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Decolonizing Reservation Economies: Returning To Private Enterprise and Trade

Adam Crepelle

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DECOLONIZING RESERVATION ECONOMIES: RETURNING TO PRIVATE ENTERPRISE AND TRADE

Adam Crepelle

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INTRODUCTION

In 1970, President Richard Nixon observed that, “[o]n virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom.”¹ Nixon stated the poor conditions Indians found themselves in were the result of “centuries of injustice” and that even well-intentioned federal policies have “proved to be ineffective and demeaning.”² Nixon’s solution to Indian economic

¹ Richard Nixon, *Special Message to the Congress on Indian Affairs*, NAT’L CONGRESS OF THE AM. INDIAN (July 8, 1970), http://www.ncai.org/attachments/Consultation_IJaOfGZqIYSuxpPUqoSSWiANtKEJEPXxKLzLcaOikifwWhGOLSA_12%20Nixon%20Self%20Determination%20Policy.pdf.

² *Id.*

malaise was to give tribes greater control over federal programs affecting Indians.³ Nixon's words heralded significant and positive policy change for Indians.⁴ Nevertheless, almost fifty years after Nixon's speech, Indians remain at the bottom of the United States' economic ladder.

Despite the profound prosperity some tribes have achieved through gaming and other means, Indians have the highest poverty rate in the United States.⁵ Indians comprised 1.7% of the United States population in the 2010 Census,⁶ yet seven of the eight poorest counties in the United States were majority Indian.⁷ The average unemployment rate on Indian reservations is over 50%,⁸ over twelve times the national average.⁹ Few jobs exist in Indian country¹⁰ because there are few small businesses on reservations.¹¹ Though the Indian entrepreneurship rate is at parity with

³ *Id.*

⁴ *Id.*

⁵ *Facts for Features: American Indian and Alaska Native Heritage Month: November 2015*, U.S. CENSUS BUREAU (Nov. 2, 2015), <https://www.census.gov/newsroom/facts-for-features/2015/cb15-ff22.html>.

⁶ Tina Norris *et al.*, *The American Indian and Alaska Native Population: 2010*, U.S. CENSUS BUREAU, <https://www.census.gov/history/pdf/c2010br-10.pdf>

⁷ S. REP. NO. 111-118, at 2 (2010).

⁸ *Id.*

⁹ Databases, Tables & Calculators by Subject, BUREAU OF LAB. STAT., <https://data.bls.gov/timeseries/LNS14000000> (last visited on Mar. 4, 2019) (noting an unemployment in the United States ranging from 3.7% to 4.1% between January and November of 2018).

¹⁰ 18 U.S.C. § 1151 (2006).

¹¹ Robert J. Miller, *Creating Economic Development on Indian Reservations*, PERC (2012), <https://www.perc.org/2012/09/14/creating-economic-development-on-indian-reservations/> (“Reservation economies rapidly lose the money that residents receive because of the absence of small businesses where people can spend their cash on needed goods and services.”); Annie Lowery, *Pain on the Reservation*, N.Y. TIMES (July 12, 2013), <https://www.nytimes.com/2013/07/13/business/economy/us-budget-cuts-fall-heavily-on-american-indians.html> (quoting Amber Ebarb of the National Congress of American Indians: “There is not as much of a private sector presence in Indian country, which tends to be high-poverty and high-unemployment to begin with.”).

their percentage of the population,¹² over 40% of Indian- owned businesses are in the twenty lowest sales industries.¹³

Those who wish to open businesses in Indian country face three levels of governmental interference. At the federal level, paternalistic policies create an immensely dense bureaucracy that makes reservation business development exceedingly complex and time consuming. Then the nonsensical jurisdictional scheme in Indian country adds uncertainty to everything, including basic governmental services such as law enforcement. States hinder tribal economies by attempting to assert jurisdiction on tribal lands. Tribes also hurt themselves by failing to enact basic laws and policies that facilitate commerce.

However, long before European arrival, tribes had vibrant economies. Individual Indians engaged in trade with nations near and far. Tribal governments, though diverse, generally adopted policies that enabled individual Indians to confidently pursue their commercial desires. Likewise, tribes implemented laws that made commerce possible. Since colonization, Indians have faced several barriers to private enterprise.¹⁴ Consequently, Indian country economies have struggled.

Tribes can solve many of their socioeconomic problems by embracing their traditional economic practices. Transforming reservation conditions begins by tribes enacting laws and developing institutions that are conducive to private enterprise. Similarly, tribes must embrace trade—both with foreign nations and other tribes. By returning to trade-based economies and adopting laws that facilitate private enterprise, tribes can decolonize reservation economies.

The rest of the article proceeds as follows. Part I discusses Indian economic practices prior to European contact and examines the United States' various Indian policies, removal to the present-day self-determination era. Part II of the paper analyzes various federal, state, and tribal policies that undermine economic development in Indian country. Part III of the paper sets forth reforms that tribal governments can implement to increase business growth in Indian country.

¹² Michael McManus, *Minority Business Ownership: Data from the 2012 Survey of Business Owners*, U.S. SMALL BUS. ADMIN. OFFICE OF ADVOC. (Sept. 14, 2016), <https://www.sba.gov/sites/default/files/advocacy/Minority-Owned-Businesses-in-the-US.pdf>.

¹³ *Id.*

¹⁴ For example, American Indians lacked many basic rights, such as citizenship itself, until 1924. *See Elk v. Wilkins*, 112 U.S. 94 (1884); 8 U.S.C. § 1401(b) (2006).

I. HISTORY

This section briefly summarizes legal and economic history impacting Indians. It begins by noting that prior to the arrival of Europeans, the indigenous inhabitants of the Americas had robust economies. The section next discusses the legal framework employed against Indians from the United States' Founding to the present-day self-determination era.

A. *Prior to 1776*

Contrary to popular belief, most Indians lived in semi-permanent towns prior to the arrival of Europeans, and many of these towns were larger than their European counterparts.¹⁵ Also contrary to popular belief, most Indians subsistence was not chiefly drawn from the forest; rather, most tribes sustained themselves primarily through agriculture.¹⁶ Indeed, numerous tribes have a “three sisters” legend explaining the significance of corn, squash, and beans to tribes.¹⁷ Some tribes' agriculture was so

¹⁵ Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 767–768 (2001) [Hereinafter, “Miller, *Economic Development in Indian Country*”] (“At the time of contact with Europeans, the majority of Indians lived permanently or semi-permanently in small towns and villages and primarily supported themselves through farming... in the eleventh through the thirteenth centuries, some American Indian towns were larger and controlled by more sophisticated societies than European countries possessed at that same time.”); Adam Creppelle and Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 315, 335–336 (2017) [Hereinafter, “Creppelle & Block, *Property Rights and Freedom*”].

¹⁶ Nathan Seppa, *Metropolitan on the Mississippi*, WASH. POST (Mar. 12, 1997), <https://www.washingtonpost.com/wp-srv/national/daily/march/12/cahokia.htm> [Hereinafter, “Seppa, *Metropolitan Life*”] (“Cahokia arose from this mini-breadbasket as its people hunted less and took up farming with gusto. By all evidence, they ate well.”).

¹⁷ Catherine Boeckmann, *The Three Sisters: Corn, Beans, and Squash*, ALMANAC, <https://www.almanac.com/content/three-sisters-corn-bean-and-squash> (last visited Mar. 4, 2019) (“In legend, the plants were a gift from the gods, always to be grown together, eaten together, and celebrated together.”); Melissa Kruse-Peebles, *How to Grow a Three Sisters Garden*, NATIVESEEDS (May 27, 2016), <https://www.nativeseeds.org/learn/nss-blog/415-3sisters> (For centuries these three crops have been the center of Native American agriculture and culinary traditions.); *The Legend of the Three Sisters*, ONEIDA,

productive that they had no need to hunt.¹⁸ The Americas' indigenous people were so proficient at agriculture that they modified their crops, and a 2016 article in the *Journal of Ethnic Foods* concluded "approximately 60% of the food consumed worldwide originated from the New World."¹⁹

The land where Indians staked their villages and planted their crops was usually communally owned.²⁰ Nonetheless, many tribes recognized individual rights to land.²¹ For example, individuals could acquire usufructuary rights to land by farming or trapping on unused land.²² Individuals were also allowed to hold private property rights to hunting territories and fishing sites.²³ In fact, private property rights in land

<http://www.oneidaindiannation.com/the-legend-of-the-three-sisters/> (last visited Mar. 4, 2019) ("There are several legends surrounding the Three Sisters; indeed, almost every American Indian nation seems to have its own.").

¹⁸ JOHN SWANTON, *INDIAN TRIBES OF THE LOWER MISSISSIPPI VALLEY AND ADJACENT COAST OF THE GULF OF MEXICO* 289 (1st ed. 1911) (quoting the journal of Gravier discussing the Houma "As they are satisfied with their squashes and their corn, of which they have an abundance, they are indolent and hardly ever hunt.").

¹⁹ Sunmin Park, Nobuko Hongo, & James W. Daily III, *Native American Foods: History, Culture, and Influence on Modern Diets*, *JOURNAL OF ETHNIC FOODS* (Sept. 2016), https://ac.els-cdn.com/S2352618116300750/1-s2.0-S2352618116300750-main.pdf?_tid=4df9c515-8017-4fa8-be31-a21c8f6aa66d&acdnat=1525896027_820f90869b676ec4c9b1e12c5a632af7 ("Now, approximately 60% of the food now consumed worldwide originated from the New World.").

²⁰ Miller, *Economic Development in Indian Country*, *supra* note 15, at 768 ("Most of the land Indians lived on, however, was considered to be tribal land; that is, it was owned by the tribe or by all the tribe's members in common."); Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 337 ("Land in pre-contact America was owned by the separate tribal governments and their citizens in common.").

²¹ Kenneth H. Bobroff, *Indian Law in Property: Johnson v. M'Intosh and Beyond*, 37 *TULSA L. REV.* 521, 534 (2013) ("Like many native societies in the Americas, Indians in early New England recognized exclusive rights in land."); Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 337 ("Individual Amerindians had possessory rights to specific plots of land and were free to cultivate their property as they saw fit.").

²² Miller, *Economic Development in Indian Country*, *supra* note 15, at 768; Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 337 ("The Indians who cultivated the land maintained their usufructuary rights as long as they continued to work the land.").

²³ Miller, *Economic Development in Indian Country*, *supra* note 15, at 771 ("The Inuit peoples of Alaska and Canada and other tribes exercised and enforced definite concepts of private property regarding hunting and fishing

and rivers were utilized by tribes as a means of averting the tragedy of the commons.²⁴ Rights to land improvements, such as storehouses for crops²⁵ and access to irrigation systems,²⁶ were held individually. Perhaps no group of people has taken the concept of private property ownership as far as the Nookta of the Pacific Northwest who privately owned everything, including fishing spots in the Pacific Ocean.²⁷

Indians wanted a greater variety of goods than were available on their land; hence, indigenous societies went to great lengths to facilitate commerce. Tribes developed trade languages in order to enable exchange with diverse peoples.²⁸ Trade languages were so widely spoken that a

territories.”); Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 337–338.

²⁴ Miller, *Economic Development in Indian Country*, *supra* note 15, at 771 (“Other tribes that became heavily involved in the European fur trade also developed individual private property rights in valuable rivers and streams to control overharvesting.”); William H. Rodgers, Jr., *Treatment As Tribe, Treatment As State: The Penobscot Indians and the Clean Water Act*, 55 ALA. L. REV. 815, 827 (2004) (quoting a 1764 non-Indian’s observations of the Penobscot Indians beaver conservation practices, “They said it was their custom to divide the hunting grounds and streams among the different Indian families; that they hunted every third year and killed two-thirds of the beaver, leaving the other third to breed; beavers were to them what cattle were to the Englishmen, but the English were killing off the beavers without any regard for the owners of the lands.”).

²⁵ Miller, *Economic Development in Indian Country*, *supra* note 15, at 769 (noting the Cherokee and Creek held crops in “privately owned storehouses.”).

²⁶ *Id.* (noting the Pueblos and Hopis held rights to irrigation individually).

²⁷ Miller *Economic Development in Indian Country*, *supra* note 15, at 772; Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 338.

²⁸ Ojibwa, *Indians 201: American Indian Trade Languages*, DAILY KOS (Oct. 25, 2011, 7:07 AM), <https://www.dailykos.com/stories/2011/10/25/1029852/> (“The indigenous trading routes often connected people who spoke unrelated languages. As a consequence, a number of trading languages evolved, which included words and phrases from a number of different languages.”); Lyle Campbell, *American Indian Languages: The Historical Linguistics of Native America 10*, <https://amerindias.github.io/referencias/cam00americanindian.pdf> (“It is well known that such American Indian trade languages as Chinook Jargon and Mobilian Jargon exist.”); *Indigenous Trade Networks Thrived Long Before the Arrival of Europeans*, INDIGENOUS CORP. TRAINING, INC. (July 5, 2017), <https://www.ictinc.ca/blog/indigenous-trade-networks-thrived-long-before-the->

European who could learn a trade language would be able to travel throughout the Americas without a guide.²⁹ Tribes also developed laws to facilitate commerce that among other things, enabled individuals to purchase items on credit.³⁰ Likewise, commerce was not conducted exclusively by barter as tribes used currencies, including wampum and dentalia shells, as mediums of exchange.³¹

Indigenous trade was not simply one Indian meeting another in the woods to swap goods—indigenous commerce occurred in vast trading centers. Cahokia, the largest American city north of Mexico prior to European contact, had earthen mounds larger than Egypt’s Great Pyramids and was fueled by transcontinental markets.³² Several other trading centers, such as Chaco Canyon, existed in the Americas long before European contact.³³ These markets were fed by indigenous trade networks

arrival-of-europeans (“We had to create institutions to facilitate trade. From Alaska to California we agreed to a common trade language, Chinook.”).

²⁹ Ojibwa, *supra* note 28 (noting European explorers and priests relied on trade languages for communication with North America’s indigenous inhabitants); *Lolo in Trade Jargon*, LEWIS-CLARK, <http://www.lewis-clark.org/article/3154> (last visited on Mar. 5, 2019) (“[The Chinook Trade Jargon] rapidly became a convenient mode of communication among all tribes in the Northwest U.S. and western Canada. That in turn encouraged missionaries to assemble vocabularies of the jargon to facilitate their pastoral work among the various tribes and bands in their missions’ districts.”).

³⁰ Miller, *Economic Development in Indian Country*, *supra* note 15, at 792 (noting Indians developed standard measurements, provided guarantees on products, and had secured transactions laws); Crepelle and Block, *supra* note 15, at 341 (“Amerindians even guaranteed their wares and could purchase items on credit.”).

³¹ Miller, *Economic Development in Indian Country*, *supra* note 15, at 795–98; Crepelle and Block, *Property Rights and Freedom*, *supra* note 15, at 341 (“American Indians engaged in commerce with both barter and currency.”).

³² Seppa, *Metropolitan Life*, *supra* note 16 (“Cahokia attracted copper from mines near Lake Superior; salt from nearby mines; shells from the Gulf of Mexico; chert, a flintlike rock, from quarries as far as Oklahoma, and mica, a sparkling mineral, from the Carolinas.”); *Mississippian Archaeological Sites: Cahokia*, MUSEUM LINK ILL. (2000), http://www.museum.state.il.us/muslink/nat_amer/pre/htmls/m_sites.html (“Cahokia was the center of a political and trade network of communities scattered up and down the Mississippi River, and perhaps of other Mississippian communities elsewhere.”).

³³ Joseph Austin & Adam Crepelle, *Revitalizing International Trade Between Native Nations*, TRIBAL BUS. J. (2018), <http://tribalbusinessjournal.com/roads-lead-chaco-canyon/>; Blake De Pastino, *Bones of Exotic Macaws Reveal Early Rise of Trade, Hierarchy in Chaco Canyon*, WESTERN DIGS (Dec. 31, 2015) <http://westerndigs.org/exotic-macaws-found-at->

that transported items over a thousand miles from their site of origin.³⁴ Lewis and Clark were astonished by the variety and volume of trade conducted at an indigenous market in Oregon, and Europeans likened an indigenous trade center in present-day Pennsylvania to the Hague.³⁵ In addition to trade centers, goods were exchanged at trade fairs such as the Shoshone Rendezvous in present-day Wyoming.³⁶ Trade was so important to tribes that wars would be paused in order for goods to flow.³⁷

chaco-canyon-reveal-trade-hierarchy-ancestral-pueblo/; Samuel Western, *Trade Among Tribes: Commerce on the Plains Before Europeans Arrived*, WYOHISTORY (Apr. 26, 2016), <https://www.wyohistory.org/encyclopedia/trade-among-tribes-commerce-plains-europeans-arrived> (“[T]hree major pre-settlement trading centers for tribes: The Dalles, where the Chinookan tribes gathered along the Columbia River in what’s now Oregon; Taos Pueblo in present New Mexico, which serviced the tribes of the southwest; and the Mandan/Hidatsa trade center, where the Knife River joins the Missouri River in modern-day North Dakota, where northern Plains tribes came to trade.”).

³⁴ Miller, *Economic Development in Indian Country*, *supra* note 15, at 787 (“For example, sea shells native to the Gulf of Mexico, the southeastern Atlantic, the Gulf of California, and the Pacific Ocean have been found a thousand miles away.”); Seppa, *Metropolitan Life*, *supra* note 16 (“Cahokians had an affinity for ornamentation, favoring beads made from sea shells collected more than a thousand miles away.”); *Indigenous Trade: The Southeast*, ENCYCLOPEDIA, <https://www.encyclopedia.com/history/news-wires-white-papers-and-books/indigenous-trade-southeast> (last visited Mar. 7, 2019) (“The presence of long-nosed god masks at Mississippian archaeological sites indicates, moreover, that these cities traded directly with the Aztec Empire, likely through traveling Aztec merchants known as *pochtecas*.”); John Collier, “*A Bill of Rights for the Indians*”: *John Collier Envisions and Indian New Deal*, HISTORY MATTERS, <http://historymatters.gmu.edu/d/5059/> (last visited Mar. 7, 2019) (“They had developed agriculture and trade, and their lines of commerce stretched from ocean to ocean and from Canada to South America.”).

³⁵ Miller, *Economic Development in Indian Country*, *supra* note 15, at 790.

³⁶ Samuel Western, *Trade Among Tribes: Commerce on the Plains Before Europeans Arrived*, WYOHISTORY (Apr. 26, 2016), <https://www.wyohistory.org/encyclopedia/trade-among-tribes-commerce-plains-europeans-arrived>; Miller, *Economic Development in Indian Country*, *supra* note 15, at 786 (“Indian people have long made goods for sale and trade which they exchanged at large fairs or markets that were held regularly at specific locations and times across the United States.”).

