Legitimizing American Indian Sovereignty: Mobilizing the Constitutive Power of Law through Institutional Entrepreneurship

Erich W. Steinman

Extensive sociolegal scholarship has addressed the utility of law as a mechanism through which marginalized groups may promote social change. Within this debate, scholars employing the legal mobilization approach have thus far highlighted law's indirect impact, beyond the formal arenas of law, via effects on the "legal consciousness" of reformers and would-be reformers. This article contributes to this debate, and the legal mobilization framework in particular, by theoretically identifying and empirically documenting ways through which the constitutive power of law may be effectively used by challengers to more directly pursue changes in institutionalized practices themselves. The article examines the strategic use of law by a set of American Indian tribal leaders in the state of Washington who, over a 13-year period, consciously meshed or "cohered" legal and extrajudicial efforts to gain recognition of their sovereign political status. Through a mode of agency known as "institutional entrepreneurship," they utilized the multiplicity of law and exploited resources and opportunities inhering within the state itself, but outside the courts. In the context of ambiguous legal precedent and widespread local challenges to tribal rights, they mobilized latent discourses of federal Indian law that legitimated the sovereign governmental status of tribes. Importantly, they circulated tribal sovereignty discourses *well beyond* the field of law, but *through* the authoritative activity and voice of the state, and in doing so, generated a precedent-setting recognition of tribal sovereignty.

On August 4, 1989, 25 federally recognized Washington tribes and the state of Washington signed the Centennial Accord, in which all parties explicitly recognized the sovereignty of the other parties and established mutually acceptable procedures for conducting subsequent relations on a "government-to-government" basis. The Accord included mechanisms for implementing this relationship, including an annual state-tribal summit, the identification of agency and tribal liaisons, and the establishment of ongoing training about the government-to-government relationship and tribal sovereignty for state officials and employees. Thus while the Accord did not change any substantive rights or powers per se, it emphatically established the cognitive and normative map upon

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which state-tribal relations would subsequently be understood and ushered in a wide-ranging set of new practices that have continued to the present.

The Centennial Accord constituted a striking reversal of Washington State practices and generated national and international attention. Infamously, the state government and its citizenry had for years emphatically denied tribal sovereignty through their words and actions. Continuing with the previous practice of treating tribes and tribal members as ethnic groups subordinate to state authority, the state and its citizens earned a stinging rebuke from the federal judiciary for their joint resistance to local Indian fishing rights declared in *United States v. Washington* (1974). In 1978, the U.S. Court of Appeals noted the state's "extraordinary machinations in resisting the decree," and asserted, "[E]xcept for some desegregation cases . . . the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century" (*Puget Sound Gillnetters Association v. United States District Court*). Indeed, sporadic anti-tribal violence and widespread civil disobedience, often implicitly or explicitly encouraged—or undertaken directly by—the state, occurred from the late 1960s through the mid 1980s.

The Accord went beyond any action mandated by legal rulings or federal laws. Indeed, Washington's unequivocal formal acknowledgment of tribes' distinctive sovereign status set national precedent. This study attempts to explain this puzzling development while advancing an understanding of how law may be creatively used by marginalized groups to promote social change. I argue that this outcome was the result of a creative and "disillusioned" mobilization of law by a group of Washington tribal leaders. Over a 13-year period (1975–1989), these innovative leaders intentionally mixed various uses of law as part of a mode of agency known as "institutional entrepreneurship." This approach emphasizes that taken-for-granted understandings of the social and political world underlie the routine application of policy approaches. By changing the operative understandings utilized by policy makers, entrepreneurs may be able to change the type of policies that are implemented.

In the context of ambiguous legal precedent and widespread challenges to tribal rights, entrepreneurial tribal leaders mobilized latent discourses of federal Indian law that legitimated the sovereign governmental status of tribes. While judges had affirmed tribal sovereignty, the technical legitimacy of this legal principle did not compel state officials to take actions beyond acknowledging the narrow tribal rights it justified (and which were specifically upheld by the court). In light of the limited scope of actionable legal rights, tribal leaders importantly circulated tribal sovereignty discourses

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well beyond the field of law, but *through* the authoritative activity and voice of the state, to gain recognition of tribal political status. In doing so, tribal leaders sought to gain recognition within an existing political category—sovereign governments—in order to newly gain policy treatment only afforded to such governments. These efforts implemented a deliberate "strategy of position" to better situate tribes vis-à-vis future challenges, reduce political opportunities available to tribal opponents, and gain functional benefits not directly actionable via other means. Pursued explicitly by tribal leaders for more than a decade, the Centennial Accord was the result of these efforts.

The rest of the article proceeds as follows. I begin by identifying gaps in the existing literature on law and social change before describing the research methodology and data. I then describe the larger legal, historical, and political context of these efforts by Washington tribal leaders. Following this I elaborate upon institutional entrepreneurship and the legal mobilization approach, as well as prior and foundational claims about the importance of language and discourse. Finally, I proceed to the empirical case and the analytical narrative documenting the focal processes in action.

Law as a Tool of Social Change

In now-familiar debates, and as recently reviewed (Kostiner 2003, Paris 2001), extensive sociolegal scholarship has addressed the utility of law as a mechanism through which marginalized groups may promote social change. The foundation of much recent scholarship is a critique of the optimistic notion that legal norms and rights provide a dependable and relatively straightforward foundation for social change efforts. In groundbreaking work, Scheingold rejects this legal liberalism and the "myth of rights" in asserting that the usefulness of law and litigation for meaningful change would rely on accompanying political struggles, or a "politics of rights" (Scheingold 1974). Scheingold's analysis poses questions about whether law can assist extrajudicial strategies, how it might do so, and how useful the law might be in such change efforts.

In addressing these questions, scholars have identified a number of weaknesses, or "counterproductive" aspects, regarding law's potential as a tool for social change. One critical viewpoint asserts that while legal strategies likely siphon off scarce resources from more promising strategies for change, the implementation of even court-approved rights will generally be narrow, limited, and resisted (Rosenberg 1991). Another argues that legal conceptions and the institutional channels through which legal strategies must proceed

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serve to demobilize, defuse, or deleteriously reframe efforts for change (Kairys 1990). In response to these and other critical views, the "legal mobilization" framework articulated by McCann has asserted the positive indirect effects of law on social movements, and through them, law's contributions to potentially successful political efforts (McCann 1986, 1992, 1994, 1998). Legal mobilization suggests a broad range of potentially subversive applications of law. Challengers may put law to multiple, mixed, and complex uses in extended political struggles (McCann 1994:292). Law may provide justification and motivation for increased mobilization even though actual court rulings may have modest direct effects (McCann 1994). Similarly, litigation and rights consciousness provide tools through which activists may theatrically disseminate their frameworks and, by targeting concrete actors, personalize more abstract struggles (Silverstein 1996). As Dudas argues in this issue (Dudas 2005), rights consciousness may also be used for countermobilizations to *defend* existing inequalities.

The legal mobilization framework has usefully stimulated a great deal of attention to "de-centered" processes of change occurring beyond both the institutional arena of the court and the formal reach of the law. Combined with other complementary work regarding the legal consciousness of citizens (Ewick & Silbey 1992, 1998), it has generated an expanded awareness of how law shapes, and is entwined in, the beliefs and conceptions of reformers, who themselves may use law to affect the conceptions of would-be reformers. However, this move to de-center the law has drawbacks that have not yet been adequately addressed by research in this tradition. In affirming the potential impact of law in stimulating oppositional consciousness outside of institutional arenas, legal mobilization scholarship has perhaps unnecessarily left unexamined the links between such dynamics and institutional arenas. In legal scholarship to date, it is difficult to identify when and how these changes in legal consciousness may themselves identifiably generate or contribute to changes in institutions and institutional practices. This leaves many key questions unanswered: (How) do the meanings unleashed by legal mobilization take effect in more narrow practices that are advantageous for challengers? What factors matter? How can we discuss such processes in more specific terms? While the absence of answers to such complex questions in no way undercuts the overall approach, addressing them would strengthen legal mobilization scholarship and bridge the implied, if unintended, gap between "institutional" arenas and public arenas of (oppositional) legal consciousness.

