the United States government concentrated on maintaining reservations and opening up the west for settlement, it deprioritized assimilation of Indians into mainstream culture. However, when stabilization of the west occurred and Native Americans' threat to expansion disintegrated, the campaign to assimilate was revived.³⁴ The Appropriations Act of 1871,³⁵ proscribing any Indian nation from recognition as an independent entity, evidenced the renewed assimilation policy.³⁶ In contrast to the Trade and Intercourse Act of 1790, which allowed Indian land transactions with federal permission, the Appropriations Act ended the right of any tribe to negotiate any treaty. The assimilation theory behind the Appropriations Act presumed that the abolition of tribal sovereignty would eliminate the tribal cultural influence and gradually assimilate tribes into mainstream culture.³⁷ Later statutes diminished whatever degree of tribal sovereignty remained after the Appropriations Act by giving Congress the right to directly intervene in all Indian affairs.³⁸

Since the Appropriations Act did not quickly diminish tribal culture nor eliminate the reservations, Congress enacted another assimilation

28. See McNickle, *supra* note 9, at 10.

29. *Id.*

30. *Id.*

31. See U.S. Commission on Human Rights, *supra* note 11, at 21.

32. *Id.* at 21-22.

33. See McNickle, *supra* note 9, at 10.

34. See FREDERICK E. HOXIE, *THE FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920* 45-48 (1984).

35. 25 U.S.C.A. § 71 (1983) states:

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired.

36. See HOXIE, *supra* note 34.

37. Jennifer J. Robach, *Exchange, Sovereignty, and Indian-Anglo Relations*, in *PROPERTY RIGHTS AND INDIAN ECONOMIES* 5, 22 (Terry L. Anderson ed., 1992).

38. *Id.* at 21-22. These statutes allowed Congress to interfere in matters of tribal government, law enforcement, and family affairs. *Id.*

measure in 1887—the Dawes General Allotment Act.³⁹ The Allotment Act provided that Indian reservation lands would be divided up into separate parcels and given to individual members of each tribe.⁴⁰ The federal government would act initially as a lessor over the lands, and after a prescribed period of years, would turn the land over to the occupant to do as he chose.⁴¹

Although it appeared to be a benevolent measure, the Allotment Act was actually intended to advance assimilation.⁴² The sponsors of the Act assumed that the Indians would come to adopt the lifestyles of mainstream culture over time if they were imbued with the concepts and privileges of property ownership.⁴³ The sponsors also assumed that if the reservations were divided into individually held parcels, Indian land holdings would be diluted with non-Indian purchasers of those properties, ultimately dissolving reservations all together.⁴⁴

The ambition of the Allotment Act was never achieved. Instead, it further strained an already tenuous relationship between Native Americans and the United States government.⁴⁵ There were numerous reasons for the failure of the plan. The foremost was the government's inability to uniformly implement the policy.⁴⁶ Some reservations were parceled out,

39. See 25 U.S.C.A. § 331-358 (1983).

40. *Id.*

41. See 25 U.S.C. § 348 (1983). The applicable portion of the statute reads:

Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

42. See McNickle, *supra* note 9, at 11.

[I]n the 1880's, arguing for the legislation which would become the General Allotment Act, Senator Pendleton of Ohio declared: "They must either change their mode of life or they must die. We may regret it, we may wish it were otherwise, our sentiments of humanity may be shocked by the alternative, but we cannot shut our eyes to the fact that that is the alternative, and that these Indians must either change their modes of life or they will be exterminated. . . . In order that they may change their modes of life, we must change our policy. . . . We must stimulate within them to the very largest degree, the idea of home, of family, and of property. These are the very anchorages of civilization; the commencement of the dawning of these ideas in the mind is the commencement of the civilization of any race, and these Indians are no exception."

11 CONG. REC. 905-06, 46th Cong., 3d Sess. (1881) (statement of Sen. Pendleton).

43. There is no dispute that the Allotment Act was formulated with noble motives; however, those motives had their basis in the assumption that European civilization was better than Native American civilization, and adopting European civilization would be best for the Native Americans. See D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 8-11 (1973).