³⁷ Miller, *Economic Development in Indian Country*, *supra* note 15, at 790–91 (“These established trading markets were so important that tribes, and later even the Spanish, would call truces to hold the markets.”).

Tribes embraced the opportunity to trade with Europeans, and the ability to obtain European wares was a primary reason that tribes allowed the fledging European outposts to exist.³⁸ As a result of well-established and efficient trade networks, Indians usually encountered European items before they encountered Europeans.³⁹ Indians eagerly sought European goods and adapted their economic practices in order to obtain them. For example, to procure firearms, tribes began mass slaving campaigns to use their captives as currency.⁴⁰ Firearms provided a military advantage, but also enabled Indians to hunt more efficiently, which boosted their productivity in the fur trade.⁴¹ Indians generally accepted European goods without believing European items made them “less Indian.”⁴² Indians even

³⁸ *Id.*

³⁹ Miller, *Economic Development in Indian Country*, *supra* note 15, at 788 (“After Europeans arrived on this continent, the extensive and well-established tribal trading networks led to the spread of European goods to many tribes long before they met their first white people.”); Bill Yellowtail, *Indian Sovereignty*, PROPERTY AND ENVIRONMENTAL RESEARCH CENTER (June 1, 2006), <https://www.perc.org/2006/06/01/indian-sovereignty/> (“Fabricating iron implements at their portable forge, they bartered them for the corn and squash that sustained the Corps of Discovery through the bitterly cold winter. A few months and a thousand miles later, Lewis was astonished to arrive in the Nez Perce community and find that one of these trade axes had proceeded him.”).

⁴⁰ DAVID J. SILVERMAN, THUNDERSTICKS: FIREARMS AND THE VIOLENT TRANSFORMATION OF NATIVE AMERICA 57 (2019) (“Competition for captives [to sell as slaves] and control of European markets galvanized intertribal arms races in the Southeast as they had in the North.”).

⁴¹ *Id.* at 86.

⁴² Miller, *Economic Development in Indian Country*, *supra* note 15, at 788 (“Tribes and individual Indians had no problem incorporating newly arrived Europeans into their trading networks.”); Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009, 1029–30 (2007) (“Many tribes pride themselves on their ability to adapt: the Navajos developed a thriving weaving industry using wool from sheep brought over by Europeans, the Plains Indians incorporated European horses into their culture, and the Choctaw claim that if the Europeans had brought aluminum foil with them Choctaws would have been cooking with it while the other tribes were still regarding it with suspicion.”); Shane Lief, *Singing Shaking, and Parading at the Birth of New Orleans*, THE JAZZ ARCHIVIST 15, 18 (2015), https://jazz.tulane.edu/sites/default/files/jazz/docs/jazz_archivist/JA%202015%20Web%20Copy_0.pdf#BirthofNewOrleans (noting Jesuit missionary Father Pierre de Charlevoix description of the Tunica Chief he encountered in the early 1700s as “dressed in the French fashion [and] carries on trade with the French, supplying them with horses and poultry, and is very expert at business.... He has long since stopped wearing Indian clothes, and takes great pride in always appearing well-dressed.”).

incorporated European items, including guns, into their traditional ceremonies.⁴³

The individual drove the Americas' indigenous economic system. Professor Robert Miller states, "Indian people operated under the purest of capitalist systems in that there was very little governmental control over the freedom of individuals to engage in whatever type or amount of economic activity they wished."⁴⁴ The indigenous economy of the Americas consisted of both goods and services.⁴⁵ Individual Indians would specialize in their fields of work including horse training, manufacturing, and medicine.⁴⁶ Moreover, Indians could earn their livelihood as brokers and middle men in trade deals.⁴⁷ Indians also developed intellectual property laws⁴⁸ and a purpose of intellectual property is to incentivize individuals to continue their creative endeavors.⁴⁹

⁴³ Silverman, *supra* note 40, at 31 (noting the Iroquois were including guns in ceremonies by the 1640s); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1727 (2012) (noting some tribes, such as the Navajo Nation, have ceremonial use clauses in their gun ordinances).

⁴⁴ Miller, *Economic Development in Indian Country*, *supra* note 15, at 780.

⁴⁵ *Id.* at 789 ("Indians also traded personal services between tribes."); Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 340.

⁴⁶ Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 340 ("The free market Amerindian economy also offered Indians the opportunity to engage in professions requiring specialization such as warriors, doctors, manufacturers, and singers.").

⁴⁷ Miller, *Economic Development in Indian Country*, *supra* note 15, at 792 ("many tribes and Indians all across North America understood the economic value in gaining monopolies on specific goods and trade routes and becoming the middleman in transactions because it enabled one to pass on goods at higher prices and to earn greater profits.").

⁴⁸ *Id.* at 773 (noting individuals in the Makah and Tlingit Tribes held private property rights in certain symbols); Kenneth H. Bobroff, *Indian Law in Property: Johnson v. M'Intosh and Beyond*, 37 TULSA L. REV. 521, 533 (2013) ("Almost all indigenous cultures here have recognized private property in personal goods, including, among many cultures, intellectual property such as songs, dances, stories, and curing rituals."); Crepelle & Block, *supra* note 15, at 338 ("Tribes developed laws to protect private property; in fact, many tribes had intellectual property laws; e.g., certain individuals or families had exclusive rights to use certain images, stories, ceremonies, and medicines among other things.").

⁴⁹ *Kewanee Oil Co., v. Bicron Corp.*, 416 U.S. 470, 496 (1974) ("The decision of Congress to adopt a patent system was based on the idea that there will be much more innovation if discoveries are disclosed and patented than there will be when everyone works in secret."); *Festo Corp., v. Shoketsu Kinzoku*

Indians were not engaging in commerce simply to survive the day.⁵⁰ Rather, Indians engaged in industrial pursuits for wealth and glory.⁵¹ Although guns made hunting easier, Blackfeet men preferred to hunt with the bow and arrow because arrows contained distinguishing marks but bullets did not.⁵² Hunting was a prestigious activity for Blackfeet men; hence, Blackfeet men wanted to claim their kills.⁵³ Other tribes marked their arrows for the same reason.⁵⁴

Therefore, the evidence makes it clear that Indians traditionally were motivated and shrewd businessmen.⁵⁵

B. *The United States Indian Policy from 1776-1970*

One of the earliest objectives of the United States Indian policy was to seize control of Indian resources. The United States' inability to control tribes was a major downfall of the Articles of Confederation; hence, tribes served as a catalyzing force for the ratification of the

Kogyo Kabushiki Co., 535 U.S. 722, 730 (2002) (“The patent laws ‘promote the Progress of Science and useful Arts’ by rewarding innovation with a temporary monopoly.”); *What Is Intellectual Property?*, WIPO, http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf (“the promotion and protection of intellectual property spurs economic growth, creates new jobs and industries, and enhances the quality and enjoyment of life.”).

⁵⁰ *But cf.*, *United States v. Sioux Nation*, 448 U.S. 371, 437 (1980) (Rehnquist, J., dissenting) (asserting the Plains Indians were simpletons that “lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching.”).

⁵¹ *Id.*

⁵² Silverman, *supra* note 40, at 262.

⁵³ *Id.*

⁵⁴ Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 339 (“Plains Indians would mark their arrows so hunters could identify their kills”).

⁵⁵ Yellowtail, *Indian Sovereignty*, *supra* note 39 (“Lewis and Clark reported to President Thomas Jefferson that native inhabitants throughout the Louisiana Territory were a thoroughly independent, businesslike lot—sharp entrepreneurs and shrewd dealers. The point to be extracted is that American Indians never have been strangers to the American entrepreneurial spirit.”); Lief, *Singing, Shaking and Parading*, *supra* note 42, at 18 (noting Jesuit missionary Father Pierre de Charlevoix’s describing the Tunica Chief in the early 1700s as “very expert at business”); Carlos L. Rodriguez, Craig S. Galbraith, & Cur H. Stiles, *American Indian Collectivism*, PERC (June 1, 2006), <https://www.perc.org/2006/06/01/american-indian-collectivism/> (“Early indigenous people in North America were both highly entrepreneurial and acutely aware of the economic forces around them . . .”).

Constitution.⁵⁶ The Constitution's Commerce Clause grants the federal government the power to regulate trade with the Indian tribes,⁵⁷ and one of the first laws passed by the first Congress was the Indian Trade and Intercourse Act of 1790.⁵⁸ The Act prohibited non-Indians from engaging in commercial activity with Indian tribes without a license from the federal government.⁵⁹ Furthermore, the Act prohibited Indians from selling their land without the express permission of the federal government.⁶⁰ A version of this paternalistic law remains on the books today.⁶¹

The subversion of Indian rights continued in the famed Marshall Trilogy. In 1823, the Supreme Court issued an opinion that laid the groundwork for property rights in the United States.⁶² The Court in

⁵⁶ Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L. J. 999, 1058 (2014) (“Knox’s invocation of ‘murdering savages’ to justify a stronger federal government became a common trope in Federalist arguments for ratification.”).

⁵⁷ U.S. Const. art. I, §. 8, cl. 3. Though the clause is now construed to give Congress “plenary power” over Indians, this construction cannot be supported by the clause’s text or history. *See* *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring) (“Congress’ purported plenary power over Indian tribes rests on even shakier foundations. No enumerated power—not Congress’ power to ‘regulate Commerce ... with Indian Tribes,’ not the Senate’s role in approving treaties, nor anything else—gives Congress such sweeping authority. . . . Indeed, the Court created this new power because it was unable to find an enumerated power justifying the federal Major Crimes Act, which for the first time punished crimes committed by Indians against Indians on Indian land.”); FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 46–47 (2009) (“Plenary authority in Indian affairs is not rooted in the text or history of the Constitution but in the text and history of colonialism—a colonialism in which a ‘conquered people’ only has authority at the ‘sufferance’ of the ‘conqueror.’”); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 132 (2006) (noting the “missing constitutional source of authority for Congress and the President to make federal Indian legislation and policy in the first instance.”).

⁵⁸ An Act to Regulate Trade and Intercourse with the Indian Tribes (1845), https://pages.uoregon.edu/mjdennis/courses/hist469_trade.htm.

⁵⁹ *Id.* at Stat. 1.

⁶⁰ *Id.* §4.

⁶¹ 25 U.S.C. § 261, et seq (2019); 25 C.F.R. §§ 140–140.26 (2019).

⁶² Kenneth H. Bobroff, *Indian Law in Property: Johnson v. M’Intosh and Beyond*, 37 TULSA L. REV. 521 (2013) (“*Johnson v. M’Intosh*, is at the root of title for most real property in the United States.”); Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1096 (2000) (“Marshall, then, created a rather strange two-tiered land tenure system: Indian title of occupancy applied before American

Johnson v. McIntosh held that Indians lost ownership of their land when Europeans arrived on the American continent by virtue of the Doctrine of Discovery⁶³—an international law used by European nations to justify the subjugation of indigenous peoples around the world.⁶⁴ Remarkably, Justice Marshall sought to strengthen his holding by asserting the “savages” were non-agricultural⁶⁵ although the Chief Justice was well aware of the fact that Indians were skilled farmers.⁶⁶ Notwithstanding the

purchase or conquest, and the common law of the several states applied after.”) Carl M. Rose, *Left Brain, Right Brain and History in the New Law and Economics of Property*, 79 OR. L. REV. 479, 485 (2000) (“Our leading case about Native American property claims is *Johnson v. M’Intosh*, where it might have been possible to recognize property in native tribes; but the Marshall Court, while not completely dismissive of all Native American claims, ignored the possibility of collective tribal ownership”).

⁶³ *Johnson’s Lessee v. McIntosh*, 21 U.S. 543, 573 (1823) (“This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.”).

⁶⁴ Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 330–31 (2011) (“The English colonists in North America and then the American colonial, state, and federal governments all utilized the Doctrine and its religious, cultural, and racial ideas of superiority over Native Americans to stake legal claims to the lands and property rights of the indigenous peoples.”); Robert A. Williams, *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L. J. 660, 672 (1990) (“For five hundred years, this doctrine and its discourse of diminished indigenous legal status and rights has been relied on by European and European-derived settler states to regulate and legitimate their colonial activities in indigenous peoples’ territories.”).

⁶⁵ *Johnson’s Lessee*, 21 U.S. at 590 (“But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness”).

⁶⁶ Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 336 (“Chief Justice John Marshall justified the confiscation of Indian land by asserting they were nomadic and nonagricultural in *Johnson v. M’Intosh* despite the fact that he knew Indians were farmers.”); Mary Kathryn Nagle, *Standing Bear v. Crook: The Case for Equality Under Waaxe’s Law*, 45 CREIGHTON L. REV. 455, 465 (2012) (noting Justice Marshall’s assertion that Indians were not farmers in *Johnson v. M’Intosh* “is ironic, since the very first English settlers to arrive on the continent relied on Native American harvests to survive--and would have starved to death but for their ability to eat the crops grown by Native Americans.”); Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 607 (2009) (“But on reaching the New World, the colonists found that not only did the tribes they encountered farm their lands, but that the English were dependent on native harvests to survive.”); Allison M. Dussias,

case's flagrant racism and factual errors, the decision remains binding law in the United States and continues to undermine Indian land rights.⁶⁷

Georgia's attempt "to annihilate the Cherokees as a political society" and steal the Cherokees' land led to the second case in the Marshall Trilogy.⁶⁸ The Court issued its opinion in *Cherokee v. Georgia* in 1831. The issue in the case was whether the Cherokee were a nation in the same sense as European nations.⁶⁹ Despite what Justice Marshall admitted was an "imposing" argument in support of the Cherokee being entitled to the same rights as European nations,⁷⁰ Marshall did not recognize the Cherokee as a foreign nation. Rather, Marshall ruled the Cherokee are a "domestic dependent nation" because the Cherokee "are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."⁷¹ Tribes still occupy the position of "domestic dependent nations,"⁷² and the bigoted, paternalistic, guardian-ward relationship lives on as well in what is known today as the "trust relationship."⁷³

Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights, 77 N.C. L. REV. 637, 640 (1999) ("The Johnson opinion was predicated on a particular conception of Indian land-use patterns and property rights. . . . Chief Justice Marshall ignored the fact that for centuries, many tribes had indeed engaged in settled agriculture. . .").

⁶⁷ *E.g.*, *Pueblo of Jemez v. United States*, 790 F.3d 1143 (10th Cir. 2015); *The Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d. 484, n1 (5th Cir. 2014); *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 488, 502–504 (W.D. N.Y. 2002).

⁶⁸ *Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1831).

⁶⁹ *Id.* at 15–16.

⁷⁰ *Id.* at 16 ("This argument is imposing, but we must examine it more closely before we yield to it.").

⁷¹ *Id.* at 17.

⁷² *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 782 (2014).

⁷³ Mary C. Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 358 (2013) ("Judges, attorneys, and scholars often describe the trust duty of protection as a principle deriving from a guardian-ward relationship between the federal government and tribes."); Heather Whitney-Williams & Hillary M. Hoffmann, *Fracking in Indian Country: The Federal Trust Relationship, Tribal Sovereignty, and the Beneficial Use of Produced Water*, 32 YALE J. ON REG. 451, 474 (2015) ("The guardian/ward relationship established in *Kagama* has evolved, not in substance, but in form, into what the Supreme Court refers to as a "trust" relationship between the federal government, as trustee, and

A year after the Court's *Cherokee* decision, the Court issued its final opinion in the Trilogy. The case arose from a Georgia law prohibiting white people from entering the Cherokee Nation without a license from the state.⁷⁴ Some white missionaries violated this law, and Georgia entered the Cherokee boundaries, arrested, and convicted the missionaries. The missionaries appealed their conviction to the Supreme Court. Surprisingly, the Court ruled Georgia's actions illegal. The Court boldly declared, "the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress."⁷⁵ This decision is widely regarded as a victory for tribal sovereignty, but it was not. The Court simply said the federal government has supreme authority over Indian affairs, and the states have none.⁷⁶

In any event, the Court's holding offered no protection to the Cherokee because President Andrew Jackson—who signed the Indian Removal Act and was nicknamed "Indian killer"⁷⁷—refused to enforce the

the tribes, as beneficiaries."); Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115, 115–16 (1997).

⁷⁴ *Worcester v. Georgia*, 31 U.S. 515, 537 (1832).

⁷⁵ *Id.* at 561.

⁷⁶ *Id.* at 561 ("The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States."); Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, n.55 (1998) [Hereinafter, "Jimenez & Song, *Concurrent Tribal and State Jurisdiction*"] ("Although *Worcester* is cited as a victory for tribal jurisdiction, the primary issue in *Worcester* was federalism, not tribal sovereignty."); Alison Burton, *What about the Children? Extending Tribal Criminal Jurisdiction to Crimes Against Children*, 52 HARV. C.R.-C.L. REV. 193, 198 (2017) ("However, the Court went on to hold that tribal sovereignty only has force against state governments and that tribes are subject to federal laws.").

⁷⁷ Eli Rosenberg, *Andrew Jackson Was Called 'Indian Killer.' Trump Honored Navajos in Front of His Portrait*, WASH. POST (Nov. 28, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/11/28/andrew-jackson-was-called-indian-killer-trump-honored-navajos-in-front-of-his-portrait/?utm_term=.02e9724b6f5b; Gale Courey Toensing, *Indian-Killer Andrew Jackson Deserves Top Spot on List of Worst US Presidents*, INDIAN COUNTRY TODAY (Sept. 10, 2017), <https://newsmaven.io/indiancountrytoday/archive/indian-killer-andrew-jackson-deserves-top-spot-on-list-of-worst-us-presidents-q-Qg-O3lJUCE1bdhzyeS-A/>; Jaweed Kaleem, *Trump's 'Pocahontas' Swipe Raises the Long History of Problems Between the Government and Native Americans*, LA TIMES (Nov. 28, 2017), <http://www.latimes.com/nation/la-na-pocahontas-native-history->

decision,⁷⁸ an egregious violation of the rule of law.⁷⁹ Jackson's failure to uphold the Court's decision led to a fraudulent treaty—another violation of the rule of law—that resulted in the Cherokees' forced removal from their homeland.⁸⁰ Shamefully, the United States funded Cherokee removal with money with money the United States stole from the Cherokee.⁸¹ A quarter of the Cherokee Nation died during their forced march to Oklahoma.⁸²

The Cherokee and numerous other tribes were placed on reservations by treaties.⁸³ The United States chose to entreat with tribes

20171128-htmistory.html (“Cherokees, who were among those who endured what was called the Trail of Tears, called Jackson the ‘Indian killer.’”).

