1 – The Indians are Different

F. Scott Fitzgerald is supposed to have said, “The rich are different from you and me.” To which Ernest Hemingway is supposed to have replied, “Right, they’ve got more money.” The Indians are different from you and me, too. They’ve got more legal privileges. Having more money and more privileges are closely related.

*Black’s Law Dictionary* rather ponderously defines a “privilege” as, “A particular and peculiar advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens.” What do you expect from a legal dictionary? More straightforward, we might say a “legal privilege” simply a legal right (or power) other people don’t have.

A legal privilege closely relates to what economists call “rent-seeking,” manipulating the political system to redistribute wealth without creating any value in return. By contrast, “profit-seeking” (as the term used by economists) creates wealth by adding value. Profit-seeking is mutually beneficial, but rent-seeking is profiteering at the public expense. Profit-seeking leads to efficiency, innovation, and economic growth, but rent-seeking has the opposite effects.

For a classic example of how legal privileges and rent-seeking go together, say a river ran through a nobleman’s domain (which many did in the long ago). Say the nobleman stretched a chain across the channel (which he had the legal right to do in those days). Now the merchant vessels plying the river had to pay a toll to pass his chain. The nobleman was profit-seeking all right, but that was rent-seeking. He was using a legal privilege to redistribute some wealth from the merchants’ pockets into his own coffers. He wasn’t adding any value, only driving up the cost of doing business. By contrast, a downriver miller might build a mill with a wheel turned by the current. He was profit-seeking, too, but not rent-seeking. His mill added something of value.

“Ye'll take the high road and I'll take the low road.” Throughout history, whoever could cram on board has traveled these lower roads (to legal privileges and rent-seeking) as the fast track to the high road (where they can ride in the first-class carriages). Indian law long ago went down this same path.

How did that happen? It’s complicated. It’s the law of unforeseen consequences in action. It’s the law of misguided good intentions in action. Above all, it’s Hobbes old primary law of political action. “So that in the first place, I put for a general inclination of all mankind, a perpetuall and restless desire of Power after power.” In other words, it’s the law of self-interest in action.

Until today, a vast gathering of interests feed on (and so support) these legal privileges. It’s the familiar iron triangle – the Indians (and those feeding on the Indians), the federal bureaucracy (a growth feeding on the Indians), and Congress (who fund the meal, dining themselves on the generous campaign contributions fed back to them by the other diners). Reinforcing this structure from the outside, the legal profession (the most powerful interest group in America) provide the (legal) buttresses. Indian law serves as a huge power source for judges and a highly lucrative revenue stream for lawyers.

What are the Indians present legal privileges? That’s complicated, too, which part of the problem. It’s so complicated no one knows quite what the Indian laws are. But togive a generalized and partial list of their privileges no one else has, most obviously perhaps, Indian casinos where no one else has the right to have a casino. Their casinos and other businesses are tax exempt, but they can tax non-Indians on their reservations (that income also tax exempt to them). They possess vast lands, theirs in perpetuity and non-taxable. They possess the income from the natural resources on those lands (also tax free). Individual Indians enjoy tax emptions as well. Often a state can’t prosecute them for crimes. They can hunt and fish with no license, no regulation, and no limit. The tribes have sovereign immunity (can’t be sued over their contracts or debts). Indians have free health care, housing, and education. Perhaps this list long enough to make a start, and we might add it’s a growing list, with new rights (and privileges) found and added all the time.

Indians are different from you and me. They’ve got more legal privileges. It’s complicated. My purpose in these articles is to unravel the story. How did Indian law take the path to privilege? Where did the path lead? Might we find a better path?