In an analysis of school finance and educational reform, Paris (2001) addresses these issues and advanced this line of inquiry. He proposes that "coherence" between legal and political efforts may

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be a crucial factor bolstering the usefulness of law in extrajudicial strategies, and he emphasizes not just ideational coherence but correspondence between discourse and action. Relatedly, he also reiterates the importance of practices for the development of new meanings, seeing practice and meanings as inevitably intertwined. Paris also questions the conventional (if not necessarily explicit) association within legal mobilization scholarship of the state as an arena of ''constraint,'' and the broader public sphere as an arena of ''opportunity'' for politico-legal efforts.

Paris's advance nonetheless leaves many unanswered questions about the relationship between legal mobilization, political struggle, and the winning of new advantages. First, the coherence Paris observes is not a *conscious* coherence, as he himself reports. This leaves open the question of whether challengers might consciously coordinate their legal and political strategies, and whether even greater effects or gains might be possible through such strategic coherence. Second, as Paris again notes, he cannot offer a well-theorized accounting for the possible efficaciousness of coherence. Thus it remains unclear as to the mechanisms through which coherence might add to the usefulness of law and legal mobilization.

Third, the claim that courts constitute an institutional arena of opportunity for discursive or ''meaning-related'' mobilization begs the question of whether additional locations within the state might also provide such opportunities, and if so, how. Finally, in the empirical case Paris examines gains are achieved through, and in a political context of, public support for the proposed policy changes. This reflects the generally implicit conception of how legal mobilization might contribute to changes involving political institutions (as opposed to changes in consciousness not linked to or occurring in institutional settings): legal mobilization → political pressure → gains. However, this leaves open the question of whether law can be usefully mobilized apart from a role in stimulating broad political pressure. Apart from the straightforward impact posited by legal liberalism, can law be crucially useful in other identifiable ways? Acknowledging some of these limits, Paris suggests that future research should closely examine coherence and how law is ''translated'' into other arenas. He calls for detailed attention to the political processes through which the effects of legal mobilization might be observed.

This article builds on and extends this particular line of inquiry, and with it, legal mobilization scholarship. I provide an account that theoretically and empirically addresses the limits of Paris's scholarship (and the broader scholarship preceding it). The article provides an account that (1) examines a strategic, *conscious* coherence of legal and political strategies, including detailed information about the legal consciousness of challengers; (2) identifies theoretical

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mechanisms through which coherence may heighten the effectiveness of law-based change efforts, and empirically details their operation; (3) identifies in theoretical terms opportunities for discursive legal mobilization that inhere within the institutional space of the state, but apart from the court, and documents challengers' use of these opportunities; and (4) does *not* revolve around conventional insider political pressure or extrainstitutional protest, in a case in which the targeted (and achieved) goals remained widely, and passionately, unpopular. As the basis for the explanatory analysis, I also (5) identify a mode of agency that can exploit the "multiplicity" of law highlighted by legal mobilization scholars, and I can thus (6) identify how the constitutive power of law may be linked to concrete practices through the strategic efforts of challengers. I also ground such constitutive actions in broader theorizing about both the power and intentional manipulation of political language.

The Study; Legal, Historical, and Political Context; and Institutional Entrepreneurship

The Study

The study informing this article reflects an analytical approach articulated by McCann, who states that the legal mobilization approach "focuses on how specific groups use law . . . a bottom-up approach" (1994:286). More specifically, he argues that scholarship evaluating the efficacy of law for social change must "directly examin[e] those various meanings, tactics and goals—i.e., the legal consciousness—of activists themselves" (1994:292). In line with this approach, this study examines the intentions and actions of Washington State tribal leaders, as articulated and enacted over a 13-year period. More concretely, the research tracks their entrepreneurial attempts, including their mixed use of law, to persuade various state actors to accept tribes as sovereign governments. The method I employ to study this effort has elsewhere been identified as "process tracing" (Campbell 2002:29; Jepperson et al. 1996:67). As Campbell notes in identifying the central focus of this method, "One way to explain how ideas affect policy making is to show through careful process tracing how specific actors carried certain ideas into the policy-making fray and used them effectively" (2002:29). This method of analysis relies on historical sequencing, close interpretation, and thick evidence, in addition to cohesive theoretical explanation. As part of the process tracing conducted for this study, I track a link between these tribal efforts and subsequent actions by state officials and can thus discuss the effectiveness of the tribal project.

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I have drawn upon a great breadth of data. One source is primary federal, state, and tribal documents containing communication between tribal and state officials, communication between state officials, and strategy documents generated by multi-tribal organizations.[1] I also interviewed 11 former and present tribal and state officials in Washington State, as well as 33 state and tribal officials from other states. I also gathered multiple types of data documenting state-tribal relations in other states.

Tribal Status in Law, Historical Practice, and Policy

Entering the 1970s, American Indian tribes in the state of Washington and elsewhere held an anomalous and ambiguous status.[2] Although they were originally acknowledged as fully independent sovereign nations by the United States through treaties, the Supreme Court in *Cherokee Nation v. Georgia* (1831) declared tribes to be "domestic, dependent nations" who enjoyed a "quasi-sovereign" status. However, as the expanding colonial nation more completely engulfed Indian reservations, tribal sovereignty and self-government powers became diminished or even dormant in practical terms. The Supreme Court in *United States v. Kagama* (1886) pronounced Indians to be wards of the state, further justifying federal control of reservations and an aggressive policy of assimilating tribal members by breaking up tribal land. By the end of the nineteenth century, tribes were shackled by federal domination and paternalism.

Informed by the widespread assumption that Indians were a "dying race," in 1924 Congress unilaterally extended citizenship to all Indians. The Indian Reorganization Act (IRA), or "Indian New Deal" of 1934, ushered in a temporary reversal of assimilationist policy. The IRA created modestly empowered tribal governments and reservation "business councils." Nonetheless, these were also heavily dominated by the U.S. Bureau of Indian Affairs (BIA). The failure of the IRA was followed in the early 1950s by the explicit policy of terminating tribes involuntarily. Though implementation faltered and was effectively halted within the decade, the policy remained formally in effect until 1970. In that year President Richard M. Nixon renounced termination and proclaimed "Indian self-determination" as the new policy principle. Rather than undermine tribes, Nixon declared, the federal government would support their existence, self-development, and self-determination.

[1] Copies of all of these documents are available from the author.

[2] For more details about the overall history of U.S. Indian policy and the issue of tribal status, see Wilkins (2002), Deloria and Lytle (1984), and Deloria (1985).

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While emphatically pro-Indian, this reversal created ambiguity regarding tribal status, although few paid immediate attention to this abstract issue. Self-determination did not address the question of exactly "what" tribes were in the contemporary context or define their relationships with state governments. Because tribes were not created pursuant to the Constitution, and had never formally joined the union, neither did any foundational political principle explain their status.[3] Among non-Indians, the taken-for-granted assumption was that all Indians, including tribal members, were unquestionably members of a racial minority group—and a historically "defeated" group at that. In practical terms, federal, state, and local officials commonly treated tribal bodies as ethnic associations subordinate to federal BIA jurisdiction, or, at most, akin to municipal governments obviously subordinate to the state.[4]

The uncertainty regarding tribal status centrally reflected deep historical ambiguity, and even contradiction, within legal precedent and principles. Lacking comprehensive constitutional foundations, federal Indian law has been, as described by legal scholars, "bizarre" (Pommersheim 1995:44) and a "middle-eastern bazaar where practically anything is available" (Wilkins 1997:20). In explaining its ambiguous qualities, Indian law expert Charles F. Wilkinson identifies two uniquely divergent lines of opinion issued by the Supreme Court. One set casts tribal governments as largely autonomous under overriding federal authority but free of state control. In the other, tribes are understood as wards of the federal government. Indian law is "time-warped," as conflicting rulings are based on laws or policy generated in different eras and reflect variants of these two interpretations of tribal status. The underlying ambiguity has resulted in widely divergent perceptions—and rulings—even though "tribal sovereignty" has nonetheless remained an active principle (Wilkinson 1987:27).