⁷⁸ Editors of Encyclopedia Britannica, *Worcester v. Georgia*, BRITANNICA, <https://www.britannica.com/topic/Worcester-v-Georgia> (last updated Feb. 24, 2019) (“Pres. Andrew Jackson declined to enforce the Supreme Court's decision, thus allowing states to enact further legislation damaging to the tribes.”); Tim Alan Garrison, *Worcester v. Georgia (1832)*, NEW GEORGIA ENCYCLOPEDIA (Feb. 20, 2018), <https://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832> (“Georgia ignored the Supreme Court's ruling, refusing to release the missionaries, and continued to press the federal government to remove the Cherokee. President Jackson did not enforce the decision against the state and instead called on the Cherokee to relocate or fall under Georgia's jurisdiction.”).

⁷⁹ Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 319 (Noting the forced removal of the Cherokee exhibited “manifest disregard for Amerindian property rights and the rule of law.”).

⁸⁰ See Gary E. Moulton, *Letter from Chief John Ross*, CHEROKEE NATION (1985), <http://www.cherokee.org/About-The-Nation/History/Trail-of-Tears/Letter-from-Chief-John-Ross>.

⁸¹ Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 386–87 (1998) (Henceforth, “Atkinson, *Red Tape*”) (“The \$4.5 million it cost to remove the Cherokees was taken from the Cherokee's money; they paid America from their own pockets to be forced off of their own land.”).

⁸² Ellen Holmes Pearson, *A Trail of 4,000 Tears*, TEACHINGHISTORY, <http://teachinghistory.org/history-content/ask-a-historian/25652> (last visited Mar. 7, 2019); *The Trail of Tears*, PBS, <https://www.pbs.org/wgbh/aia/part4/4h1567.html> (last visited Mar. 7, 2019) (“Over 4,000 out of 15,000 of the Cherokees died.”); *The Trail of Tears—The Indian Removals*, U.S. HISTORY, <http://www.ushistory.org/us/24f.asp> (last visited Mar. 7, 2019).

⁸³ William C. Canby, Jr., *AMERICAN INDIAN LAW IN A NUTSHELL* 19 [Hereinafter, “Canby, *Nutshell*”]; Tim Wright, *A History of Treaties and Reservations on the Olympic Peninsula, 1855-1898*, OLYMPIC PENINSULA COMMUNITY MUSEUM (2018),

because obtaining Indian land by treaty was less costly than it would have been to take the Indians' land by force.⁸⁴ Though the United States employed coercion and subterfuge,⁸⁵ by choosing to negotiate treaties with

https://content.lib.washington.edu/curriculumpackets/A_History_of_Treaties_and_Reservations.pdf (discussing territorial governor Isaac Stevens and Commissioner of Indian Affairs George Manypenny's plan create a reservation system in Oregon and Washington through treaties); Creppelle & Block, *Property Rights and Freedom*, *supra* note 15, at 322 ("The reservations tribes were placed on by treaties proved ruinous for Amerindians.").

⁸⁴ Letter from George Washington to James Duane (Sept. 7, 1783), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Washington/99-01-02-11798> ("I am clear in my opinion, that policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country"); Williams Least Heat-Moon, *A Stark Reminder of How the U.S. Forced American Indians into a New Way of Life*, SMITHSONIAN MAGAZINE (Nov. 2013), <https://www.smithsonianmag.com/history/a-stark-reminder-of-how-the-us-forced-american-indians-into-a-new-way-of-life-3954109/> [Hereinafter, "Heat-Moon, *A Stark Reminder*"] ("[I]n the 1850 Annual Report of the Commissioner of Indian Affairs: 'It is, in the end, cheaper to feed the whole flock for a year than to fight them for a week.'"); Lorraine Boissoneault, *How the 1867 Medicine Lodge Treaty Changed the Plains Indian Tribes Forever*, SMITHSONIAN MAGAZINE (Oct. 23, 2017), <https://www.smithsonianmag.com/history/how-1867-medicine-lodge-treaty-changed-plains-indian-tribes-forever-180965357/> [Hereinafter, "Boissoneault, *Medicine Lodge Treaty*"] ("Sherman's concern about nomadic Indians was echoed in Congress, where members claimed it cost upwards of \$1 million a week to fund the militias defending frontier populations. A peace treaty seemed like a much less costly alternative, especially if the tribes agreed to live on reservations.").

⁸⁵ Canby, *Nutshell*, *supra* note 84, at 19 (noting the United States employed various "degrees of persuasion, reward, and coercion" during treaty negotiations with Indian tribes); Charles F. Wilkinson and John M. Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows upon the Earth--How Long a Time is That*, 63 CAL. L. REV. 601, 610 (1975) ("There are numerous accounts of threats, coercion, bribery, and outright fraud by the negotiators for the United States."); Michael Leroy Oberg, *Treaty of Canandaigua Stands Apart from Others*, DEMOCRAT & CHRONICLE (Dec. 5, 2015), <https://www.democratandchronicle.com/story/opinion/guest-column/2015/12/05/treaty-canandaigua-stands-apart-others/76836580/> ("We should not claim too much for Indian treaties. Many were fraudulent, others coerced."); Arthur Spirling, *US Treaty-making with American Indians: Institutional Change and Relative Power, 1784-1911*, 7 (Sept. 13, 2011), <https://www.princeton.edu/~pcglobal/conferences/methods/papers/Spirling.pdf> (stating "officials frequently used 'force, bribery, deception and threats, among other things, to convince Indian leaders to sign land cession treaties.'").

tribes, the United States officially recognized Indian tribes as nations.⁸⁶ In treaties, tribes ceded most of their ancestral lands in exchange for smaller pieces of land—often located far away from their homes and white settlements in general.⁸⁷ Geographic isolation is a major impediment to many tribes’ economic development efforts today.⁸⁸

However, treaties were more than real estate deals. Tribes negotiated for annuities,⁸⁹ and since Indians were supposed to farm their

⁸⁶ *Worcester v. Georgia*, 31 U.S. 515, 559–60 (“The words ‘treaty’ and ‘nation’ are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.”); *Nation to Nation: Treaties Between the United States and American Indian Nations*, SMITHSONIAN INSTITUTION (2016), <http://nmai.si.edu/nationtonation/>; Karla E. General, *Treaty Rights and the UN Declaration on the Rights of Indigenous Peoples*, INDIAN LAW, <http://indianlaw.org/content/treaty-rights-and-un-declaration-rights-indigenous-peoples> (last visited Mar. 7, 2019) (“Simply put, a treaty is an agreement between two nations or sovereigns.”).

⁸⁷ Canby, *Nutshell*, *supra* note 84, at 19–20; *Winters v. United States*, 207 U.S. 564, 575–76 (1908) (noting the Indians ceded much of their land in a treaty because the United States thought smaller tracts would accelerate their civilization); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175–76 (1999) (“Under the terms of this Treaty, the Indians ceded land in present-day Wisconsin and Minnesota to the United States, and the United States guaranteed to the Indians certain hunting, fishing, and gathering rights on the ceded land.”).

⁸⁸ David A. Benson, *et al.*, *Small Business Economies of the Lakota Fund on the Native American Indian Reservation*, FORSCHUNGSINSTITUT ZUR ZUKUNFT DER ARBEIT INSTITUTE FOR THE STUDY OF LABOR 2 (Jan. 2009), https://www.researchgate.net/publication/23795365_Small_Business_Economies_of_the_Lakota_Fund_on_the_Native_American_Indian_Reservation (“Compounding these challenges is the remote geographical placement of most [Native American Indian Reservations] from major economic hub”); Adam Creppelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 43 (2018) (“Geographic isolation and a dearth of resources have doomed tribal economies since the Indian Wars.”); Trymaine Lee, *No Man’s Land: The Last Tribes of the Plains*, MSNBC (last visited Jan. 13, 2019), <http://www.msnbc.com/interactives/geography-of-poverty/nw.html> (“Native populations and reservations are most often geographically and economically isolated and are among the poorest communities in the country.”).

⁸⁹ *Indians Annuities*, COLO. ENCYCLOPEDIA, <https://coloradoencyclopedia.org/article/indian-annuities> (last visited Mar. 7, 2019) (“Annuities began to be distributed to the Cheyenne, Arapaho, and Ute as

reservations, tribes obtained provisions guaranteeing agricultural tools and training.⁹⁰ Most treaties also contained provisions guaranteeing educational services to tribal youth.⁹¹ During treaty negotiations, tribal leaders were seeking to obtain the most for their people in order to increase their odds of preserving their culture and their people's ability to provide for themselves.

a condition of the treaties they signed.”); Alicia Ault, *A Territorial Land Grab that Pushed Native Americans to the Breaking Point*, SMITHSONIAN MAGAZINE (Oct. 9, 2017), <https://www.smithsonianmag.com/smithsonian-institution/territorial-grab-pushed-native-americans-breaking-point-180965142/> (discussing the annuities various tribes received in exchange for their land); David G. Lewis, *When Treaty Annuities End—Federal Austerity in 1876*, NDNHISTORY RESEARCH (Sept. 18, 2016), <https://ndnhistoryresearch.com/2016/09/18/when-treaty-annuities-end-federal-austerity-in-1876/>.

⁹⁰ Treaty of Fort Laramie 1868 Art. VIII, http://avalon.law.yale.edu/19th_century/nt001.asp; Indian Country, *Ojibwe Treaty Rights*, MILWAUKEE PUBLIC MUSEUM (last visited July 31, 2018), <http://www.mpm.edu/content/wirp/ICW-110.html> (noting the treaty guarantees support for farmers); *Treaties and the Law*, INFORMATION BACKGROUNDER OFFICE OF THE TREATY COMMISSIONER 12 (2007), <http://docs.plea.org/pdf/TreatiesAndTheLawInformationBackgrounder.pdf> at 12 (noting farming equipment training was common in treaty provisions); Boissoneault, *Medicine Lodge Treaty*, *supra* note 85 (noting the tribes party to the Treaty of Medicine Lodge were provided with farming tools).

⁹¹ *Ojibwe Treaty Rights*, MILWAUKEE PUBLIC MUSEUM, <http://www.mpm.edu/content/wirp/ICW-110.html> (last visited Mar. 7, 2019) (noting the treaty guarantees support for schools); Stan Juneau, *Indian Education for All: A History and Foundation of American Indian Education Policy* 9, MONTANA OFFICE OF PUBLIC INSTRUCTION (Feb. 2001), https://www.bs7.org/UserFiles/Servers/Server_112418/File/Bozeman%20Public%20Schools/Indian%20Education/Materials_Resources/IndPolicyHistory.pdf (“The United States included education provisions in most treaties they negotiated with Indian tribes.”); Nizhone Meza, *Indian Education: Maintaining Tribal Sovereignty Through Native American Culture and Language Preservation*, 2015 BYU EDUC. & L.J. 353, 356 (2015) (“There are provisions regarding Indian education in over 150 treaties between tribes and the United States . . .”).

Unfortunately, the United States' treaty promises were lies,⁹² and reservation life was bitterly hard for Indians.⁹³ Almost immediately, the United States violated the provisions guaranteeing annuities and farm implements to tribes.⁹⁴ On the reservation, people who were independent and self-reliant since time immemorial suddenly had no means to support their families. The once-free Indians were subject to the reservation's Indian superintendent's totalitarian power.⁹⁵ Reservation Indians were

⁹² Hansi Lo Wong, *Broken Promises on Display at Native American Treaties Exhibit*, NPR (Jan. 18, 2015), <https://www.npr.org/sections/codeswitch/2015/01/18/368559990/broken-promises-on-display-at-native-american-treaties-exhibit>; Tim Giago, *Broken Treaties Remain Among America's Deepest and Darkest Secrets*, INDIANZ (Aug. 11, 2017), <https://www.indianz.com/News/2017/08/11/tim-giago-broken-treaties-remain-among-a.asp>; Rob Capriccioso, *Illuminating the Treaties That Have Governed U.S.—Indian Relationships*, SMITHSONIAN MAGAZINE (Sept. 20, 2014), <https://www.smithsonianmag.com/smithsonian-institution/treaties-governed-us-indian-relationships-180952443/> (quoting Robert Odawi Porter noting the U.S. has “so many broken treaty promises” with Indian tribes).

⁹³ Boissoneault, *Medicine Lodge Treaty*, *supra* note 85 (“By the early 20th century, life on reservations was similar to life in the homelands of apartheid South Africa—people had no freedom of movement, they had no freedom of religion. Basically all their rights were taken away.”); *Indian Reservations*, HISTORY (2019), <https://www.history.com/topics/indian-reservations> (“Daily living on the reservations was hard at best.”); *Indian Reservations*, ENCYCLOPEDIA (2003), <https://www.encyclopedia.com/history/dictionaries-thesauruses-pictures-and-press-releases/indian-reservations> (noting reservations were designed to solve the United States “Indian problem” by their “concentration, their domestication, and their incorporation.”).

⁹⁴ *Indians Annuities*, COLO. ENCYCLOPEDIA, <https://coloradoencyclopedia.org/article/indian-annuities> (last visited Mar. 7, 2019) (“Because of the remoteness of the Ute agencies and poor government planning and execution, sometimes annuity goods did not arrive in time for them to be distributed, or they did not arrive at all. When goods were late or absent, the Utes suffered over the winter months for lack of adequate shelter, clothing, blankets, and food. Because annuities were a stipulation of their treaties, late, absent, or poor-quality goods caused considerable distrust of the US government.”).

⁹⁵ *Id.*; DAVID H. GETCHES, ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW, 221 (7th ed. 2016) [Hereinafter, “GETCHES, ET AL, CASES AND MATERIALS”] (noting Senator Wheeler likened Indian agency intendent powers to that of “a czar”); Carrie McClery, *Of Horses and Men: Superintendent Asbury's Assault on the Crow*, Tribal College Journal (Feb. 15, 2003) (“When the Office of Indian Affairs sent Superintendent Calvin Asbury to the Crow Indian

forced to extend their hands in hope the reservation's Indian agent would provide them with a ration ticket that could be used to purchase a miniscule amount of poor-quality, rancid food.⁹⁶ The federal government provided the Blackfeet reservation with such paltry rations that a quarter of the nation died of starvation in 1884.⁹⁷ On reservations, poverty and hunger were so dire that Indian women were forced to trade sex for food and clothes.⁹⁸ As their traditional religious practices were outlawed, Indians

Reservation in 1919, he settled in like the bone-chilling winds of that Montana winter, slowly dripping the toxic waste of human oppression onto Crow culture. The Crow Tribe remains forever affected by this zealot who deprived them of their personal freedoms and wealth while expanding his own political power.”)

⁹⁶ Heat-Moon, *A Stark Reminder*; Karin Eagle, *Ration Cards Embarrassed Early Native Americans*, INDIANZ (Jan. 10, 2014), <https://www.indianz.com/News/2014/01/10/native-sun-news-ration-cards-w.asp>; “Say Commodity Cheese!”, *Circle of Goods* 1 (last visited Aug. 1, 2018), <https://www.sunypress.edu/pdf/60638.pdf> (“[M]ore than 150 years of structured dependency that began when the first parcel of Native American land was exchanged for ration tickets dispensed by government agents to obedient Indian subjects.”).

⁹⁷ Heat-Moon, *A Stark Reminder*, *supra* note 97; *see also Indian Reservations*, HISTORY, <https://www.history.com/topics/indian-reservations> (last visited Mar. 7, 2019) (stating on reservations “Starvation was common”); Sarah K. Elliott, *How American Indian Reservations Came to Be*, PBS (Oct. 18, 2016), <http://www.pbs.org/wgbh/roadshow/stories/articles/2015/5/25/how-american-indian-reservations-came-be/> (“The U.S. government had promised to support the relocated tribal members with food and other supplies, but their commitments often went unfulfilled, and the Native Americans’ ability to hunt, fish and gather food was severely restricted. Illness, starvation, and depression remained a constant for many.”).

⁹⁸ Gabrielle Mandeville, *Sex Trafficking on Indian Reservations*, 51 TULSA L. REV. 181, 184-185 (2015); Mary Annette Pember, *Native Girls Are Being Exploited and Destroyed at an Alarming Rate*, INDIAN COUNTRY TODAY (May 16, 2012), <https://newsmaven.io/indiancountrytoday/archive/native-girls-are-being-exploited-and-destroyed-at-an-alarming-rate-4r1HLmef-EWEoSpGM9DXyA/> (quoting an 1885 letter from a U.S. Indian Agent, “There is but little said in their favor regarding their moral standing, and for this there is no doubt but that the Government is largely to blame... When I first came here, the soldier had also come to stay. The Indian maiden’s favor had a money value and what wonder is that, half clad and half starved, they bartered their honor... for something to cover their limbs and for food for themselves and their kin.”).

had nowhere to look for hope.⁹⁹ Many turned to alcohol. This hopelessness continues to plague Indian country.¹⁰⁰

The United States was not acquiring Indian land by treaty fast enough to keep pace with the demand for Indian lands. Accordingly, the General Allotment Act of 1887 disregarded the United States' treaty obligations to hold reservation land for the Indians for all-time and divided reservations into 160 acre parcels.¹⁰¹ The parcels were exempt from

⁹⁹ CNSNews.com Staff, *Michelle Obama: 'Our Government... Outlawed Indian Religions,'* CNSNEWS (Apr. 9, 2015, 10:41 AM), <https://www.cnsnews.com/news/article/cnsnewscom-staff/michelle-obama-our-governmentoutlawed-indian-religions> (quoting Michelle Obama noting federal “regulations that outlawed Indian religions, ceremonies and practices – so we literally made their culture illegal.”); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 28 (1991) (“[T]he government took affirmative steps to check the religious fervor of the Lakota.”); Kristen A. Carpenter, *Chapter 9: Individual Religious Freedoms in American Indian Tribal Constitutional Law*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* 160; Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 201 (2001) (“Thus, until rescinded by the 1934 Indian Reorganization Act, multiple federal policies such as allotment, criminalization of Native religion, forcible removal of Native children to remote boarding schools (where they were forbidden to speak their languages and, in many cases, to see their relatives), were constructed to obliterate Indian cultures and, in the process, destroy the separate political identity of Indian people.”).

¹⁰⁰ Laurie Meyers, *A Struggle for Hope*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Feb. 2007), <https://www.apa.org/monitor/feb07/astuggle.aspx> (“After generations of displacement, forced assimilation, poverty and neglect, many American Indians are trapped in a cycle of hopelessness that often leads to substance abuse, violence and in many cases suicide, say experts.”); Chris McGreal, *Obama’s Indian Problem*, THE GUARDIAN (Jan. 10, 2010), <https://www.theguardian.com/global/2010/jan/11/native-americans-reservations-poverty-obama> (quoting Theresa Two Bulls, “There’s a sense of hopelessness on the reservation.”); Patrick Strickland, *Life on the Pine Ridge Native American Reservation*, AL JAZEERA (Nov. 2, 2016), <https://www.aljazeera.com/indepth/features/2016/10/life-pine-ridge-native-american-reservation-161031113119935.html> (“Teachers on the Pine Ridge reservation struggle to find ways of providing hope to younger generations amid the lack of educational and professional opportunities.”).

