

# HOW FEDERAL INDIAN LAW PREVENTS BUSINESS DEVELOPMENT IN INDIAN COUNTRY

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## I. INTRODUCTION

For thousands of years, the Americas' indigenous inhabitants had flourishing economies. Commerce was carried on by individuals and

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families.<sup>1</sup> Goods often travelled over a thousand miles from their site of origin<sup>2</sup> and were exchanged in vast economic centers.<sup>3</sup> Indigenous markets were governed by well-established rules,<sup>4</sup> and rights violations were resolved through private law.<sup>5</sup> Free-market indigenous economies had no difficulty

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1. Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTREPRENEURSHIP & L. 413, 422 (2019) [hereinafter Crepelle, *Decolonizing*] (“The individual drove the Americas’ indigenous economic system.”); Robert J. Miller, *Sovereign Resilience: Reviving Private-Sector Economic Institutions in Indian Country*, 2018 BYU L. REV. 1331, 1403 (2019) [hereinafter Miller, *Sovereign Resilience*] (“American Indians have always supported themselves through individual and family-operated economies activities and hard work.”).

2. GEORGE T. HUNT, *THE WARS OF THE IROQUOIS: A STUDY IN INTERTRIBAL TRADE RELATIONS* 61 (1960) (“The Huron expeditions to this country, more than a thousand miles from Huronia, were so regular that the priests in Huronia used them for a postal service, the letters being delivered to Three Rivers from the north.”); *Intertribal Trade*, TRAILTRIBES.ORG, <https://trailtribes.org/kniferiver/intertribal-trade.htm> [<https://perma.cc/XWY2-QCJJ>] (“As early as A.D. 350, Dentalium shells from the Pacific Ocean found their way to a Caddoan village on the Missouri, known to archaeologists as the Swift Bird Site.”); see Zoe McDonald, *The Mystery of Winterville Mounds*, UNCONQUERED AND UNCONQUERABLE: PART I OF MISSISSIPPI’S INDIANS 79, 83 (Aug. 16, 2016) [https://issuu.com/meekschool/docs/chickasawnation\\_1\\_2016\\_web/83](https://issuu.com/meekschool/docs/chickasawnation_1_2016_web/83) [<https://perma.cc/UYZ6-5QNZ>] (noting that goods have been unearthed in the Mississippi Delta that originated in Arkansas, Northern Georgia, and Oklahoma); see Jason Daley, *3000-Year-Old Quinoa Found in Ontario*, SMITHSONIAN MAG. (Jan. 23, 2019), <https://www.smithsonianmag.com/smart-news/3000-year-old-quinoa-found-ontario-180971330/> [<https://perma.cc/42A4-HQNH>] (explaining that the discovery of three thousand-year-old quinoa in Ontario suggests there were vast trade networks between tribes in the eastern US and Canada).

3. See *Mandan, Knife River Indian Villages Nat’l Hist. Site*, NAT’L PARK SERV., <https://www.nps.gov/knri/learn/historyculture/mandan.htm> [<https://perma.cc/TE43-X5VF>] (last updated June 22, 2020) (describing how the Mandan people utilized extensive trade networks that all converged on their many villages); Alexander Ross, *The Columbia River Trade Network*, OR. HIST. PROJECT, <https://oregonhistoryproject.org/articles/historical-records/the-columbia-river-trade-network/#.XtRQ6FVKiUk> [<https://perma.cc/966H-DYUH>] (last updated Mar. 17, 2018) (explaining that Alexander Ross, an American fur trader, witnessed a gathering of three thousand Native Americans at one of these trade centers in 1811); see *New Mexico: Chaco Culture National Historical Park*, NAT’L PARK SERV., <https://www.nps.gov/articles/chaco.htm> [<https://perma.cc/DJ9C-CDSV>] (last updated Aug. 7, 2017) (asserting that Chaco Canyon, located in northwestern New Mexico, was a sophisticated cultural and economic urban center for thousands of native peoples from approximately 850 A.D. to 1250 A.D.).

4. Crepelle, *Decolonizing*, *supra* note 1, at 419 (“Tribes also developed laws to facilitate commerce that among other things, enabled individuals to purchase items on credit.”); Miller, *Sovereign Resilience*, *supra* note 1, at 1333 (“Indian nations and societies also developed governmental institutions that controlled their economic activities and rights. Tribal peoples had well-established legal rules. . . .”).

5. E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 54 (1967) (“[S]hould the guest have the misfortune to slip on a rock while fishing from his host’s territory, suffering injury thereby, he had a legitimate demand-right for damages against his host arising out of his original demand-right that the owner protect

adding Europeans to their trade networks;<sup>6</sup> in fact, indigenous legal regimes and cultures organically assimilated western goods.<sup>7</sup>

Indian country<sup>8</sup> economies are far different today. Most reservations lack any semblance of a private sector;<sup>9</sup> indeed, reservation economic conditions often resemble those of third-world countries.<sup>10</sup> Thus, tribal

him from injury.”); Bruce L. Benson, *An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary Indian Law*, 5 REV. AUSTRIAN ECON. 41, 50 (1991) (“If someone used a canoe without permission, or in some way misused or harmed the canoe, the owner could collect damages.”); Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law without Government*, 9 J. LIBERTARIAN STUDIES, 1, 9 (1989) (“Every invasion of person or property could be valued in terms of property, however, and each required exact compensation.”).

6. 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.”); Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 788 (2001) [hereinafter Miller, *Economic Development*] (“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*, PERC (June 1, 2006), <https://www.perc.org/2006/06/01/indian-sovereignty/> [<https://perma.cc/BUV5-S5LBJ>] (“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.”).

7. Miller, *Economic Development*, *supra* note 6, 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) (“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.”).

8. 18 U.S.C. § 1151 (2018).

9. Annie Lowery, *Pain on the Reservation*, N.Y. TIMES (July 12, 2013), [hereinafter Lowery, *Pain on the Reservation*], <https://www.nytimes.com/2013/07/13/business/economy/us-budget-cuts-fallheavily-on-american-indians.html> [<https://perma.cc/XSN4-N7AM>], (“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.”); Robert J. Miller, *Creating Economic Development on Indian Reservations*, PERC (Sept. 14, 2012), <https://www.perc.org/2012/09/14/creatingeconomic-development-on-indian-reservations/> [<https://perma.cc/5PKW-G638>] (“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.”).

10. Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*,

government budgets depend on federal transfers and tribally owned enterprises for revenue.<sup>11</sup> Tribes know Indian country's current economic system is unsustainable,<sup>12</sup> so some tribes have gone to desperate lengths to lure private businesses to their lands.<sup>13</sup>

Indian country's legal infrastructure is often blamed for keeping businesses away from reservations.<sup>14</sup> For example, many tribes do not have fully developed commercial codes; hence, businesses do not feel comfortable investing on tribal lands.<sup>15</sup> To help address this problem, tribes and the

ATLANTIC (July 30, 2016), <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/> [<https://perma.cc/X5DC-UDKG>] ("This is the grinding poverty on some of America's Indian reservations, many of which resemble nothing so much as small third-world countries in the middle of the wealthiest nation on earth."); *Indian Reservations*, HISTORY.COM, <https://www.history.com/topics/native-american-history/indian-reservations> [<https://perma.cc/AJ4U-MDXR>] (last updated Mar. 18, 2019) ("Despite their efforts, living conditions on reservations aren't ideal and are often compared to that of a third-world country."); see Harlan McKosato, *Fighting Third-World Conditions for NM Tribes*, INDIAN COUNTRY TODAY (July 7, 2015), <https://indiancountrytoday.com/archive/fighting-third-world-conditions-for-nm-tribes-SezweXSjiUiERR9b12U2wA> [<https://perma.cc/U36C-XJ9T>] (noting that tribal communities in New Mexico lack basic water, power, and infrastructure systems).

11. See Lowery, *Pain on the Reservation*, *supra* note 9 ("The local economy is not just reliant on transfers from the federal government; it in no small part consists of them.").

12. Patrick J. Sauer, *Lance Morgan, Ho-Chunk, Inc.*, <https://www.inc.com/magazine/200401/25morgan.html> [<https://perma.cc/YB7Y-H4RP>] (last updated Feb. 6, 2020) ("Government-led economies have been a total failure. I refuse to believe the Winnebagos are Karl Marx's last hope.").

13. See H. Josef Hebert, *Store Nuclear Waste on Reservation? Tribe Split*, NBC NEWS (June 27, 2006, 9:24 AM EDT), [http://www.nbcnews.com/id/13458867/ns/us\\_news/t/store-nuclear-waste-reservation-tribe-split/#.Xur3GFVKiUI](http://www.nbcnews.com/id/13458867/ns/us_news/t/store-nuclear-waste-reservation-tribe-split/#.Xur3GFVKiUI) [<https://perma.cc/QL54-F2K5>] (explaining how some members of a Utah tribe were willing to store "radioactive used fuel" on their reservation in exchange for millions of dollars in rent money from nuclear power plants).

14. See WALTER HILLBRANT ET AL., SUPPORT SERVS INT'L, INC., URBAN INST., *OVERCOMING CHALLENGES TO BUSINESS AND ECONOMIC DEVELOPMENT IN INDIAN COUNTRY* 27 (2004), <https://www.urban.org/sites/default/files/publication/42846/411104-overcoming-challenges-to-business-and-economic-development-in-indian-country.pdf> [<https://perma.cc/4T8R-8FTT>] (arguing that tribal sovereignty and tribal government interference have stifled business and economic development within Native lands); see John Koppisch, *Why Are Indian Reservations So Poor? A Look at The Bottom 1%*, FORBES (Dec. 13, 2011, 7:32 PM EST) [hereinafter Koppisch, *Why are Indian Reservations So Poor?*], <https://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/#36ffddfc3c07> [<https://perma.cc/2KNB-FBY8>] (asserting that companies are often wary to do business on reservations because of underdeveloped Indian commercial codes, the general difficulty of enforcing contracts under tribal laws, and requirements to bring claims in tribal courts).

15. NAT'L CONF. COMM'RS ON UNIF. STATE L., *IMPLEMENTATION GUIDE AND COMMENTARY TO THE MODEL TRIBAL SECURED TRANSACTIONS ACT* 13 (2005), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/ieed/pdf/idc1-024560.pdf> [<https://perma.cc/877U>]

National Conference of Commissioners on Uniform State Laws partnered to create a secured transactions law for tribes.<sup>16</sup> The Model Tribal Secured Transactions Act (MTA), essentially a truncated version of Article 9 of the Uniform Commercial Code,<sup>17</sup> was published in 2005 to help jumpstart tribal economies.<sup>18</sup> The Crow Tribe was first to adopt the MTA over a decade ago based upon the belief that improved tribal commercial laws would cause private investors to flock to its reservation.<sup>19</sup> Sixteen years after the MTA's adoption, the Crow economy remains stagnant.<sup>20</sup> Dozens of tribes have adopted the MTA or other secured transactions laws without any notable results.<sup>21</sup>

While tribal law reforms are needed to improve reservation economies,<sup>22</sup> the key to transforming tribal economies is reforming federal

-GF22] (“While the causes are varied and tend to be many-faceted, one reason frequently cited is the lack or insufficiency of tribal commercial law to guide the parties in a business transaction that would fall within a tribe’s jurisdiction.”).

16. *Id.* at 14.

17. *Id.* at 15 (“The second objective, therefore, was to draft a shorter and less complex law that will facilitate the enactment process in the immediate future but will allow for amendments as needed as a tribe’s business environment develops.”).

18. *See id.* at 20 (stating that the purpose of the law is to promote business dealings between tribal entities, businesses, and consumers and companies outside tribal lands).

19. Paula Woessner, *A Super Model: New Secured Transaction Code Offers Legal Uniformity, Economic Promise for Indian Country*, FED. RES. BANK MINNEAPOLIS (Mar. 1, 2006), <https://www.minneapolisfed.org/article/2006/a-super-model-new-secured-transaction-code-offers-legal-uniformity-economic-promise-for-indian-country> [https://perma.cc/9KXU-BBRK] (“With commercial laws in place, the Crow people will be able to provide services and businesses to capture that traffic. . . . We’ll have hotels, restaurants, art shops, catering companies, horse rentals and culture-based businesses like Indian dance groups. The Crow Reservation will turn into another Jackson Hole.”).

20. *Tribal Energy Resources: Reducing Barriers to Opportunity: Hearing Before the Subcomm. on the Interior, Energy, and Env’t of the H. Comm. on Oversight and Gov’t Reform*, 115th Cong. 2 (2018) (statement of Alvin “A.J.” Not Afraid, Jr., Chairman of The Crow Tribe of Indians) (“Further, the Crow Nation’s unemployment rate sits at 80%, compared with the State of Montana’s unemployment rate of 3.8%.”); *see* MONT. STATE UNIV. EXTENSION, CROW RESERVATION MONTANA POVERTY REPORT CARD 1 (2017), <http://www.montana.edu/extensionecon/countydata/Crow.pdf> [https://perma.cc/3FVB-4FCR] (noting that the Crow Reservation poverty rate increased 3% from 2012 to 2015).

21. William H. Henning, Susan M Woodrow & Marek Dubovec, *A Proposal for a National Tribally Owned Lien Filing System to Support Access to Capital in Indian Country*, 18 WYO. L. REV. 475, 490 (2018) (noting 24 of 56 responding tribes have adopted secured transactions laws).

22. MARIA DAKOLIAS ET AL., WORLD BANK, LEGAL AND JUDICIAL REFORM: STRATEGIC DIRECTIONS 9 (2003), <http://documents.worldbank.org/curated/en/218071468779992785/pdf/269160Legal0101e0also0250780SCODE09.pdf> [https://perma.cc/8MMR-KKXR] (“It is generally recognized that there are strong links between the rule of law, economic development, and poverty reduction. . .”).

Indian law. Tribes are no longer considered full sovereigns. Since 1831, tribes have been regarded as “domestic dependent nations.”<sup>23</sup> Indians are still considered wards of the federal government.<sup>24</sup> Consequently, the federal government must approve virtually every activity taking place within Indian country.<sup>25</sup> The dense federal bureaucracy deters businesses from investing in Indian country.<sup>26</sup> No business wants to jump through forty-nine bureaucratic hoops to obtain a permit to drill for oil on tribal land when the same energy production outside of Indian country takes four steps.<sup>27</sup>

Federal regulations are just one of the obstacles federal Indian law imposes on tribal economic development. Businesses like certainty, but nothing is certain in federal Indian law. In fact, simply discerning whether to file a lawsuit in tribal, state, or federal court can take years to resolve if the action arose in Indian country.<sup>28</sup> Even after a judgment is obtained, enforcing a court order relating to Indian country can become an adventure.<sup>29</sup> Similarly, different rules apply in Indian country versus typical state land; however, it is often unclear whether land is Indian country.<sup>30</sup> Which government has jurisdiction to zone Indian country is not always clear either.<sup>31</sup> The federal government’s perennial failure to honor treaty

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23. *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831) (denominating Indians as “domestic dependent nations”); Adam Creppelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 315, 329 n.90 (2017) (citation omitted).

24. Oliver Whaley, *Slavery Still Exists in Some Parts of America*, INDIANZ (June 18, 2020), <https://www.indianz.com/News/2020/06/18/oliver-whaley-slavery-still-exists-in-so.a.sp> [<https://perma.cc/HQU8-LXA8>] (“Here, in the 21st century, Native Americans are still deemed ‘wards’ to their ‘guardians.’”).

25. *See id.* (explaining that the federal government owns and manages tribal lands and has imposed many regulations on Indian Country); Adam Creppelle, *White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self-Government*, 54 U. MICH. J.L. REFORM (forthcoming 2021) [hereinafter Creppelle, *White Tape*] (arguing that an unconstitutional federal regulatory structure has impeded the growth of tribal nations).

26. Whaley, *supra* note 24 (“Cumbersome and often irrelevant energy regulations make it difficult for tribes to develop their resources.”).

27. Shawn Regan & Terry L. Anderson, *The Energy Wealth of Indian Nations*, 3 LSU J. ENERGY L. & RES. 195, 208 (2014).

28. *See infra* Part IV, A, 1 (noting that non-Indians may appeal tribal court jurisdiction in federal court, but only after they have exhausted tribal court remedies).

29. *See infra* Part IV, A, 3 (stating that most state and federal courts recognize tribal court judgments only as a matter of comity).

30. *See infra* Part IV, B (noting that reservations are “checkerboarded” with non-Indian fee land due to allotment).

31. *See infra* Part IV, B (explaining that the tribes, federal government, and state governments may all have zoning authority over lands within reservations, which makes zoning difficult for businesses).

obligations has left Indian country infrastructure in shambles, and businesses want to invest in areas with paved roads, running water, and electricity.<sup>32</sup> Additionally, states often try to thwart tribal economic endeavors which adds uncertainty to Indian country commerce.<sup>33</sup>

In 1983, President Reagan identified the federal government's paternalistic regulatory regime as the major impediment to creating private sector reservation economies.<sup>34</sup> Although President Reagan created a commission to study reservation economies,<sup>35</sup> over thirty years have passed, and Indian country remains just as inhospitable to private investment. This Article proposes legislation, the Indian Country Business Certainty Act (BCA), to simplify Indian country's legal environment.

The BCA streamlines jurisdiction by granting forum-selection and arbitration clauses relating to Indian country the same weight the clauses receive in other jurisdictions. The BCA also affirms tribal courts' inherent jurisdiction over individuals and entities when commercial gain is a substantial factor for the entity's presence in Indian country. Furthermore, the BCA gives tribes the ability to opt out of perplexing federal regulations that apply only to Indian country and preempt state regulations. The BCA also requires implementing tribes to satisfy certain minimum requirements, much like the requirements tribes must meet in order to implement the Violence Against Women Reauthorization Act's special domestic violence criminal jurisdiction over non-Indians.<sup>36</sup>

The remainder of the Article proceeds as follows. It begins by discussing the statistics relating to Indian country economic development and access to capital. Next, the Article examines how tribal sovereignty has changed over the years and how it relates to reservation economic development. The Article then explores how federal Indian law undermines tribal economic development. Finally, the Article presents the BCA and discusses how it can improve tribal economies.

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32. See *infra* Part IV, E (noting that 90% of roads maintained by tribes are unpaved, 48% of tribal homes do not have access to clean water, and 14% of households lack electricity).

33. See *infra* Part IV, D (detailing states' efforts to control tribal gambling and tax companies that do business with Indian country).

34. Statement on Indian Policy, 1 PUB. PAPERS 96 (Jan. 24, 1983) ("Federal policies have by and large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decisionmaking, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency.").

35. Exec. Order No. 12,401, 48 Fed. Reg. 2309 (Jan. 18, 1983); PRESIDENTIAL COMM'N ON INDIAN RESERVATION ECON., REP. & RECOMMENDATIONS TO THE PRESIDENT OF THE U.S. (Nov. 30, 1984) [hereinafter REP. & RECOMMENDATIONS], <https://files.eric.ed.gov/fulltext/ED252342.pdf> [<https://perma.cc/W4UP-FCAV>].

36. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 120 (current version at 25 U.S.C. § 1304 (2018)).

## II. DATA

Indian tribes are often stereotyped as rich from casinos,<sup>37</sup> and indeed, some tribes have been immensely successful in the gaming industry.<sup>38</sup> However, American Indians have the highest poverty rate in the United States: twenty-six percent compared to the national average of fourteen percent.<sup>39</sup> Indians who reside within Indian country are even worse off with a poverty rate of thirty-eight percent.<sup>40</sup> Indians compose approximately one percent of the United States population,<sup>41</sup> yet eight of the ten poorest counties in the United States are majority American Indian.<sup>42</sup> Indian country is poor because employment opportunities are few; thus, Indian country's unemployment rate perennially hovers around fifty percent.<sup>43</sup> Jobs are scarce in Indian country because there is virtually no private sector.<sup>44</sup> As a result, many reservation residents must drive long distances just to purchase basic

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37. See James Ring Adams, *TV's New Indian: Gangs and Casinos*, AM. INDIAN, SMITHSONIAN INST. (Winter 2014), <https://www.americanindianmagazine.org/story/tvs-new-indian-gangs-and-casinos> [<https://perma.cc/56RQ-RA5Q>] (discussing the stereotype of American Indians gaining wealth from tribal casino successes).

38. See *Inside: America's Most Luxurious Reservation: Huge Homes of Country's Richest Native American Tribe Where eMembers Make \$1M Each*, DAILY MAIL (Feb. 4, 2013), <http://www.dailymail.co.uk/news/article-2272793/Shakopee-MdewakantoMembers-Minnesota-tribe-earn-1million-year-tax-free.html> [<https://perma.cc/NLT3-RSBK>] (reporting that the richest American Indian tribe, Shakopee Mdewakanton, earns \$1 billion per year from two casinos).

39. *Facts for Features: American Indian and Alaska Native Heritage Month: November 2017*, U.S. CENSUS BUREAU (Oct. 6, 2017), <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html> [<https://perma.cc/HW4N-UM33>].

40. *Making Indian Country Count: Native Americans and the 2020 Census: Hearing Before the S. Comm. on Indian Affs.*, 115th Cong. 26 (2nd Sess. 2018) (statement of James T. Tucker, Pro Bono Voting Rights Counsel, Native American Rights Fund) ("Native Americans have the highest poverty rate of any population group, at 26.6 percent. On federally recognized Indian reservations in Alaska Native villages, that rate is 38.3 percent.").

41. *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> [<https://perma.cc/8YUX-XWVQ>].