For such reasons, prior to the 1970s federal Indian law had proven to be, at best, a historically undependable resource for tribes. Status and rights acknowledged as inherent and guaranteed by treaties had been denied, ignored, or revoked by officials of all branches and all levels of government. Treaties and court affirmation of tribal sovereignty coexisted with federal domination and inattention to sovereignty principles. And as legal anthropologist Thomas Biolsi has pointed out, the contradictions within Indian law elicited (and still do today) continual challenges even to those

[3] Tribes are extraconstitutional—"not created pursuant to, and . . . not beholden to, the U.S. Constitution" (Wilkins 1997:5). Because of this, treaties and the Constitution do not fully specify the contemporary relationships between tribes and a multitude of non-Indian actors.

[4] See Steinman (2004) for more details about state–tribal relations prior to 1970.

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tribal rights affirmed by specific court rulings. Comparing Indian law to racial discrimination law, Biolsi asks "[W]hat things would be like if the laws of slavery *and* the 13th through 15th amendments to the Constitution were equally on the books, or if *both Plessy v. Ferguson* . . . and *Brown v. Board of Education* . . . were equally 'good law' in the present" (Biolsi 2001:16, emphasis added). Such conditions invite virtually ongoing litigation, because the ambiguity and uncertainty of rulings make it plausible that losing parties might win later cases, even with only slightly different factual conditions or doctrinal considerations.

Thus, although ample legal sources had affirmed tribal sovereignty and "national" conceptions of tribes, this had guaranteed little for tribes prior to the self-determination policy. Rights premised on a conception of tribes as sovereign or semi-sovereign nations were at best questionable when, as was the case beyond Indian country, tribes were no longer perceived as sovereign nations. Nor was the sovereignty discourse within Indian law part of the self-determination policy, as it remained absent from policy deliberations.

But near the end of the 1960s, amidst more general declarations of treaty rights by Indians around the country, tribes began vocalizing treaty-based sovereignty claims with renewed vigor. It was in this context that tribes in the state of Washington began directly enacting, and litigating for, a range of governmental powers and rights, thereby offering an explicitly *governmental* conception of the contemporary meaning of tribal sovereignty. To augment these "direct" efforts, tribes would subsequently also "indirectly" mobilize law by drawing upon resources and opportunities inhering in the state itself. Though not readily apparent, these resources and opportunities were perceptible—and useful—to tribal leaders due to the distinct mode of agency they employed. In the next section I identify in general theoretical terms this "institutional entrepreneurship" and the qualities of law and the state that make it a plausible mode of action.

Institutional Entrepreneurship and the Strategy of Position

As a strategy of change, institutional entrepreneurship is distinct from exclusively or primarily engaging in conventional power contests in which "whoever has the most (in terms of number or resources) wins and, by winning, can impose . . . preferences on other actors" (Clemens 1997:43). By contrast, it engages in "constitutive politics" (Berk 1994:11). Such politics address the shared understandings that constitute socially intelligible and legitimate actors, categories, rules, and principles for action. Political actors and their actions are premised upon, and thus only made possible

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through, such shared understandings. In general, these understandings are taken for granted (or institutionalized) rather than being an explicit focus of attention.[5] In that they constitute the shared cognitive backdrop of power politics and formal policymaking, taken-for-granted beliefs tend to promote predictable patterns of behavior. However, even when institutionalized, these understandings are not impervious to change. In light of this, institutional entrepreneurship seeks to disrupt taken-for-granted beliefs (or logics) and the linked governance structures (power arrangements) that reflect and manifest them. If entrepreneurs are able to insert new understandings, they may generate new governance structures and policies without necessarily winning power contests. Cultural institutionalist scholars Friedland and Alford articulate the core premise underlying the potency of institutional entrepreneurship in arguing that some of the most important social struggles address questions of "by which institutional logic different activities should be regulated and to which categories of persons they should apply" (Friedland & Alford 1991:256).

Closely linked to logics and structures are discourses. Discourses provide the language and clusters of concepts through which taken-for-granted logics can exist. As cognitive contexts, discourses enable and constrain what it is possible to think and speak about. Specific language and the associations that accompany its use evoke particular evaluations and judgments. As Murray Edelman identifies in *The Symbolic Uses of Politics* (1964) and *Political Language* (1977), the ability to shift discourse is a powerful political action with radiating effects. Accordingly, discursive innovation is one mechanism for enacting institutional entrepreneurship, although as emphasized in the cultural institutionalist tradition, its effect is inextricably interconnected with the new arrangements for which it provides a premise.

The strategy of position, as introduced here, refers to a particular and narrow application of institutional entrepreneurship: the promotion of new beliefs and structures relating specifically to the status or standing of a particular group. A strategy of position seeks to change the perception of the group so that the group is newly included in an existing category of privileged actors. For example, homosexuals (and their allies) within the field of psychiatry fought for the reclassification of homosexuality as a "normal" form of sexual diversity rather than as a disorder (Bayer 1987). The strategy seeks to advantageously "re-position" a group by validating its desired standing.

[5] Institutionalization is the "process by which a given set of units and a pattern of activities come to be normatively and cognitively held in place, and practically taken for granted as lawful" (Meyer et al. 1987:13).

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A strategy of position also seeks to lay claim to the power, privileges, moral authority, or rights that a group can newly assert, as justified by its status. Per the example above, when understood as a sexual minority, homosexuals can legitimately claim that honoring and celebrating their individual natures and collective culture is not only tolerable, but is healthy and should be encouraged by schools and other public institutions. Use of the term *strategy of position* is inspired by Gramsci's notion of "war of position" (Gramsci 1971; Hunt 1990) in that it also emphasizes a slow, protracted cultural struggle over beliefs and discourses within the existing social order, although the two are quite distinct. A strategy of position is also distinct from many efforts by marginalized groups in that a particular status gain, rather than immediate and tangible benefits, is the primary focus.

Law and Complex Organizations as Resources and Opportunities

As with any change strategy, the availability of appropriate resources and mechanisms of influence are crucial to attempts to utilize a strategy of position. To identify how such resources and mechanisms may, in the broader political environment itself, be available to marginalized groups, I discuss a variety of salient legal and organizational process below.

Pluralistic Law, Organizational Complexity, and Meaning Entrepreneurship

A fundamental premise of legal mobilization scholarship is that "legal conventions are inherently indeterminate, pluralistic, and contingent in actual social practice" (McCann 1994:282). Because "[L]egal discourses ... are inscribed in, and become meaningful through, the practical social activity of conscious legal agents," courts and other authoritative state actors are only *partial* contributors to the received meaning and impact of law (McCann 1994:283). Accordingly, "law is a continually contested terrain of relational power" (McCann 1994:283), and its "constitutive power" is "reciprocal, interactive and relational" (McCann 1994:290–1). Rather than inherently being a weakness for marginal groups attempting to use the law, these qualities also provide openings for innovative efforts exploiting law's possibilities. Challengers can attempt to draw upon law's power in numerous ways not intended or imagined by legislators, courts, or other elite actors.

Similarly, the modern state is not a unitary entity. Due to its organizational complexity, the modern bureaucratic state contains substantial contradictions and "institutional frictions" (Orren &

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Skowronek 1994:321). Contradictory statements and practices by various officials, agencies, and offices inhere within the state, although they are generally scattered across various fields. Actors in various substate fields respond to local logics, interests, and agendas, and they follow highly localized precedent and conceptions of efficiency (Skrentny 1996:111–44; Binder 2002:23–9). While these qualities may impede the implementation of challengers' legally affirmed gains, such variation and complexity within the state also provides openings for challengers. Some change efforts may profitably address a subsection of the state if it appears to be vulnerable or accessible. Crucially, actors operating in various agencies and other substate entities or fields may incorporate challenger claims because they assist the protection or expansion of bureaucratic turf or facilitate the achievement of substantive local goals (Giugni & Passy 1998).