¹⁰¹ *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 336 (1998) (“In accordance with the Dawes Act, each member of the Yankton Tribe received a 160-acre tract from the existing reservation, held in trust by the United States for 25 years.”); *Squire v. Capoean*, 351 U.S. 1, 3 (1956); Frank Pommersheim,

taxation and placed in trust for the benefit of each Indian head of household for a twenty-five year period, and at the end of the period, the Indian would own the land in fee-simple.¹⁰² As a result of Allotment, the Indian was also supposed to acquire farming skills and become a self-sufficient citizen.¹⁰³ The land leftover after each head of household received his plot would be opened to white settlers.¹⁰⁴

Although one of the legislation's avowed purposes was to make Indians farmers, most of the land assigned to Indians was unsuitable for agriculture.¹⁰⁵ Farming implements were supposed to accompany

Land into Trust: An Inquiry into Law, Policy, and History, 49 IDAHO L. REV. 519, 521 (2013) [Hereinafter, "Pommersheim, *Land into Trust*"].

¹⁰² *Squire*, 351 U.S. at 3 ("25 years after allotment the allottees were to receive the lands discharged of the trust under which the United States had theretofore held them, and to obtain a patent 'in fee, discharged of said trust and free of all charge or incumbrance whatsoever,' though the President might extend the period."); *History*, INDIAN LAND TENURE FOUNDATION, <https://iltf.org/land-issues/history/> (last visited Mar. 7, 2019) [Henceforth, "*History*, Indian Land Tenure Foundation"] ("[T]he Act stated that 25 years after the allotment was issued, Indian allottees would be given complete, fee simple ownership of the land."); Pommersheim, *Land into Trust*, *supra* note 102, at 521.

¹⁰³ *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 959 (1972) ("The general theory underlying the allotment policy was that an individual Indian who owned his own plot of land would thereby be transformed into a farmer or livestock operator."); *Allotment*, Encyclopedia of the Great Plains (accessed Aug. 8, 2018), <http://plainshumanities.unl.edu/encyclopedia/doc/egp.na.002> ("Reformers believed that individualized landownership (private property) would help transform Native Americans into farmers, thereby integrating them into the American economy."); Bitesize, *Life for Native Americans-CCFA*, BBC, <https://www.bbc.com/education/guides/zshwv9q/revision/2> (last visited Mar. 7, 2019) ("The aim of this act was to create responsible farmers in the white man's image.").

¹⁰⁴ *Tribal Self-Government and the Indian Reorganization Act of 1934*, *supra* note 104, at 959 ("Another consequence, of course, was to throw open to whites huge quantities of land previously un-available."); Pommersheim, *Land into Trust*, *supra* note 102, at 522 ("In addition to authorizing allotments, the Act permitted the opening of so-called surplus reservation lands for nonIndian homesteading."); Steven J. Gunn, *Indian General Allotment Act (Dawes Act) (1887)*, ENCYCLOPEDIA (accessed Aug. 8, 2018) [Henceforth, "Gunn, *Indian General Allotment*"], <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/indian-general-allotment-act-dawes-act-1887> ("[S]o-called 'surplus' lands, which it then sold to non-Native homesteaders and corporations.").

¹⁰⁵ Canby, *Nutshell*, *supra* note 84, at 23; Creppelle & Block, *Property Rights and Freedom*, *supra* note 15, at 322 (noting that much of the lands tribes

allotments, but this amounted to another pledge violated by the United States.¹⁰⁶ Indeed, the benefits the Act was alleged to bring the Indians were lies, and the bill's supporters knew it. A House Indian Affairs Committee report from 1880 on the Allotment Act declared:

The real aim of this bill is to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indians are but the pretext to get at the lands and occupy them If this were done in the name of greed it would be bad enough; but to do it in the name of humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him like ourselves whether he will or not is infinitely worse.¹⁰⁷

Allotment dispossessed the Indians of approximately 90 million acres of land.¹⁰⁸ Four decades after the enactment of allotment, a government report on the status of Indians stated: "An overwhelming majority of the Indians are poor, even extremely poor. . . ."¹⁰⁹ The Allotment Act is widely regarded as "the most disastrous piece of Indian legislation in United

retained after allotment was "unsuitable for farming."); Gunn, *Indian General Allotment*, *supra* note 105 ("Most allotted lands were not suitable for agriculture.").

¹⁰⁶ Pommersheim, *Land into Trust*, *supra* note 102, at 522 ("It was grossly undercapitalized, sometimes providing less than ten dollars per allottee for implements, seeds, and instructions"); Gunn, *Indian General Allotment*, *supra* note 105 ("The government made only minimal efforts to provide farming equipment to the indigenous peoples. Its annual appropriations for that purpose were often no more than \$10.00 per Native."); *Native American Agriculture*, ENCYCLOPEDIA OF THE GREAT PLAINS (accessed Aug. 8, 2018), <http://plainshumanities.unl.edu/encyclopedia/doc/egp.ag.052> (noting the United States failed to provide resources in order to give Indians the opportunity to become successful farmers on their allotments).

¹⁰⁷ Pommersheim, *Land into Trust*, *supra* note 102, at 524.

¹⁰⁸ Canby, *Nutshell*, *supra* note 84, at 23; Pommersheim, *Land into Trust*, *supra* note 102, at 522; *History*, Indian Land Tenure Foundation, *supra* note 103.

¹⁰⁹ BROOKINGS INST., *THE PROBLEM OF INDIAN ADMINISTRATION* 3 (1928).

States history.”¹¹⁰ The Allotment Act continues to haunt Indian country today.¹¹¹

The Indian Reorganization Act (IRA) of 1934 was a drastic break with the United States prior Indian policy.¹¹² The IRA was predicated on the theory that tribes should exist.¹¹³ The IRA was also a Congressional

¹¹⁰ Canby, *Nutshell*, *supra* note 84, at 22; *see also*, *History*, Indian Land Tenure Foundation, *supra* note 103 (“Allotment... its impact continues to have serious consequences, such as the increasingly fractionated ownership of Indian land title, checkerboard ownership patterns on many reservations and loss of access to important sacred sites, to name just a few.”); Pommersheim, *Land into Trust*, *supra* note 102, at 522 (“The results were truly devastating.”); Gunn, *Indian General Allotment* (“Historians and other observers agree that the Dawes Act was disastrous for the Indians.”).

¹¹¹ *Issues*, Indian Land Tenure Foundation (accessed Jan. 13, 2019), <https://iltf.org/land-issues/issues/> (“This division and alienation of Indian land and assets had devastating consequences for Indian people that still endure today.”); Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 18 (1995) (“The vast majority of lands that had passed into fee during the allotment years remains in fee today: the legacy of allotment that gives rise to the modern Court decisions divesting tribes of both territory and sovereignty.”).

¹¹² *The Indian Reorganization Act – 75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination Hearing Before the Committee on Indian Affairs United States Senate*, 112th Cong. 1 (2011) (opening statement of Senator Daniel K. Akaka), <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg68389/pdf/CHRG-112shrg68389.pdf> (“When Congress enacted the Indian Reorganization Act in 1934, its intent was very clear. Congress intended to end Federal policies of termination and allotment and begin an era of empowering tribes by restoring their homelands and encouraging self-determination.”); Frederick E. Hoxie, *The Goals of the Indian Reorganization Act* 2–3, <https://www.indian.senate.gov/sites/default/files/upload/files/Frederick-Hoxie-testimony.pdf> [Hereinafter, “Hoxie, *Goals of the Indian Reorganization Act*”] (“In short, the IRA was intended to initiate a new era in which the United States would support Indian people and tribal communities as continuing and dynamic members of a modern American nation.”); *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972) (“A major reversal of governmental policy and approach toward Indian affairs was effectuated by the IRA.”); *The Indian Reorganization Act*, Roosevelt Institute for American Studies, <https://www.roosevelt.nl/indian-reorganization-act> (last visited Mar. 7, 2019) (“Between 1887 and 1934, a noticeable shift occurred in government policy towards the original inhabitants of America.”);

¹¹³ Canby, *Nutshell*, *supra* note 84, at 25; *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 972 (1972) (“The IRA reaffirmed the principles of tribal self-government.”); Hoxie, *Goals of the Indian Reorganization Act*, at 2 (“For the first time in the nation’s history, the federal government codified in a general statute the idea that tribal citizenship was

acknowledgment that the federal government's prior Indian policies were "both exploitative and destructive of Indian interests."¹¹⁴ Accordingly, the IRA "establish[ed] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."¹¹⁵ Towards these objectives, the IRA prevented the further loss of Indian land and provided a mechanism for tribes to build their land bases.¹¹⁶ Economic development was encouraged by the IRA's establishment of a loan program for tribes and their citizens¹¹⁷ and by Section 17 of the IRA's authorization of tribal corporations.¹¹⁸ In order to encourage Indian self-governance, the IRA contained a provision granting Indians preferential hiring within the BIA.¹¹⁹ The Act encouraged tribes to adopt Constitutions¹²⁰ and also provided funds for Indian tuition.¹²¹

Despite being a positive step in the United States' Indian policy, the IRA left much to be desired. One of the Act's stated purposes was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."¹²² However, the Act continued the United States' paternalism towards the

compatible with national citizenship and that 'Indianness' would have a continuing place in American life.")

¹¹⁴ *Morton v. Mancari*, 417 U.S. 535, 553 (1974).

¹¹⁵ *Id.* at 542.

¹¹⁶ Wheeler-Howard Act, June 18, 1934, §§. 2-3 (<http://aghca.org/wp-content/uploads/2012/07/indianreorganizationact.pdf>).

¹¹⁷ *Id.* § 10.

¹¹⁸ *Id.* § 17.

¹¹⁹ *Id.* § 12.

¹²⁰ *Id.* § 16.

¹²¹ *Id.* § 11.

¹²² *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973).

Indians.¹²³ The constitutions that Tribes were encouraged to adopt were replicas of the United States Constitution; hence, the IRA tribal constitutions did not reflect traditional indigenous governance systems.¹²⁴ In fact, many of the IRA constitutions were adopted by tribes in illegitimate yet federally approved tribal elections.¹²⁵ The IRA inured little benefit to tribal self-governance because the Secretary of the Interior was granted near tyrannical power over all tribal activities.¹²⁶

¹²³ Tim Giago, *Good or Bad? Indian Reorganization Act Turns 75*, HUFFINGTON POST (May 25, 2011), https://www.huffingtonpost.com/tim-giago/good-or-bad-indian-reorga_b_284940.html (“To many tribal leaders it became known as the Indian New Deal, or as some skeptics called it, “The Indian Raw Deal.” Those opposed to the Act feared that it would be detrimental to them because it would be controlled by the federal government.”); STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 10 (2012) (“The IRA has been criticized as paternalistic, because tribes were not consulted in its development, and also as insufficient, because tribes remained subject to substantial federal control”); *It Set the Indian Aside as a Problem’ A Sioux Attorney Criticizes the Indian Reorganization Act*, HISTORY MATTERS, <http://historymatters.gmu.edu/d/76/> (last visited Mar. 7, 2019) (quoting Ramon Roubideaux describing the IRA as “paternalistic” and “creat[ing] a socialistic society” and designed by “bureaucrats to perpetuate their own existence.”).

¹²⁴ Canby, *Nutshell*, *supra* note 84, at 26; Adam Crepelle, *Standing Rock in the Swamp: Oil, the Environment, and the United Houma Nation’s Struggle for Federal Recognition*, 64 LOY. L. REV. 141, 155-156 (2018) [Hereinafter, “Crepelle, *Standing Rock in the Swamp*”] (“[M]any traditional tribal governments did not have Western style central governments”).

¹²⁵ Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYUL. REV. 449, 458 (1996) (noting the IRA was adopted by the Hopi; however, opponents of the IRA voiced their opposition to the act in the traditional Hopi way--they did not show up to vote); Ivan Star Comes Out, *The Indian Reorganization Act at 80 Years*, Indianz.com (Oct. 14, 2014), <https://www.indianz.com/News/2014/10/14/ivan-star-comes-out-the-indian.asp> (noting the United States defined a majority of eligible reservation voters as “30 percent” in order to increase the likelihood of tribes adopting the IRA; nevertheless, the IRA was defeated by on 60 percent of Indian reservations. However, the IRA was thrust upon tribes nonetheless).

¹²⁶ Canby, *Nutshell*, *supra* note 84, at 26 (noting tribal self-government existed at the whim of the Secretary of the Interior); Crepelle & Block, *Property Rights and Freedom*, *supra* note 15 at 324 (stating the IRA “did relatively little to improve tribal sovereignty because the Secretary of the Interior was granted power over virtually all tribal activities.”); *The Indian Reorganization Act*, Roosevelt Institute for American Studies, <https://www.roosevelt.nl/indian-reorganization-act> (last visited Mar. 7, 2019) (quoting Seneca Indian Alice Lee Jemison stating, “She argued that Collier’s Act had changed their status from ‘involuntary wards’ to ‘voluntary wards’ of the US government, and that the

The era of the Indian New Deal came to a close in the aftermath of the Second World War and was replaced by the assimilationist tribal termination policy. Tribal termination was intended to “Americanize” the American Indian.¹²⁷ During the termination era, Congress enacted legislation terminating over 100 tribes’ existence.¹²⁸ Congress enacted Public Law 83-280 (PL-280), extending state criminal and civil jurisdiction over the Indian country in six states and permitting other states to assume such jurisdiction.¹²⁹ PL-280 is a brazen contradiction of the longstanding rule that Indian country is exclusively the dominion of the tribes and federal government,¹³⁰ and despite signing the law, President

promises of self-government were in the end worthless: according to her, the government purchased lands and then assigned individual pieces of it to Indians, who in the end had no formal ownership of it – ‘all final power and authority rests in the hands of Mr. Dictator Secretary of the Interior [Harold L. Ickes].’”).

¹²⁷ Robert A. Williams Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 221 (1986) (“Many Indians, however, doubted the sincerity of efforts to ‘Americanize’ them by terminating their federally recognized status as sovereign, self-defining peoples.”); Donald Lee Fixico, *Termination and Relocation: Federal Indian Policy in the 1950’s* V, dissertation at the University of Oklahoma 1980, <https://shareok.org/handle/11244/4767> (“Emphasis on education, acquiring materialistic items of white American culture, and competing with other Americans for jobs and positions in society were viewed as Americanization of Indians.”).

¹²⁸ Crepelle, *Standing Rock in the Swamp*, *supra* note 125, at 150–51; Alysa Landry, *Harry S. Truman: Beginning of Indian Termination Era*, INDIAN COUNTRY TODAY (Aug. 16, 2016), https://newsmaven.io/indiancountrytoday/archive/harry-s-truman-beginning-of-indian-termination-era-Ma3YnfYy_U-AFyBGsUxzCw/ (“Within the first decade of the termination era, policies that Truman supported terminated more than 100 tribes, severing their trust relationships with the federal government.”); William J. Lawrence, *In Defense of Indian Rights* 396, https://www.hoover.org/sites/default/files/uploads/documents/0817998721_391.pdf (“By 1970, when the termination policy unofficially ended, almost 100 tribes, with an approximate total tribal membership of only 13,000 (less than 2 percent of the total Indian population), had their relationship to the federal government terminated”).

¹²⁹ 18 U.S.C. §1162 (2010); 28 U.S.C. §1360 (2015).

¹³⁰ Canby, *Nutshell*, *supra* note 84, at 29 (“[PL-280] ran directly counter to John Marshall’s original characterization of Indian country as territory in which the laws of the state ‘can have no force.’”); Jimenez & Song, *Concurrent Tribal and State Jurisdiction*, at 1656-1657 (“In passing Public Law 280, Congress disrupted the traditional distribution of power over Indian country principally

Eisenhower expressed “grave doubts” about the prudence of allowing states to unilaterally impose their laws on tribes.¹³¹

Furthermore, the federal government’s solution to poverty on Indian reservations during the termination era was buying the Indians a one-way bus ticket to big cities.¹³² The Indians who relocated were promised job training and housing, but yet again, the United States failed to keep its promise to the Indians. Many of the Indians who relocated to urban areas found themselves stuck in dire poverty.¹³³ Although Indians

shared by the Federal Government and tribes.”); Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 922 (2012).

¹³¹ President Dwight D. Eisenhower, *Statement by the President Upon Signing Bill Relating to Jurisdiction over Cases Arising on Indian Reservations on Aug. 15, 1954*, <http://www.presidency.ucsb.edu/ws/index.php?pid=9674> (“My objection to the bill arises because of the inclusion in it of Sections 6 and 7. These Sections permit other states to impose on Indian tribes within their borders, the criminal and civil jurisdiction of the state, removing the Indians from Federal jurisdiction, and, in some instances, effective self-government. The failure to include in these provisions a requirement of full consultation in order to ascertain the wishes and desires of the Indians and of final Federal approval, was unfortunate.”)

¹³² Indian Relocation Act of 1956, Pub. L. No. 959, 70 Stat. 986 (1956); Crepelle, *Standing Rock in the Swamp*, *supra* note 125, at 151 (“Moreover, the termination era’s Urban Indian Relocation Program bussed Indians from their rural reservations to major cities, making Indians more visible to the American mainstream.”); *1952-Indian Relocation*, SAVAGES & SCOUNDRELS (Aug. 8, 2018), <http://www.savagesandsoundrels.org/flashpoints-conflicts/1952-indian-relocation/> (“Typically, a reservation Indian was given a one-way bus or train ticket to a distant urban center, usually a West Coast city, and told to check in with the local office of the BIA in order to land a job, find lodging, and to start a new life.”).

¹³³ Atkinson, *Red Tape*, *supra* note 81, at 392 (“Indians languished in poverty on what had once been reservations; those who relocated languished in poverty in urban slums.”); Adam Crepelle, *The Struggle for Federal Recognition of Louisiana’s Indian Tribes*, LA. CULTURAL VISAS (Winter 2016), available at <https://newsroom.pepperdine.edu/publicpolicy/2016/12/adam-crepelle-mpp-15-struggle-federal-recognition-louisiana%E2%80%99s-indian-tribes> (“Relocated Indians were promised good paying jobs and housing, but like so many of the government’s commitments to the Indians, the promise went unkept.”); Ojibwa, *American Indian Relocation*, NATIVE AM. NETROOTS (May 14, 2010), <https://nativeamericannetroots.net/diary/496> (“When they arrived in the city, Indians found no help, no training, no housing, and no good-paying jobs. The BIA hadn’t bothered to find out if there were actually jobs in the cities and Indians were frequently sent to areas of high unemployment.”).

overwhelmingly opposed termination era legislation, some Indians saw termination as means to end the BIA's tyranny over their lives and as a way to gain greater control of their land.¹³⁴

President Richard Nixon formally advocated against tribal termination. In a 1970 special message to Congress, Nixon noted the United States' long history of oppressing Indians and acknowledged that even well-intentioned programs for Indians "have frequently proven to be ineffective and demeaning."¹³⁵ Nixon admitted the federal government's termination policy violated the United States treaty obligations to Indian tribes.¹³⁶ Nixon also rejected federal paternalism in Indian Affairs and concluded tribal self-determination is the proper path for the United States Indian policy.¹³⁷ Congress adopted President Nixon's view in 1975 with the passage of the Indian Self-Determination and Education Assistance Act.¹³⁸ Every Congress and President since has embraced tribal self-determination.¹³⁹

¹³⁴ GETCHES, ET AL., CASES AND MATERIALS, *supra* note 96, 233.