44. *Id.* at 8-32.

45. See U.S. Commission on Human Rights, *supra* note 11, at 25.

46. Fred S. McChesney, *Government as Definer of Property Rights: Indian Lands, Ethnic Externalities, and Bureaucratic Budgets*, in *PROPERTY RIGHTS AND INDIAN ECONOMIES* 109, 110-120 (Terry L. Anderson, ed., 1992).

and others not divided at all. Some land holdings were diluted while others were not, leaving a complex scheme of laws that often made land ownership difficult to determine. Without uniformity, the goal of total assimilation was impossible.⁴⁷

Moreover, the Allotment Act impaired the economic development of reservations, which defeated the purpose of instilling zeal for private ownership.⁴⁸ Because the federal government retained a role as overseer⁴⁹ by restricting alienation and the type of commercial leases that could be negotiated,⁵⁰ it defeated the purpose of fostering commercial independence in Native Americans.⁵¹ Second, because many reservations were fragmented by property divisions, many Indians were isolated from their tribes. This isolation fostered social alienation and hindered the formation of cooperative enterprises.⁵² Additionally, Indians on reservations upon which there had been no clear implementation of the Allotment Act lacked a clear idea as to what potential development could occur.⁵³

In 1934, Congress passed the Indian Reorganization Act in an attempt to rectify the mistakes of the Allotment Act.⁵⁴ This Act ended the practice of allotment and endeavored to restore tribal properties in order to make some of the original reservations whole again.⁵⁵ It seemed clear that the

47. See OTIS, *supra* note 43, at 8-32.

48. It has also been posited that the entire campaign to assimilate ironically caused the gap between European and Indian civilizations to widen. While the original thought was to develop a homogenous society, eventually the theory of assimilation shifted to one of class differentiation. As a result, tribal customs were encouraged and allowed to flourish eventually resulting in "self-consciousness, resourcefulness and excessive pride." FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS 1880-1920* 239-244 (1984).

49. See *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978). Representative of the prevailing attitude, the court stated, "[t]he provision of the Allotment Act against alienation, save with the approval of the Secretary, arose from the Indian's need for protection from the machinations of others in derogation of the Indian's best interests." *Id.* at 181.

50. 25 U.S.C. § 348 (1988) provides that alienation of an allotment is restricted for twenty-five years, but may be extended at the discretion of the Secretary of the Interior. The section was interpreted to restrict leases during that "trust" period. See, e.g., *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 368 (1968).

51. See generally OTIS, *supra* note 43.

52. Otis adds,

The reasons why the Indian allotment policy fell short of the goal which its white sponsors dreamed of are varied, and yet they fit together rather neatly to make a panorama of American life in the 1890's . . . [t]here was the fundamental fact that allotment with all its cultural implications was alien to the way of Indian life. If the allotment system were to have succeeded, the Indian would, culturally, have had to be made over. The significance of this fact was never fully grasped by the philanthropists and the Government. Individual land ownership was supposed to have some magic in it to transform an Indian hunter into a busy farmer. As for education, it would be enough to inculcate in him the forms if not the substance of the American social heritage. So the Indian, hopefully if not enthusiastically, went, unprepared, out upon his allotment, as an unarmed man would go unwittingly into a forest of wild beasts.

Id. at 141.

53. See generally *id.*

54. 25 U.S.C. § 461-479 (1988).