Because of these dynamics, institutional entrepreneurship introducing new discourses or transforming existing ones may be conducted within and through the state. The theoretical and practical importance of these opportunities is further amplified when the role of *meanings* is taken into account. More narrow than discourses, meanings are constitutive of discourses in that they "tell us the identity of a person or thing . . . [and] are the foundations of the legitimacy rules or 'logics of appropriateness'" (i.e., beliefs) (Skrentny 2002:9). As asserted by Murray Edelman, political language works directly and indirectly to shape meanings by casting some groups as deserving of certain treatment and excluding other groups. "To place an object in one class of things . . . establishes its central characteristics," as "[L]inguistic categorization gives meaning both to what is observed and what is assumed" (1964:23). Meanings emerge, are negotiated, and become accepted (or not) in the context of historically grounded discourse, through practical activity. Reciprocally, new meanings reshape discourse, which subsequently functions to diffuse the meaning and any new logic it implies or explicitly legitimates. In the authoritative context of state activity, new meanings can transform the premise and structure of a policy or delegitimate a previous approach. For example, establishing poverty as a "welfare" problem suggests that structural reform of the economic system is an inappropriate response (Edelman 1964:26–9). Or new meanings may make a policy "acceptable for one goal or group, but not for others" (Skrentny 2002:9).[6]

[6] For example, in the 1960s federal bureaucrats determined that women were minorities and would qualify for new affirmative action programs, but that ethnic whites were not. Subsequently, the discourse of the "minority rights revolution" spread the logic justifying an expanding host of new practices (Skrentny 2002).

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The large number of actors involved in meaning definition within many fields provides multiple channels through which challengers may attempt to insert preferable meanings (Scott 2002:459). Thus challengers may be able to introduce new meanings through responsive substate elites even when formal policy makers are unsupportive. If some substate elites do incorporate challengers' meanings into their beliefs and practices, these elites may act as meaning entrepreneurs themselves (Skrentny 2002:11).

Shaping Law and Generating Justifying Principles Within Organizations

Additional sociolegal organizational dynamics provide other avenues through which challengers may exploit law. Cultural institutionalists have highlighted indirect and unanticipated effects of law that develop as law is actually put into practice within organizations, especially in cases where legal requirements are particularly ambiguous or vague (L. Edelman 1992; L. Edelman et al. 1999). For example, after organizational innovation to satisfy vague legal requirements has created new practices, entrepreneurs may promote new justifications in order to continue or expand such practices. These justifications may subsequently become rationales for the behaviors or policies apart from the original legal impetus. For example, actions originally taken for other reasons may become justified as efficient and continued even after the original motivation is withdrawn (Dobbin & Sutton 1998; Dobbin 1994:218). Accordingly, if challengers can influence the principles or practices utilized in the implementation of law, they may be able to help generate long-lasting and broadly applied effects.

Concluding Theoretical Comments and Disillusioned Challengers

The preceding points suggest that challengers may plausibly attempt to exploit the pluralistic nature of law in a strategy of position partly through the state itself. The various components of the modern state offer a set of potential venues through which challengers may draw upon favorable legal discourses to promote their repositioning projects. Groups may attempt to centrally utilize the legitimating powers of the state as manifested by a variety of legal statements and discourses (court rulings, legislation, administrative rulings, directives, etc.). When following a long-term strategy of position, challengers may be able to creatively exploit such statements and discourses in ways that extend, in consciously guided ways, their cognitive and normative impacts well beyond their technical or coercive reach. Various actors within the state and other large organizations, for their own self-serving reasons,

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appear as potential accomplices in the promotion of new or revised discourses (and with them, new meanings and logics) regarding the standing of marginalized groups.

However, the possibilities described above for marginalized groups to shape and use legal discourse are abstract. To exploit opportunities, challengers must identify them as they appear in specific historical developments, and pursue them through a sophisticated and "disillusioned" approach to law. To demonstrate how such a mobilization of law may lead to significant gains through institutional entrepreneurship, I now turn to the narrative analysis of Washington tribal leaders' efforts.

Tribal Entrepreneurs: Circulating and Applying Law's Sovereignty Discourse

Affirmation, Reaction, and an Institutional Strategy

Partial affirmation of Washington tribes' governmental standing came in 1974 via *United States v. Washington*, a historical treaty rights ruling.[7] Federal district court Judge George H. Boldt upheld the fishing rights of Washington tribes that had been promised in treaties with the U.S. government. In his ruling, the judge went beyond a declaration of user rights to affirm that "any one of plaintiff tribes is entitled to exercise its *governmental* powers by regulating the treaty right fishing of its members" (*United States v. Washington* 1984:340, emphasis added). Insulated from public and political pressures, and thus able to be more responsive to tribal claims than state or public officials, Judge Boldt in effect declared the continuity of tribal rights and status.

For the tribes, the Boldt decision "was like a bolt, literally, into the legal system and the political system because all of a sudden it said the tribes have a place at the table as equals," reports one former tribal official.[8] However, this affirmation, apart from the narrow actionable aspects of the ruling regarding fishing rights, changed little, and it would take years for tribal leaders to enjoy the broader "constitutive" aspect of Judge Boldt's decision. Already preceded by a decade of bitter confrontation and litigation over fishing rights, the ruling was incendiary. The broad precedent supporting treaty rights, and Judge Boldt's allotment to tribes of 50% of the fish in question, were powerfully symbolic and substantively of tremendous importance. Resistance by state officials and

[7] For more information about the overall case, the Boldt decision itself, and post-ruling developments, see *Uncommon Controversy* (American Friends Service Committee 1970) and *Treaties on Trial* (Cohen 1986).

[8] Interview with former tribal official Rudolph Ryser, 19 March 2003.

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citizen groups was quick and lasting. Throughout the rest of the decade and beyond, a host of state officials resisted the ruling in various ways. Attorney General Slade Gorton emphatically rejected the legitimacy of the ruling, denouncing it and tribal rights more generally. His office appealed the ruling but met with stinging defeats. In 1975, the Circuit Court of Appeals affirmed the ruling and Judge Boldt's oversight of its implementation. Even after the Supreme Court declined to hear the case in 1976, Gorton's office encouraged additional legal challenges. More narrowly, officials from the state departments of game and fishing reacted by disproportionately prosecuting tribal fishermen and apportioning low levels of fish to tribal fisheries.

Among citizens of the state, a large and animated popular resistance to the ruling signaled support for rejectionist officials. Such resistance targeted not just the specific fishing rights but Indian treaty rights and tribal status more generally. For all parties involved, the two were inextricably bound together. In 1976, this growing resistance in Washington State played a pivotal role in the formation of the first national anti-Indian network, the Interstate Congress for Equal Rights and Responsibilities (ICERR) (Grossman 1992; Johansen 2000; Ryser 1992). In their framing of tribal issues, the ICERR and affiliated groups highlighted, amplified, and merged two nongovernmental conceptions of tribes. First, they cast tribes as racial groups. Second, tribes were understood at most as the technical inheritors of distinctive rights originally granted under conditions that no longer existed. These groups argued that while originally tribes may have been separate nations, the 1924 extension of citizenship to all Indians meant that distinctive tribal rights were both racial and anachronistic in nature. Thus even while specific rights might be affirmed by courts on technical grounds, such a legalistic rendering was irresponsible and outdated, and it created provocatively illegitimate "special rights" (Dudas 2005). As analyzed by Goldberg-Hiller and Milner (2003), labeling legal claims as special rights denigrates and stigmatizes such claims by invoking a binary between these rights and "equal rights." Even technically "lawful" claims, when cast as special rights, are construed as affronts to cultural and moral norms. As suggested by Hiller and Milner's analysis, the whole arrangement of tribal nationhood and treaty rights was denounced by tribal opponents as discriminatory and in conflict with the 14th Amendment. Amplifying this framing, Gorton and allied citizen groups labeled Indians as "supercitizens" (United States Civil Rights Commission 1977).