¹³⁵ *Richard Nixon, Special Message to the Congress on Indian Affairs*, THE AM. PRESIDENCY PROJECT (Jul. 8, 1970), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-indian-affairs>.

¹³⁶ *Id.* ("The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people.").

¹³⁷ *Id.*

¹³⁸ Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1996).

¹³⁹ See e.g., Alysa Landry, *Jimmy Carter: Signed ICWA into Law*, INDIAN COUNTRY TODAY (Sep. 12, 2017), <https://newsmaven.io/indiancountrytoday/archive/jimmy-carter-signed-icwa-into-law-GtsQUN5tRkG1iNzMVHJP8g/> ("During his presidential campaign in 1976, Carter's staff reached out to the National Congress of American Indians and the National Tribal Chairmen's Association. Carter met briefly with some leaders and his staff drafted a position paper that endorsed Indian self-determination policy, already in force."); Ronald Reagan, *Statement on Signing the Indian Self-Determination Assistance Act Amendments of 1988*, THE AM. PRESIDENCY PROJECT (Oct. 5, 1988), <http://www.presidency.ucsb.edu/ws/index.php?pid=34969>; George Bush, *Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments*, THE AM. PRESIDENCY PROJECT (June 14, 1991), <http://www.presidency.ucsb.edu/ws/index.php?pid=19695>; William J. Clinton,

II. GOVERNMENTS STILL HOLDING INDIAN BUSINESSES BACK

Self-determination is the United States' current Indian policy, but self-determination is far from a reality for Indian tribes. Bureaucracy, bad laws, and jurisdictional disputes make much of Indian country an undesirable location for private businesses. This section examines federal, state, and tribal laws and policies that drive private investors away from Indian country.

A. *Federal Laws and Policies that Stifle Reservation Economies*

Trust land is likely the biggest impediment to economic development in Indian country.¹⁴⁰ Having land held in trust means the federal government holds title to the land while the tribe or an individual Indian has rights to use the land.¹⁴¹ Since trust land is owned by the federal government, the federal government must approve any activity that may

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments, THE AM. PRESIDENCY PROJECT (Nov. 6, 200), <http://www.presidency.ucsb.edu/ws/index.php?pid=61665%23axzz1LRLPHEvH>; George W. Bush, *Memorandum on Government-to-Government Relationship With Tribal Governments* (Sep. 23, 2004), <https://www.gpo.gov/fdsys/pkg/WCPD-2004-09-27/pdf/WCPD-2004-09-27-Pg2106.pdf>; A Renewed Era of Federal-Tribal Relations, Executive Office of the President (Jan. 2017),

https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf

¹⁴⁰ Lance Morgan, *Ending the Curse of Trust*, INDIAN COUNTRY MEDIA (Mar. 23, 2005), <https://newsmaven.io/indiancountrytoday/news/ending-the-curse-of-trust/> (“[Trust land] also serves as the single largest impediment to Indian country’s economic growth and tribal sovereignty.”); Narayana Kocherlakota, *What’s Different about Economic Development in Indian Country?*, Federal Reserve Bank of Minneapolis (May 1, 2012),

<https://www.minneapolisfed.org/news-and-events/presidents-speeches/whats-different-about-economic-development-in-indian-country> (“[M]any of the participants in last year’s conferences raised concerns about the trust system. They pointed out that it also makes it hard to conduct some basic business transactions, such as using trust land to collateralize business loans or home mortgages.”); Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, THE ATLANTIC (Jul. 30, 2016),

<https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/> (“And no one can get a mortgage because the property on the reservation is held in trust by the federal government”) [Henceforth, “Riley, *One Way to Help*”].

¹⁴¹ 25 C.F.R. § 152.1(d) (2014).

affect the land.¹⁴² This means an act as simple as obtaining a mortgage requires the approval of the Secretary of the Interior.¹⁴³ Likewise, engaging in energy development on trust land requires jumping through nearly fifty bureaucratic hoops while performing the same energy development outside of Indian country only requires four steps.¹⁴⁴ Trust land, and the bureaucracy that encumbers it, is based upon the notion that Indians are too incompetent to own land.¹⁴⁵

Though trust land exists because Indians are perceived to be incompetent, the United States government proved itself to be an extremely inept trustee. Allegedly, the federal government mismanaged

¹⁴² Brett Robinson, *Native American Trust Lands Explained*, 1ST TRIBAL LENDING, <https://www.1tribal.com/native-american-trust-lands/> (last visited Mar. 7, 2019) (“Even though the tribes are allowed to make their own governments, there is a limitation to how they can use the land and require federal approval when it comes to most actions, including taking out mortgages for home, building on the land, and renovating existing buildings.”); Terry Anderson & Dominic Parker, *Un-American Reservations*, HOOVER INSTITUTION (Feb. 24, 2011), <https://www.hoover.org/research/un-american-reservations> (“Not only does trusteeship saddle Indian lands with bureaucratic oversight, it prevents Indians from using their land as collateral for borrowing.”); Creppelle & Block, *Property Rights and Freedom*, *supra* note 15, at 326–27 (“Nothing can happen in Indian country without the BIA’s approval.”).

¹⁴³ 25 U.S.C. § 5135 (1990); 25 C.F.R. § 152.34 (1956).

¹⁴⁴ Shawn Regan & Terry L. Anderson, *The Energy Wealth of Indian Nations*, 3 L.S.U. J. ENERGY L. & RES. 195, 208 (2014) (“On Indian lands, companies must go through four federal agencies and 49 steps to acquire a permit to drill, compared with only four steps when drilling off of the reservation”).

¹⁴⁵ *Johnson v. McIntosh*, 21 U.S. 543, 576–577 (1823) (“Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.”); 25 U.S.C. § 349 (1906); James Warren, *A Victory for Native Americans?*, THE ATLANTIC (June 7, 2010), <https://www.theatlantic.com/national/archive/2010/06/a-victory-for-native-americans/57769/> [Hereinafter, “Warren, *A Victory for Native Americans?*”] (“The Indians were given beneficial ownership but the government managed the land, believing Indians couldn’t handle their affairs.”); *Key Principles of Indian Trust Modernization*, UNITED SOUTHERN AND EASTERN TRIBES, INC. (Oct. 2015), <https://www.usetinc.org/wp-content/uploads/bvenuti/WWS/2016/June%20202016/June%2024/Trust%20Modernization%20Principles%20and%20Strategies%20USET.pdf> (“The current trust model is broken and based on faulty and antiquated assumptions from the 19th Century that Indian people were incompetent to handle their own affairs and that Indian Tribes were anachronistic and would gradually disappear.”).

and stole over \$150 billion from Indian trust land¹⁴⁶ in what was described by a federal court as “government irresponsibility in its purest form.”¹⁴⁷ After decades of litigation and with no end in sight, the *Cobell* case settled for \$3.4 billion, and remarkably, the Department of Interior—the very agency responsible for the theft—wound up with \$1.9 billion from the settlement.¹⁴⁸ Similarly, the congressionally-created American Indian Policy Review Commission described the lease agreements negotiated by the federal government on behalf of the Indians “as among the poorest agreements ever made.”¹⁴⁹ To make matters worse, tribes have no remedy

¹⁴⁶ Warren, *A Victory for Native Americans?*, THE ATLANTIC (June 7, 2010) <https://www.theatlantic.com/national/archive/2010/06/a-victory-for-native-americans/57769/>; Jodi Rave, *Milestone in Cobell Indian Trust Case*, HIGH COUNTRY NEWS (Jul. 27, 2011), <https://www.hcn.org/issues/43.12/milestone-in-cobell-indian-trust-case> (“Attorneys for Cobell’s side charged that upwards of \$170 billion was missing or stolen from those accounts.”); Terry L. Anderson, *Presidential Medal of Freedom Should Come with Freedom for American Indians*, FORBES (Nov. 22, 2016), <https://www.forbes.com/sites/realspin/2016/11/22/presidential-medal-of-freedom-should-come-with-freedom-for-american-indians/#797109594e5c> (“The suit alleged that the federal government as the trustee for Indian lands had withheld and even lost more than \$150 billion received for oil, timber, mineral and other leases of Indian lands. Ultimately the suit grew into a class action claim with as many as 500,000 plaintiffs claiming a federal liability of \$176 billion.”).

¹⁴⁷ *Cobell v. Salazar*, 240 F.3d 1081 (D.C. Cir. 2001).

¹⁴⁸ Tim Giago, *Cobell Settlement a Massive Case of Incompetence*, HUFFINGTON POST (May 29, 2014), https://www.huffingtonpost.com/tim-giago/cobell-settlement-a-massi_b_5411709.html (“Some of the stipulations of the settlement still anger many of us. For example, how did the lawyers determine that \$1.9 billion should go back to the Department of the Interior to buy-back the land on the Indian reservations that was fractionated by the incompetence of the Bureau of Indian Affairs? That is like giving money back to the people who created the problem.”); Terry L. Anderson, *Presidential Medal of Freedom Should Come with Freedom for American Indians*, FORBES (Nov. 22, 2016), <https://www.forbes.com/sites/realspin/2016/11/22/presidential-medal-of-freedom-should-come-with-freedom-for-american-indians/#797109594e5c> (“Though Cobell died in 2011, she lived long enough to see the case settled in 2009 for \$3.4 billion, a pittance compared to the amounts allegedly lost.”); David Reese, *Feds Spend \$1 Billion on Land for Native American Tribes*, COURT HOUSE NEWS (Nov. 17, 2017), <https://www.courthousenews.com/feds-spend-1-billion-land-native-american-tribes/> (“The *Cobell* settlement included \$1.9 billion for the federal government to purchase fractional interests held in trust or restricted land owned by Native Americans and turn it over to the tribes with jurisdiction.”).

¹⁴⁹ American Indian Policy Review Commission Final Report, AM. INDIAN POLICY REVIEW COMM’N 1, 339 (1997), <http://files.eric.ed.gov/fulltext/ED164229.pdf>.

if the United States violates its fiduciary duty unless a statute explicitly provides a tribe with recourse.¹⁵⁰ Furthermore, the United States pledged to provide tribes services in numerous treaties, yet the federal government drastically underfunds services to tribes.¹⁵¹

While the legislative and executive branches of the federal government embraced tribal self-determination, the judicial branch continues to anchor contemporary Indian law jurisprudence in racist precedent from the 1800s¹⁵² and has continuously chipped away at tribal

¹⁵⁰ *United States v. Navajo Nation*, 537 U.S. 488 (2003).

¹⁵¹ *Investing in Indian Country for a Stronger America 5*, NATIONAL CONGRESS OF THE AMERICAN INDIAN (2018), <http://www.ncai.org/FY2018-NCAI-Budget-Request2.pdf> (“Indian Country has faced insufficient public investment for decades in housing, roads, education, criminal justice systems, water and sanitation systems, and human services.”); Senator Tom Udall, *Trump Administration’s Proposed FY19 Budget for Indian Programs is ‘Totally Inadequate’* (Apr. 11, 2018), <https://www.tomudall.senate.gov/news/press-releases/udall-trump-administrations-proposed-fy19-budget-for-indian-programs-is-totally-inadequate> (“The president’s proposed budget is totally inadequate -- an insult to Indian Country, really.”); see generally *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, U.S. Commission on Civil Rights (Jul. 2003), <http://www.usccr.gov/pubs/na0703/na0204.pdf>.

¹⁵² *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya*, A/HRC/21/47/Add.1, at 17, para. 15–16 https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47-Add1_en.pdf (“While acknowledging positive characteristics of the rights-affirming strain of this judicial doctrine, the Special Rapporteur notes that the rights-limiting strain of this doctrine is out of step with contemporary human rights values. As demonstrated by a significant body of scholarly work, the use of notions of discovery and conquest to find Indians rights diminished and subordinated to plenary congressional power is linked to colonial era attitudes toward indigenous peoples that can only be described as racist. Early Supreme Court decisions themselves reveal perceptions of Indians as backward, conquered peoples, with descriptions of them as savages and an inferior race.”); Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law’s Brown v. Board of Education*, 38 TULSA L. REV. 73 (2013) (“We will likely never read another Supreme Court decision that blatantly rationalizes disenfranchisement on the basis that a group is ‘so far inferior, that they [have] no rights which the white man [is] bound to respect.’ Unless, perhaps, the United States Supreme Court is deciding an Indian law case.”); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON* 161 (2005) (“Many Indian law scholars and advocates believe that a group, the justices of the Rehnquist Court are prejudiced against Indians when it comes to deciding certain types of Indian rights cases arising under the Marshall

sovereignty in recent years.¹⁵³ Despite the Supreme Court's stating jurisdictional rules should be simple and clear,¹⁵⁴ the Court has created a thoroughly nonsensical jurisdictional framework for Indian country.¹⁵⁵ Opaque jurisdictional rules deter individuals from investing in Indian country.¹⁵⁶ Similarly, the Supreme Court continues to uphold Congress's

model, particularly in situations where important interests and values of the non-Indian society are involved.”).

¹⁵³ See N. Bruce Duthu, *The New Indian Wars: Tribal Sovereignty, The Courts and Judicial Violence*, in 144 *REVUE FRANÇAISE D'ETUDES AMERICAINES* 78–94 (2015) (discussing the Supreme Court's role in divesting tribes of sovereignty while the executive and legislative branches have adopted policies favoring tribal sovereignty); Pommersheim, *BROKEN LANDSCAPE*, *supra* note 57, at 297 (discussing the Supreme Court's massive erosion of tribal sovereignty in *Oliphant v. Suquamish Indian Tribe* and *Montana v. United States*, and noting that the Court's decisions in those cases are entirely unmoored from the Constitution or any other statute); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 *VT. L. REV.* 623, 627 (2011) (“[T]he Court has essentially stripped tribal sovereignty beyond intra-tribal relations and ‘has transformed itself from the court of the conqueror into the court as the conqueror.’”); Matthew L.M. Fletcher, *Statutory Divestiture of Tribal Sovereignty*, *FED. LAW.*, April 2017, at 38 *passim* [hereinafter Fletcher, *Statutory Divestiture*] (discussing the Supreme Court's role in the erosion of tribal sovereignty).

¹⁵⁴ *Hertz Corp. v. Friend*, 130 S.Ct. 1181, 1193 (2010) (“Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions.”); *Grable & Sons Metal Products, Inc., v. Darue Engineering & Manufacturing*, 545 U.S. 308, 321 (2005) (Thomas, J., concurring) (“Jurisdictional rules should be clear.”).

¹⁵⁵ See Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 *ARIZ. ST. L.J.* 779 (2014); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 *U. COLO. L. REV.* 1187 (2010); Arvo Q. Mikkanen, *Indian Country Criminal Jurisdiction Chart*, U.S. ATTY'S O., (2010), <http://www.justice.gov/sites/default/files/usao-wdok/legacy/2014/03/25/Indian%20Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf>.

¹⁵⁶ John Koppisch, *Why Are Indian Reservations So Poor? A Look at the Bottom 1%*, *FORBES* (Dec. 13, 2011), <https://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/#1777183a3c07> [Hereinafter, “Koppisch, *Why Are Indian Reservations So Poor?*”] (“The non-Indian owners of privatized land in a reservation have always faced legal questions over whether they come under the jurisdiction of the tribal authority.”); Testimony of Ross Alan Hill, Founder, President, and CEO Bank2 Oklahoma City, OK, for the U.S. Senate Committee on Indian Affairs Hearing on “Accessing Capital in Indian Country,” June 17, 2015, at 26,

unconstitutional plenary power over Indian tribes.¹⁵⁷ As long as Congress maintains unrestricted power over Indian country, there will be uncertainty over the legal landscape in Indian country. Uncertainty is the biggest deterrent for private investment and business development.¹⁵⁸

B. *States v. Tribes*

States theoretically lack authority on tribal land,¹⁵⁹ but in reality, state behavior has an enormous impact within tribal borders.¹⁶⁰ States have

<https://www.indian.senate.gov/sites/default/files/upload/files/6.17.15%20Hill%20Testimony.pdf> (noting jurisdictional uncertainty makes lending in Indian country more costly and makes obtaining a loan take longer); Graham Safty, *Federal Diversity Jurisdiction and American Indian Tribal Corporations*, 79 U. CHI. L. REV. 1593, 1623 (2012) [Henceforth, “Safty, *Federal Diversity Jurisdiction*”] (“But jurisdictional barriers that prevent parties from consistently accessing a convenient and reliable forum likely contribute to underinvestment.”)

¹⁵⁷ *United States v. Bryant*, 136 S.Ct. 1954, 1969 (2016) (Thomas, J., concurring) (“And, until the Court rejects the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all-encompassing control over the ‘remnants of a race’ for its own good.”); *United States v. Lara*, 541 U.S. 193, 200 (2004) (“The ‘central function of the Indian Commerce Clause,’ we have said, ‘is to provide Congress with plenary power to legislate in the field of Indian affairs.’”).

¹⁵⁸ Schumpeter, *Uncertain Business*, THE ECONOMIST (Nov. 19, 2016), <https://www.economist.com/news/business-and-finance/21710245-companies-will-pay-high-price-soaring-political-risk-uncertain-time-businesses> (“political uncertainty will pull companies in the opposite direction from the one in which the stimulus is supposed to push them. Businesses will refrain from making hard-to-reverse investments if they are unsure about the future.”); Richard Turnill, *Economic Uncertainty Is Rising—and There’s One Move That Can Help Investors Weather the Storm*, BUSINESS INSIDER (Jul. 4, 2018), <https://www.businessinsider.com/investment-advice-amid-economic-uncertainty-higher-quality-credit-2018-7> (“This greater uncertainty—along with rising interest rates—has contributed to tightening financial conditions and argues for higher-quality ballast in portfolios.”); Reema Khari, *CEOs Say Trade Uncertainty Is Restraining Hiring and Investing*, MARKETPLACE (June 6, 2018), <https://www.marketplace.org/2018/06/06/business/ceos-say-trade-uncertainty-restraining-hiring-investing>.