55. But see Russell Barsh, *Another Look at Reorganization: When Will Tribes Have a Choice*, INDIAN TRUTH (1982).

Act was intended as a way to remedy previous injustices inflicted upon Native Americans. Assimilation did not seem to be a motivating factor in the passage of the Act.⁵⁶ However, there were other problems on the reservations that could not be solved by the Reorganization Act.⁵⁷

Because of historically ambiguous policies and the indigenous nature of Native Americans that favored sustenance living in harmony with the land, economic development was not occurring on reservations. Native Americans began emerging as a poverty-stricken underclass.⁵⁸ In response to this problem, the policy of the federal government again shifted towards overtly encouraging and facilitating assimilation.⁵⁹ To that end, the federal government decided to terminate its relationships with Native American tribes and turn discretion of Indian affairs over to the states.⁶⁰ Through termination it was believed that Native Americans would no longer enjoy a special "ward" status and correspondingly would be divorced from the social welfare programs that many blamed for lack of inducement to develop economically.⁶¹

The Termination Act was no more successful than the Allotment Act in terms of forcing assimilation.⁶² The federal government simplistically assumed that a declaration of various tribes as individual citizens of their respective states would eliminate the legal oddities of tribal status and the cultural anomalies that contributed to economic strife. Instead, there were problems with uniform state law enforcement, state run educational institutions, Indian opposition to the derogation of tribal sovereignty, and in knowing just what federal entitlements and protections still existed.⁶³ Although Native Americans were encouraged to work outside the reservation, doing so did not prove to be an economic boon, nor did

56. See generally Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

57. The Act did, however, allow the Secretary of the Interior to remove restrictions against alienation on a discretionary basis. 25 U.S.C. § 483 (1988).

58. See generally Duane Champagne, *Economic Culture, Institutional Order, and Sustained Market Enterprise: Comparisons of Historical and Contemporary American Indian Cases*, in PROPERTY RIGHTS AND INDIAN ECONOMIES 195, 195-213 (Terry L. Anderson ed., 1992).

59. The forces behind assimilation are many and varied, for the special status of Indians touches diverse sectors within our society. Business interests often seek to acquire the land, timber, water, gas, and oil on the reservations. Some fiscal conservatives wish to trim the federal budget. Tax administrators in most western states resent the tax-exempt status of Indian lands, while other state officials push to extend the full range of state laws onto the reservation. There are philosophical objections, based on generalized notions of "reverse discrimination," to the special, separate status of Indians in our legal system. Many self-styled supporters of Indians believe that poverty and lack of opportunity on the reservations can be eliminated only if Indians will leave the reservations and move into the mainstream of American society.

Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139 (1977).

60. *Id.* at 140.

61. From 1959 through 1970, approximately 109 tribes were terminated from federal wardships. Wilkinson & Biggs, *supra* note 59, at 151 (listing specific tribes and corresponding termination acts).

62. See *id.* at 158.

63. *Id.* at 159.

it foster any type of assimilation.⁶⁴ Moreover, "termination" from federal resources proved to be an economic detriment to those tribes that had been benefiting from their wardship status and, ironically, had become the most commercially assimilated.⁶⁵

In the late 1960s and early 1970s, the federal government's policy again shifted. The government retreated from advocating complete assimilation through termination and began promoting "tribal self-determination under federal guardianship."⁶⁶ During this period, the government restored several of the tribes that had been terminated from federal supervision to their status as wards.⁶⁷ This policy continued through the 1980s and, to an extent, is the policy in existence today.⁶⁸

II. WILL ECONOMIC DEVELOPMENT RESULT IN ASSIMILATION?

Native American reservations are some of the most poverty-stricken areas in the country and, in the majority of situations, largely lack either an economic base or a plan upon which to build a future.⁶⁹ Reasons for this situation are numerous and complex. Many of these reasons can be traced back to the distinctive social nature of the Native American tribe—a culture that has been historically non-property oriented, and somewhat isolationist in terms of maintaining the integrity and independence of tribal sovereignty.⁷⁰ Other reasons clearly stem from the "underdevelopment, powerlessness, dependency, and expropriation"⁷¹ Native Americans have had to endure at the hands of historic federal policies. There has never been the opportunity to develop solidly in one way or another and the result has been fragmentation. Poverty has been exacerbated by lack of uniform leadership. Leadership has been hindered by the decline of social morale and lack of incentive to change the situation.⁷²

In recent years, there has been increased development on reservation lands, and this development has occurred due primarily to both economic

64. *Id.* at 161-162.