42. *Unemployment on Indian Reservations At 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 2 (2nd Sess. 2010) (opening statement of Hon. Byron L. Dorgan, Chairman, S. Comm. On Indian Affairs).

43. *Id.* at 1.

44. Crepelle, *Decolonizing*, *supra* note 1, at 414 ("[T]here are few small businesses on reservations."); Miller, *Economic Development*, *supra* note 6, at 760–61 ("It has resulted to a large degree in the formation of what looks to the untrained eye to be socialistic economies in Indian country because the federal and tribal governments control most of the economic activity and jobs.").

goods.<sup>45</sup>

Accessing capital is difficult in Indian country.<sup>46</sup> Businesses need capital to operate;<sup>47</sup> hence, barriers to capital prevent businesses from investing in Indian country<sup>48</sup> and help explain the relatively low number of American Indian owned small businesses.<sup>49</sup> Interestingly, even Indians with good credit and sufficient collateral have difficulty obtaining capital in

45. Gavin Clarkson & Alisha Murphy, *Tribal Leakage: How the Curse of Trust Land Impedes Tribal Economic Self-Sustainability*, 12 J.L. ECON. & POL'Y 177, 177 (2016) (“[M]ost Navajos end up driving for an hour or more to purchase much needed groceries, lumber, auto-parts, and kid’s school clothes in border towns such as Gallup.”); Dana Ferguson & Argus Leader, *Violated: How the Indian Health Service Betrays Patient Trust and Treaties in the Great Plains*, ARGUS LEADER (Dec. 13, 2019, 2:23 AM CST), <https://www.argusleader.com/in-depth/news/2018/12/05/south-dakota-health-care-ihs-hospital-native-american-trust-violated/1728819002/> [<https://perma.cc/22SH-M94E>] (“The nearest Walmart is 130 miles away.”); Cecily Hilleary, *Native American Tribes Fighting High Prices, Poor Food Quality*, VOA (Mar. 24, 2017, 9:19 AM), <https://www.voanews.com/usa/native-american-tribes-fighting-high-prices-poor-food-quality> [<https://perma.cc/TQ2F-2ECK>] (“When Hope-Heth needs groceries, she must either drive 40 kilometers south to the town of Chamberlain or 100 kilometers northwest to Pierre.”).

46. *Accessing Capital in Indian Country: Hearing Before the S. Comm. On Indian Affairs*, 114th Cong. 2 (2015) (statement of Hon. John Barrasso, Chairman, S. Comm. on Indian Affairs) [hereinafter S. Hearing, *Accessing Capital in Indian Country*] (“This Committee has received testimony in prior hearings relating to economic development that accessing capital is still quite problematic for Indian and tribal businesses.”); Evan Way, *Raising Capital in Indian Country*, 41 AM. INDIAN L. REV. 167, 171 (2016) [hereinafter Way, *Raising Capital*] (“But economic development and growth rely on access to capital.”); Henning et al., *supra* note 21, at 476 (“This critical need for access to capital to support business development and consumer needs is not an Indian Country-exclusive phenomenon; it is true of every market economy in the world.”).

47. *Capital*, INC. (Feb 6, 2020), <https://www.inc.com/encyclopedia/capital.html#:~:text=All%20businesses%20must%20have%20capital,the%20future%2C%20usually%20with%20interest> [<https://perma.cc/WM2X-B4Q7>] (“All businesses must have capital in order to purchase assets and maintain their operations.”).

48. S. Hearing, *Accessing Capital in Indian Country*, *supra* note 46, at 2 (statement of Hon. John Barrasso) (“This Committee has received testimony in prior hearings relating to economic development that accessing capital is still quite problematic for Indian and tribal businesses.”); Way, *Raising Capital*, *supra* note 46, at 171 (“But economic development and growth rely on access to capital.”); Henning et al., *supra* note 21, at 476 (“This critical need for access to capital to support business development and consumer needs is not an Indian Country-exclusive phenomenon; it is true of every market economy in the world.”).

49. S. Hearing, *Accessing Capital in Indian Country*, *supra* note 46, at 1 (statement of Hon. John Barrasso) (“Individual Indians do not have as many small business owners when compared to other groups.”); MIRIAM JORGENSEN, NATIVE NATIONS INST., ACCESS TO CAPITAL AND CREDIT IN NATIVE COMMUNITIES 35 (2016) [hereinafter JORGENSEN, ACCESS TO CAPITAL], [https://mni.arizona.edu/application/files/8914/6386/8578/Accessing\\_Capital\\_and\\_Credit\\_in\\_Native\\_Communities.pdf](https://mni.arizona.edu/application/files/8914/6386/8578/Accessing_Capital_and_Credit_in_Native_Communities.pdf) [<https://perma.cc/R5NM-9TLJ>] (“American Indians, Alaska Natives, and Native Hawaiians constitute 1.7 percent of the U.S. population but a much lower percentage of business owners, business receipts, and self-employed workers.”).

Indian country.<sup>50</sup> One reason is that there are no banks in most of Indian country, and a large percentage of Indians live over one hundred miles from a bank.<sup>51</sup> Another is that Indian country residents typically cannot use their land as collateral.<sup>52</sup> The federal government holds title to trust land, so trust land cannot be repossessed upon default.<sup>53</sup> Thus, leasehold mortgages are the most common loan vehicle.<sup>54</sup> Leasehold mortgages typically result in higher interest rates and are less appealing to banks than real property mortgages.<sup>55</sup> Indian country's bizarre legal structure is to blame for the capital crunch.<sup>56</sup>

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50. W. Gregory Guedel & J. D. Colbert, *Capital, Inequality, and Self-Determination: Creating a Sovereign Financial System for Native American Nations*, 41 AM. INDIAN L. REV. 1, 12 (2016) ("Further still, Native-owned businesses that possess 'adequate collateral and good credit histories' struggle to obtain capital for operations and expansion.").

51. OFF. INDIAN ENERGY AND ECON. DEV., U.S. DEP'T INTERIOR, WHY TRIBES SHOULD ADOPT A SECURED TRANSACTIONS CODE 4 (2019), <https://www.usetinc.org/wp-content/uploads/bvenuti/RN%20Economic%20Development/Why%20Tribes%20Should%20Adopt%20a%20Secured%20Transactions%20Code.pdf> [<https://perma.cc/NKK6-9EGJ>].

52. 25 U.S.C. § 5135 (2018); 25 C.F.R. § 152.34 (2020); S. Hearing, *Accessing Capital in Indian Country*, *supra* note 46, at 38 (statement of Hon. Al Franken, U.S. Sen. from Minn., questioning Derrick Watchman, Chairman, Board of Directors, National Center for American Indian Enterprise Development) ("As a former banker, you go into a situation and look at trust land, there are many different obstacles. As a bank, you have many different checklists you have to follow, so trying to reconcile the tribal court and title to land makes it challenging. At the end of the day when you risk rate a credit, it risk rates very high in terms of very risky.").

53. Guedel & Colbert, *supra* note 50, at 13 ("Tribal lands that have been placed into trust status cannot be leveraged as collectible collateral for bank financing, and the legal jurisdiction of tribal governments generally prevents property seizures and sales by outside commercial and law enforcement agencies.").

54. Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RES. J. 317, 363 (2006) [hereinafter Gover, *Indian Trust*] ("Tribes currently rely primarily on leasehold mortgages that give lenders only the right to operate the business envisioned by the lease in the event of a default."); Amy Loftsgordon, *Tribal Land Foreclosures*, NOLO, <https://www.nolo.com/legal-encyclopedia/tribal-land-foreclosures.html> [<https://perma.cc/CK2P-DZVC>] ("If the land is tribal trust land or tribal restricted fee land, mortgaged property is typically set up as a leasehold estate.").

55. Gover, *Indian Trust*, *supra* note 54, at 363 ("The right to own the land in the event of a default should be more attractive to lenders and should result in somewhat lower interest rates on the mortgage loans than can be obtained on leasehold mortgages."); Guedel & Colbert, *supra* note 50, at 13 (noting that because trust land cannot be seized, "most American financial institutions do not do business with tribes or lend money for reservation business, housing, or other development activities, thereby perpetuating the obstacles to economic progress in tribal communities").

56. Koppisch, *supra* note 14; Brief for Amicus Curiae Retail Litigation Ctr., Inc. Supporting Petitioners at 16, *Dollar General Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496), 2015 WL 5244347 [hereinafter Brief, Retail Litigation Ctr.] ("Moreover, *amicus* emphasizes that a hindsight-based approach discourages investment and expansion because businesses are wary of exposing themselves to risks where such

### III. TRIBAL SOVEREIGNTY AND ECONOMIC DEVELOPMENT

Tribes existed as sovereigns long before the United States' founding.<sup>57</sup> Europeans immediately recognized tribal sovereignty.<sup>58</sup> Tribal military capacity made obtaining Indian lands costly in both blood and treasure;<sup>59</sup> thus, the European nations entreated with the Indian nations.<sup>60</sup> The newly-formed United States enshrined tribal sovereignty in its founding

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fundamental factors as the applicable legal system cannot be identified until after a dispute has arisen.”); Brief Amicus Curiae of the S.D. Bankers Ass’n in Support of Petitioners at 1, *Dollar General Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496), 2015 WL 5261542 [hereinafter Brief, S.D. Bankers Ass’n] (“Uncertainty as to the rules of the ‘economic game’ leads to reluctance on the part of off-reservation businesses to transact business on Indian reservations or with Indians who live on reservations.”).

57. *McClanahan v. Ariz. Tax Comm’n*, 411 U.S. 164, 172 (1973) (“It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.”); *Williams v. Lee*, 358 U.S. 217, 218 (1959); *Worcester v. Georgia*, 31 U.S. 515, 542–43 (1832).

58. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 451 (1989) (Blackmun., J., dissenting) (“From a time long before the 13 Colonies declared their independence from England, European nations recognized the native tribes of this continent as self-governing, sovereign, political communities.”); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1194 (2010) [hereinafter Krakoff, *Civil Judicial Jurisdiction*] (“[A]rriving European colonists treated the indigenous peoples of North America as foreign nations, and the terms on which the two groups interacted were governed initially, though not uniformly, by early principles of international law.”).

59. See Letter from George Washington, General, to James Duane, Member, Cong. of the Confederation (Sept. 7, 1783), <https://founders.archives.gov/documents/Washington/99-01-02-11798> [<https://perma.cc/4FSU-4HLY>] (presenting George Washington’s strategic plan relating to Indian Affairs).

60. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 7 (1984) (“It is in the treaties that one sees best the acceptance by Europeans of the nationhood of the Indian groups that became a fixed principle in the national policy of the United States.”); Ian Pajer-Rogers, *The Politics of Survival: Indian and European Collaboration in Colonial North America*, *INQUIRY* J. 3 (2005) [https://scholars.unh.edu/cgi/viewcontent.cgi?article=1008&context=inquiry\\_2005](https://scholars.unh.edu/cgi/viewcontent.cgi?article=1008&context=inquiry_2005) [<https://perma.cc/P5S2-SGW5>] (“Thus, as Indian tribes and nations allied with various English companies against other similar alliances, Indian nations were embarking on their own rudimentary arms race.”); *The New World: A Stage for Cultural Interaction*, TEACHINGHISTORY.ORG, <https://teachinghistory.org/history-content/ask-a-historian/25447> [<https://perma.cc/XRT2-252C>] (“The Iroquois quickly signed an alliance and trade treaty with the English.”).

documents<sup>61</sup> and treated tribes as foreign nations.<sup>62</sup> The United States even required American citizens to obtain a passport prior to entering Indian Territory.<sup>63</sup> Nevertheless, the United States immediately restricted tribal economic freedom with the Trade and Intercourse Act of 1790.<sup>64</sup> The law forbade non-Indians from trading with tribes without federal permission;<sup>65</sup> furthermore, it prohibited Indians from selling their land without the permission of the United States.<sup>66</sup>

American control over Indian land and trade was justified by the

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61. U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States . . . excluding Indians not taxed. . . .”); U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power . . . To regulate commerce . . . with the Indian Tribes. . . .”); ARTICLES OF CONFEDERATION of 1777, art. IX, para. 4 (“[R]egulating the trade and managing all affairs with the Indians, not members of any of the states. . . .”); ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, art. III, reprinted at <https://uscode.house.gov/statc/1787ordinance.pdf> [<https://perma.cc/G64E-NKLD>] (“The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.”).

62. U.S. CONST. art. II, § 2; THE FEDERALIST NO. 75 (Alexander Hamilton) (“They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.”); Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F. 93, 98 (2014) (“The treaty power is a carefully devised mechanism for the federal government to enter into agreements with foreign nations.”); Rory Taylor, *6 Native Leaders on What It Would Look Like if the US Kept Its Promises*, VOX (Sept. 23, 2019, 8:30 AM EDT), <https://www.vox.com/first-person/2019/9/23/20872713/native-american-indian-treaties> [<https://perma.cc/5MQT-X5U2>] (“The US has signed hundreds of treaties with Indigenous peoples.”).

63. Treaty with the Creeks, Creek Nation—U.S., art. VII, Aug. 7, 1790 (“No citizen . . . of the United States shall . . . go into the Creek country, without a passport. . . .”); Treaty with the Cherokee, Cherokee Nation—U.S., art IX, July 2, 1791. Some tribes continue to issue passports with mixed results. Compare Oren Lyons, Faithkeeper, Seneca Nation, *Looking Toward the Seventh Generation*, Presentation at the University of Arizona Native Nation Institute (Apr. 17, 2008) (transcript available at <https://nnigovernance.arizona.edu/oren-lyons-looking-toward-seventh-generation> [<https://perma.cc/67ZB-TRNA>]) (“I just traveled from Sweden to here. I traveled on a passport issued at Onondaga and we’ve been using that passport for now since 1977.”) with Suzanne Merkelson, *Why the Iroquois Lacrosse Team Couldn’t Travel Abroad*, FOREIGN POLICY (July 19, 2010, 6:07 PM), <https://foreignpolicy.com/2010/07/19/why-the-iroquois-lacrosse-team-couldnt-travel-abroad/> [<https://perma.cc/S8B5-F7L6>] (providing an account where the United Kingdom would not accept Iroquois-issued passports).

64. An Act to Regulate Trade and Intercourse with the Indian Tribes (originally enacted as Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, amended by Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729 (codified as amended at 25 U.S.C. § 177 (2018))).

65. Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137—138.

66. *Id.* § 4.

Doctrine of Discovery.<sup>67</sup> The Doctrine of Discovery is an international legal principle that granted the first European nation to encounter land inhabited by non-Europeans dominion over the “discovered” territory.<sup>68</sup> Despite admitting the Doctrine of Discovery was nonsense, the Supreme Court unanimously incorporated the Doctrine into federal common law in the 1823 case of *Johnson v. McIntosh*.<sup>69</sup> This reduced Indian land ownership rights to a right of occupancy that could be legitimately extinguished by the United States through purchase or conquest; moreover, the United States acquired control over tribes via discovery.<sup>70</sup> The Court noted the violation of indigenous rights was justified<sup>71</sup> because the United States provided the Indians with “civilization and Christianity.”<sup>72</sup>

Federal paternalism over Indian tribes was further justified eight years later in *Cherokee Nation v. Georgia*.<sup>73</sup> In response to Georgia’s attempts to destroy the Cherokee Nation, the Cherokee Nation sought an injunction directly from the United States Supreme Court.<sup>74</sup> The Cherokee Nation based its direct appeal to the Supreme Court on Article 3, Section 2 of the Constitution, as it provides for original jurisdiction over controversies between states and foreign states.<sup>75</sup> However, the predicate issue the Court had to resolve was whether the Cherokee Nation constituted a “foreign state.”<sup>76</sup> The Court fractured on the issue, with two Justices vehemently rejecting the idea that the Cherokee Nation, or any other tribe, could be considered a foreign or nation,<sup>77</sup> while two Justices could not imagine how

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67. Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 333–34 (2011).

68. *Id.* at 333.

69. *Johnson v. McIntosh*, 21 U.S. 543, 591 (1823) (“However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear . . . if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.”).

70. *Id.* at 587 (“They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest. . .”).

71. *Id.* at 589 (“Although we do not mean to engage in the defence [sic] of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.”).

72. *Id.* at 573.

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

74. *Id.* at 15.

75. *Id.*

76. *Id.* at 16.

77. *Id.* at 21 (Johnson, J., concurring) (“I cannot but think that there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are.”). *Id.* at 44 (Baldwin, J., concurring) (“Mere

the Cherokee Nation was anything but a foreign nation.<sup>78</sup> In Solomonic fashion, Justice Marshall attempted to split the baby by concluding the Cherokee Nation was a “domestic dependent nation,” meaning the relationship between the Cherokee Nation and the United States is like “that of a ward to his guardian.”<sup>79</sup> Thus, the Court lacked jurisdiction over the case.<sup>80</sup> Tribes remain “domestic dependent nations” in the twenty-first century.<sup>81</sup>

The Court was forced to address Georgia’s encroachment upon the Cherokee Nation’s sovereignty a year later in *Worcester v. Georgia*.<sup>82</sup> Georgia enacted legislation forbidding white people from entering the Cherokee Nation without a state-issued license.<sup>83</sup> White missionaries within the Cherokee Nation did not possess the license, so Georgia arrested the men.<sup>84</sup> Samuel Worcester and Elizur Butler challenged the application of Georgia’s laws within the Cherokee Nation.<sup>85</sup> As Worcester and Butler were white men, jurisdiction was uncontroversial.<sup>86</sup> The Court held that state law has no force within the borders of an Indian nation but did acknowledge federal primacy in Indian affairs.<sup>87</sup> However, President Andrew Jackson, champion of the Indian Removal Act of 1830,<sup>88</sup> refused to enforce the

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phraseology cannot make Indians nations, or Indian tribes foreign states.”).

78. *Id.* at 80 (Thompson, J., dissenting) (“That the Cherokees compose a foreign state within the sense and meaning of the constitution, and constitute a competent party to maintain a suit against the state of Georgia.”).

79. *Id.* at 17.

80. *Id.* at 20.

81. See *Genskow v. Prevost*, No. 19-C-1474, 2020 U.S. Dist. LEXIS 59860, at \*4 (E.D. Wis. Apr. 6, 2020) (“[T]he starting point is the principle that ‘Indian tribes are domestic dependent nations that exercise inherent sovereign authority.’”); *Hwal’bay Ba: J Enterprises, Inc. v. Jantzen*, 458 P.3d 102, 102 (Ariz. 2020) (“Indian tribes, as ‘domestic dependent nations,’ are immune from lawsuits in state and federal courts, unless. . . .”); *Mendoza v. Isleta Resort & Casino*, 460 P.3d 467, 472 (noting that Indian tribes are “domestic dependent nations”).

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

83. *Id.* at 542.

84. *Id.* at 538.

85. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 520 (1969).

86. *Worcester*, 31 U.S. at 541.

87. *Id.* at 561.

88. Indian Removal Act of 1830, Pub. L. No. 21-148, 4 Stat. 411; See *Andrew Jackson—Key Events*, UVA MILLER CTR., <https://millercenter.org/president/andrew-jackson/key-events> [<https://perma.cc/LZ2L-BJAS>] (last visited May 23, 2020) (highlighting that Andrew Jackson signed the Indian Removal Act of 1830 and argued that American Indians needed to be moved to unsettled western lands); *Indian Removal*, TEACH U.S. HIST., <http://www.teachushistory.org/indian-removal> [<https://perma.cc/GUD2-XMWY>] (last visited May 23, 2020) (suggesting that Andrew Jackson backed the Indian Removal Bill of 1830). See generally *Presidency*,

Court's decision,<sup>89</sup> precipitating the Cherokee Trail of Tears.<sup>90</sup>

The Cherokee and numerous other tribes' Trails of Tears led to reservations.<sup>91</sup> On reservations, tribes were supposed to be able to continue to exist as self-governing peoples,<sup>92</sup> but in reality, tribes had no freedom on reservations.<sup>93</sup> Accordingly, reservation superintendents had tyrannical control over their Indian wards.<sup>94</sup> Indians attempted to engage in

THE HERMITAGE, <https://thehermitage.com/learn/andrew-jackson/president/presidency/> [<https://perma.cc/KVL4-6JCX>] (last visited May 23, 2020) ("Congress' authorization of the Indian Removal Act in 1831 empowered Jackson to make treaties with the tribes in arranging for their displacement.").

89. See *Worcester v. Georgia*, ENCYC. BRITANNICA (May 18, 2020), <https://www.britannica.com/topic/Worcester-v-Georgia> [<https://perma.cc/ZQ2Z-CTDH>] ("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 GA. ENCYC. (Feb. 20, 2018), <https://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832> [<https://perma.cc/CMV7-B9WN>] ("Georgia ignored the Supreme Court's ruling, refused 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.").

90. See Ellen Holmes Pearson, *A Trail of 4,000 Tears*, TEACHINGHISTORY.ORG, <http://teachinghistory.org/history-content/ask-a-historian/25652> [<https://perma.cc/5GYZ-LEWG>] (last visited Mar. 7, 2019) ("It is estimated that of the approximately 16,000 Cherokee who were removed between 1836 and 1839, about 4,000 perished."); *The Trail of Tears*, PBS, <https://www.pbs.org/wgbh/aia/part4/4h1567.html> [<https://perma.cc/M4PY-ER78>] (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> [<https://perma.cc/JSY8-SKPS>] (last visited Mar. 7, 2019) ("About 20,000 Cherokees were marched westward at gunpoint on the infamous TRAIL OF TEARS. Nearly a quarter perished on the way, with the remainder left to seek survival in a completely foreign land.").