¹⁵⁹ *Worcester v. Georgia*, 31 U.S. 515, 561 (holding the laws of Georgia “have no force” inside the Cherokee Nation); 42 C.J.S. *Indians* § 92 (“A state is preempted by operation of federal law from applying its own laws to land held by the United States in trust for the tribe.”).

¹⁶⁰ Lance Morgan, *The Rise and Fall of Federal Indian Law*, 49 ARIZ. ST. L.J. 115, 123 (2017) (“The states can usually impose their will indirectly on

long been hostile towards tribal governments.¹⁶¹ Today, state officials often fail to recognize that tribes are governments and routinely ignore tribal interests when engaging in policy decisions.¹⁶² However, cooperation between tribes and states makes sense because when tribes succeed, states benefit.¹⁶³

Nevertheless, many states continue to have adversarial relationships with tribes.¹⁶⁴ Tension over tribal gaming is well-known.¹⁶⁵

tribes, ignoring conflicting tribal taxation laws because the states control the tribe's access to the stream of commerce.”).

¹⁶¹ *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“Because of the local ill feeling, the people of the States where [the tribes] are found are often their deadliest enemies.”).

¹⁶² Susan Johnson, Jeanne Kaufmann, John Dossett, & Sarah Hicks, *Government to Government: Models of Cooperation Between States and Tribes* 1, National Conference of State Legislatures, http://www.ncai.org/policy-issues/tribal-governance/state-tribal-relations/Govt_to_Govt_Models_of_Cooperation_Between_States_and_Tribes_2002.pdf [Hereinafter, “Johnson, et al., *Government to Government*”] (“Outdated and inaccurate perceptions of American Indian tribes continue to prevail in non-Indian communities, and state officials may not understand that tribes are functioning governments.”); Annette Alvarez, *Native American Tribes and Economic Development*, URBANLAND (Apr. 19, 2011), <https://urbanland.uli.org/development-business/native-american-tribes-and-economic-development/> (“An essential but misunderstood fact is that tribes are governments—sovereign governmental bodies that have jurisdiction over their lands.”).

¹⁶³ Johnson, et al., *Government to Government*, *supra* note 163, at 4–5 (discussing how tribal economic development benefits states).

¹⁶⁴ *Id.* at 1; Emily Foxhall, *Alabama-Coushatta Tribe Fights for Right to a Gaming Center-Again*, HOUSTON CHRONICLE (Feb. 25, 2018), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Alabama-Coushatta-fight-for-the-right-to-a-gaming-12707848.php>; Erin Mundahl, *2 Tribal Cases Before Supreme Court Involve Washington State*, HERALD NET (Feb. 26, 2018), <https://www.heraldnet.com/northwest/2-tribal-cases-before-supreme-court-involve-washington-state/>.

¹⁶⁵ *E.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); BRIAN KLOPOTEK, RECOGNITION ODYSSEYS: INDIGENEITY, RACE, AND FEDERAL TRIBAL RECOGNITION POLICY IN THREE LOUISIANA INDIAN COMMUNITIES 188 (2011) (“[Louisiana] continues to operate its own gaming facilities while blocking the Jena Band [of Choctaw Indians] casino on supposedly moral grounds or anti-corruption grounds is the height of hypocrisy, a clear example of unrestrained colonialism.”); Heidi L. McNeil, *Indian Gaming in Arizona*, MYAZBAR (Jan. 1998), <https://www.myazbar.org/AZAttorney/Archives/Jan98/1-98a2.htm>.

Though tribes are sovereigns constitutionally equal to the states, states can unilaterally forbid tribes from engaging in gaming on tribal land,¹⁶⁶ yet tribes have no such authority to interfere with gaming enterprises operating on state land. States have sought to stifle tribally-owned-and-operated wildlife enterprises that take place exclusively on tribal land.¹⁶⁷ States have sought to interfere with basic tribal law enforcement practices such as prohibiting tribal police from driving on state roads with their emergency lights on.¹⁶⁸ States have refused to recognize tribally-issued vehicle titles and registrations while honoring foreign vehicle registrations.¹⁶⁹ States levy taxes on businesses operating in Indian country despite the state provision of barely, if any, services to the business or tribe, and this functionally deprives tribes of their ability to assess taxes.¹⁷⁰ States even battle tribes over access to water.¹⁷¹

State-tribal conflicts rage most fiercely in uncharted areas. A Memorandum from the United States Department of Justice provided a basis for tribes to enter the cannabis industry.¹⁷² Some states have

¹⁶⁶ 25 U.S.C. § 2710(b)(1)(A); Dennis Romboy, *Utahns Find Ways to Gamble Despite It Being Illegal in the State—But the Cost Is High*, DESERT NEWS (Jul. 5, 2013), <https://www.deseretnews.com/article/865582732/No-casino-lottery-yet-gambling-pervasive-in-Utah.html> (“Utah has no tribal casinos because the state outlaws all forms of gambling.”).

¹⁶⁷ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

¹⁶⁸ *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004).

¹⁶⁹ *Prairie Band of Potawatomi Nation v. Wagon*, 476 F.3d 818 (10th Cir. 2007).

¹⁷⁰ *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 189 (1989) (acknowledging that allowing states to tax on-reservation economic activity puts a higher tax burden on entities doing business on the reservation as opposed to those doing business off reservation); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980) (explaining that states can impose taxes on reservation purchases “even if it seriously disadvantages or eliminates the Indian retailer’s business with nonIndians”); *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046 (W.D. Wash. 2018).

¹⁷¹ *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983); *Agua Caliente v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017); *Nevada v. United States*, 463 U.S. 110 (1983).

¹⁷² Monty Wilkinson, *Memorandum on Policy Statement Regarding Marijuana Issues in Indian Country*, (Oct. 28, 2014), <https://dfi.wa.gov/sites/default/files/monty-wilkinson-memo.pdf>; James Cole, *Memorandum Guidance Regarding Marijuana Related Financial Crimes*, (Feb. 14, 2014), <https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf>.

responded to tribal marijuana projects with extreme force. For example, South Dakota's Attorney General threatened to have the feds raid the Santee Sioux Reservation in response to the tribe's proposed marijuana hotel that would have required cannabis consumption to take place under strictly controlled conditions that would have foreclosed the possibility of cannabis escaping the reservation and entering the state.¹⁷³ South Dakota has made no such effort to impede the flow of South Dakotans to states or countries that have legalized marijuana consumption. State hostility toward tribes creates an uncertain regulatory environment for investors and drives businesses away from Indian country.

C. *How Tribes Hurt Themselves*

Tribes deserve some blame for their economic woes because many tribes are not ready for business. Many tribes have not adopted corporations codes.¹⁷⁴ Among the tribes that have adopted corporations codes, some tribes make starting a business a hassle-free process while other tribes make incorporating a business a Sisyphean task.¹⁷⁵ In fact, one

¹⁷³ Regina Garcia Cano, *Flandreau Santee Sioux Tribe Burned Pot Crop for Fear of Federal Raid*, ARGUS LEADER (Nov. 9, 2015), <https://www.argusleader.com/story/news/2015/11/09/flandreau-santee-sioux-tribe-burned-pot-crop-fear-federal-raid/75479902/>; Associated Press, *South Dakota Jury Finds Consultant Not Guilty in Pot Case*, CAPITAL JOURNAL (May 25, 2017), https://www.capjournal.com/news/south-dakota-jury-finds-consultant-not-guilty-in-pot-case/article_ac13f2c4-40ff-11e7-968a-f7d0c0ad0128.html.

¹⁷⁴ Stephen Cornell, *Tribal-citizen Entrepreneurship: What Does It Mean for Indian Country, and How Can Tribes Support It?*, FEDERAL RESERVE BANK OF MINNEAPOLIS (Feb. 2, 2006), <https://www.minneapolisfed.org/publications/community-dividend/tribalcitizen-entrepreneurship-what-does-it-mean-for-indian-country-and-how-can-tribes-support-it> (“Many reservations have no commercial codes.”); Robert J. Miller, *Inter-Tribal and International Treaties for American Indian Economic Development*, 12 LEWIS & CLARK L. REV. 1103, 1111 (2008) [Hereinafter, “Miller, *Inter-Tribal and International Treaties*”] (“[M]any Indian nations lack business laws and regulatory codes, such as incorporation codes and the Uniform Commercial Code, and court systems that are experienced in litigating principles of business and contract law.”).

¹⁷⁵ Cornell, *supra* note 175 (“If you want to start a business on a reservation, you may face no regulatory regime at all, or one that is mystifyingly complex, or one that is clear but not enforced.”).

tribal corporations code requires would-be-entrepreneurs to perform over 100 steps prior to incorporation.¹⁷⁶

To improve investor confidence, a model of the Uniform Commercial Code (U.C.C.) was drafted for tribes;¹⁷⁷ however, few tribes adopted a version of it or any other secured transactions laws.¹⁷⁸ Likewise, most tribes do not have a contracts clause provision, and this makes investors leery that tribes will utilize their sovereignty to impair business contracts.¹⁷⁹ Despite the proven effectiveness of several tribal justice systems,¹⁸⁰ some tribal courts are significantly influenced by tribal politics and are not fair arbiters of justice.¹⁸¹ Additionally, tribal bureaucracy often

¹⁷⁶ Cornell, *supra* note 175 (“If you want to start a business, you need to lease a site from the nation, but the site-leasing process has more than 100 steps and typically takes more than a year to complete.”).

¹⁷⁷ *Model Tribal Secured Transactions Act*, (Aug. 2005), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/ieed/pdf/idc1-024559.pdf>.

¹⁷⁸ ROBERT J. MILLER, *RESERVATION CAPITALISM: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY* 143 (2013) [Hereinafter, “Miller, *Reservation Capitalism*”].

¹⁷⁹ Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 330 (“Most tribal constitutions do not contain provisions prohibiting the tribal government from violating contracts. Without a contracts clause type provision, tribes can use their sovereign status to impair contracts, and this has a chilling effect on business development.”).

¹⁸⁰ *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report 1*, NATIONAL CONGRESS OF AMERICAN INDIANS (Mar. 2018), http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf. (“To date, the implementing tribes report 143 arrests of 128 non-Indian abusers. These arrests ultimately led to 74 convictions, 5 acquittals, and 24 cases currently pending. There has not been a single petition for habeas corpus review brought in federal court in an SDVCJ case. Although preliminary, the absence of habeas petitions suggests the fairness of tribal courts and the care with which tribes are implementing SDVCJ.”).

¹⁸¹ Cornell, *supra* note 175 (“Some tribal courts answer to tribal councils and are either politicized or severely underfunded, or both.”); Koppisch, *Why Are Indian Reservations so Poor?*, *supra* note 157 (quoting a former Crow Tribe official admitting that some “tribal courts are not reliable dispute forums.”); Terry Anderson, *Zuckerberg Meets Native American Poverty*, THE HILL (Jul. 24, 2017), <https://thehill.com/blogs/pundits-blog/energy-environment/343503-zuckerberg-meets-native-american-poverty> (noting some tribal judiciary systems are not independent from other branches of tribal governments).

behaves in a highly political manner.¹⁸² Political instability coupled with the absence of laws to protect against political whims chill investment in Indian country.

III. RETURNING TO TRADITIONAL TRIBAL BUSINESS PRACTICES

Tribal governments are not acting in their traditional manner when they enact laws that complicate business. Bureaucratic governance is a result of BIA influence, and indeed, many contemporary tribal governments are the result of BIA imposed governance systems.¹⁸³ Traditionally, most tribes did not have centralized governments nor were tribal leaders interested in micromanaging the affairs of tribal citizens.¹⁸⁴ Rather, traditional indigenous governing structures usually provided individuals with great personal freedom.¹⁸⁵ The liberty enjoyed by

¹⁸² Cornell, *supra* note 175 (“How the tribal bureaucracy deals with you may depend on who you voted for or who your relatives are.”).

¹⁸³ *Indian Reorganization Act Era Constitutions and Charters*, <http://thorpe.ou.edu/IRA.html>.

¹⁸⁴ See, e.g., *United States v. Washington*, 384 F. Supp. 312, 354–55 (W.D. Wash. 1974) (noting the tribes in the Puget Sound had “[n]o formal political structure” when they first encountered the United States, and that Governor Stevens “created political entities” of the Indians in the region and selected their leaders); Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. REV. 449, 456–58 (1996) (noting the Hopi did not have a centralized government until it adopted a constitution under the Indian Reorganization Act in 1936 and that the election was controversial because the voting method used was “alien to the Hopi”); Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. REV. L. & SOC. CHANGE 629, 667 (2013). (“Many traditional tribal governing structures do not utilize overt control of individuals’ behavior.”); Adam Creppelle, *The Struggle for Federal Recognition of Louisiana’s Indian Tribes*, LA. CULTURAL VISAS (2016), <https://64parishes.org/arbitrary-process> (“A criterion for petitioners is the historical status of a tribal political structure, as imagined by Anglo-Americans; historically, however, many Indian tribes did not have a prototypical central government that would dictate how individual Indians lived their lives. Instead, the family, or other small bands of people, often comprised the major governing unit.”).

¹⁸⁵ Creppelle & Block, *Property Rights and Freedom*, *supra* note 15, at 339 (“As a result of the rule of law and private property rights, American Indian culture was based upon the individual.”); *American Indians—How They Govern Themselves*, UTAH DIVISION OF S. HIST., <http://ilovehistory.utah.gov/topics/government/indians.html> (last visited Mar. 1, 2018) (noting the Paiute leaders operated by consensus, and that the Ute leaders “could only lead as long as people chose to follow.” Also, noting Goshute leaders

individual Indians meant they were largely uninhibited in the pursuit of their economic gain.¹⁸⁶

Today, many Indians subscribe to the popular myth that Indians historically did not engage in commerce or have private property; hence, many Indians think business is antithetical to their traditional culture.¹⁸⁷ As former Montana state democratic senator and Crow Indian Bill Yellowtail said:

Our people don't understand business. After 10 or 15 generations of not being involved in business, they've lost their feel for it. Capitalism is considered threatening to our identity, our traditions. Successful entrepreneurs are considered sell-outs, they're ostracized. We have to promote the dignity of self-sufficiency among Indians. Instead we have a culture of malaise: 'The tribe will take

“didn't have political power, only the power to make suggestions”); Klopotek, *supra* note 166, at 179 (stating that traditionally, Choctaw leaders “did not have to be obeyed”).

¹⁸⁶ Miller, *Economic Development in Indian Country*, *supra* note 15, at 780; Matthew L. M. Fletcher, *Theoretical Restrictions on the Sharing of Indigenous Biological Knowledge: Implications for Freedom of Speech in Tribal Law*, 14 KAN. J.L. & PUB. POL'Y 525, 534 (2004–2005) (“The kind of coercive, arbitrary, and violent government actions generated by EuroAmerican governments - i.e., imprisonment, execution, police brutality, denial of governmental benefits and services, eminent domain, interrogation, entrapment, surveillance, quartering of soldiers, and so on - were rarely, if ever, perpetuated by Indian communities.”); Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 339 (“As a result of the rule of law and private property rights, American Indian culture was based upon the individual.”).

¹⁸⁷ Terry Anderson, *The Wealth of (Indian) Nations*, HOOVER INSTITUTION (Oct. 25, 2016), <https://www.hoover.org/research/wealth-indian-nations-1> (quoting Robert Miller noting, “Contrary to what most Americans believe, individual and family entrepreneurship is not a new concept to Indian cultures.”); Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 335 (“The idea of American Indians living in collectivist societies, much like Indian reservations today but with more space, is not new.”); Carlos L. Rodriguez, Craig S. Galbraith, & Cur H. Stiles, *American Indian Collectivism*, PERC VOL. 24, NO. 2 (2006), <https://www.perc.org/2006/06/01/american-indian-collectivism/> (Beginning in the 1940s, “Gradually more and more people started to honestly believe that the indigenous people of North America had been historically communal, non-property oriented, and romantic followers of an economic system more harmonious with nature.”).

care of us.’ We accept the myth of communalism. And we don’t value education. We resist it.¹⁸⁸

As discussed above, tribes had vibrant economies that were driven by private enterprise prior to European contact.¹⁸⁹ The myth of Indians being non-commercial, hunter-gatherers was fabricated by colonial whites to justify the theft of Indian wealth.¹⁹⁰ Similarly, the BIA and reservation system were designed to crush the Indian’s spirit.¹⁹¹ Unfortunately many tribes have absorbed the BIA’s mentality.

While overcoming anti-Indian state and federal policies is difficult, tribes can make major strides towards revitalizing their economies by doing what they did prior to the arrival Europeans; that is, tribes must enact laws and adopt policies that are conducive to private business development. In the same vein, tribes must establish independent judicial systems to ensure tribal courts are legitimate arbiters of justice. Reembracing trade is essential to the tribal economic development. Tribes should consider all opportunities to engage in trade, but particular attention should be given to international trade and trade with other tribes. The remainder of this section discusses how tribes should pursue these avenues.

1. Develop Laws, Policies, and Governance Institutions

Enacting commerce-facilitating laws is a simple step tribes can take to attract investors. Tribes must enact corporations codes that set forth the types of business entities, the rights and requirements, as well as the procedures for incorporation of the entities. Once investors know how to

¹⁸⁸ Koppisch, *Why are Indian Reservations So Poor?*, *supra* note 157.

¹⁸⁹ *Supra* note 14.

¹⁹⁰ Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 336 (“Some believe the notion that American Indians owned nothing more than their captured prey and a few personal items arose in order to justify the confiscation of Amerindian property.”); Carlos L. Rodriguez, Craig S. Galbraith, & Cur H. Stiles, *American Indian Collectivism*, PERC VOL. 24, No. 2 (2006), <https://www.perc.org/2006/06/01/american-indian-collectivism/> (noting the myth of Indians not owning lands has been linked to white farmers differing valuation of land use than the Plains Indians).

¹⁹¹ Crepelle & Block, *Property Rights and Freedom*, *supra* note 15, at 322; History Matters, “*Kill the Indian, and Save the Man*”: *Capt. Richard H. Pratt on the Education of Native Americans*, HISTORY MATTERS, <http://historymatters.gmu.edu/d/4929/> (last visited Mar. 7, 2019) (“Neither can the Indians understand or use American citizenship theoretically taught to them on Indian reservations.”).

form corporations, a basic law that will improve investor confidence is a contracts clause provision because this will prohibit tribal governments from arbitrarily using their sovereignty to impair investor rights.¹⁹² Likewise, tribes must adopt U.C.C.-type provisions to increase the confidence of outside investors.¹⁹³ A version of the U.C.C. has been crafted by the National Conference of the Commissioners on Uniform Laws specifically for Indian tribes.¹⁹⁴ Ratification of secured transactions laws, like the U.C.C., is a beacon to investors that a tribe is ready for business.¹⁹⁵ Moreover, tribes must make their business laws readily available to the public to create investor confidence.