In response to the strong backlash, tribal leaders reacted by unequivocally defending the rights as affirmed by Judge Boldt and by strenuously opposing Congressional legislation introduced in 1977 and 1978 that would have destroyed or seriously weakened

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Indian treaty rights and tribal sovereignty (*Congressional Record* 1977:29777; 1978:20848–9). As early as 1976, however, they formalized a distinctive and clear long-term "institutional" agenda aimed at establishing the political status of tribes. As much as this agenda affirmed its goals and mechanisms, it was also notable for what it avoided or sought to minimize.

One possibility was to respond by labeling tribal opponents as racist in nature, and by mobilizing support for tribes on the basis of tribal members' racial minority status and their historic victimization. Similarly, tribal leaders could have clung closely to the newly advantageous realm of litigation.[9] Around the country many tribal leaders dismissed any other meaningful interaction with state officials, asserting that due to their treaties with the federal government they did not have to deal with states.

Washington's tribal leaders, and most emphatically Quinault President Joe DeLaCruz, rejected both of these options. Their choices were guided by an explicit long-term vision they developed in the wake of the Boldt decision. They spelled out this vision and the strategy they would use to promote it in a series of formal documents starting in 1976. With a goal of clearly establishing the *political* status of tribes, and acceptance of this status by the state, they in general eschewed racialized discourses for framing Indian rights issues. They consistently and straightforwardly emphasized that, in contrast to their predominant historical treatment by the state, they were not an ethnic or racial minority.

For other reasons, they were strongly critical of purely legalistic strategies for change, even given the strength and importance of the Boldt ruling. As discussed at length in a 1980 report by an intertribal study group, excessive reliance on litigation made tribes "truly dependent upon lawyers who have only to gain by prolonging these disputes" (Ryser 1992:6). Focused on "legal rhetoric which nobody seems to understand," litigation would not effectively promote broader change in public policies (Ryser 1992:10). In court, "arguments get thinner and thinner, the points so narrow and obscure that broad conflicts end up as tedious debates" (Ryser 1992:10). Furthermore, strategies focused on court action risked grave unintended consequences. "Because of the practice of looking for legal solutions to political problems, every time there is a change in the U.S. judicial bench, some judge thinks it's a good idea to change all the rules regarding Indian Affairs!" (Ryser 1992:6).

[9] The authors of a major casebook on American Indian law note that the decade between 1973 and 1983 was "characterized by a rising crescendo of success for the efforts of Indian peoples . . . [as] on balance Indian tribes and members were winning more cases than they were losing" (Clinton et al. 1991:v).

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This wariness about relying on litigation also reflected a more comprehensive strategic assessment. Tribal leaders paid great attention to the constitutional vulnerability of tribes' status, the variability in court rulings, and the temporal nature of the Supreme Court's general support for tribes. In this regard they shared concerns with Philip S. "Sam" Deloria, who, although not from the Northwest, worked closely with DeLaCruz in the 1970s and 1980s.[10] Expressing a view he has promoted since the 1970s, Deloria recently and succinctly noted that "if you are the state and you complain loud enough, someone might abolish . . . the tribe . . . If you're the tribe and complain about the state, no one is about to abolish the state of New Mexico."[11] Deloria asserts that when active tribal governments become integrated and "locked in" within broader governmental procedures, it makes returning to previous policies "more difficult to accomplish" (Philp 1986:188). Otherwise, as anomalies they would continue to stick out, virtually inviting legislative solutions. Addressing disputes in practical terms and keeping tribal status issues off the legislative agenda would serve to protect tribes. To advance tribal governments and protect their future, Deloria argued in 1983, required "the development of institutions and the implementation of political philosophies in a very short time" to address "a set of issues with respect to federal, state and municipal governments that were beyond the wildest imagination of people twenty years ago. A whole new set of issues has to be confronted" (DeLaCruz et al. 1986:321).

In the wake of the Boldt controversy, northwestern tribal leaders such as Deloria turned their attention to the issue of how tribes as sovereign governments could be favorably situated in relation to, and the fact of their existence incorporated by, external political philosophies and political structures. Along these lines, in place of racial frameworks and reliance on litigation, northwestern tribal entrepreneurs adopted an institution-building agenda to embed the tribal political status affirmed by Judge Boldt within the principles and practices of the state government. The agenda was, of course, premised not only on the Boldt ruling but also on the underlying treaties, pro-sovereignty precedents in federal law, and other legal affirmations of tribal sovereignty. When acclaimed by the court or by tribes, however, these claims were seen as anachronistic, irrelevant, illegitimate, and even—notwithstanding court rulings—unconstitutional. In response, tribal leaders sought nonjudicial affirmation of the legitimacy of their sovereign political

[10] Deloria was director of the American Indian Law Center at the University of New Mexico, and starting in 1977, also director of the Commission on Tribal-State Relations. DeLaCruz was co-chair of the Commission.

[11] Interview with Philip S. Deloria, 21 February 2003.

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status, wholly premised on treaties and associated legal documents and principles. Tribal leaders aimed to defuse the rights controversy and solidify their status, in symbolic and practical terms, by getting state officials to affirm, through their more authoritative voice, the legal basis for tribal claims.

The overall approach was articulated and reaffirmed numerous times by northwestern tribal leaders. In 1976, draft documents prepared for the first Washington Council of Tribal Governments (held in February 1977) declared that "Indian governments must be treated with recognition of their powers and status," and they advocated for the development of "a series of compacts and agreements . . . [to] establish principles of intergovernmental relations" between the state and the tribes (Washington Council of Tribal Governments 1976:12). Tribal leaders emphatically declared as fundamental "the political status question" and "the need for formal intergovernmental mechanisms between the three [federal, state, and tribal] governments," the absence of which left "the very existence of tribes as distinct sovereign-entities . . . severely threatened" (Ryser 1992:3). As DeLaCruz political associate Ryser recounts, lacking any formal structuring of the state-tribal relationship by the federal government, "we said . . . we have to create a mechanism or a structure or something between the tribes and the states . . . because the federal courts won't do that . . .. It was a question of trying to figure out how to create mechanisms for it."[12]

Multiple Obstacles and Initial Discursive Attempts

These efforts faced significant cognitive and normative obstacles linked to the illegitimacy and ambiguity of federal Indian law. First, and most squarely, the state did not recognize tribal sovereignty or the independent status of tribal governments. As suggested by the reaction to the Boldt decision, treaties and the court's affirmation of tribal sovereignty did not legitimate tribal governments in the eyes of most state officials or the public. Even if state officials were inclined to do so, strong action recognizing tribal sovereignty would be provocatively incomprehensible to most state residents, and politically risky, to say the least. In addition, perceptions of opposing interests and a desire to maintain a monopoly on governmental authority informed the stances of state officials. A recognition of tribal governments would complicate what had been, BIA tribal jurisdiction notwithstanding, effective functional control within state limits.

[12] Interview with Rudolph Ryser, 19 March 2003.