91. Crepelle, *Decolonizing*, *supra* note 1, at 428.

92. See Andrew Jackson, *December 8, 1829: First Annual Message to Congress*, PRESIDENTIAL SPEECHES, UVA MILLER CTR., <https://millercenter.org/the-presidency/presidential-speeches/december-8-1829-first-annual-message-congress> [<https://perma.cc/2CR8-877G>] ("There they may be secured in the enjoyment of governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes."). See generally Crepelle, *White Tape*, *supra* note 25, at 106–07 (noting that the Indian Tribes have the power to self-govern).

93. See Benjamin Jewell, *Lakota Struggles for Cultural Survival: History, Health, and Reservation Life*, 19 NEB. ANTHROPOLOGIST 129, 130 (2006) ("Reservations are a means to restrict, deny, or alter freedoms to a group of people. . . .").

94. 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 those of "a czar"); Carrie McClery, *Of Horses and Men: Superintendent Asbury's Assault on the Crow*, TRIBAL COLL. J. AM. INDIAN HIGHER EDUC. (Feb. 15, 2003), <https://tribalcollegejournal.org/horses-men-superintendent-asbury%E2%80%99s-deadly-assault-crow/> [<https://perma.cc/5Nzt-Z79Q>] ("When the Office of Indian Affairs sent Superintendent Calvin Asbury to the Crow Indian Reservation in 1919, he settled in like the bone-chilling winds of that Montana winter, slowly dripping the toxic waste

economically productive endeavors on reservations;<sup>95</sup> however, reservation superintendents compelled Indians to farm despite acknowledging reservation land was ill-suited for agricultural use.<sup>96</sup> Thus, Indians were unable to support themselves on reservations and were forced to subsist on poor quality food obtained through ration tickets.<sup>97</sup> Inadequate provisions led to mass death by malnutrition on reservations.<sup>98</sup> Desperation forced Indian women to trade sex for bread.<sup>99</sup>

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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.”); Tanis Thorne, *The Death of Superintendent Stanley and the Gahulla Uprising of 1907-1912*, 24 J. CAL. & GREAT BASIN ANTHROPOLOGY 233, 244 (2004) (“We complained in the past because the government put a tyrannical man over us who disregarded our wishes and rode over our rights simply because he had the power to do so.”).

95. Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1557, 1594 (2001) (“Even after resettlement or confinement to reservations, many Indians continued to create or modify private property systems to meet their new circumstances.”); Jeffrey Ostler, “*The Last Buffalo Hunt*” *And Beyond Plains Sioux Economic Strategies in the Early Reservation Period*, 21 GREAT PLAINS Q. 115, 119–20 (2001) (noting that the Indian tribes pursued economic strategies to respond to their needs).

96. Ostler, *supra* note 95, at 120.

97. See TRESSA BERMAN, *CIRCLE OF GOODS: WOMEN, WORK, AND WELFARE IN A RESERVATION COMMUNITY 1* (2003) (“[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.”); Karin Eagle, *Native Sun News: Ration Cards Were Part Of Reservation Life, 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> [<https://perma.cc/E5FQ-DXDT>] (“The flour and grains were often moldy, and the beef was a poor, less flavorful, substitute for the healthier buffalo meat the tribes were used to.”); William Least Heat-Moon, *A Stark Reminder of How the U.S. Forced American Indians Into a New Way of Life*, SMITHSONIAN MAG. (Nov. 2013), <https://www.smithsonianmag.com/history/a-stark-reminder-of-how-the-us-forced-american-indians-into-a-new-way-of-life-3954109/> [<https://perma.cc/MH89-HKCF>] [hereinafter Heat-Moon, *A Stark Reminder*] (“Never mind that the flour and grains sometimes had gone moldy or that most of the Indians found the taste of beef no match for the rich flavor of bison.”).

98. 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-americanindian-reservations-came-be/> [<https://perma.cc/6VQ9-HTM4>] (“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.”); Heat-Moon, *A Stark Reminder*, *supra* note 97 (“[T]he people suffered from malnutrition: A quarter of them died of starvation. They couldn’t eat paper.”); see also *Indian Reservations*, HISTORY (Mar. 18, 2019), <https://www.history.com/topics/indian-reservations> [<https://perma.cc/AJ4U-MDXR>] (“Starvation was common [on reservations]. . .”).

99. See Gabrielle Mandeville, *Sex Trafficking on Indian Reservations*, 51 TULSA L. REV. 181, 184–85 (2015) (“Soldiers often . . . coerce[d] Native women into trading sexual favors for food, clothing, and blankets.”); Mary Annette Pember, *Native Girls Are Being Exploited*

Creating dependency on reservations was the United States' intent.<sup>100</sup> Starving Indians were in no condition to negotiate for land cessations.<sup>101</sup> Furthermore, dependency justified expansive federal power over Indian affairs.<sup>102</sup> Dependency allowed the United States to impose behavioral codes on Indian adults.<sup>103</sup> Dependency was used to deny Indians citizenship, though it was granted to every person by the Fourteenth Amendment.<sup>104</sup> Dependency was also used to abrogate tribal treaty rights<sup>105</sup> and strip Indians of ninety million acres of their best lands.<sup>106</sup> Dependency had reduced the majority of Indians to extreme poverty by the early 1900s.<sup>107</sup>

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*and Destroyed at an Alarming Rate*, INDIAN COUNTRY TODAY (May 16, 2012), <https://indiancountrytoday.com/archive/native-girls-are-being-exploited-and-destroyed-at-an-alarming-rate-4r1HLmef-EWEoSpGM9DXyA> [<https://perma.cc/9Z5Z-R77L>] (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.").

100. See Kevin Gover, Remarks at the Ceremony Acknowledging the 175th Anniversary of the BIA (Sept. 8, 2000), [http://www.tribal-institute.org/lists/kevin\\_gover.htm](http://www.tribal-institute.org/lists/kevin_gover.htm) [<https://perma.cc/HXC5-G6FH>] ("After the devastation of tribal economies and the deliberate creation of tribal dependence on the services provided by this agency, this agency set out to destroy all things Indian.").

101. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346–47 (1998); Gretchen Cassel Eick, *U.S. Indian Policy, 1865-1890 As Illuminated Through the Lives of Charles A. Eastman and Elaine Goodale Eastman*, 28 GREAT PLAINS Q. 27, 35 (2008) ("Meanwhile, confined to reservations with their food supply dependent on US. supplies of rations, those Lakota and their allies who were not at war with the U.S. Army would be 'persuaded' to sign away the Black Hills in order to get food. The United States would use food as a weapon.").

102. See *United States v. Kagama*, 118 U.S. 375 (1886) (holding that Congress could exercise jurisdiction over crimes between Native Americans on Indian reservations).

103. *United States v. Clapox*, 35 F. 575 (D. Or. 1888); Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (2018)); Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 27–28 (2018) [hereinafter Crepelle, *Tribal Lending and Tribal Sovereignty*] (discussing the creation of CFR courts and how they suppressed Indian culture and accelerated assimilation amongst Native Americans).

104. See *Elk v. Wilkins*, 112 U.S. 94, 100 (1884) (holding that the Fourteenth Amendment did not apply to Native Americans for citizenship purposes).

105. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564 (1903) ("The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States.").

106. Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 525 (2013) [hereinafter Pommersheim, *Land into Trust*]; *Land Tenure Issues*, INDIAN LAND TENURE FOUND. [hereinafter *Land Tenure Issues*], <https://iltf.org/land-issues/issues/> [<https://perma.cc/4P8Q-CW29>]; *General Allotment Act*, AM. EXPERIENCE, PBS, <https://www.pbs.org/wgbh/americanexperience/features/1900-allotment-act/> [<https://perma.cc/DY2G-3KPF>].

107. See LEWIS MERIAM, MERIAM REPORT: THE PROBLEM OF INDIAN ADMINISTRATION

The Indian Reorganization Act of 1934 (IRA) was designed to support tribal existence;<sup>108</sup> nonetheless, the IRA kept tribes in a state of dependency. The IRA benefitted tribes by preventing further diminishment of their land holdings.<sup>109</sup> The IRA also contained provisions to improve economic conditions for tribes such as establishing a loan fund for tribes and their citizens<sup>110</sup> as well as creating *sui generis* Section 17 corporations for tribes.<sup>111</sup> However, tribal governmental authority was subject to the complete discretion of the Secretary of the Interior.<sup>112</sup> Federal bureaucrats even purported to have the power to set Indian bedtimes under the IRA.<sup>113</sup> Moreover, traditional tribal governance institutions were supplanted by federally-imposed IRA constitutions.<sup>114</sup>

Federal Indian policy shifted from supporting tribes to terminating them in the 1950s. Accordingly, Congress ended over 100 tribes' government-to-government relationship with the United States with the stroke of a pen.<sup>115</sup>

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(1928); Crepelle, *Decolonizing*, *supra* note 1, at 414 (discussing the poverty and poor quality of life that Native Americans have endured).

108. Crepelle, *Decolonizing*, *supra* note 1, at 437 n.113 (discussing the IRA reaffirming principles of tribal self-government, and the federal government codifying compatibility between national and tribal citizenship).

109. 25 U.S.C. § 5102 (2018) (originally enacted as Wheeler-Howard Act of 1934 (Indian Reorganization Act), ch. 576, § 2, 48 Stat. 984) (extending the existing periods of trust placed on Indian lands).

110. Wheeler-Howard Act of 1934 (Indian Reorganization Act), ch. 576, § 10, 48 Stat. 986 (codified as amended at 25 U.S.C. § 5113 (2018)) (establishing a revolving fund for loans to Indian chartered corporations).

111. Wheeler-Howard Act of 1934 (Indian Reorganization Act), ch. 576, § 17, 48 Stat. 988 (codified as amended at 25 U.S.C. § 5124 (2018)) (granting the Secretary of interior the power to issue corporate charters to tribes).

112. Crepelle, *Decolonizing*, *supra* note 1, at 439 n.126 (discussing the power the Secretary of Interior exerted over Indian tribes).

113. Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 787–88 (2014) (discussing the federal government's intrusion on the daily operations of Native American tribes).

114. Crepelle, *Decolonizing*, *supra* note 1, at 439 nn.124–25 (highlighting Indian tribes' adoption of the IRA).

115. 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, 150–51 (2018) [hereinafter Crepelle, *Standing Rock in the Swamp*]; 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-ofindian-termination-era-Ma3YnfYy\\_U-AFyBGsUxzCw/](https://newsmaven.io/indiancountrytoday/archive/harry-s-truman-beginning-ofindian-termination-era-Ma3YnfYy_U-AFyBGsUxzCw/) [<https://perma.cc/9D44-6MTA>] (“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.”); *Termination Policy 1953-1968*, PARTNERSHIP WITH NATIVE AMERICANS, [http://www.nativepartnership.org/site/PageServer?pagename=PWNA\\_Native\\_History\\_terminationpolicyNP](http://www.nativepartnership.org/site/PageServer?pagename=PWNA_Native_History_terminationpolicyNP) [<https://perma.cc/7E8B-SG6R>] (last visited Feb. 28, 2021) (“From 1953-1964 109 tribes were terminated. . .”).

The United States relocated reservation resident Indians to urban centers as a solution to reservation poverty.<sup>116</sup> Indians were promised help finding jobs and assistance until they became self-sufficient in their new home; however, the federal government broke this promise.<sup>117</sup> Relocation caused tremendous hardship for numerous Indian families.<sup>118</sup> Moreover, Indian children were taken from their families en masse and placed in white homes as part of the United States' effort to destroy tribal identity.<sup>119</sup> Congress also extended state criminal law and civil adjudicatory jurisdiction into reservations with Public Law 83-280 (PL 280).<sup>120</sup> While PL 280 was supposed to improve reservation safety, studies consistently show PL 280 results in higher crime rates on reservations.<sup>121</sup>

President Nixon decided to set the nation on a different path in 1970,<sup>122</sup> and Congress agreed in 1975, ushering in the era of tribal self-determination.<sup>123</sup> Tribes, desperate to improve their economic welfare,

116. Indian Relocation Act of 1956, Pub. L. No. 84-959, 70 Stat. 986 (1956); Crepelle, *Standing Rock in the Swamp*, *supra* note 115, 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*, <http://savagesandscoundrels.org/flashpoints-conflicts/1952-indian-relocation/> [<https://perma.cc/EYY3-K5CN>].

117. Crepelle, *Decolonizing*, *supra* note 1, at 441 (“The Indians who relocated were promised job training and housing, but yet again, the United States failed to keep its promise to the Indians.”).

118. Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 407 (1998) (“Indians languished in poverty on what had once been reservations; those who relocated languished in poverty in urban slums.”); Adam Crepelle, *Arbitrary Process: The Struggle for Federal Recognition of Louisiana’s Indian Tribes*, 64 PARISHES (Winter 2016), [https://64parishes.org/arbitrary-process?utm\\_source=LEH+Newsletter+January+2017&utm\\_campaign=January+2017&utm\\_medium=email](https://64parishes.org/arbitrary-process?utm_source=LEH+Newsletter+January+2017&utm_campaign=January+2017&utm_medium=email) [<https://perma.cc/885N-AKSA>]; *American Indian Relocation*, NATIVE AM. NETROOTS (May 14, 2010), <http://nativeamericannetroots.net/diary/496> [<https://perma.cc/6WYV-5CFG>].

119. 25 U.S.C. § 1901(4) (2018) (discussing the finding that a high percentage of Indian families are broken up by the removal of children); *Indian Adoption Project*, ADOPTION HISTORY PROJECT, <https://pages.uoregon.edu/adoption/topics/IAP.html> [<https://perma.cc/R4UP-PXGZ>].

120. 18 U.S.C. § 1162 (2018); 28 U.S.C. § 1360 (2018); 25 U.S.C. §§ 1321—1326 (2018).

121. Daniel Twetten, *Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever be Made into a Right*, 90 J. CRIM. L. & CRIMINOLOGY 1317, 1318 (2000) (“Public Law 280 created many problems for tribal justice systems, ultimately resulting in higher crime rates for tribes in Public Law 280 states than for tribes in non-Public Law 280 states.”).

122. Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 567 (July 8, 1970) (highlighting President Richard Nixon’s 1970 speech imploring Congress to repeal and reject termination).

123. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1996) (codified at 25 U.S.C. §§ 5301—5423 (2018)).

sought to capitalize on their sovereignty and turned to gaming.<sup>124</sup> States were hostile to tribal gaming efforts;<sup>125</sup> nevertheless, the Supreme Court affirmed tribes' right to have gaming enterprises on their land.<sup>126</sup> The Court noted the federal government's policy of tribal economic development and self-sufficiency were furthered by gaming.<sup>127</sup> Since this decision, Indian gaming has grown into a \$30 billion a year industry.<sup>128</sup>

Gaming is undoubtedly the best known tribal economic venture, but tribes have experienced success in many other fields. Tribes are major players in natural resources such as oil and gas,<sup>129</sup> coal,<sup>130</sup> and timber.<sup>131</sup> Some tribes have returned to traditional economic activities like farming<sup>132</sup>

124. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (holding that the laws of Georgia "have no force" inside the Cherokee Nation); Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 45 (2007) [hereinafter Fletcher, *Bringing Balance*]; 42 C.J.S. *Indians* § 92 (2018) ("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.").

125. *E.g.*, *United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986); *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981); *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981).

126. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (holding that state and local governments may not regulate gambling on Native American land).

127. *Id.* at 219 ("Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.").

128. Press Release, Nat'l Indian Gaming Comm'n, 2018 Indian Gaming Revenues of \$33.7 Billion Show a 4.1% Increase (Sept. 12, 2018), <https://www.nigc.gov/news/detail/2018-indian-gaming-revenues-of-33.7-billion-show-a-4.1-increase> [<https://perma.cc/8SPM-9HRZ>].

129. *See, e.g.*, *Our Purpose*, RED WILLOW PROD. CO., <https://www.rwpc.us/> [<https://perma.cc/ZQ4E-WCGF>] (last visited Feb. 13, 2021) (summarizing the Southern Ute Indian Tribe's involvement in the oil and gas industry).

130. Tripp Baltz, *Mining Tribal Land Weighs on Crow Family as Cost of Prosperity*, BLOOMBERG LAW (Mar. 12, 2020, 3:00 AM), <https://news.bloomberglaw.com/environment-and-energy/mining-tribal-land-weighs-on-crow-family-as-cost-of-prosperity> [<https://perma.cc/LBB6-33N2>] ("The Navajo Transitional Energy Company, Inc. in October became the third-largest coal company in the U.S. after buying assets including three mines in the Powder River Basin straddling Wyoming and Montana from bankrupt Cloud Peak Energy Resources LLC.").

131. *E.g.*, Brian Bull, *Native American Tribes Gaining Recognition for Timber and Forestry Practices*, KLCC (Jan. 30, 2019), <https://www.klcc.org/post/native-american-tribes-gaining-recognition-timber-and-forestry-practices> [<https://perma.cc/27FS-5YKK>].

132. *About Us*, INTERTRIBAL AGRIC. COUNCIL, <https://www.indianag.org/home> [<https://perma.cc/C89K-66TA>] (last visited Feb. 13, 2021) (describing intertribal pursuits in agriculture); Agriculture, NAT'L CONG. AM. INDIANS, <http://www.ncai.org/policy-issues/land-natural-resources/agriculture> [<https://perma.cc/KBH7-S8YS>] (last visited Feb. 13, 2021) ("Agriculture is increasingly important to Native economies, representing the economic backbone of more than 200 tribal communities and witnessing an 88 percent increase in the

and wildlife management.<sup>133</sup> Government contracting has been a boon for several tribes.<sup>134</sup> Tribes have also experienced success in the technology industry.<sup>135</sup> However, tribal economic ventures, even corporations, are government-owned.<sup>136</sup> While tribal enterprises have helped reduce poverty in Indian country, the reservation private sector remains undeveloped.<sup>137</sup>

Sustainable economies require private enterprise, both inside and outside of Indian country. Tribes have succeeded in operating relatively large-scale enterprises; however, smaller ventures, such as retail stores, are much more likely to succeed as private businesses.<sup>138</sup> Due to the lack of small businesses, Indian country residents are often forced to leave the reservation to purchase goods.<sup>139</sup> Creating a private sector will allow money to circulate within the reservation and stimulate further economic development.<sup>140</sup> Private businesses provide economic diversity and reduce

number of American Indian Farmers between 2002 and 2007.”).

133. For examples of various Apache tribes engaging in wildlife management, see *About*, SAN CARLOS APACHE TRIBE RECREATION & WILDLIFE, <https://www.sancarlosrecreationwildlife.com/> [<https://perma.cc/8RGJ-UE5A>], JICARILLA APACHE GAME & FISH, <https://www.jicariilahunt.com/> [<https://perma.cc/FMD2-9LED>], and WHITE MOUNTAIN APACHE TRIBE GAME & FISH, <https://wmatoutdoor.org/> [<https://perma.cc/9YQD-DW9R>].

134. For some examples of tribes engaging in government contracting, see *About*, ARCTIC SLOPE REG’L CORP., <https://www.asrc.com/about/> [<https://perma.cc/S7VF-SDUH>] (last visited Feb. 13, 2021), *Choctaw Contracting Services*, CHOCTAW NATION, <https://www.choctawnation.com/business/choctaw-business/choctaw-global-staffing/choctaw-contracting-services> [<https://perma.cc/A9C5-ERJW>] (last visited Feb. 13, 2021), and *Government Contracting*, HO-CHUNK INC., <https://hochunkinc.com/government-contracting.php> [<https://perma.cc/WT5B-W3SC>].

135. See *About Minokaw Technologies*, MINOKAW TECHS., [https://www.minokaw.com/about\\_us.php](https://www.minokaw.com/about_us.php) [<https://perma.cc/CPA6-BM5G>] (last visited Feb. 13, 2021) (indicating that Minokaw is a “tribally owned technology company”); *About Us*, MOBILOANS, <https://www.mobiloans.com/about-us> [<https://perma.cc/ZD4E-5NXT>] (indicating that Mobiloans is an online lending company owned by the Tunica-Biloxi Tribe of Louisiana).

136. *Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 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.”); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (“When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe.”); KAREN J. ATKINSON & KATHLEEN M. NILLES, OFF. OF INDIAN ENERGY & ECON. DEV., TRIBAL BUSINESS STRUCTURE HANDBOOK I-5 (2008) [hereinafter ATKINSON & NILLES, HANDBOOK] (“Many tribes conduct their commercial activities through federally-chartered corporations formed under Section 17 of the Indian Reorganization Act (IRA).”).

137. JORGENSEN, ACCESS TO CAPITAL, *supra* note 49, at 35–36.

138. Stephen Cornell et al., *Citizen Entrepreneurship: An Underutilized Development Resource*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 197, 215 (Miriam Jorgensen ed., 2007).

139. *Id.* at 199; Miller, *Sovereign Resilience*, *supra* note 1, at 1367–68.