The legislative and executive branches of tribes need to implement governance policies that build investor confidence. Political instability is

¹⁹² Miller, *Reservation Capitalism*, *supra* note 179, at 143 (“Enacting such provisions in tribal constitutions or laws would help reassure many Indian and non-Indian investors.”); Steve Miller, *Judge Says Hog-Farm Lease Valid*, RAPID CITY J. (June 9, 2003), http://rapidcityjournal.com/news/local/judge-says-hog-farm-lease-valid/article_e76579da-0124-5127-8256-91771dc33337.html (“It is important for tribes' economic well-being that contracts be enforced and not subject to elections.”).

¹⁹³ See U.C.C. § 1-102(a); William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 10 (1967) (“the primary purpose of the Code is to make uniform the laws of the various American jurisdictions regulating commercial transactions.”); Jessica Kent, *What Is the Purpose of the Uniform Commercial Code?*, SMALL BUSINESS, <http://smallbusiness.chron.com/purpose-uniform-commercial-code-4915.html> (last visited Mar. 7, 2019) (“As the national economy grew at the turn of the 20th century, a need to regulate business transactions in a uniform way became necessary. With the adoption of the UCC, businesses as well as individuals are protected.”).

¹⁹⁴ Revised Model Tribal Secured Transactions Act (May 2017), http://www.uniformlaws.org/shared/docs/mtsta/RMTSTA_Final_2017.pdf.

¹⁹⁵ See Miriam Jorgensen, *Access to Capital and Credit in Native Communities* 77, NATIVE NATIONS INSTITUTE, https://nni.arizona.edu/application/files/8914/6386/8578/Accessing_Capital_and_Credit_in_Native_Communities.pdf (“Tribal governments that adopt the MTSTA or a modified version of it send a strong signal to lenders that their capital will not be at risk.”); Miller, *Reservation Capitalism*, *supra* note 179, at 143 (noting a bank refused to open a branch on a reservation until the tribe adopted the U.C.C., and the bank opened a bank that provides jobs and loans to tribal members as a result of the U.C.C. provisions adopted by the tribe).

a major deterrent to private business development in Indian country.¹⁹⁶ Implementing a contracts clause (discussed above) helps address this concern. Having staggered tribal council terms helps ameliorate this concern as well because staggered terms help prevent extreme policy swings and preserve institutional memory.¹⁹⁷ Additionally, staggered terms help prevent corruption.¹⁹⁸ Transparent government operations also increase investor confidence;¹⁹⁹ hence, tribes should consider measures such as opening tribal council meetings to the public. Allowing the public to see tribal council meetings will remove some of the mystery surrounding tribes and help allay investor uncertainty.

¹⁹⁶ Miller, *Reservation Capitalism*, *supra* note 179, at 102 (“One reporter stated that everyone in Indian country knows of business projects that were cancelled after the latest election.”).

¹⁹⁷ See Democracy Lab, Legislator Guide, *Staggered Terms for Government Boards and Commissions*, <https://static1.squarespace.com/static/571542c12eeb81d49159f0ae/t/5804f53fd2b85773b25eeb14/1476719937105/DL+-+Staggered+Terms+for+Boards+and+Commissions+-+ver.9-.pdf>; Robert Jumper, *The Good, the Bad and the Ugly of Term Limits and Staggered Terms*, CHEROKEE ONE FEATHER (Oct. 1, 2015), <https://theonefeather.com/2015/10/editorial-the-good-the-bad-and-the-ugly-of-term-limits-and-staggered-terms/> (“With regard to staggered terms, a staggered term system could curtail the possibility of an overly inexperienced Council body slowing legislative work due to a learning curve in processes.”); *The Senate and the United States Constitution*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Constitution_Senate.htm (last visited Mar. 8, 2019) (“Framers hoped biennial elections would bring stability to the Senate, and in turn, to other branches of the new government.”).

¹⁹⁸ See *The Senate and the United States Constitution*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Constitution_Senate.htm (last visited Mar. 7, 2019) (“By gradually changing members, class rotations would prevent senators from permanently combining for ‘sinister purposes’”); *Staggered Terms for Government Boards and Commissions*, DEMOCRACY LAB, <https://static1.squarespace.com/static/571542c12eeb81d49159f0ae/t/5804f53fd2b85773b25eeb14/1476719937105/DL+-+Staggered+Terms+for+Boards+and+Commissions+-+ver.9-.pdf> (“Regular, periodic, staggered rotation of terms makes it harder to make and carry out corrupt arrangements.”).

¹⁹⁹ See R. Gaston Gelos & Shang-Jin Wei, *Transparency and International Investor Behavior*, BROOKINGS INST. (Oct. 16, 2002), <https://www.brookings.edu/wp-content/uploads/2016/06/20021016-1.pdf> (“First, we find relatively clear evidence that international funds prefer to hold more assets in more transparent markets.”).

Investor confidence will be further enhanced if the tribe produces and publishes an economic development plan. An economic development plan showcases a tribe's values and vision. The plan will help investors determine whether their businesses are good matches for a tribe and increase investor confidence. While the plan will undergo revisions over time, the establishment of an economic development plan provides investors with a general guide of what to expect from the tribe. Crafting an economic development plan shows investors that the tribe means business.

2. Tribal Courts

Some fear tribal courts cannot render fair and impartial decisions,²⁰⁰ and this apprehension discourages business development in Indian country.²⁰¹ Though some tribal courts have acted in a questionable manner,²⁰² these are but a small portion of the more than 300 tribal

²⁰⁰ See Dao L. Bernardi-Boyle, *State Corporations for Indian Reservations*, 26 AM. INDIAN L. REV. 41, 54 (2001) (“While the tribe's tribal court may have jurisdiction, many outsiders feel that tribal court systems are often an inadequate substitute.”); INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TO TRIBAL COURTS, U.S. GOV'T ACCOUNTABILITY OFFICE (2011), <http://www.gao.gov/assets/320/315698.pdf> (stating that cozy relationships between some tribal councils and tribal courts spurs questions about their integrity); John McCory, *Legislature Considers Wider Authority for Tribal Courts*, THE SEATTLE TIMES (Feb. 20, 2012), <https://www.seattletimes.com/seattle-news/legislature-considers-wider-authority-for-tribal-courts/> [Hereinafter, “McCory, *Legislature Considers Wider Authority for Tribal Courts*”] (“But some say they worry that restoring full sovereignty to tribes over their members might subject outsiders to unfair treatment in tribal courts.”).

²⁰¹ See Safty, *Federal Diversity Jurisdiction*, *supra* note 157 (“Yet non-Indian companies may be deterred from doing business with tribes and their corporations because of the legal uncertainties that arise.”); Garrett Epps, *Who Can Tribal Courts Try?*, THE ATLANTIC (Dec. 7, 2015), <https://www.theatlantic.com/politics/archive/2015/12/who-can-tribal-courts-try/419037/> (quoting Judge Frank Pommersheim stating the Supreme Court “does not ‘trust’ [tribal courts] to be competent and fair. That is most unfortunate and quite inaccurate.”).

²⁰² See M. Gatsby Miller, *The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction over Nonmembers in Civil Cases*, 114 COLUM. L. REV. 1825, n86 (2014) [Henceforth, “Miller, *The Shrinking Sovereign*”]; McCory, *Legislature*

courts.²⁰³ Tribal courts routinely settle disputes involving non-Indian parties with little controversy.²⁰⁴ Likewise, studies show tribal courts administer justice fairly when non-Indians are parties to the case.²⁰⁵ In the event that a non-Indian feels she was treated unfairly in tribal court, she has the right to have the ruling reviewed by a federal court.²⁰⁶

Considers Wider Authority for Tribal Courts, supra note 201 (“But some say they worry that restoring full sovereignty to tribes over their members might subject outsiders to unfair treatment in tribal courts.”).

²⁰³ See Richard Wolf, *Supreme Court Appears Likely to Limit Reach of Native American Courts*, USA TODAY (Dec. 7, 2015), <https://www.usatoday.com/story/news/2015/12/07/supreme-court-mississippi-dollar-general-tribe-lawsuit/76931690/>; Adam Creppelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 29 (2017); Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 71 (2013) (estimating the number of tribal courts to be approximately 300); *Ninigret Dev. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d. 21, 34 (1st Cir. 2000) (“The unsupported averment that non-Indians cannot receive a fair hearing in a tribal court flies in the teeth of both congressional policy and the Supreme Court precedents establishing the tribal exhaustion doctrine. The requirements for this exception are rigorous: absent tangible evidence of bias—and none has been proffered here—a party cannot skirt the tribal exhaustion doctrine simply by invoking unfounded stereotypes.”).

²⁰⁴ Matthew L.M. Fletcher, *Contract and (Tribal) Jurisdiction*, 126 THE YALE F. L.J. 1, 3, Apr. 2016, https://www.yalelawjournal.org/pdf/FletcherPDF_xevyxrDi.pdf (“At this late date, it is well established that nonmembers who have consented to tribal jurisdiction will not be successful in challenging tribal jurisdiction in federal court, especially if the dispute arises on Indian lands. These challenges are almost uniformly unsuccessful. The simple answer for any commercial entity doing business in Indian country is to resolve these uncertainties in contract with the tribal business partner. In fact, Indian country business entities successfully contract away jurisdictional problems in most instances.”).

²⁰⁵ See *United States v. Bryant*, 136 S.Ct. 1954, 1966 (2016) (“Proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions. Therefore, the use of those convictions in a federal prosecution does not violate a defendant’s right to due process.”); Miller, *The Shrinking Sovereign, supra* note 203, n.85; Alexander S. Birkhold, *Predicate Offenses, Foreign Convictions, and Trusting Tribal Courts*, 114 MICHIGAN L. REV. ONLINE 155, 159 (June 2016), <http://michiganlawreview.org/wp-content/uploads/2017/03/114MichLRevFI155.pdf> (“Tribal court convictions result from fair and reliable proceedings; Congress and tribes have guaranteed criminal defendants in tribal courts the right to due process.”).

²⁰⁶ *Iowa Mut. Ins. Co., v. LaPlante*, 480 U.S. 9, 20 (1987) (“Although petitioner must exhaust available tribal remedies before instituting suit in federal

Tribes must ensure their judiciaries are independent from tribal politics and staffed by competent individuals in order to gain the confidence of outside investors. Exercising special domestic violence jurisdiction under the Violence Against Women Reauthorization Act of 2013 (VAWA)²⁰⁷ and enhanced sentencing authority under the Tribal Law and Order Act of 2010 (TLOA)²⁰⁸ are ways to indicate judiciary legitimacy. Tribes wishing to implement the VAWA and the TLOA criminal provisions must meet certain federal requirements. To exercise enhanced sentencing authority under the TLOA, tribes must provide individuals with an “effective” and licensed attorney.²⁰⁹ The TLOA requires that tribes employ licensed judges who are trained to preside over criminal proceedings.²¹⁰ The TLOA also requires the tribe publish all law relevant to the criminal proceeding and record the proceeding.²¹¹ The VAWA requires that tribal court juries be composed of a fair cross-section of the community, meaning no systematic exclusion of non-Indians.²¹² Compliance with federal guidelines that enables tribes to sentence non-Indians to nine years in jail is a strong signal to private investors that a tribal court will fairly and effectively adjudicate disputes.²¹³

To date, only about two dozen of the 573 federally recognized tribes²¹⁴ have implemented VAWA and TLOA.²¹⁵ Some tribes refuse to

court, the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review.”); *Nat'l Farmers Union Ins. Comp. v. Crow Tribe*, 471 U.S. 845, 856 (1985) (“Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.”).

²⁰⁷ 25 U.S.C. § 1304(a)(6) (2013).

²⁰⁸ *Id.* § 1302(a)(7)(C-D).

²⁰⁹ *Id.* § 1302(c)(1-2).

²¹⁰ *Id.* § 1302(c)(3).

²¹¹ *Id.* § 1302(c)(4).

²¹² *Id.* § 1304(d)(3)(A-B).

²¹³ *Id.* § 1302(a)(7)(D).

²¹⁴ Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34863 (July 23, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-07-23/pdf/2018-15679.pdf> (“This notice publishes the current list of 573 Tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes.”)

²¹⁵ *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report 1*, NATIONAL CONGRESS OF AMERICAN INDIANS, (Mar. 20, 2018),

implement these laws because the laws' requirements are out of sync with tribal culture.²¹⁶ Money, however, is the bigger issue, as prosecuting individuals under the VAWA and the TLOA can be financially burdensome as licensed attorneys and law-trained judges are not cheap.²¹⁷ Refusing to implement VAWA and TLOA on financial grounds is unwise because the laws never need to be used; that is, having the VAWA and TLOA provisions in a tribal code does not mean the tribe needs to prosecute individuals under the laws. Simply having the laws on the books adds to the legitimacy of tribal courts. For example, had the Mississippi Band of Choctaw Indians been authorized to exercise VAWA and TLOA, the tribe's claim of civil jurisdiction over Dollar General, a non-Indian corporation, would have been much stronger.²¹⁸

Tribal courts must be fair—and be perceived as fair—to attract business to Indian country.²¹⁹ Since VAWA's enactment, no non-Indian

http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf
("To date, 18 tribes are known to be exercising SDVCJ.")

²¹⁶ See Mary K. Mullen, *The Violence Against Women Act: A DoubleEdged Sword for Native Americans, Their Rights, and Their Hopes of Regaining Cultural Independence*, 61 ST. LOUIS U. L.J. 811, 812 (2017) ("I argue that, while VAWA grants Native Americans more power over non-native perpetrators, it does so with the expectation that tribal courts will conform to Anglo-American criminal procedure, creating further assimilation of tribal courts and robbing Native Americans of their cultural uniqueness."); Catherine M. Redlingshafer, *An Avoidable Conundrum: How American Indian Legislation Unnecessarily Forces Tribal Governments to Choose Between Cultural Preservation and Women's Vindication*, 93 NOTRE DAME L. REV. 393, 410 (2017) ("VAWA cannot necessarily be as smoothly implemented in tribes where the culture and legal tools do not so neatly align with those of the federal system.")

²¹⁷ *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report* 29, NATIONAL CONGRESS OF AMERICAN INDIANS (Mar. 20, 2018), http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf ("The primary reason tribes report for why SDVCJ has not been more broadly implemented is a focus on other priorities and a lack of resources. During and beyond the implementation phase, tribes need funding, access to resources, and services to support implementation."); Maureen L. White Eagle, Melissa L. Tatum, & Chia Halpern Beetso, *Tribal Legal Code Resource: Tribal Laws Implementing TLOA Enhanced Sentencing and VAWA Enhanced Jurisdiction* 21, TRIBAL LAW & POLICY INST., Feb. 2015, <http://www.tribal-institute.org/download/TLOA-VAWA-Guide.pdf> ("Complying with all of these requirements will be expensive, both in time and in money.")

²¹⁸ *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S.Ct. 2159 (2016).

²¹⁹ *Tribal Courts and the Administration of Justice in Indian Country: Hearing on S. 110-576 Before the S. Comm. on Indian Affairs*, 110th Cong. 21 (2008) (statement of Hon. Joseph Thomas Flies-Away, C.J., Hualapai Tribe),

has alleged that a tribe has violated his rights during a VAWA prosecution.²²⁰ Congress has authorized tribal courts to hear adoption proceedings,²²¹ and the Supreme Court recently held that tribal court convictions obtained against a sans-counsel defendant count for purposes of determining whether the individual is a habitual offender in federal court.²²² These are serious matters. Congress and the Supreme Court's faith in tribal courts should be used as a signal to investors that tribal courts are legitimate arbiters of justice. Plus, tribes have an economic incentive to have fair and independent judicial systems because independent courts are strongly linked to tribal economic growth.²²³ Accordingly, tribes must take measures to ensure their courts are fair, independent, and that investors know this.

("When people want to come to the reservation and do business and there is a fair playing field to do so, then that is going to be a court, a good court is going to be a place where they can come and actually feel good and comfortable about doing business there.").

²²⁰ See Nat'l Cong. of Am. Indians, *supra* note 216, at 1. ("There has not been a single petition for habeas corpus review brought in federal court in an SDVCJ case. Although preliminary, the absence of habeas petitions suggests the fairness of tribal courts and the care with which tribes are implementing SDVCJ."); Adam Creppelle, *Concealed Carry to Reduce Sexual Violence Against American Indian Women*, 26 KAN. J.L. & PUB. POL'Y 236, 237 (2017) ("Multiple tribes are currently exercising VAWA jurisdiction, and no due process issues have been reported to date.").

²²¹ 25 U.S.C. § 1911(a) (2012) (noting that tribal courts have "exclusive jurisdiction" over child custody proceedings involving Indian children).

²²² Bryant, *supra* note 206, at 1966 ("Proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions. Therefore, the use of those convictions in a federal prosecution does not violate a defendant's right to due process.").

²²³ Miriam Jorgensen & Jonathan Taylor, *What Determines Indian Economic Success? Evidence from Tribal and Individual Indian Enterprises 5* (June 2003),

<https://hpaied.org/sites/default/files/publications/WhatDeterminesIndianEconomicSuccess.pdf> ("Thus, all else equal, tribes that implement a separation of powers that leaves their dispute resolution mechanisms outside political influence enjoy a 5 percent lower level of unemployment than tribes that do not."); Terry L. Anderson, *Zuckerberg Meets Native American Poverty*, THE HILL, Jul. 24, 2017, <https://thehill.com/blogs/pundits-blog/energy-environment/343503-zuckerberg-meets-native-american-poverty> ("Tribes without independent judiciaries have per capita income 30 percent below those with and growth rates 20 percent below.").

3. *International Trade*

International trade helps economies grow.²²⁴ Since colonization, tribes have been barred from international trade according to the Supreme Court.²²⁵ However, when the Court first arrived at this conclusion, there was debate over whether Indians were human beings;²²⁶ it was assumed that Indians would vanish from the face of the earth within a few generations,²²⁷ and Indians were not American citizens.²²⁸ Since the 1970s, the United States has embraced tribal self-determination.²²⁹ Congress has acknowledged economic empowerment is a fundamental component of

²²⁴ IMF Staff, *Global Trade Liberalization and the Developing Countries*, IMF (Nov. 2001); *The Benefits of International Trade*, U.S. CHAMBER OF COM. (Sept. 29, 2018),

<https://www.uschamber.com/international/international-policy/benefits-international-trade>;

<https://www.wto.org/english/thewtoe/whatis/10thie/10thi03e.htm>; 3 *The WTO Can ... Stimulate Economic Growth and Employment*, WTO (last visited Sep. 29, 2018),

https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi03_e.htm (“Open economies tend to grow faster and more steadily than closed economies and economic growth is an important factor in job creation.”).