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Facing such challenges, tribal leaders not only solicited explicit state-tribal agreements, but also attempted through more subtle discursive action to shift language use. This goal informed the use of the organizational title "Washington Conference of Tribal Governments," which, it was imagined, would help differentiate subsequent meetings with state officials from previous communication because under "such [previous] efforts . . . advice to the state government is accepted on the basis of citizen/state relationships" rather than on intergovernmental terms (Washington Council of Tribal Governments 1976:12). Soon the tribal leaders explicitly adopted the stronger term *government-to-government* to specify more clearly the nature of the intergovernmental relations they sought. More generally, tribal strategists were highly aware of the importance of language:

> One of the things that we deliberately, certainly wanted and needed to do was to create the language that we would use. To describe what we were to do. It was always the language ahead of where we were. That way we would grow into the language, and as soon as that language was co-opted our job was to change the language again. And keep the language moving . . . if the [tribal] political leadership were seen to be the ones who provided the language then they could define what things meant . . . they [tribal leaders] were very conscious of it. Having been one of the writers and scribes we talked about it all the time.[13]

Tribal leaders in the late 1970s and early 1980s sought numerous times to promote an intergovernmental framework that would instantiate the discourse of tribal sovereignty, via direct meetings with the governor, communication through the Governor's Office of Indian Affairs, and sympathetic statewide legislators. These actions produced no general changes in how tribal governments were discussed or treated.

Exploiting Opportunity

Even without success at the highest levels of state government, however, tribal leaders ceaselessly declared tribal status and its implications in the unfolding interactions involving fisheries. Facing widespread state recalcitrance in the years following the ruling, tribes won victory after victory in the early 1980s in a special "fish court" Judge Boldt had established. In 1983, with approval by state political leadership, a cooperative approach was discussed between state and tribal officials at pivotal and tense meetings held at Port Ludlow, Washington. Guided both by concern for the resource and by their institution-building agenda, tribal leaders came to a rough

[13] Interview with Rudolph Ryser, 19 March 2003.

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consensus in support of a cooperative approach. The parties informally agreed to try to implement cooperative management.

Tribal leaders used the opportunity to introduce government-to-government language into the domain of fisheries as premise of the negotiations. As former Washington State Fisheries Director Bill Wilkerson recounted in an interview from which I quote here extensively, "There was lots of discussion about whether to have any kind of government-to-government negotiation or discussion with the tribes."[14] Tribes insisted that other well-organized and influential groups of fishermen be excluded from the meetings. Wilkerson noted, "There was a lot of process tension. The tribes had a very fixed position—this was a government-to-government discussion. That terminology was very much in place." While fisheries had to deal separately with other fishermen through public processes, department officials and tribal representatives would "meet as governments, as government bodies." By the early 1980s, fisheries officials were well versed in Judge Boldt's affirmation of tribes' political status as well as the sovereignty tradition in federal Indian law. There was no doubt; tribes "did want to be treated like a government . . . and there were enough of us who agreed with that position that we were able to work with them as a government."

Although a large number of fisheries personnel were vehemently opposed to any negotiations and "couldn't overcome the sovereignty question,"[15] the cooperative management approach gradually became a highly functional practice. Over a period of five years, the number of litigated cases dropped "from 70 to 40 to 20 to five or six" (Wilkerson 1993:7). The emergent state-tribal cooperation began to generate additional and far-ranging benefits. Collaboration in the multi-party U.S.-Canada Treaty and the "North of Falcon" agreements helped punctuate the transformation of state-tribal fisheries relations and provided real gains.[16] These "collaborative events" (Wilkerson 1993:13) helped develop what Fisheries Assistant Director Bob Turner described as an

> institutional relationship . . . because so many people in both institutions . . . had to interact with one another so much . . . we did everything we could to have these staffs go back and forth, so you had state biologists go and work for the tribes and vice versa . . . we [Turner and Wilkinson] were able to stay in our jobs long enough to get it institutionalized . . . the government-to-government part, the relationship . . . Now, you have a whole generation—

[14] Interview with Bill Wilkerson, 8 January 2003. All quotes in this paragraph are from Wilkerson.

[15] Interview with former Fisheries Assistant Director Bob Turner, 18 December 2002.

[16] Interview with Bill Wilkerson, 8 January 2003; also see Blumm (2002:85).

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> it's been 10 or 15 years—you have a whole new generation of technical biologists who grew up in that world, and I don't think it will ever go back.[17]

These cooperative efforts generated renewed ire from opponents of tribal fishing rights. Accusations began to circulate that through "secret meetings" the agencies or the state in general were participating in possibly illegal deals with tribes. In opponents' eyes, private state-tribal meetings were undemocratic, in that they advantaged some groups of citizens by including them and excluding others. As Wilkerson described, "The non-Indian fishermen were furious about this [cooperative management]. The whole time, all of us. There was still quite a bit of civil disobedience."[18] The situation continued to be "social dynamite . . . really reminiscent of *Brown v. Board of Education*–type turmoil back in the 1950s and 60s in the South" (Wilkerson 1993:11). Reflecting this, in 1984 an initiative to undo "special rights" by nullifying all treaty rights passed with 53% of the statewide vote. Although Initiative 456 was subsequently ruled unconstitutional, it testified to the continuing controversy over the Boldt decision and a widespread resistance to tribal governments as holding distinctive rights, 11 years after the fact.

Institutional Agenda, Again (and Again); and Meaning Entrepreneurship by the Department of Fisheries

In the mid-1980s, tribal leaders again renewed efforts to promote their institutional agenda to state political leaders and to gain a wider acceptance of the government-to-government recognition now operative within fisheries. At the beginning of Democrat Booth Gardner's first term as governor in 1985, Quinault Chairman DeLaCruz solicited a formal dialogue with the governor to establish "formal contact." A letter from DeLaCruz's advisor Rudolph Ryser stated the chairman's desire to renew the "government-to-government discussions" about the state-tribal relationship. However, no clear action resulted from this and related queries. Nonetheless, the fisheries-tribal relationship had continued to deepen, expand, and produce observable results.[19] Through it, tribal governments also demonstrated their scientific and regulatory sophistication (Blumm 2002).

Armed with the continuing intergovernmental successes in the Department of Fisheries, in 1988 Washington tribes again pursued

[17] Interview with Bob Turner, 18 December 2002.

[18] Interview with Bill Wilkerson, 8 January 2003.

[19] In 1987, state fisheries officials, the tribes, representatives of the timber industry, and representatives of environmental groups agreed upon the Timber/Fish/Wildlife Agreement as a solution to environmental problems involving fish habitat.

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improved, formalized, and comprehensive state-tribal relationships. During an April meeting with Governor Gardner organized around a broad and informal agenda, tribal leaders revisited the issue. Gardner chief of staff Dick Thompson, who missed the April meeting, recounted the meeting as it was conveyed to him. "As I understand it . . . Ron . . . or Joe . . . or Mel . . . said 'three years ago we asked you to consider the issue of sovereignty, the issue of government-to-government . . . the big one. Can we get back to that one?'" (Thompson 1993:17). After the meeting a group of tribal leaders solicited further action. While acknowledging areas of progress and cooperation, they emphasized in a May letter that "in order to address these various issues and needs, it is important that the State embrace a strong and clear Tribal-State Policy that acknowledges the 'government-to-government' relationship."[20] The letter also presented language that could be adopted as an executive order proclaiming the state's commitment to such a relationship, and insisted that a "Policy Framework Plan" follow soon thereafter to ensure meaningful implementation of the policy and relationship.[21]

Gardner responded with interest, and Thompson was put in charge of the process. He was thoroughly educated by former Fisheries Directors Kurt Smitch and Bill Wilkerson, and Fisheries Assistant Director Bob Turner, which allowed these fisheries veterans to put their stamp on the emerging negotiations. Because of his tribal relationships in fisheries, Turner would eventually join the governor's office to guide the process. A formalized government-to-government model was promoted by fisheries officials, reflecting both tribal wishes and the experience in fisheries. The deeply institutionalized government-to-government relationship in fisheries was consciously used as the model for the larger relationship framework. Turner said that

> we just cribbed from that, frankly . . . in the fish business . . . you have these two entities interacting with each other all the time. . . . So let's just crib from that relationship to the degree that you can . . . from a fisheries perspective the relationship with the tribes was very practical. We did business with them every day of the week. It was part of what we had to accomplish and people we had to deal with it and you had to know the phone numbers and everything . . . it was pretty pragmatic, predictable part of life.[22]

In the long wake of the Boldt decision, and because of tribal leaders' insistence, the taken-for-granted discourse of government-to-

[20] May 9, 1988, letter from Ron Allen, Joe DeLaCruz, Joe V. Flett, Mel Tonasket, Gerald James, and Ray Olney to Governor Booth Gardner.