140. Cornell et al., *supra* note 138, at 199.

tribal dependence on federal funds.<sup>141</sup> Moreover, private businesses create jobs<sup>142</sup> that provide additional opportunities for tribal citizens to become productive members of the tribal community.<sup>143</sup>

Private sector development strengthens tribal sovereignty. A private sector economy enables tribes to tax businesses, and this enables tribes to fund themselves like every other government in the United States.<sup>144</sup> Additionally, privately-owned enterprises are not entitled to sovereign immunity,<sup>145</sup> which tribal enterprises may possess.<sup>146</sup> The sovereign immunity of tribal corporations has come under increased scrutiny in recent years<sup>147</sup> and threats to tribal immunity endanger tribal sovereignty.<sup>148</sup> Private businesses help tribes become less reliant on tribally owned enterprises; consequently, more private businesses reduce the threats to tribal sovereign immunity.<sup>149</sup>

Tribes realize the value of creating private sector economies and have made substantial efforts to promote Indian entrepreneurs. Some tribes have developed programs to provide their citizens with business skills and financing.<sup>150</sup> Some tribes have even started community development financial institutions to provide their citizens with credit,<sup>151</sup> and tribes have

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141. Cornell et al., *supra* note 138, at 200–01.

142. Cornell et al., *supra* note 138, at 199–200.

143. Cornell et al., *supra* note 138, at 201.

144. Cornell et al., *supra* note 138, at 200.

145. Crepelle, *Decolonizing*, *supra* note 1, at 470 (“Privately-owned Indian businesses, however, are not eligible for sovereign immunity.”).

146. *Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 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.”).

147. Crepelle, *Tribal Lending and Tribal Sovereignty*, *supra* note 103, at 23 (“Tribal sovereign immunity has become an increasingly controversial topic. . .”).

148. Crepelle, *Decolonizing*, *supra* note 1, at 470.

149. See Crepelle, *Decolonizing*, *supra* note 1, at 470 (“Thus, tribal sovereignty is not imperiled through individual Indian commerce.”).

150. For examples of business development programs established by the Choctaw, Mille Lacs Band, and Chickasaw Nations, see, respectively, *About the Choctaw Business Development Center*, CHOCTAW NATION, <https://www.choctawnation.com/business/business-development-center/about-choctaw-business-development-center> [<https://perma.cc/7Q5L-UUVY>]; Honoree Profile Describing the Mille Lacs Band’s Small Business Development Program, HARV. PROJECT ON AM. INDIAN ECON. DEV., [https://nmigovernance.arizona.edu/sites/default/files/attachments/text/honoring\\_nations/2000\\_HN\\_Mille\\_Lacs\\_small\\_business\\_development\\_program.pdf](https://nmigovernance.arizona.edu/sites/default/files/attachments/text/honoring_nations/2000_HN_Mille_Lacs_small_business_development_program.pdf) [<https://perma.cc/NK8M-CQ6H>] (last visited Feb. 13, 2021); *Small Bus. Dev. Ctr.*, OFFICE OF THE GOVERNOR, CHICKASAW NATION, <https://www.chickasaw.net/Services/Enterprises-Commerce/Small-Business-Development-Center.aspx> [<https://perma.cc/4PAC-3HEG>].

151. See U.S. Dep’t of the Treasury, *Certified Native CDFIs*, INDIAN AFFS., <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/CertifiedNativeCDFIs%202018.pdf> [<https://perma.cc/4PAC-3HEG>].

adopted secured transactions laws to improve lending opportunities with mainstream banks.<sup>152</sup> Since Indian preferences are constitutional,<sup>153</sup> tribes have created preferred supplier programs that grant Indian businesses preferences for tribal contracts.<sup>154</sup> Tribes have also begun encouraging their citizens to buy from other Indians.<sup>155</sup> Likewise, over a dozen American Indian Chambers of Commerce exist to teach business skills and provide networking opportunities for Indian-owned businesses.<sup>156</sup> Even colleges are now offering courses directly related to tribal business.<sup>157</sup>

Despite tribes' best efforts, private sectors have yet to blossom in Indian country. The next section explores how federal Indian law and policy prevent tribes from developing private sector economies.

#### IV. HOW FEDERAL INDIAN LAW KILLS RESERVATION ECONOMIES

Federal Indian law keeps tribes poor. Federal Indian law is a legal regime that was designed to make tribes subordinate to the United States.

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c/DB2M-9P6D] (last visited Feb. 13, 2021) (listing numerous tribes' community development financial institutions).

152. Henning et al., *supra* note 21, at 490 (noting that at least twenty-four tribes have adopted a secured transaction law).

153. *Morton v. Mancari*, 417 U.S. 535, 553–55 (1974).

154. For examples of preferred supplier programs established by the Choctaw, Chickasaw, and Cherokee Nations, see *Preferred Supplier Program*, CHOCTAW NATION, <https://www.choctawnation.com/preferred-supplier-program> [<https://perma.cc/VHA2-PCYH>], *Preferred Vendor Program*, CHICKASAW NATION, <https://www.chickasaw.net/services/preferred-vendor-program.aspx> [<https://perma.cc/8ZKR-SGDL>], and *About TERO*, CHEROKEE NATION TRIBAL EMP. RTS. OFF., <http://cherokeetero.com/> [<https://perma.cc/ACH7-V94V>].

155. Andrew Ricci, *T'aa Hwo' Ajit'EEgo (To Be Able to Do for Yourself): Jonathan Nez, Myron Lizer and the Future of the Navajo Nation*, NATIVE BUS. MAG., MAY 2019, at 9 (May 2019) (describing the Navajo Nation's "Buy Navajo, Buy Local" initiative).

156. For examples of American Indian Chambers of Commerce in different states, see *AICCAZ*, AM. INDIAN CHAMBER OF COM. ARIZ., <http://aiccaz.com/> [<https://perma.cc/C8AP-A5TQ>]; MINN. AM. INDIAN CHAMBER OF COM., <https://www.maicc.org/> [<https://perma.cc/J53Z-D2N8>]; AM. INDIAN CHAMBER OF COM. N.M., <http://www.aiccnm.com/> [<https://perma.cc/H7VE-ST9K>]; AM. INDIAN CHAMBER OF COM. OKLA., <https://aiccok.org/> [<https://perma.cc/3BGL-9W6E>].

157. *E.g.*, *Minor in Alaska Native Business Management*, UNIV. OF ALASKA ANCHORAGE, <https://catalog.uaa.alaska.edu/undergraduateprograms/cbpp/businessadministration/minor-aknativebusinessmanagement/> [<https://perma.cc/MZR6-SAKS>] (last visited Feb. 13, 2021); *MBA in American Indian Entrepreneurship*, GONZAGA UNIV., <https://www.gonzaga.edu/school-of-business-administration/graduate/mba-in-american-indian-entrepreneurship> [<https://perma.cc/N69G-DH79>] (last visited Feb. 13, 2021); *Online BBA: General Business-Tribal Management*, N.M. ST. U. COLLEGE OF BUS., <https://business.nmsu.edu/academics/undergraduate/online-programs/tribal-management/> [<https://perma.cc/PL39-TKHD>].

While elements of federal Indian law are designed to protect tribes,<sup>158</sup> federal Indian law usually only ends up making matters more complicated and confusing. “Complicated” and “confusing” are two words that businesses do not want to hear. Add massive infrastructure deficits to the mix, and you have a recipe to repel business. This section explores how federal Indian law keeps businesses away from Indian country.

### *A. Jurisdictional Uncertainty*

Non-Indians are reluctant to invest in Indian country because of Indian country’s perplexing legal landscape.<sup>159</sup> Although the Supreme Court has stated jurisdictional rules should be simple and clear,<sup>160</sup> the Supreme Court’s decisions on Indian country jurisdiction have reached a level of abstraction that would make Jackson Pollock proud.<sup>161</sup> Indeed, Justice Douglas wrote that Indian country’s convoluted jurisdictional scheme aids only “those who benefit from confusion and uncertainty.”<sup>162</sup> Businesses are not among those who benefit from confusion and uncertainty; accordingly, jurisdictional confusion has been identified as a major impediment to Indian country economic development.<sup>163</sup> This section explores some of the jurisdictional issues that prevent businesses from investing in Indian country.

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158. See 1 AM. INDIAN POL’Y REV. COMM’N, 94TH CONG., FINAL REP., 130 (Comm. Print 1977), <https://files.eric.ed.gov/fulltext/ED164229.pdf> [<https://perma.cc/MRG9-HJPF>] (citing various congressional acts designed to promote the “well-being of the Indian people”).

159. See Brief, S.D. Bankers Ass’n, *supra* note 56, at 2 (“A primary source of reluctance on the part of non-Indian businesses to doing business on reservations is difficulty in determining and understanding ‘the rules of the game.’”); Grant Christensen, *Selling Stories OR You Can’t Own This: Cultural Property as a Form of Collateral in a Secured Transaction Under the Model Tribal Secured Transactions Act*, 80 BROOK. L. REV. 1219, 1261 (2015) (“Indian Country is just different. The title to property is more complicated, the issue of sovereignty is more nuanced, and the choice of law and choice of forum questions are more complex.”).

160. See *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002) (“Motives are difficult to evaluate, while jurisdictional rules should be clear.”); see also Crepelle, *Decolonizing*, *supra* note 1, at 447 n.154 (listing Supreme Court decisions that call for straightforward jurisdictional rules).

161. *DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 466–67 (1975) (Douglas, J., dissenting) (criticizing the Court’s endorsement of a system of “checkerboard jurisdiction” that had allowed homesteaders to settle on various parts of Indian territory).

162. *Id.* at 467.

163. See REP. & RECOMMENDATIONS, *supra* note 35, at 40 (observing that jurisdictional conflicts and dual taxation concerns have impeded the economic development of Indian reservations).

## 1. Civil Jurisdiction

While businesses may be skeptical of tribal courts,<sup>164</sup> tribal courts routinely resolve civil matters involving non-Indians with little hassle.<sup>165</sup> In fact, tribal courts have exclusive jurisdiction over lawsuits arising within Indian country against Indians, so non-Indians must pursue some claims against Indians in tribal court.<sup>166</sup> Contrarily, the Supreme Court has stated tribes generally lack civil jurisdiction over nonmembers.<sup>167</sup> Tribal courts can only exercise civil jurisdiction over non-Indians if the non-Indian conduct fits into one of two exceptions.<sup>168</sup> Under *Montana* Prong One, tribes can assert civil jurisdiction over non-Indians within tribal lands if the activity arises from a consensual relationship with the tribe or its citizens.<sup>169</sup> *Montana* Prong Two authorizes tribal jurisdiction over non-Indian conduct within tribal lands that endangers the political or economic welfare of the tribe.<sup>170</sup>

Non-Indians have a common law right to challenge tribal court jurisdiction in federal court,<sup>171</sup> and non-Indians frequently exercise this

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164. Koppisch, *Why are Indian Reservations So Poor*, *supra* note 14 (explaining that tribal courts refusal to recognize individual property rights makes business activity difficult in tribal communities); Brief, Retail Litigation Ctr., *supra* note 56; Brief, S.D. Bankers Ass'n, *supra* note 56.

165. Fletcher, *supra* note 113, at 815–816 (explaining that improvements in tribal governance capacity have allowed efficient adjudication of cases dealing with non-Indians); Matthew Fletcher, *Contract and (Tribal) Jurisdiction*, 126 YALE L.J. F. 1 (2016) (explaining the increased volume of business contracts executed between Indians and non-Indians); Krakoff, *Civil Judicial Jurisdiction*, *supra* note 58, at 1193 (“Many assertions of tribal authority over nonmembers are uncontroversial and do not result in litigation.”).

166. *Williams v. Lee*, 358 U.S. 217 (1959).

167. *See Montana v. United States*, 450 U.S. 544, 565 (1981) (“Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”). This premise is debatable as *Montana* dealt exclusively with nonmember activities on non-Indian fee land. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (Blackmun, J., dissenting) (“When considered in the full context of the Court’s other relevant decisions, it is evident that *Montana* must be read to recognize the inherent authority of tribes to exercise civil jurisdiction over non-Indian activities on tribal reservations where those activities, as they do in the case of land use, implicate a significant tribal interest.”).

168. *Montana*, 450 U.S. at 565–66.

169. *Id.* at 565.

170. *Id.* at 566.

171. *Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852–53 (1985) (holding that non-Indians challenging tribal court’s power to exercise civil subject-matter jurisdiction had an action “arising under” federal law within the meaning of 28 U.S.C. § 1331).

right.<sup>172</sup> However, non-Indians must exhaust their tribal court remedies prior to appealing to federal court.<sup>173</sup> Tribes often have tiered judicial systems,<sup>174</sup> and from there, the jurisdictional determination can go all the way to the United States Supreme Court. This means businesses must pay court costs, attorney's fees, and endure lengthy delays just to figure out where to file suit.<sup>175</sup> Businesses don't want to deal with this.

Business often involves contractual relationships, so this would seem to place many commercial relationships within the purview of *Montana* Prong One. Under the Supreme Court's precedent, this is not necessarily the case. A business transaction involving a lease and a sale of fee simple land within a reservation was at issue in *Plains Commerce Bank v. Long Family Land and Cattle Co.*<sup>176</sup> Although the transactions were negotiated on a reservation with a tribal citizen in an Indian-owned company,<sup>177</sup> five Supreme Court Justices believed a discrimination claim arising from the lease and sale did not implicate *Montana* Prong One.<sup>178</sup> However, four Supreme Court Justices thought the tribal court had jurisdiction,<sup>179</sup> as did the

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172. WILLIAM CANBY JR., *INDIAN LAW IN A NUTSHELL* 239 (6th ed. 2014) [hereinafter CANBY, *NUTSHELL*] ("Frequently, when a nonmember (usually a non-Indian) is sued in tribal court, he or she will bring an action in federal court either to challenge the tribal court's jurisdiction or to attempt to litigate the underlying dispute in federal court."); Krakoff, *Civil Judicial Jurisdiction*, *supra* note 58, at 1191 ("Nonmember defendants challenge even seemingly clear examples of legitimate tribal jurisdiction.").

173. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (ruling that federal courts cannot exercise diversity jurisdiction until a tribal court has had a chance to decide its own jurisdiction first); *Nat'l Farmers Union Ins. Co.*, 471 U.S. at 857 (requiring an exhaustion of Tribal court remedies before challenging jurisdiction in federal court).

174. E.g., *Important Announcements*, SUPREME COURT OF THE NAVAJO NATION (updated Apr. 9, 2020), <http://www.navajocourts.org/indexsuct.htm> [<https://perma.cc/9TEX-CMV4>] (showing that filing for appeals and petitions in tribal courts is a two-step process); *Home*, CHEROKEE NATION JUDICIAL BRANCH, <https://www.cherokeecourts.org/> [<https://perma.cc/8X5L-M24K>] (explaining the different levels of courts within the Tribal court system); *Home*, TULALIP TRIBAL COURT, <https://www.tulaliptribalcourt-nsn.gov/> [<https://perma.cc/W2P2-JWNB>] (explaining the Tulalip Tribal Court system).

175. Krakoff, *Civil Judicial Jurisdiction*, *supra* note 58, at 1191 (noting jurisdictional challenges "result[] in delay, multiplication of expenses, and insecurity for the parties seeking relief in their chosen forum."); Joel Pruett, *Nothing Personal (or Subject Matter) About It: Jurisdictional Risk As an Impetus for Non-Tribal Opt-Outs from Tribal Economies, and the Need for Administrative Response*, 40 AM. INDIAN L. REV. 131, 131–32 (2016) [hereinafter Pruett, *Nothing Personal*] ("[T]he tribal exhaustion doctrine also imposes on potential non-tribal litigants the threat of expending substantial 'time, money and effort litigating . . . in . . . Tribal Court' before 'seeking to terminate the tribal court actions against them' in federal court.").

176. 554 U.S. 316 (2008).

177. *Id.* at 321.

178. *Id.* at 332.

179. *Id.* at 345–346 (Ginsburg, J., dissenting).

federal district court and Eighth Circuit Court of Appeals.<sup>180</sup> More recently, the Supreme Court split four-to-four over whether a tribal court could exercise civil jurisdiction over a non-Indian company that leased trust land from the tribe and obtained a tribal business license to operate on the Mississippi Choctaw Reservation in *Dollar General v. Mississippi Band of Choctaw Indians*.<sup>181</sup> This unnaturally narrow construction of consensual relations transforms what should be a straightforward basis for tribal court jurisdiction into a roll of the dice.

*Montana* Prong Two—the ability to regulate non-Indians engaged in behavior that threatens tribal political or economic welfare—seems extremely capacious. However, the Supreme Court has read this exception in a remarkably restrictive manner.<sup>182</sup> For example, the Supreme Court held in *Strate v. A-1 Contractors*<sup>183</sup> that reckless driving within a reservation that results in severe injury to a lifelong reservation resident and mother of five tribal citizens<sup>184</sup> does not implicate the health or welfare of the tribe under *Montana* Prong Two.<sup>185</sup> Precluding tribal jurisdiction over on-reservation auto accidents is perplexing because the Supreme Court expanded the rules of personal jurisdiction in order to ensure that states could protect their citizens from careless nonresident drivers.<sup>186</sup> No such luck for tribes. In a similarly bizarre construction of *Montana*, the majority in *Plains Commerce* stated that *Montana* governs conduct on non-Indian fee simple land within a reservation, and selling land *is not* conduct.<sup>187</sup> Common sense suggests that

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180. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 440 F. Supp. 2d 1070 (D.S.D. 2006), *aff'd*, 491 F.3d 878 (8th Cir. 2007), *rev'd*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) (holding that the parties' involvement was consensual and that the tribal court had subject matter jurisdiction).

181. *Dollar General Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016). See also *Dolgencorp v. MBCI*, 732 F.3d 409, 411 (5th Cir. 2013) (“The store sits on land held by the United States in trust for the Mississippi Band of Choctaw Indians, and operates pursuant to a lease agreement with the tribe and a business license issued by the tribe.”).

182. *CANBY, NUTSHELL*, *supra* note 172, at 230 (“These exceptions were susceptible to being broadly read (especially the second one, with its echoes of the police power of a State), but that has not proved to be the case.”).

183. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

184. *GETCHES ET AL.*, *CASES AND MATERIALS*, *supra* note 94, at 629.

185. *Strate*, 520 U.S. at 457–58.

186. *Hess v. Pawlowski*, 274 U.S. 352, 356 (1927) (“Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonable calculated to promote care on the part of all, residents and non-residents alike, who use its highways.”).

187. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 340 (2008) (“But conduct taking place on the land and the sale of the land are two very different things.”).

sales are in fact conduct,<sup>188</sup> but this warped reading presents a serious issue in cases involving contracts in Indian country. The Court's compressed construction of *Montana* Prong Two's expansive language creates confusion over the confines of tribal court jurisdiction.

Further confusion arises over who qualifies as an "Indian" for tribal civil jurisdiction purposes. In *Williams v. Lee*, the United States Supreme Court held that tribal courts have exclusive jurisdiction over civil suits arising against Indians on a reservation.<sup>189</sup> The Court has since divided Indians into "members" and "nonmembers" averring, "For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation."<sup>190</sup> The Supreme Court has held that tribes cannot exercise criminal jurisdiction over nonmember Indians;<sup>191</sup> however, Congress swiftly rejected this proposition by reaffirming tribes' "inherent power" to criminally prosecute all Indians.<sup>192</sup> Presumably the ability to assert criminal power translates into the ability to assert civil power,<sup>193</sup> but the Court continues to use the terms "member" and "nonmember" in tribal civil jurisdiction cases.<sup>194</sup> Although this issue seems minor, resolving it could take years to litigate.

Indian country's legal landscape can complicate basic procedural issues, even in state and federal courts. Defendants can ordinarily assert counterclaims against plaintiffs. Civil suits arising against "member" Indians in Indian country must be filed in tribal court, but it is unclear whether a tribal court will be able to assert jurisdiction over counterclaims

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188. *Id.* at 347 (2008) (Ginsburg, J., dissenting) ("Sales of land—and related conduct—are surely 'activities' within the ordinary sense of the word.").

189. *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.").

190. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161 (1980).

191. *Duro v. Reina*, 495 U.S. 676 (1990).

192. 25 U.S.C. § 1301(2) (2018).

193. *Crepelle*, *Decolonizing*, *supra* note 1, at 470 n.268 ("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.").

194. *E.g.*, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001) ("The question with which we are presented is whether this general rule applies to tribal attempts to tax nonmember activity occurring on non-Indian fee land."); *Nevada v. Hicks*, 533 U.S. 353, 355 (2001) ("This case presents the question whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation."); *Strate*, 520 U.S. at 442 ("This case concerns the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members.").

against the nonmember who filed the claim.<sup>195</sup> This could result in separate trials in separate court systems over the same matter. Presumably state court defendants can counterclaim against Indian plaintiffs for matters arising in Indian country.<sup>196</sup> However, the issue is unsettled,<sup>197</sup> and unsettled equals uncertainty, which is exactly what businesses do not like. Even serving state court process on an Indian for an off-reservation lawsuit is complicated if process must be served within Indian country.<sup>198</sup> While some federal questions arising on tribal land must be filed directly in federal court,<sup>199</sup> some federal courts will not hear Indian country cases until tribal court remedies are exhausted, even if no tribal court proceeding has been initiated.<sup>200</sup> This jurisdictional rollercoaster ride raises the cost of capital and scares businesses away from Indian country.<sup>201</sup>

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195. See, e.g., Joseph Chilton, *The Jurisdictional "Haze": An Examination of Tribal Court Contempt Powers over Non-Indians*, 90 N.C. L. REV. 1189 (2012) (discussing a case where a non-Indian initiated a tribal court proceeding then abandoned it and whether the non-Indian's institution of the suit authorized the tribal court to hold her in contempt).

196. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986) ("Petitioner also concedes that a non-Indian defendant may assert a counterclaim arising out of the same transaction or occurrence that is the subject of the principal suit as a setoff or recoupment.").

197. CANBY, NUTSHELL, *supra* note 172, at 214–15.

198. CANBY, NUTSHELL, *supra* note 172, at 216; Katosha Belvin Nakai, *Red Rover, Red Rover: A Call for Comity in Linking Tribal and State Long-Arm Provisions for Service of Process in Indian Country*, 35 ARIZ. ST. L.J. 633, 635 (2003); Raymond Cross, *De-Federalizing American Indian Commerce: Toward A New Political Economy for Indian Country*, 16 HARV. J.L. & PUB. POL'Y 445, 466 (1993) ("Another barrier that businesses seeking to have disputes resolved in state fora face is that there may be doubt whether state service of process reaches within Indian Country.").

199. *El Paso Nat. Gas Co. v. Neztosie*, 526 U.S. 473 (1999) (noting a case in which tribal court exhaustion did not apply).

200. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000) ("[A]s a general rule, if a tribe has not explicitly waived exhaustion, courts lack discretion to relieve its litigation adversary of the duty of exhausting tribal remedies before proceeding in a federal forum."); *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577, 579 (9th Cir. 1987) ("If the dispute arises in Indian territory, both are limited to tribal court as the forum of first recourse. It is in non-Indian matters only that non-Indians can go to district court directly."); *Navajo Nation v. Intermountain Steel Bldgs., Inc.*, 42 F. Supp. 2d 1222, 1227 (D.N.M. 1999) ("The tribal exhaustion rule applies even when no action is pending in the tribal court and Indian plaintiffs seek to invoke federal court subject matter jurisdiction.").

201. *Conducting Business with Tribes in the Aftermath of the Dollar General Supreme Court Split: What You and Your Clients Need to Know*, AM. BAR ASS'N (Apr. 27, 2017), [https://www.americanbar.org/groups/business\\_law/publications/blt/2017/04/01\\_speirs/](https://www.americanbar.org/groups/business_law/publications/blt/2017/04/01_speirs/) [https://perma.cc/AY2D-LY3W]; Brief, Retail Litigation Ctr., *supra* note 56, at 2 ("Yet when it comes to investment and expansion, retailers face continuing uncertainty over the fundamental question of which judicial system governs their conduct on tribal lands."); Pruetz, *Nothing Personal*, *supra* note 175, at 163 ("The requirement of a Jurisdictional Risk premium would impede growth of tribal economies by increasing the cost of capital.").

## 2. Forum Selection Clauses and Arbitration Agreements

The dissent in *Plains Commerce* recommended forum selection clauses and arbitration agreements as remedies to Indian country's jurisdictional quagmire.<sup>202</sup> The Supreme Court has expressed a strong policy in favor of enforcing forum selection clauses<sup>203</sup> and has acknowledged that businesses benefit from the certainty provided by forum selection clauses.<sup>204</sup> Nevertheless, the law surrounding forum selection clauses in Indian country is unsettled. Forum selection clauses opting out of tribal court jurisdiction can be enforced,<sup>205</sup> but enforcing forum selection clauses involving Indian country gets tricky.<sup>206</sup> Although some courts have ruled the tribal exhaustion

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202. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 346 (2008) (Ginsburg, J., dissenting) (“Had the Bank wanted to avoid responding in tribal court or the application of tribal law, the means were readily at hand: The Bank could have included forum selection, choice-of-law, or arbitration clauses in its agreements with the Longs, which the Bank drafted.”).

203. *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. D. of Tex.*, 571 U.S. 49, 66 (2013) (holding that “the interest of justice,” in the vast majority of cases, will require the enforcement of forum selection clauses); *see also* David K. Duffee et al., *U.S. Supreme Court Reaffirms that Forum-Selection Clauses Are Presumptively Enforceable*, ABA BUS. L. TODAY (Jan. 22, 2014), <https://businesslawtoday.org/2014/01/u-s-supreme-court-reaffirms-that-forum-selection-clauses-are-presumptively-enforceable/> [<https://perma.cc/LKL3-YWLC>] (“The Court in *Atlantic Marine* reinforced the strong federal policy favoring the enforcement of such clauses and clarified the mechanism for their enforcement.”).

204. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991) (“Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions.”); *see also* *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13–14 (1972) (“The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.”).

205. *See Enerplus Res. (USA) Corp. v. Wilkinson*, 865 F.3d 1094, 1097 (8th Cir. 2017) (“By this forum selection clause, Wilkinson agreed that any and all disputes arising under the Settlement Agreement would be litigated in federal district court—not tribal court . . . . Consequently, Wilkinson cannot bring suit arising from or related to the Settlement Agreement in the tribal court.”); *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 198–99 (7th Cir. 2015) (“In any event, with the advent of *Altheimer & Gray*, the presence of a forum selection clause is dispositive of the exhaustion issue: ‘To refuse enforcement of this routine contract provision would be to undercut the Tribe’s self-government and self-determination.’”).

206. Aaron D. Johnson, *Just Say No (To American Capitalism): Why American Indians Should Reject the Model Tribal Secured Transactions Act and Other Attempts to Promote Economic Assimilation*, 35 AM. INDIAN L. REV. 107, 118 (2010) [hereinafter Johnson, *Just Say No*] (“Furthermore, attempts by lenders to insert contractual provisions designed to minimize jurisdictional quarrels may be ineffective.”); Pruet, *Nothing Personal*, *supra* note 175, at 173 (“Despite the Supreme Court’s general support for traditional forum selection

doctrine can be waived in forum selection clauses, other courts disagree.<sup>207</sup> Forum selection clauses cannot create subject matter jurisdiction over an action,<sup>208</sup> thus, forum selection clauses are unable to circumvent subject matter jurisdiction issues involving Indian country matters.<sup>209</sup>

Assuming a forum selection clause is effective, the scope of the clause remains an open question in Indian country. For example, the Navajo Nation entered a bulk vehicle contract with Ford Motor Company.<sup>210</sup> The contract contained a forum selection clause that stated, “All actions which arise out of this Lease or out of the transaction it represents shall be brought in the courts of the Navajo Nation.”<sup>211</sup> Forum selection clauses are typically construed broadly and govern torts resulting from the contractual

clauses, there is much less agreement as to how courts should handle forum selection clauses attempting to avoid *tribal* civil jurisdiction.”).

207. *Larson v. Martin*, 386 F. Supp. 2d 1083, 1087 (D.N.D. 2005) (“The application of the tribal exhaustion doctrine is complicated by the existence of a valid forum selection clause. While there is disagreement among the circuit courts regarding the impact of a forum selection clause upon the tribal exhaustion doctrine. . . .”); Thomas Weathers, *Encouraging Business with Indian Tribes: A Brief Discussion of the Tribal Exhaustion Doctrine*, 18 BUS. L. TODAY 16, 17, 19 (2008) (“Some courts hold that a valid forum selection clause essentially waives any exhaustion requirement; some courts hold the opposite.”); Johnson, *Just Say No*, *supra* note 206, at 118 (“Furthermore, attempts by lenders to insert contractual provisions designed to minimize jurisdictional quarrels may be ineffective.”).

208. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“[N]o action of the parties can confer subject-matter jurisdiction upon a federal court.”); *Kennerly v. Dist. Ct. of the Ninth Jud. Dist. of Mont.*, 400 U.S. 423, 427 (1971) (holding that a tribal council resolution granting the state concurrent jurisdiction over the Blackfeet Indian Reservation “was insufficient to vest Montana with jurisdiction over Indian country under the 1953 Act”).

209. *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1262 (D.N.M. 2013) (“Generally, absent clear federal authorization, state courts lack jurisdiction to hear actions against Indian defendants arising within Indian country.”); *Winer v. Penny Enters., Inc.*, 674 N.W.2d 9, 17 (2004) (“The exercise of state court jurisdiction over Winer’s personal injury action against the Mudgetts would infringe on the rights of the Spirit Lake Tribe to govern themselves. The district court did not err in concluding it lacked subject-matter jurisdiction over the action against the Mudgetts.”); CANBY, NUTSHELL, *supra* note 172, at 211 (“It should be noted that *Williams v. Lee* deprives the state courts of *subject matter jurisdiction*. . . . As a consequence, the parties cannot confer jurisdiction on the state by consent.”); 1 CYCLOPEDIA OF FEDERAL PROCEDURE § 2:160 (3d ed. 2021) (“While actions by Indians against outsiders or non-Indians in state courts have been sanctioned, the state courts generally do not have jurisdiction of civil causes against Indians, or non-Indians, on an Indian reservation or in Indian country, even when the plaintiff is a non-Indian, in the absence of a federal statute granting such jurisdiction.”).

210. *Ford Motor Co. v. Todecheene*, 394 F.3d 1170, 1173 (9th Cir. 2005), *opinion withdrawn on reh’g*, 488 F.3d 1215 (9th Cir. 2007) (“Ford Motor Credit Company (Ford Credit), Ford’s wholly-owned subsidiary, financed the purchase of the Expedition driven by Todecheene, as well as six bulk-purchases of vehicles over an eight-year period.”).

211. *Id.*

relationship.<sup>212</sup> Nonetheless, the Ninth Circuit Court of Appeals determined the Navajo Nation courts lacked civil jurisdiction over a products liability action arising from a vehicle purchased under the agreement.<sup>213</sup> In addition to the subject matter of forum selection clauses, who is bound by the clause can become an issue. Nonparties can be bound by forum selection clauses they have not signed;<sup>214</sup> however, it seems unlikely that nonparties would be bound by a forum selection clause naming a tribal court.<sup>215</sup>

Like forum selection clauses, arbitration agreements involving non-Indian entities in Indian country stand on shaky ground.<sup>216</sup> Arbitration agreements within Indian country are enforceable, but some federal courts have required an exhaustion of tribal remedies prior to permitting arbitration.<sup>217</sup> Some federal courts have refused to enforce tribal arbitration agreements because the tribe has not authorized arbitration.<sup>218</sup> Although

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212. 14D FEDERAL PRACTICE & PROCEDURE § 3803.1 (4th ed. 2020) (“Courts are governed by the intent of the parties and tend to conclude that a contract-based clause will apply to torts that arise from the contractual relationship.”); Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in which Action may be Brought*, 31 A.L.R.4TH 404 (1984) (“Forum selection clauses are presumptively valid in actions arising out of a contract.”).

213. *Todecheene*, 394 F.3d at 1180 (“This clause does not appear to cover a product liability tort action. Rather it seems to be directed toward contract disputes.”).

214. Dougherty, *supra* note 212 (“[Forum selection clauses] are enforced against nonparties where the alleged conduct of the nonparties is closely related to the contractual relations such that the nonparties can be considered transaction participants intended to benefit from and be subject to the forum selection clause.”); Tom Stilwell & Audrey Cumming, *Forum Selection Clauses: Another Facet of the Freedom of Contract Phenomenon*, 39 ADVOC. (TEXAS) 19, 23 (2007) (“[T]he courts appear lenient in allowing the scope of a forum selection clause to pertain to all parties involved in a transaction, including non-signatories.”).

215. *See* *Strate* 520 U.S. at 457 (refusing to bind the wife of a tribal citizen and the mother of five more tribal citizens and non-Indian company, who contracted to do business with the tribe on its reservation to tribal court jurisdiction, to a forum selection clause because the parties were “strangers” to the tribe).

216. *See* Liliana Burnett, *The Current State of Arbitration Clauses Within Native American Tribal Contracts: An Examination of Binding Arbitration Contracts in Native American Payday Lending*, 4 ARB. BRIEF 142, 143 (2014) (“It is important to understand that the arbitration and forum selection clause issues within contracts between Native American tribes and non-Native American businesses or individuals have not been settled by the courts and are ongoing.”).

217. CANBY, NUTSHELL, *supra* note 172, at 239 (“Exhaustion is required in a suit where there is a motion to compel arbitration under the Federal Arbitration Act.”); Pruetz, *Nothing Personal*, *supra* note 175, at 175–76 (“Despite these general rules, strong federal support for arbitration clauses loses significant force when tribal courts are involved, as some federal courts analyze arbitration clauses similarly to forum selection clauses, demanding adherence to the tribal exhaustion doctrine.”).

218. *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 228 (3d Cir. 2018) (“Thus, we conclude,

nonparties can be compelled to arbitrate when suing directly under the agreement,<sup>219</sup> arbitration agreements usually only bind signatories to the agreement.<sup>220</sup> Business transactions frequently involve multiple parties. Despite proactively attempting to clarify jurisdiction in Indian country, a trip down the jurisdictional rabbit hole is easily foreseeable. Businesses do not want to spend time and money litigating whether a forum selection clause or arbitration agreement is enforceable.

### 3. Enforcing Judicial Decrees

Once a judgment is rendered, enforcing it becomes an issue when Indian country is involved. The Full Faith and Credit Clause of the Constitution<sup>221</sup> was designed to help economically unify the United States, particularly to prevent individuals from dodging court judgments by hopping across state lines.<sup>222</sup> Federal legislation implementing the Clause requires the courts of states, territories, and possessions of the United States to recognize judgments issued by these courts.<sup>223</sup> Tribal court judgments are

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like our sister circuits, that the CRST arbitral forum is nonexistent.”); *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 672 (4th Cir. 2016) (“In fact, one official from the Tribe has acknowledged that the tribal ‘governing authority does not authorize Arbitration’ and the tribal court ‘does not involve itself in the hiring of an arbitrator.’”).

219. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (“If a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute’s terms are fulfilled.”); Michael A. Rosenhouse, Annotation, *Application of Equitable Estoppel Against Nonsignatory to Compel Arbitration Under Federal Law*, 43 A.L.R. FED. 2D 275 (2010) (“It has, however, been accepted as a general principle that nonsignatories to an arbitration agreement can be compelled to arbitrate their claims with a signatory in certain circumstances, such as where the nonsignatory is suing directly under the agreement containing the arbitration clause or has directly benefited from such agreement.”).

220. *See, e.g., Perez v. Qwest Corp.*, 883 F. Supp. 2d 1095, 1121 n.6 (D.N.M. 2012) (“Enforcing arbitration agreements against non-signatories is generally not permitted.”); *Anderton v. Practice-Monroeville, P.C.*, 164 So. 3d 1094, 1101 (Ala. 2014) (“[G]enerally, a nonsignatory cannot compel arbitration.”); *In the Estate of Guerrero*, 465 S.W.3d 693, 701 (Tex. App. 2015) (“Generally, an arbitration agreement is enforced only between signatories to the agreement.”); *Interstate Bankers Cas. Co. v. Hernandez*, 3 N.E.3d 353, 364 (2013) (“Arbitration is a ‘creature of contract’ [citation], and under basic principles of contract law, only parties to the arbitration contract may compel arbitration or be compelled to arbitrate [citations].”).

221. U.S. CONST. art. IV.

222. David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1587 (2009); Rex Glensy, *The Extent of Congress’ Power Under the Full Faith and Credit Clause*, 71 S. CAL. L. REV. 137, 151–52 (1997) (noting that failure to recognize judgements of other states “would have impeded one of the objectives behind the framing of the Constitution, namely the integration of the economic life of the participating states”).

223. 28 U.S.C. § 1738 (2018).

excluded from the list, but tribal courts are not obligated to enforce state court rulings either.<sup>224</sup> While certain federal statutes grant tribal court judgments full faith and credit in other United States' courts, none of these statutes directly relate to business.<sup>225</sup> This is problematic because neither states nor tribes can enforce judgments beyond their borders.<sup>226</sup> Moreover, states do not always enforce tribal court judgments when required to do so by federal law.<sup>227</sup> As a result, Dean Stacy Leeds has stated, "The lack of a broad federal mandate on recognition of tribal judgments creates a chaotic environment within which each state implements its own approach, if at all."<sup>228</sup>

This does not mean that judgments from tribal and state courts cannot be enforced across reservation borders.<sup>229</sup> Some state and federal courts have granted tribal court judgments full faith and credit,<sup>230</sup> but most state courts and federal courts recognize tribal court judgments only as a matter of comity.<sup>231</sup> However, some state policies on enforcing tribal judgments vary

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224. CANBY, NUTSHELL, *supra* note 172, at 262 ("Neither the Constitution nor federal statutes appear to require tribal courts to give full faith and credit to state court judgements."); Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 332 (2000) [hereinafter Leeds, *Cross-Jurisdictional Recognition*] ("[M]any tribal courts conclude they are not bound to extend full faith and credit to state or federal judgments because 28 U.S.C. § 1738 imposes no obligation on tribal courts.").

225. 25 U.S.C. § 1911(d) (2018); 18 U.S.C. § 2265 (2018); 25 U.S.C. § 3713 (2018).

226. *Wilson v. Marchington*, 127 F.3d 805, 807 (9th Cir. 1997) ("Because states and Indian tribes coexist as sovereign governments, they have no direct power to enforce their judgments in each other's jurisdictions."); 42 C.J.S. *Indians* § 65 ("[B]ecause states and Indian tribes coexist as sovereign governments, they have no direct power to enforce their judgments in each other's jurisdictions.").

227. Leeds, *Cross-Jurisdictional Recognition*, *supra* note 224, at 349 ("But the most striking result of the study is the extent to which states fail to recognize tribal court judgments even when required by federal law to do so.").

228. Leeds, *Cross-Jurisdictional Recognition*, *supra* note 224, at 336.

229. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 n.21 (1978).

230. *Standley v. Roberts*, 59 F. 836, 845 (8th Cir. 1894) ("[T]his court has held that the judgments of the courts of these nations, in cases within their jurisdiction, stand on the same footing with those of the courts of the territories of the Union and are entitled to the same faith and credit."); *Jim v. CIT Fin. Serv. Corp.*, 533 P.2d 751, 752 (N.M. 1975) ("[T]he laws of the Navajo Tribe of Indians are entitled by Federal Law, 28 U.S.C. § 1738, to full faith and credit in the Courts of New Mexico because the Navajo Nation is a 'territory' within the meaning of that statute."); *In re Adoption of Buehl*, 555 P.2d 1342 (Wash. 1976) ("Tribal court decrees are entitled to full faith and credit to the same extent as decrees of sister states.").

231. *Wilson v. Marchington*, 127 F.3d 805, 807 (9th Cir. 1997) ("We conclude that the principles of comity, not full faith and credit, govern whether a district court should recognize and enforce a tribal court judgment."); *Coeur d'Alene Tribe v. Johnson*, 405 P.3d 13, 17 (Idaho 2017) ("[W]e overrule the holding in *Sheppard* that tribal judgments are entitled to full faith and credit and adopt the reasoning of the Ninth Circuit in *Wilson* and hold that tribal

depending on the tribe.<sup>232</sup> Tribal courts typically apply a comity analysis when enforcing state court judgments.<sup>233</sup> Even well-intentioned efforts by both state and tribal courts to enforce the other's judgment may flounder due to subject matter jurisdiction issues.<sup>234</sup> Jurisdictional issues are foreseeable because tribal courts often lack jurisdiction over fee simple land within their reservations.<sup>235</sup> Thus, uncertainty is likely to surround the enforcement of a judgment involving Indian country.

#### 4. Criminal Jurisdiction

High crime rates deter business investment,<sup>236</sup> and Indian country often has high crime rates.<sup>237</sup> Jurisdiction is a major factor in Indian country's high crime rate.<sup>238</sup> Tribes generally lack criminal jurisdiction over non-Indians<sup>239</sup> but have exclusive jurisdiction over Indians for some crimes.<sup>240</sup> Meanwhile,

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court judgments are entitled to recognition and enforcement under principles of comity."); Mashantucket Pequot Gaming Enter. v. DiMasi, 25 Conn. L. Rptr. 474, 1999 WL 799526, at \*5 (Conn. Super. Ct. 1999) ("The judgment of the Tribal Court is, therefore, entitled to enforcement by this court under the principle of comity.").

232. 12 O.S. ch. 2 app., Rule 30(B) (1994), <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=93646> [<https://perma.cc/J39F-Q6WC>]; Leeds, *Cross-Jurisdictional Recognition*, *supra* note 224, at 336 n.133.

233. CANBY, NUTSHELL, *supra* note 172, at 262 ("[M]any tribal courts regularly give full effect to state court judgements, presumably also as a matter of comity.").

234. *See* 42 C.J.S. *Indians* § 65 (noting federal courts must relitigate tribal court judgements if the federal court finds the tribal court lacked jurisdiction over the case).

235. *See supra* Part IV, A, 1.

236. U.N. OFF. ON DRUGS & CRIME & THE LATIN AM. & THE CARIBBEAN REGION OF THE WORLD BANK, *CRIME, VIOLENCE, AND DEVELOPMENT: TRENDS, COSTS, AND POLICY OPTIONS IN THE CARIBBEAN I* (2007) ("Crime drives away investment, both foreign and domestic, and consequently slows growth."); Rachel Steiner-Dillon, *Crime Prevention for Economic Development: Lessons from Chicago and Los Angeles*, CHI. POL'Y REV. (Nov. 29, 2019), <http://chicagopolicyreview.org/2019/11/29/crime-prevention-for-economic-development-lessons-from-chicago-and-los-angeles/> [<https://perma.cc/KR3J-PM3P>] ("High and rising rates of crime are often cited as reasons for businesses not to locate to areas of concentrated poverty.").

237. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(5-6), 124 Stat. 2262 (stating that Congress has found elevated levels of crime involving Native Americans).

238. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(4)(B), 124 Stat. 2262; Adam Creppelle, *Tribal Courts, The Violence Against Women Act, And Supplemental Jurisdiction: Expanding Tribal Court Jurisdiction To Improve Public Safety In Indian Country*, 81 MONT. L. REV. 59, 61-62 (2020) [hereinafter Creppelle, *Tribal Courts*]; Adam Creppelle, *Shooting Down Oliphant: Self-Defense as an Answer to Crime in Indian Country*, 22 LEWIS & CLARK L. REV. 1283, 1316-17 (2018) [hereinafter Creppelle, *Shooting Down Oliphant*].

239. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

240. 18 U.S.C. § 1153 (2018); CANBY, NUTSHELL, *supra* note 172, at 190 ("The tribe has exclusive jurisdiction over non-major crimes committed by Indians against Indian in Indian

states have exclusive jurisdiction over crimes involving only non-Indians.<sup>241</sup> Plus, Indian country has a severe shortage of cops,<sup>242</sup> and there is debate over whether tribal police can arrest non-Indian offenders.<sup>243</sup> As a result, Indian country law enforcement depends upon state, federal, and tribal law enforcement.<sup>244</sup> Determining which cops to call requires discerning whether the perpetrator and victim are Indians or non-Indians as well as the type of offense and the status of the land where the crime was committed.<sup>245</sup> State and federal law enforcement are often over a hundred miles away from Indian country.<sup>246</sup> Businesses do not want to invest in jurisdictions where they cannot reliably call the police.

### *B. Land Status*

Businesses often require land, and land use is complicated when tribes are involved. Disputes over whether land qualifies as Indian country are not uncommon and can take years to resolve.<sup>247</sup> Adding further uncertainty, a recent Supreme Court decision has cast a shadow over the status of reservations for tribes federally recognized after 1934,<sup>248</sup> and the Department of Interior recently revoked a tribe's reservation.<sup>249</sup> Although tribes have the ability to purchase fee lands outside of their reservations, it is not clear whether tribes can legally sell their privately-owned fee land without federal

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country.”).

241. *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881).

242. Tribal Law and Order Act of 2010, Pub. L. No. 111–211, § 202(a)(3), 124 Stat. 2262.

243. Alex Treiger, *Thickening the Thin Blue Line in Indian Country: Affirming Tribal Authority to Arrest Non-Indians*, 44 AM. INDIAN L. REV. 163 (2019); Crepelle, *Shooting Down Oliphant*, *supra* note 238, at 1317.

244. Crepelle, *Tribal Courts*, *supra* note 238, at 6667.

245. ARVO Q. MIKKANEN, DEP'T OF JUST., INDIAN COUNTRY CRIMINAL JURISDICTION CHART (2010), <http://www.justice.gov/sites/default/files/usao-wdok/legacy/2014/03/25/Indian%20Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf> [<https://perma.cc/8ZUQ-WMCN>].

246. Crepelle, *Shooting Down Oliphant*, *supra* note 238, at 1320 (“Additionally the nearest state or federal courthouse is often over 100 miles from Indian country.”).

247. *Land Tenure Issues*, *supra* note 106 (“Jurisdictional challenges are common on checkerboard reservations, as different governing authorities – county, state, federal, and tribal governments for example – claim the authority to regulate, tax, or perform various activities within reservation borders.”).

248. *Carcieri v. Salazar*, 555 U.S. 379 (2009).

249. Rory Taylor, *Trump Administration Revokes Reservation Status for Mashpee Wampanoag Tribe Amid Coronavirus Crisis*, Vox (Apr. 2, 2020, 10:30 AM EDT), <https://www.vox.com/identities/2020/4/2/21204113/mashpee-wampanoag-tribe-trump-reservation-native-land> [<https://perma.cc/Y72Z-5M66>].

approval.<sup>250</sup> The impediment to tribal sales of their privately-owned land is a result of antiquated legislation,<sup>251</sup> nevertheless, it remains a part of the United States Code doing nothing more than creating “confusion and uncertainty for tribes and their business partners.”<sup>252</sup>

Land use in Indian country is further complicated by the General Allotment Act of 1887.<sup>253</sup> The purpose of allotment was to compel Indians to adopt white ways by flooding reservations with white settlers.<sup>254</sup> Allotment dispossessed tribes of over ninety million acres of land.<sup>255</sup> The land that remained under tribal control was often passed on as individual allotments. Each generation, the ownership interest further divides, resulting in extremely fractionated ownership.<sup>256</sup> Using fractionated land requires consent of multiple owners,<sup>257</sup> and there can be well over one hundred owners.<sup>258</sup> This often renders fractionated land economically useless.<sup>259</sup>

Zoning is important to businesses,<sup>260</sup> and zoning may be the trickiest

250. Mark A. Jarboe & Daniel B. Watts, *Can Indian Tribes Sell or Encumber Their Fee Lands Without Federal Approval?*, 0 AM. INDIAN L.J. 10, 24 (2012).

251. 25 U.S.C. § 177 (2018).

252. Jarboe & Watts, *supra* note 250, at 11.

253. General Allotment Act of Feb. 8, 1887, Pub. L. No. 49-105, ch. 119, 24 Stat. 388, *repealed by* Act of Nov. 7, 2000, Pub. L. No. 106-462, Title I, § 106(a)(1).

254. *Mattz v. Arnett*, 412 U.S. 481, 496 (1973) (“Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.”).

255. CANBY, NUTSHELL, *supra* note 172, at 23; Pommersheim, *Land into Trust*, *supra* note 106, at 522; *Land Tenure Issues*, *supra* note 106.

256. *Hodel v. Irving*, 481 U.S. 704, 707 (1987) (“Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew and grew over time.”).

257. 25 C.F.R. § 162.012(a)(1) (2020).

258. *See Hodel*, 481 U.S. at 707 (1987) (“The average tract has 196 owners and the average owner undivided interests in 14 tracts [on the Sisseton-Wahpeton Lake Traverse Reservation].”).

259. LAND BUY BACK PROGRAM FOR TRIBAL NATIONS, INITIAL IMPLEMENTATION PLAN, U.S. DEP’T OF INTERIOR 6-7 (2012), [https://www.doi.gov/sites/doi.gov/files/migrated/buybackprogram/about/upload/Initial-Implementation-Plan-508\\_v2.pdf](https://www.doi.gov/sites/doi.gov/files/migrated/buybackprogram/about/upload/Initial-Implementation-Plan-508_v2.pdf) [<https://perma.cc/94CC-K3JU>] (“As a result, highly-fractionated tracts lie idle, unable to be used for any economically beneficial purpose or for direct use by tribal nations for the benefit of their members.”); Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 731 (2003) (“Fractionation prevents efficient use of property, impedes individual and community economic development, and fundamentally bars realization of successful tribal self-determination and self-governance—the promotion of which is said to be the current national goal.”).

260. *Zoning Ordinances, INC.* (Feb. 6, 2020), <https://www.inc.com/encyclopedia/zoning-ordinances.html> [<https://perma.cc/6793-EFJK>] (“These ordinances have to be considered by entrepreneurs/business owners wishing to set up, expand, or relocate business establishments.”); Practical Law Real Estate, *Zoning and Land Use Law for Owners and*

issue for businesses operating on a reservation. Due to allotment, reservations are frequently speckled with non-Indian fee land, resulting in “checkerboarding.”<sup>261</sup> Tribes and the federal government zone trust land.<sup>262</sup> Tribes can also zone fee land owned by the tribe or Indians within a reservation.<sup>263</sup> However, non-Indian fee land within a reservation is typically under state zoning authority.<sup>264</sup> Tribes, nevertheless, can assert zoning authority over non-Indian fee land within a reservation if a *Montana* exception is satisfied, which essentially requires the land to retain its tribal characteristics.<sup>265</sup> The Supreme Court addressed zoning non-Indian fee land within reservations in 1989, but its opinion provided little help.<sup>266</sup>

In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,<sup>267</sup> the Court issued a confusing plurality opinion. Four Justices held that tribes could not zone non-Indian land within a reservation because affirming tribal zoning of non-Indian fee land would be too broad a reading

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*Developers: Overview* (2020) (“The ability to use a property for a particular purpose is a core issue for any real estate transaction or project. Zoning therefore is a vital part of the analysis that parties must undertake before proceeding with a deal.”).

261. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 502 (1979) (“In short, checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution.”).

262. Pamela R. Logsdon, *Jurisdiction to Regulate Land Uses in Indian Country: Basic Concepts and Recent Developments*, 33 URB. LAW. 765, 775 (2001) (“All that seems completely clear is that tribes have jurisdiction over all lands held in trust for their benefit by the federal government.”).

263. FED. RESERVE BANK OF MINNEAPOLIS CTR. FOR INDIAN COUNTY DEV., TRIBAL LEADERS HANDBOOK ON HOMEOWNERSHIP 80 (Patrice H. Kunesh ed., 2018) [hereinafter TRIBAL LEADERS HANDBOOK], [https://www.minneapolisfed.org/~media/files/community/in\\_diancountry/resources-education/cicd-tribal-leaders-handbook-on-homeownership.pdf?la=en](https://www.minneapolisfed.org/~media/files/community/in_diancountry/resources-education/cicd-tribal-leaders-handbook-on-homeownership.pdf?la=en) [<https://perma.cc/TQ9G-XHAH>] (“When owned by a tribe or individual within the boundaries of a reservation, fee lands are subject to tribal jurisdiction.”); Jessica A. Shoemaker, *Complexity’s Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 489 (2017) (“Property jurisdiction varies parcel by parcel depending on factors invisible to an outside observer, including the owner’s identity and the land’s legal tenure status.”).

264. See *supra* Part IV, A, 1.

265. 42 C.J.S. *Indians* § 75 (2020) (“In a reservation divided into an area closed to the public with little fee land and an area open to the public, a large portion of which is fee land held by nonmembers, the tribe may regulate land use in the closed area but not in the open area.”).

266. Logsdon, *supra* note 262, at 768 (“Unfortunately, the case failed to create any kind of clarity as to whether a state or a tribe has authority in a particular situation.”); Karl Newman, *Property Law: Zoning Indian Reservations—Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 1990 ANN. SURV. AM. L. 633, 634 (1992) (“[B]ecause *Brendale* is a plurality decision comprised of three widely divergent opinions, the issue of whether and when Indian tribes can zone nonmember owned land appears unresolved.”).

267. 492 U.S. 408 (1989).

of *Montana*.<sup>268</sup> These four Justices thought allowing tribes to zone based on *Montana* Prong Two “would be chaotic for landowners” because determining whether the tribe or state could zone the land would change depending on how the land was being used.<sup>269</sup> Two Justices believed tribal zoning power over fee lands should be based on the tribe’s power to exclude; that is, tribes can zone land only if they can exclude non-Indians from it.<sup>270</sup> These two Justices admitted their opinion produced no “bright-line rule.”<sup>271</sup> Three Justices thought *Montana* clearly allowed tribes to zone non-Indian fee land within reservations because “[i]t would be difficult to conceive of a power more central to ‘the economic security, or the health or welfare of the tribe,’ than the power to zone.”<sup>272</sup> These Justices believed allowing states to zone fee simple land while tribes zone trust land would produce a zoning arrangement that is “by its very nature [un]workable.”<sup>273</sup> None of the Justices who decided *Brendale* remain on the Court, so the lack of a clear rule plus an entirely new Court exacerbates the existing uncertainty over zoning authority.

### C. Federal Bureaucracy

Tribes are considered “domestic dependent nations” under federal law, and tribes have a trust relationship with the federal government.<sup>274</sup> In the name of protecting tribes, numerous federal regulations apply in Indian country that exist nowhere else in the United States.<sup>275</sup> A 1984 Presidential Commission described Indian country’s regulatory scheme as “[a] Byzantine system of overregulation [that] actually deters investment by raising costs, creating uncertainty, and undermining local initiative.”<sup>276</sup> Consequently, projects can take ten times longer to complete inside Indian country than outside of it.<sup>277</sup> Furthermore, failure to gain the Secretary of the Interior’s

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268. *Id.* at 428 (“Initially, we reject as overbroad the Ninth Circuit’s categorical acceptance of tribal zoning authority over lands within reservation boundaries.”).

269. *Id.* at 430.

270. *Id.* at 433 (Stevens, J., concurring) (“Thus, the proper resolution of these cases depends on the extent to which the Tribe’s virtually absolute power to exclude has been either diminished by federal statute or voluntarily surrendered by the Tribe itself.”).

271. *Id.* at 447 (Stevens, J., concurring).

272. *Id.* at 458 (Blackmun, J., dissenting).

273. *Id.* at 466 (Blackmun, J., dissenting).

274. Crepelle, *White Tape*, *supra* note 25.

275. *Id.*

276. REP. & RECOMMENDATIONS, *supra* note 35, at 31.

277. Crepelle, *White Tape*, *supra* note 25, at 104 nn.14–15. U.S. DEP’T OF INTERIOR BUREAU OF INDIAN AFFAIRS, TRANSCRIPT OF TRIBAL CONSULTATION, IDENTIFYING ECONOMIC PRIORITIES IN INDIAN COUNTRY, 5 (Aug. 17, 2017) (“When they’re drilling off reservation, it

approval prior to encumbering Indian lands for seven years or more renders a contract invalid,<sup>278</sup> and Secretarial approval may even be required for contracts that are only remotely connected to Indian land.<sup>279</sup> Businesses do not want to contact high ranking federal officials before building a hamburger stand.<sup>280</sup>

Trust land is the predominant land tenure regime in Indian country,<sup>281</sup> and trust land is not freely alienable.<sup>282</sup> Therefore, businesses that wish to operate on trust land must lease it.<sup>283</sup> Leasing trust land requires compliance with federal leasing regulations, and different federal regulations apply depending on the type of lease.<sup>284</sup> In order to obtain a business lease, the company must complete heaps of paperwork including “environmental and archeological reports, surveys, and site assessments” that are only applicable on federal and tribal land.<sup>285</sup> Recent reforms allow tribes to establish their own leasing regulations,<sup>286</sup> however, the Secretary of the Interior will not relinquish leasing control to a tribe unless the tribal regulations carbon copy the federal regulations.<sup>287</sup> Efforts have also been made to improve the

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takes them about four months to get all the permitting process off reservation. On reservation, it takes 31 months for no other reason than it’s our fault.”).

278. 25 U.S.C. § 81(b) (2018).

279. See 116 AM. JUR. *Trials* 395 (2010) (“Indeed, Interior Secretary approval is needed if an Indian tribe is one of the contracting parties and the contract is ‘relative to’ Indian lands.”).

280. Crepelle, *White Tape*, *supra* note 25, at 145.

281. TRIBAL LEADERS HANDBOOK, *supra* note 263, at 79.

282. Gover, *Indian Trust*, *supra* note 54, at 363 (noting conventional mortgages are not available on trust land due to constraints on alienation); Stacy L. Leeds, *Moving Toward Exclusive Tribal Autonomy over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439, 445 (2006) (“Lands that are held in trust are subject to federal restraints against alienation and encumbrances.”).

283. PROCEDURAL HANDBOOK: LEASING AND PERMITTING CHAPTER 1 – GENERAL INFORMATION, DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, DIV. OF REAL ESTATE SERV. 2 (2006), [https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Procedural-HB-Leasing-and-Permitting\\_Chapter-1-General-Information\\_OIMT.pdf](https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Procedural-HB-Leasing-and-Permitting_Chapter-1-General-Information_OIMT.pdf) [<https://perma.cc/4VZY-3U4H>] (“While there is no statutory requirement that Indian lands held in trust by the United States Government be leased, the Secretary of the Interior has a fiduciary obligation to ‘protect and preserve Indian trust assets from loss, damage, unlawful alienation, waste, and depletion,’ and to make decisions concerning trust lands that are in the best interest of the Indian landowner.”).

284. Crepelle, *White Tape*, *supra* note 25, at 114 (“The lease requirements are different for agricultural, residential, and wind and solar projects. The federal leasing regulations can vary from reservation to reservation.”).

285. 25 C.F.R. § 162.438(g) (2018).

286. 25 U.S.C. § 415(h) (2018).

287. 25 U.S.C. § 415(h)(3)(B)(i) (2018); Josephine Foo, *The HEARTH Act of 2012 and the Navajo Leasing Act of 2000: Financial and Self-Determination Issues*, at 2, AM. BAR ASS’N (Jan. 3, 2019), [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/nar/20190103-the-hearth-act-of-2012/](https://www.americanbar.org/groups/environment_energy_resources/publications/nar/20190103-the-hearth-act-of-2012/) [<https://perma.cc/CL64-CESW>]

process of obtaining rights of way in Indian country.<sup>288</sup> Nonetheless, one federal court expressed its displeasure with the new right of way regulations stating, “[T]he Final Rule will likely create far more confusion, chaos, and litigation than what the Department of the Interior ever contemplated.”<sup>289</sup>

Once a business obtains a lease, the business must obtain an Indian trader license.<sup>290</sup> Indian trader licenses were created over two hundred years ago<sup>291</sup> based on the notion that Indians were too incompetent to trade with white people.<sup>292</sup> Procuring the license requires the would-be licensee to prove she is morally fit to be in Indian country and has business experience, among other things.<sup>293</sup> If an individual opens more than one store within the same reservation, she must get a separate license for each store.<sup>294</sup> The federal government has the authority to set the price of goods sold by Indian traders.<sup>295</sup> It is not clear how often Indian trader regulations are enforced,<sup>296</sup>

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(“However, the HEARTH Act does not simply hand over tribal trust land lease approvals to tribes to administer as they will. HEARTH Act opt-in tribes are essentially required to adopt and maintain federal long-term Indian trust land management lease types, terms, and general processes as well as federal environmental protection priorities, rather than being able to freely devise land use processes pursuant to tribal priorities.”).

288. Kevin Washburn & Jody Cummings, *Explaining the Modernized Leasing and Right-of-Way Regulations for Indian Lands* 17 (Univ. N.M. Sch. of L. Research Paper No. 2017-10, 2017), [https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1554&context=law\\_facultyscholarship](https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1554&context=law_facultyscholarship) [<https://perma.cc/8U9H-R9Y4>].

289. *Id.* at 31–32.

290. 25 U.S.C. § 264 (2018); 25 C.F.R. § 140.3 (2020).

291. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, § 4, 1 Stat. 137, 138, *amended by* Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729 (codified as amended at 25 U.S.C. § 177 (2018)).

292. *Cent. Mach. Co. v. Ariz. Tax Comm’n*, 448 U.S. 160, 163 (1980) (internal citation omitted) (“In 1790, Congress passed a statute regulating the licensing of Indian traders. Ever since that time, the Federal Government has comprehensively regulated trade with Indians to prevent ‘fraud and imposition’ upon them.”); *Ewert v. Bluejacket*, 259 U.S. 129, 136 (1922) (“The purpose of the section clearly is to protect the inexperienced, dependent and improvident Indians from the avarice and cunning of unscrupulous men in official position and at the same time to prevent officials from being tempted, as they otherwise might be, to speculate on that inexperience or upon the necessities and weaknesses of these ‘Wards of the Nation.’”); *United States v. Hutto*, 256 U.S. 524, 528 (1921) (“The purpose was to protect the Indians from their own improvidence; relieve them from temptations due to possible cupidity on the part of persons coming into contact with them as representatives of the United States; and thus to maintain the honor and credit of the United States, rather than to subserve its pecuniary interest.”); *Ashcroft v. U.S. Dep’t of Interior*, 679 F.2d 196, 198 (9th Cir. 1982) (“The Indian Trader Statutes were enacted to protect the Indians from unethical traders’ exploitation of an essentially captive consumer market.”).

293. 25 C.F.R. § 140.9(a) (2020).

294. 25 C.F.R. § 140.14 (2020).

295. 25 C.F.R. § 140.22 (2020).

296. Matthew L.M. Fletcher & Leah K. Jurss, *Tribal Jurisdiction—A Historical Bargain*,

but failure to obtain an Indian trader license can result in the Bureau of Indian Affairs (BIA) shutting down the business<sup>297</sup> and forfeiting all merchandise on its premises.<sup>298</sup> No business wants this threat looming over it.

#### D. State Animosity

Tense tribal-state relations deter businesses from investing in Indian country. Although some states and tribes have amicable relations, states often attempt to undermine tribal self-governance and economic endeavors.<sup>299</sup> States successfully lobbied for legislation that has allowed them to control tribal gaming<sup>300</sup> and have refused to bargain with tribes in good faith.<sup>301</sup> States attempt to control tribal hunting and fishing businesses that take place exclusively on tribal land despite admitting tribal wildlife

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76 MD. L. REV. 595, 598 (2017) (“Indian trader statutes are still extant, though it is not clear if the United States continues to license traders in the twenty-first century.”).

297. 25 C.F.R. § 140.13 (2020).

298. 25 U.S.C. § 264 (2018); 25 C.F.R. § 140.3 (2020).

299. Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L.J. 115, 123 (2017) (“The states can usually impose their will indirectly on tribes, ignoring conflicting tribal taxation laws because the states control the tribe’s access to the stream of commerce.”); Annette Alvarez, *Native American Tribes and Economic Development*, URBANLAND (Apr. 19, 2011), <https://urbanland.uli.org/development-business/native-american-tribes-andeconomic-development/> [<https://perma.cc/P9ZX-7P5T>] (“An essential but misunderstood fact is that tribes are governments—sovereign governmental bodies that have jurisdiction over their lands.”); SUSAN JOHNSON ET AL., NAT’L CONF. OF ST. LEGISLATURES, GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES 1 (2009), [http://www.ncai.org/policy-issues/tribal-governance/state-tribal-relations/Govt\\_to\\_Govt\\_Models\\_of\\_Cooperation\\_Between\\_States\\_and\\_Tribes\\_2002.pdf](http://www.ncai.org/policy-issues/tribal-governance/state-tribal-relations/Govt_to_Govt_Models_of_Cooperation_Between_States_and_Tribes_2002.pdf) [<https://perma.cc/SX97-V7ZG>] (“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.”).