65. *Id.* at 162.

66. See U.S. Commission on Human Rights, *supra* note 11, at 28.

67. See generally 25 U.S.C.A. §§ 791-1300f-2 (1983).

68. See U.S. Commission on Human Rights, *supra* note 11, at 28. *But see* C. Patrick Morris, *Termination by Accountants: The Reagan Indian Policy*, in *NATIVE AMERICANS AND PUBLIC POLICY* 63-70 (Fremont J. Lyden & Lyman H. Legters eds., 1992). Morris asserts,

[T]he Reagan Indian policy is seen by many Indian people to have been a callous form of "termination by accountants," a half-clever attempt on the part of the administration to end the government's historic trust responsibilities towards the U.S. Indian tribes Many of the major Indian policy issues that faced the administration when it entered office were not resolved, some even worsened, while new issues were created by administration failures

Id. at 63.

69. See Stephen Cornell & Joseph P. Kalt, *Culture and Institutions as Public Goods: American Indian Economic Development as a Problem of Collective Action*, in *PROPERTY RIGHTS AND INDIAN ECONOMIES* 215, 215-230 (Terry L. Anderson ed., 1992).

70. *Id.* at 219-222.

71. *Id.* at 225.

72. *Id.* at 215-230.

and cultural compromise with the world outside the reservation.⁷³ The first compromise allows industry on reservations, when the capitalistic principle of industry and commercial enterprise is arguably incongruous with Native American culture.⁷⁴ The second compromise allows any type of industry on reservation land that is funded in whole or in part by non-Indian dollars, which contradicts Native Americans' strong interest in sovereignty.⁷⁵

With respect to the first compromise, the primary money-maker for tribes in recent years has been casino gambling.⁷⁶ Bingo and other forms of gaming had their genesis because of the special tax-exempt status of tribal sovereignties and received validation from the United States Supreme Court⁷⁷ and Congress.⁷⁸ Both the Court and Congress recognized that reservations without natural resources could develop few other sources of revenue. Although incongruous with the "noble savage" depiction of Justice John Marshall, many casinos have made the difference between a poverty-stricken and flourishing economy.⁷⁹

The second compromise comes via joint agreements that tribes enter into with commercial enterprises outside the reservation. Joint leases have been encouraged and supervised by the federal government for a large part of the last fifty years, suggesting a continuation of the federal government's forced assimilation policy.⁸⁰ Joint leases, which have been the impetus for projects such as the one at Mission Viejas, theoretically afford reservations the opportunity to invite commercial development through private dollars while still retaining the benefit of the profits from such ventures. Many lease agreements are for mining or other resource extraction,⁸¹ and these have, like gaming, fostered the modernization of reservation living.⁸²

73. See generally Serwer, *supra* note 3.

74. Bingo or casino gambling is the first type of these industries that comes to mind, although anything dealing with natural resource removal would qualify.

75. See *supra* note 68.

76. Josephine Marcotty, *Mystic Lake is Unique in Indian-owned Casinos; Location Accounts for its Financial Success*, STAR TRIBUNE, Apr. 28, 1994, at 5A.

77. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1986).

78. See Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (Supp. 1994).

79. One of the most successful casinos is the Mystic Lake complex situated on the Shakopee Mdewakanton Dakota Reservation in Minnesota. Before Mystic Lake opened, unemployment on the reservation was eighty-five percent. See Carla Solberg, *The Tales Behind Three Minority-Owned Firms*, 11 MINNEAPOLIS-ST. PAUL CITY BUS., Sept. 24, 1993, at § 1, 21. There is no longer unemployment on the reservation and the influx of dollars has enabled the tribe to modernize the entire city. *Id.*

80. 25 U.S.C.A. 415 (1983) was enacted in 1955. It permits leases for public religious, education, recreational, residential or business purposes, but all leases are contingent upon the approval of the Secretary of the Interior. Prior to the enactment of 25 U.S.C.A. § 415, several "informal" types of leases were entered into, primarily for the purpose of extracting sources of energy from reservation lands, and primarily to the detriment of the tribe upon whose land the drilling was being done. For a discussion of the government's tactics with respect to exploiting the natural resources on reservation lands, see Rebecca L. Robbins, *Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance*, in THE STATE OF NATIVE AMERICA 87, 94 (M. Annette Jaimes ed., 1992).