[21] May 9, 1988, letter from Ron Allen, Joe DeLaCruz, Joe V. Flett, Mel Tonasket, Gerald James, and Ray Olney to Governor Booth Gardner.

[22] Interview with Bob Turner, 18 December 2002.

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government and tribal sovereignty constituted the world in which fisheries officials functioned.

Well-informed about the law, and accepting tribes' sovereignty as a fact of life, the fisheries personnel who guided state participation in the negotiations made sovereignty a non-issue. For Turner,

> I knew the law, top to bottom, knew it all and knew where the sovereignty issue was. . . . So, it was easy. . . . We knew what the difficulties would be and we steered away from them. . . . I do know we took time to make sure the cabinet was aware of the sovereignty status, *not issue*, in the sense of this is not up for debate, this is what it is . . . *given that*, how are we going to deal with that? (emphasis added)[23]

State leaders did have to deal with a fair amount of confusion expressed by other state officials. Thompson developed a standard response by offering a comparison. "Whenever somebody wanted to argue about it I would say, how would you deal with British Columbia?"[24] "I would tell them "that is how you have to deal with tribes. You can 't tell them anything. They are not bound by anything you tell them. Which means that you have to negotiate with them"' (Thompson 1993:11).

In early 1989, after handily winning re-election a few months earlier, Governor Gardner issued a government-to-government proclamation recognizing tribal sovereignty. Preceding the statement, Thompson and state leadership avoided legislation, as "we did not think we could get it through the legislature. People did not agree with the Boldt decision that the tribes were . . . sovereign."[25] State leaders also had worries about whether the attorney general's office might resist or challenge the overall effort. Their fears of an intrastate legal conflict did not come to pass, as the attorney general did not intervene. Having won from the governor the explicit recognition of their sovereign governmental status, tribes then wanted to extend the practical reach of this sovereignty talk. With tribal leaders still pushing, negotiations continued toward an outcome that would extend recognition of sovereignty beyond the governor's office.

The Centennial Accord and Its Local Symbolic and Practical Effects

On August 4, 1989, the state of Washington and 25 Washington tribes mutually recognized the sovereignty of the other part(ies) and established procedures for government-to-government relations through the Centennial Accord. Accompanied by a variety of

[23] Interview with Bob Turner, 18 December 2002.

[24] Interview with Dick Thompson, 19 December 2002.

[25] Interview with Dick Thompson, 19 December 2002.

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mechanisms for implementing this relationship, the Accord emphatically established the cognitive and normative map upon which state-tribal relations would subsequently be understood. The practices called for in the Accord were soon initiated and have continued to the present.

Furthermore, as stated by Thompson, the Accord effectively ended debate about whether the tribes were sovereign.

> It was all a little bit like . . . this closes the door on anyone who wants to assert that they don't have sovereignty rights. Never has [since been asserted], by the way. It's like it's over now . . . it is hard for people to take on. In a very different way . . . look at Trent Lott now, with his statement [in 2002, which implied support for prior segregation policies]. I think if someone came out tomorrow and tried to formally [oppose it], a public figure elected or appointed, or even a business leader, that needs to have some connection to the center, [who] isn't just right-wing, I just don't see someone coming out and repudiating it, the Accord.[26]

As he also noted in the same interview, "Every governor since then has recognized it as a force of obligation on the governor. The legislature would quickly tell you it's not an obligation on us, but I think they would be loath to repudiate it."

The Accord's emphatic affirmation of tribal sovereignty, and the ensuing *practical* spread of sovereignty and government-to-government discourse, legitimated tribal governments in ways that neither court rulings nor the claims of tribes themselves could. This functioned to preemptively narrow or even close political opportunities otherwise possibly available to tribal opponents. By making it much less likely that state officials would publicly support groups challenging tribes' fundamental existence and rights, the Accord gave tribes an institutionalized leg up on their opponents. While low-profile anti-tribal efforts continued into the new millennium, they have been unable to garner vocal support from state officials.

Tribal leaders believed that additional cognitive and normative factors could in the future also powerfully complement the limited coercive power of the Accord. Aware through their own experience that "practices frequently become new policy," through the Accord tribal leaders hoped to gradually put the power of tradition to their advantage (Washington Council of Tribal Governments 1976:12). Allen identifies such insights into organizational dynamics and taken-for-granted aspects of behavior as an aspect of tribes' efforts. One of the elements one must address: "[I]n changing ways of doing business [is] tradition . . . 'this is the traditional way we've done this' . . . What you have to do is set a precedent . . . One of the

[26] Interview with Dick Thompson, 19 December 2002.

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key themes . . . is . . . educating people to understand who we are as tribal governments'' (Allen 1993:21–2). The tribal leaders could see the possibility and value in ''soft'' mechanisms for change because they employed a long-term framework. The changes they have put into motion at the state level may, Allen acknowledges, ''take 20, 30 years . . . to unfold.''[27]

After the Centennial Accord was announced, it received extensive national as well as international publicity. It was celebrated by Chairman of the Senate Committee on Indian Affairs Senator Daniel K. Inouye, who had encouraged Governor Gardner to continue forward as the Accord was being negotiated. In an April 27, 1989, letter, he wrote, ''I believe that the paramount importance . . . of the government to government policy [is to] serve as a model for the manner in which other states will develop their own state/tribal governmental relations policy. I know that the tribes in Washington State, with vision and diplomacy, have pursued the development of this policy for nearly 20 years.''

Although Washington State officials initially received calls of dismay as well as calls of interest from other state governments, the Centennial Accord did become a national model for state-tribal relations. As soon as 1991, a variety of sources were highlighting the state-tribal relationship in Washington as a model for others to follow (Pommersheim 1995:154–6; Wilson & Quenemoen 1991:8). In the next decade, a number of other states would enter similar government-to-government agreements with tribes (Steinman 2004). Washington's state-tribal relationship, even with many bumps and problems, continues to be an example for officials elsewhere.

Conclusion

The analytical narrative I have presented identifies a strategic mobilization of the constitutive power of law based in, but extending far beyond, a court ruling. As I have attempted to demonstrate, the institutionalized acceptance of tribal sovereignty by the state of Washington was not a direct result of the historical Boldt decision, even though the ruling explicitly affirmed the contemporary saliency of treaties and tribes' governmental status. Rather, the ruling was put to use as part of the larger and ''coherent'' tribal strategy, and through tribes' institutional entrepreneurship. Bolstered by the court's firm declaration of tribal fishing rights, tribal leaders

[27] Interview with Ron Allen, 29 January 2003. Governor Gardner privately identified the Accord as one of the three or four things he considered his most important and lasting acts as governor, stating that it was one of his ''legacy'' issues'' that ''are not going to change somebody's budget for a year. They will last a long time'' (Thompson 1993:17).

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inserted the discourse of tribal sovereignty and government-to-government relations through cooperative fisheries management. Developing the governmental regulatory powers affirmed by Boldt, tribes simultaneously made the government-to-government relationship functional and beneficial to state fisheries officials. Tribes became deeply embedded in the intergovernmental business of regulating fish. The legal coercion of Judge Boldt and the functional successes of cooperation combined to make government-to-government relations a taken-for-granted fact of life within the domain of fisheries.

Subsequently, in the context of repeated tribal advocacy for an overarching intergovernmental "mechanism," fisheries officials became meaning entrepreneurs themselves. Armed with a deep—and practical—understanding of the pro-sovereignty tradition in federal Indian law, they *definitively* declared to other state officials that tribes were sovereign. Fisheries officials could credibly and persuasively interpret—in ways tribes themselves could not—the legal status of treaties and tribes to the broader state government. In effect, these officials relayed to the broader state community the declarations made by Judge Boldt 15 years earlier than the Centennial Accord, and they also testified to the benefits of intergovernmental collaboration. Through their key role, tribal sovereignty and government-to-government relations were made comprehensible, plausible, and legitimate.