300. Justin Neel Baucom, *Bringing Down the House: As States Attempt to Curtail Indian Gaming, Have We Forgotten the Foundational Principles of Tribal Sovereignty*, 30 AM. INDIAN L. REV. 423, 427 (2006) (“Similar to the after effects of the *Worcester* decision, however, the states lobbied Congress to pass Indian gaming legislation to counteract the Supreme Court’s resolution of *Cabazon* in favor of tribal interests.”); Steven Andrew Light & Kathryn R.L. Rand, *The Hand That’s Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 DRAKE L. REV. 413, 420 (2009) (“*Cabazon*’s bottom line—that states were powerless to regulate Indian gaming—catalyzed Indian gaming opponents who forcefully lobbied Congress to authorize state regulation.”); Fletcher, *Bringing Balance*, *supra* note 124, at 50. (“States and local governments responded to *Cabazon Band* by urging Congress to enact legislation to regulate Indian gaming. . . .”).

301. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 52 (1996); Devin O’Connor, *Oklahoma Gov. Kevin Stitt Says Commercial Casinos Better for State, Tribes Question His Ancestry*, CASINO.ORG (Mar. 2, 2020, 11:22 AM), <https://www.casino.org/news/oklahoma-gov-kevin-stitt-says-commercial-casinos-better-for-state/> [<https://perma.cc/6G2V-HUHK>].

management has “not had an adverse impact on fish and wildlife outside the Reservation.”<sup>302</sup> States have attempted to blockade reservations over legalized cannabis while blissfully allowing their citizens to engage in cannabis tourism outside of Indian country.<sup>303</sup> States have even intentionally impeded tribal law enforcement efforts.<sup>304</sup> When states and tribes fight over regulatory authority, this creates uncertainty that prevents investment in Indian country.<sup>305</sup>

State taxes absolutely kill private investment in Indian country.<sup>306</sup> States cannot tax a tribe or its citizens within the tribe’s reservation,<sup>307</sup> but states can tax transactions involving non-Indians that occur in Indian

302. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 342 (1983).

303. Crepelle, *Decolonizing*, *supra* note 1, at 451 (“South Dakota has made no such effort to impede the flow of South Dakotans to states or countries that have legalized marijuana consumption.”).

304. *Cabazon Band of Mission Indians v. Smith*, 249 F.3d 1101, 1103 (9th Cir. 2001) (describing Riverside County’s attempt to prohibit tribal police from using emergency light bars on police cars); *Smith v. Parker*, 996 F. Supp. 2d 815, 833 (D. Neb.), *aff’d*, 774 F.3d 1166 (8th Cir. 2014), *aff’d sub nom. Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (“Thurston County refused to join any cross-deputization efforts despite the willingness of the Nebraska State Patrol to participate in such an agreement” with the Omaha Indian Tribe.); U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-23, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: ADDITIONAL OUTREACH AND NOTIFICATION OF TRIBES ABOUT OFFENDERS WHO ARE RELEASED FROM PRISON NEEDED 35 (2014) (“[S]tates are not consistently notifying these tribes about registered sex offenders who plan to live, work, or attend school on tribal lands upon release from state prison—similar to the problem we discussed earlier that tribes that retained their implementation authority experienced.”).

305. Crepelle, *Decolonizing*, *supra* note 1, at 451 (“State hostility toward tribes creates an uncertain regulatory environment for investors and drives businesses away from Indian country.”).

306. Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1001 (2020) [hereinafter Crepelle, *Taxes, Theft, and Indian Tribes*]; KELLY S. CROMAN & JONATHAN B. TAYLOR, WHY BEGGAR THY INDIAN NEIGHBOR? THE CASE FOR TRIBAL PRIMACY IN TAXATION IN INDIAN COUNTRY 8 (2016) [hereinafter CROMAN & TAYLOR, WHY BEGGAR], [http://nni.arizona.edu/application/files/8914/6254/9090/2016\\_Croman\\_why\\_beggar\\_thy\\_Indian\\_neighb\\_or.pdf](http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighb_or.pdf) [<https://perma.cc/82UJ-LX68>] (arguing that “[e]conomic development that should occur does not” as a result of the confusing status of Indian tax law).

307. *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (“Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country.”); *Okla. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (“But our cases make clear that a tribal member need not live on a formal reservation to be outside the State’s taxing jurisdiction; it is enough that the member live in ‘Indian country.’ Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.”); *McClanahan v. Ariz. Tax Comm’n*, 411 U.S. 164, 165 (1973).

country.<sup>308</sup> States take the tax revenue generated in Indian country and spend it on projects outside of Indian country.<sup>309</sup> State taxes essentially prohibit tribes from levying their own taxes because the tribal tax on top of the state tax would equate to double taxation and make doing business in Indian country unduly expensive.<sup>310</sup> The specter of double taxation prevents business development in Indian country.<sup>311</sup> But when tribes forego tax revenue, tribes lack the funds to provide the infrastructure and governmental services that businesses need.<sup>312</sup> Moreover, businesses operating in Indian country are required to keep records of the transactions between the tribe's citizens and others then report this information to the state.<sup>313</sup> This

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308. *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 185–87 (1989) (affirming a New Mexico tax on reservation oil production by a non-Indian company, though New Mexico provided less than \$90,000 worth of services but collected over \$2,000,000 in taxes during the oil production); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (“We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.”); *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046, 1050 (W.D. Wash. 2018) (describing states’ power to tax the activities of non-Indians on Indian reservations).

309. BUREAU OF INDIAN AFFAIRS, DEP’T OF THE INTERIOR, ADDRESSING THE HARMS OF DUAL TAXATION IN INDIAN COUNTRY THROUGH MODERNIZING THE INDIAN TRADER REGULATIONS 1 (2017), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/39%20-%20Ewiiapaayp%20Band%20of%20Kumeyaay%20Indians%204%20of%204.pdf> [<https://perma.cc/C6F6-QFSJ>] [hereinafter ADDRESSING THE HARMS] (“To add insult to injury, reservation economies are funneling millions of tax dollars into treasuries of state and local governments who spend the funds outside of Indian country.”); REP. & RECOMMENDATIONS, *supra* note 35, at 41 (“State and local governments frequently impose additional regulation and taxation of business activity on Indian reservations, in excess of the public services which they provide.”).

310. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 116 (2005) (Ginsburg, J., dissenting) (“Effectively double-taxed, the Nation Station must operate as an unprofitable venture, or not at all.”); ADDRESSING THE HARMS, *supra* note 309, at 1 (describing how state taxation discourages tribal governments from levying sales taxes).

311. Crepelle, *Taxes, Theft, and Indian Tribes*, *supra* note 306, at 1000; CROMAN & TAYLOR, WHY BEGGAR, *supra* note 306, at 17–18 (“Companies, behaving rationally, flee Indian country” because of double taxation); ADDRESSING THE HARMS, *supra* note 309, at 12 (“Even then, the threat of double taxation still scares off investors.”).

312. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985) (“The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs.”); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5 (1982) (quoting Judge McKay’s lower court opinion that “[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers . . .”); Crepelle, *Taxes, Theft, and Indian Tribes*, *supra* note 306, at 1020.

313. *Dep’t of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73

requirement exists only in Indian country and is something businesses do not want to deal with.

### *E. Lack of Infrastructure*

Businesses require physical infrastructure,<sup>314</sup> and Indian country's infrastructure is often in shambles.<sup>315</sup> Over ninety percent of roads maintained by tribes and three-quarters of roads maintained by the BIA are unpaved;<sup>316</sup> hence, Indian country's roads are considered among the worst in the United States.<sup>317</sup> Bad roads are particularly problematic for tribes because Indian country is often geographically isolated.<sup>318</sup> Troubles caused

(1994); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 160–61 (1980); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976).

314. Charles L. Carlyle, *Native American Reservations Need Basic Infrastructure to Be Economically Sustainable*, PHOENIX BUS. J. (Oct. 18, 2016), <https://www.bizjournals.com/phoenix/news/2016/10/18/native-american-reservations-basic-infrastructure.html> [<https://perma.cc/3HK8-UM2V>] (“That’s because government officials and policymakers know that sufficient infrastructure has always been a key factor in attracting and retaining business interests.”); Robert Puentes, *Why Infrastructure Matters: Rotten Roads, Bum Economy*, BROOKINGS (Jan. 20, 2015), <https://www.brookings.edu/opinions/why-infrastructure-matters-rotten-roads-bum-economy/> [<https://perma.cc/7P49-BEVA>].

315. U.S. COMM’N ON CIVIL RIGHTS, *BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS* 169 (2018), <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf> [<https://perma.cc/ZZ74-AR9Z>] [hereinafter *BROKEN PROMISES*] (“Unfortunately, with dangerous conditions due to impassible roads and a lack of public transportation options, Native Americans encounter issues traveling to and from a job, traveling to school, accessing health care and emergency services, and even accessing the ballot box, all of which create barriers to economic development and growth in Indian Country.”); Seth Tupper, *Where Water is Life, Many on the Pine Ridge Reservation Go Thirsty*, HIGHCOUNTRYNEWS (May 27, 2019), <https://www.hcn.org/articles/tribal-affairs-where-water-is-life-those-on-the-pine-ridge-reservation-go-thirsty> [<https://perma.cc/28PK-39LE>] (“Historically, a dearth of water and related infrastructure have contributed to persistent poverty on the reservations.”).

316. *BROKEN PROMISES*, *supra* note 315, at 168.

317. *Enhancing Tribal Self-Governance and Safety of Indian Roads: Hearing Before the S. Comm. on Indian Affairs*, 116th Cong. 21 (2019) (statement of Hon. Joe Garcia, Head Councilman, Ohkay Owingeh Pueblo Council) (“Altogether, the 42,000 miles of roads in Indian Country are still among the most underdeveloped, unsafe, and poorly maintained road networks in the nation. . . .”).

318. Crepelle, *Tribal Lending and Tribal Sovereignty*, *supra* note 103, at 43 (“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, <http://www.msnbc.com/interactives/geography-of-poverty/nw.html> [<https://perma.cc/UNG8-NAKE>] (“Native populations and reservations are most often geographically and economically isolated and are among the poorest communities in the country.”); Nolan Smith-Kaprosy et al., *An Overview of American Indians and Alaska Natives in the Context of Social Security and Supplemental*

by isolation and poor roads are compounded by the fact that buildings on many reservations lack physical addresses.<sup>319</sup> Poor quality roads also present a safety hazard.<sup>320</sup> If it is difficult to get to a reservation, it will be difficult to conduct business on the reservation.

Roads and distance are not the only infrastructure obstacles in Indian country. Safe running water is something businesses expect; however, forty-eight percent of tribal homes lack access to basic clean water supplies, compared to less than one percent of the United States' population.<sup>321</sup> Fourteen percent of Indian country housing lacks electricity, compared to roughly one percent throughout the United States.<sup>322</sup> Businesses are growing increasingly dependent on digital technology, and over a third of Indian country residents lack access to broadband.<sup>323</sup> Without adequate

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*Security Income*, 72 SOC. SEC. BULL. 4, 5 (2012), <https://www.ssa.gov/policy/docs/ssb/v72n4/v72n4p1.html> [<https://perma.cc/KJB7-DZYE>] (“US policy created the reservation system that forced many American Indians onto rural, isolated Western lands.”).

319. Camila Domonoske, *Many Native IDs Won't Be Accepted At North Dakota Polling Places*, NPR (Oct. 13, 2018, 10:46 AM ET), <https://www.npr.org/2018/10/13/657125819/m-any-native-ids-wont-be-accepted-at-north-dakota-polling-places> [<https://perma.cc/XCT4-KCLF>] (“Many Native American reservations, however, do not use physical street addresses.”); Katie Reilly, *North Dakota's Voter ID Law Disproportionately Affects Native Americans. Here's How They're Mobilizing to Fight It*, TIME (Nov. 2, 2018, 6:46 PM), <https://time.com/5442434/north-dakota-voting-law-native-american-activism/> [<https://perma.cc/AKW9-ZB8B>] (“Semans thinks the law — which requires voters to present identification that displays a street address and disproportionately affects Native Americans on reservations, where street addresses are not common. . . .”); Matt Vasilogambros, *For Some Native Americans, No Home Address Might Mean No Voting*, SALT LAKE TRIB. (Oct. 6, 2019, 6:54 PM), <https://www.sltrib.com/news/2019/10/06/some-native-americans-no/> [<https://perma.cc/CTR6-BP7M>] (“The Navajo Nation has 50,000 unaddressed homes and businesses, creating complications for hundreds of thousands of people.”).

320. *Enhancing Tribal Self-Governance and Safety of Indian Roads: Hearing Before the S. Comm. on Indian Affairs*, 116th Cong. 21 (2019) (statement of Hon. Joe Garcia, Head Councilman, Ohkay Owingeh Pueblo Council); NAT'L CONG. OF AM. INDIANS, TRIBES AND TRANSPORTATION-POLICY CHALLENGES AND OPPORTUNITIES 3, [http://civilrightsdocs.info/pdf/reports/Tribes\\_and\\_Transportation\\_Report.pdf](http://civilrightsdocs.info/pdf/reports/Tribes_and_Transportation_Report.pdf) [<https://perma.cc/2UBE-SZF4>] (last visited July 1, 2020) (“These inferior road conditions explain why American Indians have the highest rates of pedestrian injury and vehicle deaths per capita of any racial or ethnic group in the United States.”).

321. DEMOCRATIC STAFF OF THE H. COMM. ON NAT. RES., WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED ACCESS TO WATER FOR NATIVE FAMILIES 1 (2016), <http://blackfeetnation.com/wp-content/uploads/2016/10/House-NRC-Water-Report-Minority-10-10-16.pdf> [<https://perma.cc/S3U3-5L6N>] (“According to data from the Indian Health Service (IHS), nearly half (48%) of all homes on tribal land lack access to adequate drinking water, sewage, or solid waste disposal facilities.”).

322. BROKEN PROMISES, *supra* note 315, at 171 (“Although energy resources are rich in Indian Country, an estimated 14 percent of households in Indian Country have no access to electricity—ten times higher than the national average.”).

323. FED. COMM'NS COMM'N, FCC 18-10, 2018 BROADBAND DEPLOYMENT REPORT 22

infrastructure, Indian country will remain unattractive to private enterprise.

### *F. Self-Inflicted Tribal Troubles*

Tribal governments also do things that repel businesses. Many tribes have not adopted corporations codes,<sup>324</sup> and some tribal corporations codes require aspiring entrepreneurs to jump through obscene levels of bureaucracy.<sup>325</sup> In some tribes, starting a business can require over one hundred steps and take over a year.<sup>326</sup> Plus, many tribes have not published their laws.<sup>327</sup> While federal law prevents tribes from taking private property without providing just compensation,<sup>328</sup> most tribes do not have contracts clause type provisions, so businesses are afraid that tribes will use their sovereignty to alter contracts.<sup>329</sup> This is particularly true when tribal

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(2018), <https://www.fcc.gov/document/fcc-releases-2018-broadband-deployment-report> [<https://perma.cc/Q5F8-G6SU>]; Hansi Lo Wang, *Native Americans On Tribal Land Are 'The Least Connected' To High-Speed Internet*, NPR (Dec. 6, 2018, 6:42 PM), <https://www.npr.org/2018/12/06/673364305/native-americans-on-tribal-land-are-the-least-connected-to-high-speed-internet> [<https://perma.cc/3X67-WKW4>].

324. 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.”); Stephen Cornell, Professor, Univ. of Ariz., Speech at the Montana Indian Business Conference: Tribal-citizen Entrepreneurship: What Does It Mean for Indian Country, and How Can Tribes Support It? (Feb. 2, 2006) (summary available at <https://www.minneapolisfed.org/article/2006/tribalcitizen-entrepreneurship-what-does-it-mean-for-indian-country-and-how-can-tribes-support-it> [<https://perma.cc/UB7A-WJC2>]) [hereinafter Cornell, *Tribal-citizen Entrepreneurship*] (“Many reservations have no commercial codes.”).

325. Crepelle, *Decolonizing*, *supra* note 1, at 451 (“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.”).

326. Cornell, *Tribal-citizen Entrepreneurship*, *supra* note 324 (“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.”).

327. *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (“Although some modern tribal courts ‘mirror American courts’ and ‘are guided by written codes, rules, procedures, and guidelines,’ tribal law is still frequently unwritten. . . .”); *DolgenCorp, Inc. v. Miss. Band of Choctaw Indians*, 732 F.3d 409, 422–233 (5th Cir. 2013) (Smith, J., dissenting) (“The elements of Doe’s claims under Indian tribal law are unknown to DolgenCorp and may very well be undiscoverable by it.”); Kelly Kunsch, *A Legal Practitioner’s Guide to Indian and Tribal Law Research*, 2 AM. INDIAN L. REV. 484, 508 (2014) [hereinafter Kunsch, *A Legal Practitioner’s Guide*] (“Published print copies of tribal codes have long been rarities.”).

328. 25 U.S.C. § 1302(a)(5) (2018).

329. The Contracts Clause provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts. U.S. CONST. art. I, § 10, cl. 6. Crepelle & Block, *supra* note 23,

governments lack separation of powers, which is not uncommon.<sup>330</sup> Furthermore, many tribal court judges do not possess law degrees.<sup>331</sup> While studies consistently show that tribal courts treat non-Indians fairly,<sup>332</sup> businesses expect to have their cases heard by law-trained, licensed attorneys.

## V. RECOMMENDATIONS

Expanding tribal sovereignty is the key to creating private sector economies in Indian country. Indeed, increased sovereignty is “the only policy” that has been indisputably proven to enhance tribal economies.<sup>333</sup> Congress has enacted several laws designed to further tribal economic development.<sup>334</sup> Congress has also enacted laws designed to strengthen and clarify tribal court jurisdiction.<sup>335</sup> Accordingly, Congress should enact legislation to reaffirm tribal sovereignty over economic matters in Indian country.<sup>336</sup>

This section proposes the Indian Country Business Certainty Act (BCA). The BCA will subject individuals and entities to tribal court jurisdiction when commercial gain is a substantial factor in their entering into Indian country. Tribal jurisdiction under the BCA will cover all persons employed by a party who has entered a commercial contract with a tribe. The Act will make consent a basis to tribal court jurisdiction; thus, forum selection and arbitration clauses involving Indian country will operate the same as these clauses do outside of Indian country. The Act simplifies Indian country’s regulatory regime by allowing tribes to opt out of federal regulations that are only applicable to Indian country. Finally, the Act imposes baseline requirements on tribes who wish to implement the BCA. Tribal court judgments rendered in compliance with the BCA will receive full faith and credit. The remainder of this section explains how the BCA

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at 330 (“Most tribal constitutions do not contain provisions prohibiting the tribal government from violating contracts.”); Miller, *Sovereign Resilience*, *supra* note 1, at 1370.

330. REP. & RECOMMENDATIONS, *supra* note 35, at 29.

331. Fletcher, *supra* note 113, at 825.

332. Crepelle, *Tribal Courts*, *supra* note 238, at 83.

333. Joseph Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self Rule 1* (Native Issues Rsch. Symp., Harvard Univ., Working Paper No. RWP04-016, 2004).

334. 25 U.S.C. § 3601 (2018); 25 U.S.C. § 1451 (2018); 25 U.S.C. § 2702(1) (2018); 25 U.S.C. § 4351(3) (2018).

335. 25 U.S.C. § 1304 (2018); 25 U.S.C. § 1301(2) (2018); 25 U.S.C. § 1911(a) (2018).

336. While Congress’s plenary power rests on dubious moral and legal grounds, Congress does have unquestioned constitutional power to regulate commerce with the Indian tribes. U.S. CONST. art. 1, § 8, cl. 3.

will work and provides alternative paths to improve the business climate in Indian country.

### *A. Simplifying Jurisdiction*

The BCA takes two approaches to simplify tribal civil jurisdiction. First, the BCA makes consent an express basis for tribal court jurisdiction; hence, contracts naming tribal courts as the venue will no longer be challenged for lack of jurisdiction. Thus, the BCA makes clear that forum selection and arbitration clauses pertaining to Indian country contracts are treated with the same weight as forum selection clauses in other jurisdictions. This will enable Indian country litigation to proceed at a much faster rate. Second, the BCA will recognize tribes' civil jurisdiction over all entities within Indian country if commercial gain is a substantial factor in the person or entity being within Indian country.

The substantial factor test requires two elements: (1) the harm would not have occurred *but for* the action, and (2) the action must be significant enough for a reasonable person to identify the action as a cause of the harm.<sup>337</sup> Thus, commercial gain would not have to be the only reason why an entity was within Indian country—it would only have to be a substantial factor for a party's presence within Indian country.<sup>338</sup> Although the substantial factor test has been criticized in the torts context,<sup>339</sup> the test is still widely used to add clarity to the *but for* test.<sup>340</sup> The substantial factor test

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337. 3 AM. L. TORTS § 11:2 (2020) (“The substantial factor test of legal causation generally requires both but for causation, that an injury would not have occurred but for the tortious act, and that the tortious act was so important in bringing about the injury that reasonable individuals would regard it as a cause and attach responsibility to it.”); 8 BUS. & COMM. LITIG. FED. COURTS § 85:46 (4th ed. 2020) (“Jurisdictions that have adopted the substantial factor test generally agree that the substantial factor analysis *subsumes* the but-for test.”).