²²⁵ See *Worcester v. Georgia*, 31 U.S. 515, 559 (Indian tribes “cannot enter directly into commercial or governmental relations with foreign nations.”); *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408, 426 (1989); *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F. Supp. 3d 1221, 1228 (D.C. Nev. 2014) (“Congressionally recognized tribes retain all aspects of sovereignty they enjoyed as independent nations before they were conquered, with three exceptions: (1) they may not engage in foreign commerce or foreign relations”)

²²⁶ In *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879).

²²⁷ See Kathryn E. Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 ST. LOUIS L.J. 297, 310 (2013) (“Throughout the early 1800s the vanishing Indian became ‘a habit of thought.’”); Dina Gilio-Whitaker, *‘Real’ Indians, the Vanishing Native Myth, and the Blood Quantum Question*, INDIAN COUNTRY TODAY, Aug. 30, 2015, <https://newsmaven.io/indiancountrytoday/archive/real-indians-the-vanishing-native-myth-and-the-blood-quantum-question--9YB0dvG2UqTYWMH4e4KFg/> (“Even before the United States was created European immigrants counted on the disappearance of the indigenous population because they wanted the land, and so they narrated the reality they wanted to see as soon as they got here.”).

²²⁸ *Elk v. Wilkins*, 112 U.S. 94, 100 (1884); Indian Citizenship Act of 1924, 43 Stat. 253 (1924).

²²⁹ 25 U.S.C. § 4301(a)(2) (2012).

tribal self-determination; moreover, Congress desires to encourage international trade as a component of tribal economic development.²³⁰ In fact, the Secretary of Commerce is required to “give priority to activities that . . . foster long-term stable international markets for Indian goods and services.”²³¹

A few Indian tribes are already engaging in international trade. The Coushatta Tribe of Louisiana has a trade agreement with Israel and is currently negotiating trade deals with other foreign nations.²³² The Mississippi Band of Choctaw Indians operates a wire harness manufacturing plant in Sonora, Mexico, that employs over 1,000 people.²³³ The Choctaw Nation of Oklahoma operates a munitions manufacturing plant in Italy.²³⁴ The Morongo Band of Mission Indians has entered an agreement with South Korea “to explore business opportunities together,”²³⁵ and the Mohegan Tribe is opening a \$5 billion casino resort in South Korea.²³⁶ Hard Rock Cafe Inc. has hotels, casinos, and restaurants in over sixty countries, and the enterprise is owned by the Seminole Tribe of Florida.²³⁷ The Navajo Nation has a letter of intent to sell agricultural

²³⁰ 25 U.S.C. § 4301(b)(5) (2012) (“To encourage intertribal, regional, and international trade and business development in order to assist in increasing productivity and the standard of living of members of Indian tribes and improving the economic self-sufficiency of the governing bodies of Indian tribes.”).

²³¹ 25 U.S.C. § 4304(e)(2) (2012).

²³² Joseph Austin & Adam Creppelle, *All Roads Lead to Chaco Canyon: Revitalizing International Trade Between Native Nations*, TRIBAL BUS. J. (2018), <http://tribalbusinessjournal.com/roads-lead-chaco-canyon/>.

²³³ Mark Devaney, *Chata Enterprises Inc. Tribal Enterprise*, INDUSTRY TODAY (2003), <https://industrytoday.com/article/tribal-enterprise/>.

²³⁴ *Choctaw Defense*, OKLA. CTR. FOR THE ADVANCEMENT OF SCI. & TECH. (last visited Sep. 29, 2018), <https://www.ok.gov/ocast/documents/IS-ChoctawDefense.pdf>.

²³⁵ Fielding Buck, *Morongo: Tribe Signs Business Agreement with South Korea*, THE PRESS-ENTERPRISE, May 19, 2016, <https://www.pe.com/2016/05/19/morongo-tribe-signs-business-agreement-with-south-korea/>.

²³⁶ Devin O’Connor, *Mohegan Sun Now Fully Controls South Korea Casino Project ‘Inspire’*, Casino.org (May 5, 2018), <https://www.casino.org/news/mohegan-sun-now-fully-controls-south-korea-casino-project-inspire>.

²³⁷ Chabeli Herrera, *How the Seminole Tribe Came to Rock the Hard Rock Empire*, MIAMI HERALD (May 27, 2016), <http://www.miamiherald.com/news/business/biz-monday/article79172817.html>.

products to Cuba,²³⁸ additionally, the Navajo Nation is using EB-5 visas to obtain foreign investment and create jobs on the reservation.²³⁹ Foreign investment by way of Malaysia was the source of startup capital for the Mashantucket Pequot and the Seneca Nation of New York's casinos.²⁴⁰

The idea of contemporary Indian tribes engaging in international trade is largely unexplored,²⁴¹ but international indigenous trade is gaining traction. The 2013 trade agreement between New Zealand and Taiwan "is the first free trade agreement to include a special chapter to foster closer interactions between the indigenous peoples of both parties."²⁴² Accordingly, expanding commercial relations between the indigenous peoples of both countries is a goal of the agreement.²⁴³ The Trans-Partnership Agreement of 2016 included a provision respecting the treaty rights of the Maori.²⁴⁴ Canada made an effort to include a provision for indigenous trade in the Canada-United States-Mexico Agreement²⁴⁵ and succeeded in having a provision for the duty-free importation of

²³⁸ Steve Inskeep, *Navajos Sign Cuba Trade Deal*, NPR, Aug. 24, 2006, <https://www.npr.org/templates/story/story.php?storyId=5701604>.

²³⁹ *President Shelly Praises Federal EB-5 Immigrant Investor Designation*, THE NAVAJO NATION (Mar. 2, 2015), <http://www.navajonnsn.gov/News%20Releases/OPVP/2015/mar/Federal%20EB-5%20Immigrant%20Investor%20Program.pdf>.

²⁴⁰ Robert J. Miller, *Inter-Tribal and International Treaties*, *supra* note 175, at 1110.

²⁴¹ Austin & Crepelle, *supra* note 233 (noting international trade is a new method of economic development for tribes in the present day though historically tribes were no strangers to international trade).

²⁴² Explanatory Materials for the Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Cooperation Art. V(5) (July 2013), <https://www.mofa.gov.tw/en/Upload/WebArchive/1266/%E5%8D%94%E5%A E%9A%E5%90%84%E7%AB%A0%E7%AF%80%E4%BB%8B%E7%B4%B 9-%E8%8B%B1%E6%96%87-20130710.pdf>.

²⁴³ Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation, chap. 19, art. 1(b), ("The objectives of this Chapter are to expand and facilitate trade and economic relations between the indigenous peoples in the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and New Zealand's Māori.").

²⁴⁴ Trans-Pacific Partnership Agreement, art. 29.6, (2016).

²⁴⁵ *IITIO, NAFTA Indigenous Chapter-Round 6- UPDATE*, IITIO (Feb. 1, 2018), <https://iitio.org/nafta-6-update/>; Perry Bellegarde, *Indigenous Rights in NAFTA Are Not a Social Agenda*, THE STAR (Jan. 26, 2018), <https://www.thestar.com/opinion/contributors/2018/01/26/indigenous-rights-in-nafta-are-not-a-social-agenda.html>

indigenous handicraft goods.²⁴⁶ The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms the right of indigenous people “to have access to financial and technical assistance from States and through international cooperation”²⁴⁷ as well as the right of indigenous peoples “to freely pursue their economic, social and cultural development.”²⁴⁸ The United States has endorsed the UNDRIP,²⁴⁹ and international trade fits the UNDRIP criteria.

Tribally-owned enterprises and privately-owned businesses will both benefit from participating in the global economy. By engaging in foreign trade, tribes will have access to new markets and become more attractive venues for private businesses. An added benefit of dealing with foreign governments according to Ernest Sickey, the former Chairman of the Coushatta Tribe of Louisiana, is “Foreign countries understand sovereignty better than the United States does.”²⁵⁰ Therefore, international trade is a way to simultaneously strengthen tribal economies and sovereignty.

4. *Intertribal Trade*

²⁴⁶The United States Mexico Canada Agreement art. 6.2, Nov. 30, 2018, <https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-06.pdf>.

²⁴⁷ G.A. Res. 61/295, art. 39, United Nations Declaration on the Rights of Indigenous Peoples- (Sept. 13, 2007), Art. 39, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

²⁴⁸ *Id.* at art. 3.

²⁴⁹ See *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> (last visited Feb. 25, 2019) (“Since adoption of the Declaration, Australia, New Zealand, United States and Canada have all reversed their positions and expressed support for the Declaration.”).

²⁵⁰ Ernest Sickey, *Tribal Nation-Building in the U.S. South: Reflections on a Lifetime of Leadership with the Coushatta Tribe of Louisiana*, Public Lecture, Arizona State University (February 8, 2018).

Historically, tribes traded with each other.²⁵¹ Early European settlements in North America were reliant on tribal trade networks,²⁵² but the European colonial effort was devoted to disrupting and controlling tribal trade networks.²⁵³ Now, federal policy has shifted and a stated purpose of federal policy is to encourage intertribal trade as a means of promoting tribal economic development.²⁵⁴ Likewise, several tribes have supported intertribal trade as a way to increase business opportunities in Indian country as well as a way to reduce tribal reliance on the federal government.²⁵⁵

Despite little formal policy on intertribal trade, intertribal trade is occurring. Four Indian tribes partnered with Marriot International to build a multi-million dollar hotel in Washington D.C.,²⁵⁶ and three of the four tribes involved in the D.C. venture partnered with Marriott to construct a hotel in Sacramento.²⁵⁷ The Confederated Tribes of Siletz in Oregon are

²⁵¹ See *Resolution #TUL-13-018 Support of Inter-Tribal Trade Legislation and the National Native Trade Network*, NATIONAL CONGRESS OF AMERICAN INDIANS (Oct. 18, 2013),

http://www.ncai.org/attachments/Resolution_KamadPusMycgRZjqlnLwPEjrmjExDbKhMIjoFvgduICCrJQMopk_TUL-13-018.pdf (“[H]istory shows us that Tribes once had strong vibrant tribal economies which were based, in large part, upon a system of inter-tribal trade” and . . . “history also shows us that these inter-tribal trade networks were of great benefit to the surrounding non-Indian economies, and in fact many of the first non-Indian economies in the United States and Canada were centered around, or directly dependent upon, these inter-tribal systems.”).

²⁵² *Id.*

²⁵³ See *id.* (“history also shows us that these inter-tribal trade networks were of great benefit to the surrounding non-Indian economies, and in fact many of the first non-Indian economies in the United States and Canada were centered around, or directly dependent upon, these inter-tribal systems”); Terry Anderson & Wendy Purnell, *Restoring Tribal Economies*, HOOVER INST. (Dec. 20, 2017), <https://www.hoover.org/research/restoring-tribal-economies> (“In the nineteenth century, the young nations of the United States and Canada enacted laws designed to undermine indigenous governance and economic independence.”).

²⁵⁴ 25 U.S.C.A. § 4301(b)(5) (2000).

²⁵⁵ See National Congress of American Indians, *supra* note 251 (“[T]he NCAI member tribes have regularly endorsed Inter-tribal trade efforts. . .”).

²⁵⁶ Michael Milligan, *Marriott, Native American Tribes Team on New D.C. Hotel*, TRAVEL WEEKLY (May 4, 2005), <http://www.travelweekly.com/Travel-News/Hotel-News/Marriott-Native-American-tribes-team-on-new-D-C-hotel>.

²⁵⁷ *Three Fires Breaks Ground on \$53 Million Residence Inn; Multi-Tribe Coalition and Investment Firm Partner to Bring Hotel Project to Burgeoning Downtown Sacramento*, BUS. WIRE (Dec. 9, 2004),

considering the idea of an intertribal casino comprised of all nine tribes.²⁵⁸ Ho-Chunk, Inc., the economic development arm of the Winnebago Tribe, has mastered the art of intertribal trade in the realms of fuel, cigarettes, and more.²⁵⁹ The author has learned that the Coushatta Tribe of Louisiana and the Tunica-Biloxi Tribe of Louisiana are attempting to supply their restaurants with seafood procured by the United Houma Nation's fishermen. In order to facilitate even more intertribal trade, the Inter-Tribal Economic and Trade Treaty was drafted though little trade has flowed from it to date.²⁶⁰ The National Congress of the American Indian has called for Congress to enact legislation that would prevent the federal and state governments from engaging in taxing and regulatory efforts that chill intertribal trade.²⁶¹

Intertribal trade includes privately-owned Indian businesses, and tribes should develop programs that increase opportunities for Indian entrepreneurs. Some tribes have created preferred supplier programs.²⁶²

<https://www.businesswire.com/news/home/20041209005234/en/Fires-Breaks-Ground-53-Million-Residence-Inn>.

²⁵⁸ Gordon Oliver, *Spirit Mountain Likes Its Odds Against Casino Rivals*, THE OREGONIAN (May 27, 2017),

<http://www.oregonlive.com/business/index.ssf/2017/05/spirit-mountain-likes-it-s-odds.html>; Alexander Brandon, *New Casino Proposed in Salem Oregon*, WORLD CASINO INDEX (May 4, 2017),

<https://www.worldcasinoindex.com/new-casino-proposed-in-salem-oregon/>.

²⁵⁹ See Anderson & Purnell, *supra* note 253 (noting Ho-Chunk Inc, an arm of the Winnebago Tribe, "established trade with neighboring tribes"); *Ho-Chunk Inc. History*, FUNDING UNIVERSE (accessed Sep. 30, 2018), <http://www.fundinguniverse.com/company-histories/ho-chunk-inc-history/>

("Ho-Chunk's success also helped other tribes in the region. It built a call center on the Lakota tribe's Pine Ridge Indian Reservation in South Dakota in 2001, financing the construction of the building in exchange for equity in the business. Ho-Chunk's gas and tobacco distribution business, HCI Distribution, sold its goods to other area tribes, including the Fox, Sac, Iowa, and Kickapoo.").

²⁶⁰ Inter-Tribal Economic and Trade Treaty, (Apr. 30, 2018) (unpublished trade treaty draft) (on file at https://nanopdf.com/download/inter-tribal-economic-and-trade-treaty_pdf).

²⁶¹ See National Congress of American Indians, *supra* note 251 ("[The] NCAI calls upon Congress and the President to promote and secure the enact[ment] of Indian Commerce Legislation . . .").

²⁶² E.g., *Preferred Supplier Program*, CHOCTAW NATION, <https://www.choctawnation.com/preferred-supplier-program> (last visited Mar. 7, 2019); *Preferred Vendor Program*, CHICKASAW NATION, <https://www.chickasaw.net/Services/Preferred-Vendor-Program.aspx> (last visited Mar. 8, 2019).

Tribes are not bound by the United States Constitution,²⁶³ and “Indian” is a political rather than a racial classification meaning the preferential treatment arises from the Indian’s citizenship in an Indian tribe and not her Indian blood.²⁶⁴ Thus, tribal programs giving Indian’s preferential treatment in employment or procurement do not violate the United States Constitution’s Equal Protection Clause. Tribes should also form programs to teach their citizens business skills such as the Choctaw Nation of Oklahoma’s Small Business Development Services.²⁶⁵

Tribes engaging in commerce with other Indian enterprises is exceedingly beneficial to tribal economies. Doing business with other tribes puts money in Indian pockets which will likely circulate amongst other Indians. This will encourage the growth and expansion of Indian businesses and also lead to job creation in Indian country. More businesses in Indian country will result in less economic leakage from Indian country.²⁶⁶ This will spur Indian country economies.

Furthermore, doing business with Indians reduces assaults on tribal sovereignty. For example, Dollar General, a non-Indian corporation, threatened tribal sovereignty when the company challenged the Mississippi Band of Choctaw Indians jurisdiction over the company.²⁶⁷ This challenge would not have arisen if Dollar General was an Indian owned enterprise because tribal courts would have jurisdiction over

²⁶³ See *Talton v. Mayes*, 163 U.S. 376, 376 (1896) (holding the Bill of Rights does not apply to Indian tribes); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) (noting that tribes surrendered no powers at the Constitutional Convention).

²⁶⁴ *Morton v. Mancari*, 417 U.S. 535, n24 (1974) (“The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”).

²⁶⁵ *Small Business Development Services*, CHOCTAW NATION, <https://www.choctawnation.com/business/division-commerce/small-business-development-services> (last visited Mar. 8, 2019).

²⁶⁶ See Robert J. Miller, *Creating Economic Development on Indian Reservations*, PERC Vol. 30, No.2 Fall 2012, <https://www.perc.org/2012/09/14/creating-economic-development-on-indian-reservations/> (“Reservation economies rapidly lose the money that residents receive because of the absence of small businesses where people can spend their cash on needed goods and services The only solution to this problem for reservations seems to be for Indian governments to help develop and locate a substantial number of privately owned and tribally owned businesses in their communities.”).

²⁶⁷ *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S.Ct. 2159 (2016).

Indians.²⁶⁸ Similarly, more privately-owned Indian businesses means tribes will have less need to create tribally-owned enterprises. Tribally-owned enterprises are entitled to sovereign immunity,²⁶⁹ and the sovereign immunity of tribal enterprises has come under increased scrutiny in recent years.²⁷⁰ Privately-owned Indian businesses, however, are not eligible for sovereign immunity. Thus, tribal sovereignty is not imperiled through individual Indian commerce. Additionally, tribes are less likely to engage in battles over sovereign immunity with other tribes because all tribes lose when sovereign immunity is placed at risk. Therefore, intertribal trade simultaneously enhances tribal economies and shields tribal sovereignty.

CONCLUSION

Anti-Indian state and federal policies are likely to remain in place for years. However, tribes can take control of their own economic destiny. Tribes created successful economies on their own long before European contact. They did this by adopting simple laws that facilitated private enterprise and trade. Tribes can revive their economies by returning to their traditional economic framework. Private and enterprise trade can decolonize Indian country economies.

²⁶⁸ *Cf.* United States v. Lara, 541 U.S. 193 (2004) (holding tribes have inherent sovereignty to prosecute nonmember Indians). Following *Lara*, it is presumable that a tribe's sovereign power to criminally prosecute nonmember Indians translates into the power to exercise civil jurisdiction over nonmember Indians as well as Indian owned corporations.

²⁶⁹ *Inyo Cty. v. Paiute-Shoshone Indians*, 538 U.S. 701, 705 n.1 (2003) (“The United States maintains, and the County does not dispute, that the Corporation is an ‘arm’ of the Tribe for sovereign immunity purposes.”).

²⁷⁰ Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 23 (2018) (“Tribal sovereign immunity has become an increasingly controversial topic . . .”).