Through the functional fisheries relationship, and as expressed through the Centennial Accord, Judge Boldt's strong affirmation of tribal sovereignty became the operative understanding of tribal status informing Washington State government practices. But it was not the only precedent the state could have plausibly affirmed as its formal position. Notably, another landmark case involving Washington tribes set Indian law precedent four years after Boldt. In *Oliphant v. Suquamish Indian Tribe* (1978), the U.S. Supreme Court issued a major blow to tribal sovereignty. The Court slightly shifted its interpretation of the basis of tribal powers away from inherent sovereignty. As one expert noted, the ruling "appeared to take several major strides down a road now seeming to lead inexorably toward a doctrine that would base tribal powers on federal delegation," and it "marked the historic low ebb of the doctrine of tribal sovereignty" (Wilkinson 1987:61; Wilkins 1997:186–234). While subsequent rulings again muddled the Court's contemporary interpretation of tribal sovereignty, the *Oliphant* interpretation meshed much better with the default state treatment of tribes than did the Boldt ruling. Yet the views expressed in *Oliphant* and other similar rulings were unequivocally displaced through the Accord by a pro-sovereignty understanding. The developments described above must be credited with this outcome.

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Through their persistent institutional entrepreneurship, their exploitation of opportunities, and by following their clearly articulated strategy of position, northwestern tribal leaders *guided* these contingent developments. Crucially aided by fisheries officials and other factors beyond their control, they took law from the courtroom and effectively inserted it into policy processes. Sovereignty discourse that was initially legitimate only in the narrow confines of federal Indian law became, gradually, legitimate and privileged within the overall state government in 1989. As was obvious, a conception of tribes as sovereign governments represented a major shift from previous conceptions held by state officials and the public. Now, through the government-to-government training conducted as part of the Centennial Accord, the state itself proactively informs state employees that tribes are not minority groups or subordinate local governments. The authoritative power of the state is straightforwardly and explicitly engaged in the business of legitimizing treaties, tribal governments, and the government-to-government relationship. The powers of tradition, cognitive assumptions, and norms are now more likely to lean in tribes' favor, rather than support efforts to resist tribal claims and tribal sovereignty.

Substantive Implications

The outcomes within and beyond Washington State suggest that although the Boldt decision is already proclaimed as a historic treaty rights ruling, scholars have missed its role in even larger developments bolstering the sovereign governmental status of tribes. Similarly, the roles played by nonjudicial "meaning entrepreneurs" within the state, who may act to crucially legitimate the law's constitutive power regarding tribal status, have gone unobserved. Nonetheless, such nonjudicial insider legitimation may be a widespread aspect of tribal struggles for recognition of their status. The tribal actions cultivating such insider meaning allies, although not identified in previous research, are likewise potentially important elements of these struggles. These absences and omissions contribute to incomplete understandings of the role of law regarding contemporary gains by American Indian tribes.

Theoretical Implications

Underlying the omissions and gaps in previous conceptions of tribes' use of law has been the lack of conceptual tools with which to interpret the role of law in these and other efforts for social change. The analysis in this article advances in a number of ways the conceptual insights scholars can bring to bear on the role of law in

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social change. One point is applicable to all types of mixed political-legal efforts. The analysis amplifies the importance of the coherence of legal and extrajudicial strategies as suggested by Paris (2001). It also suggests that if such coherence is conscious and strategic, law may be wielded in extremely innovative and effective ways. Additional insights are more specific to the legal mobilization framework. First, the article usefully links the constitutive power of law with insights about the power and manipulation of political language previously articulated by Murray Edelman. Second, it demonstrates that the constitutive power of law may be utilized by challengers beyond the arena of law, yet within the state. The multiplicity of law, the de-centered and contradictory nature of the state itself, and the organizational generation of new justifications for compliance-based practices all provide opportunities for challengers to promote new legal consciousness within and through the state.

The preceding point implies the third cluster of insights relating to legal mobilization. The analysis suggests that while changes in the legal consciousness of citizens are important, and may stimulate political pressure, this indirect route is not the only means through which legal mobilization may centrally assist change efforts. Because of this, legal mobilization need not necessarily operate through "popular" consciousness or rely on social movement mobilization as the only alternatives to conventional political channels stacked against challenging groups. Finally, the analysis identifies an overall mode of agency, institutional entrepreneurship, which appears well-suited to exploit the constitutive powers of law and to promote changes in legal consciousness. It also presents a particular type of institutional entrepreneurship, a strategy of position, which may be a useful conceptual tool for interpreting law-related change efforts of other actors.

The cumulative contribution of this article to the legal mobilization approach is that it provides a theoretically specified and empirically detailed account of how the constitutive power of law may be linked to concrete practices through the strategic efforts of challengers. In addition, the analysis bolsters a methodological claim of legal mobilization. Even though the tribal status gains rested indirectly on a court victory, the case further establishes that the winning of court cases and their successful implementation should not be privileged to the exclusion of other types of evaluative criteria. More pointedly, the analysis reaffirms that challengers' goals must be centrally incorporated in studies of the impact of law on social change. Indeed, in this case the rejection of litigation as a default response was part of tribal leaders' overall strategy of position. Such a critical approach to litigation produces, in terms of court activity, "non-event" outcomes that, of course,

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cannot be observed. Without understanding challengers' goals and legal consciousness, strategic action may elude detection.

Are the law-based mechanisms analyzed above potentially available and fruitful for other groups? Or does tribes' successful legal mobilization in Washington State reflect unique features of Indian rights? My cautious assertion is that these means are available to others. Certainly the promotion of new meanings, a strategy of position, and institutional entrepreneurship more generally are available to many kinds of challenging groups. Even so, it would appear that tribes' treaties with the U.S. government provided them with a uniquely powerful legal grounding from which to conduct such efforts. However, it is questionable how advantageous the treaties and rulings were, *apart from* tribes' strategic entrepreneurship. There are, I suspect, ample foundations for a great variety of novel and advantageous law-based claims that could be the focus of coherent and strategic efforts by marginalized groups. Legal multiplicity and organizational complexity likely provide a variety of groups with openings to pursue strategic legal mobilization through, as well as beyond, the state. In addition, broader social changes periodically subvert established cultural understandings and provide historically specific openings for law-based assertions.

However, a central question is whether challenging groups can sustain efforts so as to harvest the possible fruits of legal mobilization and exploit newly arising historical openings. Based on this one case, the entrepreneurial mobilization of law appears most promising in the context of long-term efforts. As with tribal sovereignty, new discourses and meanings are unlikely to be generated or legitimated in chunks of time corresponding to most political or social movement campaigns. Because of this, the targeted discursive outcomes, and the imagined new practices or structures for which they provide justification, may remain distant for years. Favorable opportunities for active advocacy are beyond the control of challengers, requiring them to pay patient attention. Accordingly, the ability to sustain entrepreneurship over lengthy periods of time may be crucial. This is likely a real challenge for many groups. Even though discursive changes provide the premise for new structures or practices, their abstract nature may make them of limited use in keeping marginalized groups engaged in ongoing efforts. Beyond long-term staying capacity, other organizational or cultural resource factors may be crucial to attempts to mount institutional change through entrepreneurial efforts.

Future research may further explore whether other challengers have intentionally exploited the types of organizational opportunities and dynamics identified in this case. Armed with an

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enhanced appreciation for the complex, mixed, and strategic ways that challengers use law, legal scholars in the future may be able to more effectively identify such consequential, albeit out-of-sight, efforts. Doing so must attempt, through interviews, archival research, and other means, to directly identify the legal consciousness of challengers, and examine possible direct and indirect links to strategies and actions. While going beyond legal documents, formal policy declarations, and news coverage to examine this link may be a demanding task, it is also very promising.

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