338. 63 AM. JUR. 2D *Products Liability* § 27 (2d ed. 2020) (“The concern in applying the substantial factor test is not which of the many contributing causes are most substantial; rather, the concern is whether each contributing cause, standing alone, is a substantial factor in causing the alleged injury.”); 3 AM. L. TORTS § 11:2 (2020) (“For purposes of a negligence claim, the law does not require an act to be the exclusive or even the primary cause of an injury in order for that act to be considered the proximate cause of the injury. Rather, it need only be a substantial cause of the injury.”).

339. DAN B. DOBBS ET AL., *DOBBS' LAW OF TORTS* § 189 (2d ed. 2020) (“The substantial factor test is not so much a test as an incantation. It points neither to any reasoning nor to any facts that will assist courts or lawyers in resolving the question of causation.”).

340. AM. L. PROD. LIAB. § 4:4 (3d ed. 2020) (“Often when ‘substantial factor’ language is used, it functions to clarify when to apply the ‘but for’ test of causation; that is, if one’s negligence is so slight as not to be a substantial factor, then even though it may have been a ‘but for’ cause of the harm, it is not significant enough to result in legal responsibility for that harm.”).

can also bring clarity to the *Montana* test and reduce the number of challenges to tribal court jurisdiction.

For example, a business that contracts with a tribe or its citizens to conduct business within Indian country for commercial gain would now indisputably be subject to tribal jurisdiction under *Montana* Prong One. As applied to *Strate*, tribal court jurisdiction would exist over the non-Indian company because it entered a contract with the tribe and commercial gain was a substantial factor in the company's presence on the reservation.<sup>341</sup> Tribal court jurisdiction would exist in *Plains Commerce* because the company performed a land sale with an Indian-owned company within a reservation.<sup>342</sup> Commercial gain was a substantial factor in the contract. In *Dollar General*, the company opened a store on a reservation.<sup>343</sup> Commercial gain was a substantial factor in the company opening the store, so tribal civil jurisdiction would exist over Dollar General. Furthermore, the tribal court would have had jurisdiction over the non-Indian employee who allegedly molested the Choctaw child because the manager was employed by Dollar General to perform work on the reservation.<sup>344</sup> The BCA's substantial factor test essentially says businesses cannot profit from tribes without following tribal law.<sup>345</sup>

Making commercial gain a substantial factor in tribal civil jurisdiction addresses many concerns over tribal court jurisdiction. One concern is that tribal authority over everyone in Indian country would impede state law enforcement, but making commercial gain a substantial factor for tribal civil jurisdiction would not impact state law enforcement on reservations.<sup>346</sup> Thus, the tribal court would lack civil jurisdiction over state police officers under the facts in *Nevada v. Hicks*.<sup>347</sup> Some have fears that tribal courts and laws are strange and believe subjecting everyone to tribal court jurisdiction would be unfair.<sup>348</sup> Using commercial gain as the key factor in the tribal civil

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341. *Strate* 520 U.S. at 443 (1997).

342. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 321 (2008).

343. *Dolgenercorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

344. *Id.*

345. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137–38 (1982) (“They benefit from the provision of police protection and other governmental services, as well as from ‘the advantages of a civilized society’ that are assured by the existence of tribal government.”).

346. *Nevada v. Hicks*, 533 U.S. 353, 365 (2001).

347. *Id.*

348. *Id.* at 384 (Souter, J., concurring) (“Although some modern tribal courts ‘mirror American courts’ and ‘are guided by written codes, rules, procedures, and guidelines,’ tribal law is still frequently unwritten. . . .”); *Dolgenercorp, Inc. v. Miss. Band of Choctaw Indians*, 732 F.3d 409, 422–23 (5th Cir. 2013) (Smith, J., dissenting) (“The elements of Doe’s claims under Indian tribal law are unknown to Dolgenercorp and may very well be undiscoverable by

jurisdiction analysis “protects” people simply visiting reservations for recreational purposes.<sup>349</sup>

Besides, the argument for “protecting” people from tribal courts is incredibly weak. Tribes have exercised jurisdiction over non-Indians from 1492 through most of the United States history.<sup>350</sup> In fact, federal courts during the early 1900s recognized tribes’ civil jurisdiction over non-Indians.<sup>351</sup> As recently as 1985, the Supreme Court acknowledged that no tribe ever relinquished civil jurisdiction over non-Indians.<sup>352</sup> The Court’s

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it.”).

349. Gaming would be considered recreational. *Stevensyre, Study to Examine Impact of Casino Gambling Among Older Adults in Surrounding Communities*, GERONTOLOGY INST. BLOG (Sept. 5, 2019), <http://blogs.umb.edu/gerontologyinstitute/2019/09/05/study-to-examine-impact-of-casino-gambling-among-older-adults-in-surrounding-communities/> [<https://perma.cc/FQ8W-MSWF>] (“Previous research indicates casinos may offer some benefits to older adults by providing social recreational activity.”). Similarly, individuals who go on corporate golf outings or hunting trips on tribal land would not be liable under the substantial factor test because they are not seeking to profit from the tribe or its citizens. Tribal courts already have exclusive jurisdiction over Indian country suits against Indians or tribes anyway. See Williams, *supra* note 166.

350. *Nat’l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 854 (1985) (“First, although Congress’ decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian Country supported the holding in *Oliphant*, there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation.”); MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* 349 (2016) (“Moreover, federal officials were aware that the Cherokee courts asserted jurisdiction over non-Indians, and in at least one instance in 1824 turned over an American citizen to the Cherokees for prosecution.”); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1086 n.400 (2015) (“It also ignores historical evidence suggesting that the federal government not only permitted, but oversaw, tribal court jurisdiction exercising tribal sovereignty over non-Natives.”); Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 531 (2021) [hereinafter Crepelle, *Lies, Damn Lies*]; Sarah Deer & Mary Kathryn Nagle, *Return to Worcester: Dollar General and the Restoration of Tribal Jurisdiction to Protect Native Women and Children*, 41 HARV. J. L. & GENDER 179 (2018) [hereinafter Deer & Nagle, *Return to Worcester*].

351. *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Maxey v. Wright*, 54 S.W. 807, 809–810 (1900) (“We fully agree with these opinions, and hold, therefore, that unless since the ratification of the treaty of 1856 there has been a treaty entered into, or an act of congress passed, repealing it, the Creek Nation had the power to impose this condition or occupation tax, if it may be so called, upon attorneys at law (white men) residing and practicing their profession in the Indian Territory.”); *Buster v. Wright*, 135 F. 947, 951–52 (8th Cir. 1905) (“But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances.”).

352. *Nat’l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, n.17 (1985).

decisions restricting tribal jurisdiction over non-Indians are loaded with factual errors and outright racist reasoning.<sup>353</sup> Tribes have all powers that they have not surrendered,<sup>354</sup> therefore, tribal civil jurisdiction over non-Indians should exist under settled law. Furthermore, territorial jurisdiction is the baseline jurisdictional rule in the United States and around the world,<sup>355</sup> so it is unclear why people within Indian country should be able to claim exemption from tribal jurisdiction. Crafting a bright line rule for tribal jurisdiction adds certainty and will facilitate private sector growth in Indian country.<sup>356</sup>

### *B. Regulatory Clarity*

The BCA simplifies regulation in Indian country by making tribal laws the exclusive regulatory force within Indian country.<sup>357</sup> If a federal law does not apply to state land, the federal government should not be able to impose the regulation on tribal land. This disposes of the heaps of federal red tape that do nothing but complicate life for Indian country private investors.<sup>358</sup> Many Indian country federal regulations were designed for racist and paternalistic reasons over two centuries ago; moreover, many of these regulations are of questionable constitutionality.<sup>359</sup> Repealing federal regulations allows tribal law to govern tribal lands. This furthers the United States' policy of tribal self-determination and also makes Indian country a more attractive venue for private investment.

Likewise, the BCA withdraws state regulatory authority from Indian

353. ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 97–113 (2005); Crepelle, *Lies, Damn Lies*, *supra* note 350; Deer & Nagle, *Return to Worcester*, *supra* note 350, at 218.

354. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“But until Congress acts, the tribes retain their existing sovereign powers.”); *United States v. Winans*, 198 U.S. 371, 381 (1905) (“[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted.”); Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 104 (2017).

355. Crepelle, *Tribal Courts*, *supra* note 238, at 64.

356. Brief, Retail Litigation Ctr., *supra* note 56, at 14–15 (“*Amicus* RLC urges this Court to adopt a bright-line standard for measuring such consent, so that its members will be able to evaluate in advance the merits and risks of expanding into tribal areas.”); Brief, S.D. Bankers Ass’n, *supra* note 56, at 2 (“In a legal landscape already difficult for outsiders to navigate, the decision below injects greater uncertainty as to the rules of the game and increases the risks of doing business with tribes or tribal members who reside in Indian country. The net result of this uncertainty and risk will be further economic hardship for those living on and near Indian reservations.”).

357. Crepelle, *White Tape*, *supra* note 25.

358. Crepelle, *White Tape*, *supra* note 25, at 113–119.

359. Crepelle, *White Tape*, *supra* note 25, at 119–26.

country because states are not supposed to be involved in Indian affairs. The Constitution made Indian commercial regulation an exclusively federal and tribal matter,<sup>360</sup> and early Supreme Court precedent crafted the bright line rule that state power stops where the reservation begins.<sup>361</sup> This position was so entrenched that even the Confederate States of America never attempted to tax Indian reservations.<sup>362</sup> In fact, many states expressly agreed to never assess taxes within Indian country as a requirement of statehood.<sup>363</sup> Even the federal government took the position that states could not tax tribes until the 1970s.<sup>364</sup> Prohibiting state regulation of Indian country immediately lowers the cost of doing business in Indian country, and it also reduces recordkeeping requirements for businesses.<sup>365</sup> Allowing tribes to be the sole regulator of Indian country removes regulatory uncertainty.

### *C. Prerequisites*

In order to implement the BCA, tribes will be required to meet certain standards. One is that tribal courts must be independent branches of government; that is, tribal courts must not be influenced by tribal politics. The BCA will require tribal judges presiding over BCA cases to possess a law degree and be licensed to practice law. The law license must require the holder to pass a written examination and be monitored by a governing body.<sup>366</sup> Tribes implementing the BCA must have a contracts clause in their constitution or tribal code.

The BCA's requirements have recent precedent in the 2013 Violence Against Women Reauthorization Act's (VAWA) special domestic violence criminal jurisdiction provisions.<sup>367</sup> VAWA authorized tribes to prosecute non-Indians for dating violence, domestic violence, and protective order

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360. Crepelle, *Taxes, Theft, and Indian Tribes*, *supra* note 306, at 1002–03.

361. Crepelle, *Taxes, Theft, and Indian Tribes*, *supra* note 306, at 1003.

362. Crepelle, *Taxes, Theft, and Indian Tribes*, *supra* note 306, at 1003.

363. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 149, n.23 (1980) (listing cases involving state enabling acts that prohibit state authority over Indian lands).

364. Crepelle, *Taxes, Theft, and Indian Tribes*, *supra* note 306, at Part II.

365. *Dep't of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994).

366. The COVID-19 pandemic is changing perceptions on the importance of passing a bar exam. See Stephanie Francis Ward, *Jurisdictions with COVID-19-related Diploma Privilege are Going Back to Bar Exam Admissions*, ABA J. (Dec. 10, 2020, 3:16 PM CST), <https://www.abajournal.com/web/article/jurisdictions-with-covid-related-diploma-privilege-going-back-to-bar-exam-admissions> [<https://perma.cc/2BD5-UNNC>]. If states start eliminating the bar and granting diploma privilege, diploma privilege will suffice under the BCA.

367. 25 U.S.C. § 1304 (2018).

violations.<sup>368</sup> The non-Indian must have a prior connection to the victim or tribe,<sup>369</sup> and the prosecuting tribe must have law-trained judges as well as publicly available laws.<sup>370</sup> VAWA also mandates that states and tribes grant full faith and credit to validly issued protective orders.<sup>371</sup> By all accounts, VAWA has been a tremendous success.<sup>372</sup> Tribes have asserted jurisdiction over several non-Indians and not a single non-Indian has alleged unfair treatment by a tribe.<sup>373</sup> Moreover, tribes that have implemented VAWA report increased public safety.<sup>374</sup> Efforts are being made to further expand tribal criminal jurisdiction.<sup>375</sup> What VAWA has done for tribal public safety, the BCA can do for tribal economic development.

Like VAWA, the BCA is not perfect and will likely be subjected to similar critiques. One is that mandating law-trained judges and the publication of laws as a prerequisite for jurisdiction over non-Indians is likely to be viewed as a colonial imposition.<sup>376</sup> Cost is the other critique of

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368. *Id.* § 1304(c).

369. *Id.* § 1304(b)(4)(B).

370. *Id.* § 1304(d)(2).

371. 18 U.S.C. § 2265(a) (2018).

372. NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 2 (2018), [http://www.ncai.org/resources/ncai-publications/SDVCJ\\_5\\_Year\\_Report.pdf](http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf) [<https://perma.cc/A3MK-84BH>] [hereinafter VAWA SDVCJ FIVE-YEAR REPORT]; *Reauthorization of the Violence Against Women Act: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 116th Cong. 2 (2019) (written testimony of Sarah Deer, Professor, Univ. of Kan.); *Udall Joins Senate Democrats to Introduce VAWA Reauthorization Bill with Strong Tribal Provisions to Address Epidemic of Missing and Murdered Indigenous Women*, U.S. S. COMM. ON INDIAN AFFS. (Nov. 13, 2019), <https://www.indian.senate.gov/news/press-release/photo-udall-joins-senate-democrats-introduce-vawa-reauthorization-bill-strong> [<https://perma.cc/NP67-EZVL>].

373. VAWA SDVCJ FIVE-YEAR REPORT, *supra* note 372, at 7–8.

374. *Id.* at 1 (“By exercising SDVCJ, many communities have increased safety and justice for victims who had previously seen little of either.”); Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1605 (2016) [hereinafter Riley, *Crime*].

375. Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. (2019). On March 17<sup>th</sup>, the House of Representatives passed the Violence Against Women Reauthorization Act of 2021. *Statement by President Biden on the Passage of the Violence Against Women Reauthorization Act of 2021 in the House of Representatives*, White House (March 17, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/17/statement-by-president-biden-on-the-passage-of-the-violence-against-women-reauthorization-act-of-2021-in-the-house-of-representatives/> [<https://perma.cc/PJ7F-JGMC>].

376. Jessica Allison, *Beyond VAWA: Protecting Native Women from Sexual Violence Within Existing Tribal Jurisdictional Structures*, 90 U. COLO. L. REV. 225, 246 (2019) (“VAWA 2013 is an important tool in a post-colonial world, but it does not meet this standard because it completely neglects tribal culture and values in favor of following Anglo-American court processes and procedures.”); Mary K. Mullen, *The Violence Against Women Act: A*

VAWA because many tribes cannot afford to hire law-trained judges.<sup>377</sup> However, these critiques are less valid for the BCA than for VAWA. VAWA deals with criminal justice, and every government should have the ability to protect their citizens from *all* violent criminals.<sup>378</sup> While improved public safety does have economic benefits, VAWA is unlikely to pay for itself. Things are different with the BCA.

Although the BCA's requirements will be imposed by Congress, the requirements are actually for tribes' benefit in this case. Businesses are leery of Indian country's legal landscape, and fulfilling congressional mandates signals to industry that tribes have legitimate legal systems.<sup>379</sup> Plus, businesses are not going to invest in Indian country until tribes take these actions anyway. Tribal courts must be independent in order to attract investment;<sup>380</sup> likewise, tribes must have law-trained, licensed attorneys as

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*Double-Edged 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.").

377. VAWA SDVCJ FIVE-YEAR REPORT, *supra* note 372, at 29 ("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 ET AL., TRIBAL LAW & POLICY INST., TRIBAL LEGAL CODE RESOURCE: TRIBAL LAWS IMPLEMENTING TLOA ENHANCED SENTENCING AND VAWA ENHANCED JURISDICTION 21 (2015), <http://www.tribal-institute.org/download/TLOA-VAWA-Guide.pdf> [<https://perma.cc/XDM4-9KDB>] ("Complying with all of these requirements will be expensive, both in time and in money."); Riley, *Crime*, *supra* note 374, at 1631 ("Costs stand as the greatest barrier to making any kind of meaningful change in criminal justice in Indian country. Tribes contemplating VAWA report that a lack of resources is the primary reason they have not implemented the laws.").

378. Ari Amehae, "Somebody's Daughter" MMIW Documentary Premiere Highlights Native American 2020 Presidential Forum, NATIVE NEWS ONLINE (Jan. 16, 2020) <https://native-newsonline.net/currents/somebodys-daughter-mmiw-documentary-premiere-highlights-native-american-2020-presidential-forum/> [<https://perma.cc/VH4Z-UFCH>] (statement of Chairman David Sickey of the Coshatta Tribe of Louisiana) ("Violence does not discriminate, and neither should our laws.").

379. Crepelle, *Decolonizing*, *supra* note 1, at 478.

380. Miriam Jorgensen & Jonathan B. Taylor, *What Determines Indian Economic Success? Evidence from Tribal and Individual Indian Enterprises*, at 5 (2000), <https://hpaied.org/publications/what-determines-indian-economic-success-evidence-tribal-and-individual-indian> [<https://perma.cc/6JSB-LR2E>] ("Thus, all else equal, tribes that implement a separation of powers that leaves their dispute resolution mechanisms outside political influence enjoy a

judges if they want private investment. Indeed, tribes have proposed creating an intertribal business court to increase investor confidence.<sup>381</sup> Businesses also want to know the rules of the game before they invest in a jurisdiction, so tribes need to publish their laws.<sup>382</sup> In the same vein, tribes have also lost business deals because they lack contract clauses.<sup>383</sup> Accordingly, the BCA's requirements are merely turning a de facto measure into a de jure matter. These requirements make Indian country a much more appealing commercial destination, so the BCA has the potential to more than pay for itself.

## VI. CONCLUSION

Tribal economies have come a long way since the 1970s. Many tribes are now major employers.<sup>384</sup> Nevertheless, Indian country still suffers from a dearth of small businesses, so money immediately leaves the reservation.<sup>385</sup> Tribes need small businesses so money can circulate within the community. This will help create jobs and generate tax revenue. While some tribes are able to fund their governments through tribally owned enterprises, tribes need tax revenue to truly operate as governments.<sup>386</sup> Tribes will not be

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5 percent lower level of unemployment than tribes that do not."); Terry L. Anderson, *Zuckerberg Meets Native American Poverty*, THE HILL (July 24, 2017, 5:40 PM), <https://thehill.com/blogs/pundits-blog/energy-environment/343503-zuckerberg-meets-native-american-poverty> [<https://perma.cc/5X9H-V7HA>] ("Tribes without independent judiciaries have per capita income 30 percent below those with and growth rates 20 percent below."); Miller, *Sovereign Resilience*, *supra* note 1, at 1371.

381. Miller, *Inter-Tribal and International Treaties*, *supra* note 324, at 1371.

382. Miller, *Sovereign Resilience*, *supra* note 1, at 1370 ("The value of publicly available codes is that businesses need certainty and knowledge of the laws of a region before they can decide to invest or start a business in the area.").

383. Crepelle, *Decolonizing*, *supra* note 1, at 452–53; Miller, *Sovereign Resilience*, *supra* note 1, at 1370 ("There are some well-known examples of this issue, and this undoubtedly has stopped or stalled many investors' interest in Indian country.").

384. ATKINSON & NILLES, *HANDBOOK*, *supra* note 136, at I-1 ("In many parts of the country, Tribes are becoming regional economic and political power houses. They are the largest employer in many counties."); Fletcher & Jurss, *supra* note 296, at 594 ("Modern Indian nations are serious economic players in many parts of the United States and are often the largest and most stable employers in large swaths of regional territories.").

385. CROMAN & TAYLOR, *WHY BEGGAR*, *supra* note 306, at 15 ("Given that Indian country economies are predominantly small, undiversified, and remote, virtually all their households and businesses turn to the off-reservation economy for goods and services.").

386. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985) ("The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs.").

respected as nations until tribes operate as nations.<sup>387</sup>

No country can operate as a nation under the constraints foisted upon tribes. Federal Indian law must be reformed in order for tribes to create functioning economies. Businesses will not invest in Indian country until the jurisdictional kaleidoscope shakes out and the federal regulations are repealed. Congress must take action to liberate tribes from the antiquated legal regime that kills reservation business development. The BCA can deliver Indian country from the Byzantine system that has impoverished tribes for generations. Once allowed to operate as nations, tribes will be able to craft rules that entice business development in Indian country. Tribes had vibrant economies for thousands of years and can rebuild those economies if they are freed from the economic mires of federal Indian law.

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387. Raymond D. Austin, Comments on Proposed Navajo Nation Council Resolution, Legislation No. 0103-15, at 2 (Mar. 28, 2015), <http://www.navajocourts.org/PressReleases/0103-15-Austin-comment.pdf> [<https://perma.cc/3S8S-RUR2>] (“Senator Inouye would say to tribal leaders: ‘If you want to be respected and treated like sovereign nations, then act like nations.’”).