81. See STEVEN HABERFELD ET AL., A SELF-HELP MANUAL FOR TRIBAL ECONOMIC DEVELOPMENT 2-8 (1982).

82. For a list of diverse businesses existing on reservation lands, see Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1062-1063 n.9 (1974).

Neither joint-lease agreements nor casinos have proven to be the cure-all for reservation economies, nor for the overall self-determination and morale of every Native American tribe in the United States. Since the attractiveness of a reservation is often an accident of geography, reservations rich in resources might thrive through joint leases while reservations without natural resources remain destitute.⁸³ Reservations located in remote areas of the country have little opportunity to compete for private enterprises.⁸⁴ Even the success of casinos is related to geography. While those casinos situated near urban settings are successful, casinos situated in remote areas lag far behind in profits, and consequently, in modernization of reservation communities.⁸⁵

In addition, conflicting tribal goals have also impeded reservation economic development.⁸⁶ While a desire to raise the standard of living on reservations has always existed, relations with the "white man" have understandably been strained. Tribes disagree on how much cultural purity will be compromised by "nontraditional" enterprises if outside entities are allowed to develop businesses on reservation lands.⁸⁷ Definitions of cultural purity have ranged from extreme reluctance to switch from a sustenance agrarian economy to a more modern point of view that does not want to improve reservation economies through the use of private non-Indian dollars.⁸⁸ Moreover, many Native Americans still live traditional lifestyles with an emphasis on ecological preservation.⁸⁹ For these Native Americans, the problem is not outside industry on the reservation but the type of industry that will operate on the reservation.⁹⁰ Conflicting goals and definitions of potential economic development have caused friction within the tribes, which has hindered any attempts to resolve these conflicts.⁹¹

Despite this, the Mission Viejas project and those of tribes similarly situated provide some indication of what the future holds for reservation economies. Despite the historic antagonistic relationship Native Americans have had with the European Americans, the future portends a continuing compromise with outside influences. In terms of extracting reservations from destitute economic situations, perhaps this is a compromise; however, by inviting non-Indian dollars and capitalist enterprises onto the reser-

83. See *supra* note 68.

84. See Serwer, *supra* note 3, remarking that the largest impediment to economic growth on reservations is their "barrenness and remoteness." See also HABERFELD, *supra* note 81, at 1-1. Many reservation lands were those not wanted by anyone else.

85. See *supra* note 76.

86. See HABERFELD, *supra* note 81, at 1-3.

87. See Cornell & Kalt, *supra* note 69, at 230. The Warm Spring Indians in Oregon voted against the private development of a ski slope to be situated on their reservation, despite the fact that the project would have been economically profitable.

88. See generally Gaw, *supra* note 2. The biggest impediment to getting a project started was the vote of the tribe members themselves.

89. See HABERFELD, *supra* note 81, at 1-3.

90. *Id.*

91. See Serwer, *supra* note 3 (commenting that the key to future economic success on reservations is strong, stable tribal governments without "divisive factions.").

vation, the trade-off seems to be the loss of some of the cultural purity and independence so many Native American tribes have struggled so long and so hard to protect. Ironically, this necessary compromise will, hundreds of years after, fulfill to an extent the assimilationist desires of the early European colonizers.

The challenge for Native American tribes in the future will be to maintain cultural integrity while benefiting from the progress of a changing world and adopting a commercialism some might think repugnant to the Native American culture. Given that over two hundred years of attempted forced assimilation has not resulted in the eradication of Native American culture, it is unlikely, however, that any perceived assimilation by way of economic necessity and compromise will do so now.