TRIBAL LAW'S INDIAN LAW PROBLEM: HOW SUPREME COURT JURISPRUDENCE UNDERMINES THE DEVELOPMENT OF TRIBAL LAW AND TRIBAL ECONOMIES

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Reservation Indians[1] are the poorest people in the United States;[2] in fact, Indian country[3] is commonly likened to the third world.[4] Houses in Indian country often lack access to water[5] and electricity.[6] Reservation unemployment rates consistently linger at fifty percent.[7] Many believe Indian country is lawless,[8] so significant natural resource endowments go undeveloped.[9] Reservation poverty is frequently attributed to Indian culture; that is, Indian tribes are traditionally non-commercial and egalitarian.[10] However, this is a colonial myth. Reservations are poor

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[1] "Indian" is the term used in this paper. It is the proper legal term. It is also the preferred term of many tribes. *E.g.*, Mississippi Band of Choctaw Indians, Poarch Band of Creek Indians, Jena Band of Choctaw Indians.

[2] *Unemployment on Indian Reservations at Fifty Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affs.*, 111th Cong. 1-2 (2010) [hereinafter *Unemployment Hearing*] (statement of Hon. Byron L. Dorgan, Chairman, S. Comm. on Indian Affs.).

[3] 18 U.S.C. § 1151 (2018).

[4] Harlan McKosato, *Fighting Third-World Conditions for N.M. Tribes*, INDIAN COUNTRY TODAY (July 7, 2015), http://indiancountrytoday.com/archive/fighting-third-world-conditions-for-nm-tribes?redir=1 [https://perma.cc/U36C-XJ9T].

[5] Democratic Staff of H. Comm. on Nat. Res., 114th Cong., Water Delayed is Water Denied: How Congress has Blocked Access to Water for Native Families (2016) ("Over a half million people - nearly 48% of tribal homes - in Native communities across the United States do not have access to reliable water sources, clean drinking water, or basic sanitation.").

[6] *Energy and Minerals*, NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/policy-issues/land-natural-resources/energy-and-minerals [https://perma.cc/XXD2-PJT5] (last visited Feb. 20, 2021) ("Many tribal homes lack access to electricity and affordable heating sources.").

[7] *Unemployment Hearing*, *supra* note 2, at 1 (statement of Hon. Byron L. Dorgan, Chairman, S. Comm. on Indian Affs.).

[8] AMNESTY INT'L USA, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA, 8 (2007) ("The US federal government has created a complex interrelation between these three jurisdictions that undermines equality before the law and often allows perpetrators to evade justice. In some cases this has created areas of effective lawlessness which encourages violence.").

[9] U.S. Gov't Accountability Off., GAO-15-502, Indian Energy Development: Poor Management by BIA has Hindered Energy Development on Indian Lands, 1 (2015) (noting Indian energy resources "remain largely undeveloped.").

[10] Adam Crepelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. C.R. & SOC. JUST.

because they are trapped in an antiquated and oppressive federal regime.[11] This regime limits tribal jurisdiction over non-Indians and creates a vexing legal climate that is antithetical to economic development.

The Supreme Court's 2020 decision in *McGirt v. Oklahoma* illustrates the confusing state of tribal law.[12] The ruling held the Muscogee Reservation, and by implication the other reservations encompassing eastern Oklahoma, had never been disestablished.[13] In so holding, the jurisdictional rules in eastern Oklahoma were cast into confusion.[14] Chief Justice Roberts lamented the ramifications in dissent:

> State and tribal authority are also transformed. As to the State, its authority is clouded in significant respects when land is designated a reservation. Under our precedents, for example, state regulation of even non-Indians is preempted if it runs afoul of federal Indian policy and tribal sovereignty based on a nebulous balancing test. This test lacks any "rigid rule"; it instead calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," contemplated in light of the "broad policies that underlie" relevant treaties and statutes and "notions of sovereignty that have developed from historical traditions of tribal independence." This test mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all.[15]

Chief Justice Roberts is correct on the law; however, he misses the point. The source of uncertainty is federal Indian law—not tribal law. By limiting tribal sovereignty on tribal lands, *the Court* has created legal ambiguity. Ending the uncertainty Chief Justice Roberts bemoans is simply a matter of allowing tribes to implement their own laws and apply their laws to all persons on their land as tribes did for millennia.

315, 335 (2017) ("Myths, such as those that the Amerindians were limited to wandering hunter-gatherer societies, still persist today.").

[11] Adam Crepelle, *White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self-Government*, 54 U. MICH. J.L. REFORM 563, 569 (2021) [hereinafter Crepelle, *White Tape*]; Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTREPRENEURSHIP & L. 129, 131 (2019) [hereinafter Crepelle, *Decolonizing*].

[12] McGirt v. Oklahoma, 140 S. Ct. 2452 (2016).

[13] *Id.* at 2482 (Roberts, C.J., dissenting).

[14] Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. 2049, 2094 (2021) ("Complex issues of Indian law and tribal versus state sovereignty will have to be addressed, and the uncertainty of this new situation can cause confusion and create complex new issues.").

[15] *McGirt*, 140 S. Ct. at 2501 (Roberts, C.J., dissenting) (citations omitted).

Indians participated in a free market economic system centuries before European arrival.[16] Free market exchanges require well-established rules,[17] and indigenous nations were governed by laws.[18] Contrary to popular belief, Indians had well-established property rights in both movable and immovable property. All of an Indian's personal property was privately owned.[19] Rights in land were respected as long as land remained in use;[20] in fact, even nomadic Plains Indians recognized land rights if crops had been cultivated.[21] Moreover, individuals acquired property rights in improvements to land such as crop houses,[22] fishing

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[16] Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 780 (2001) ("In one sense, Indian people operated under the purest of capitalist systems in that there was very little governmental control over the freedom of individuals to engage in whatever type or amount of economic activity they wished.") [hereinafter Miller, *Economic Development*]; Terry Anderson & Dominic Parker, *Un-American Reservations*, PROP. & ENV'T RSCH. CTR. (Feb. 24, 2011), https://www.perc.org/2011/02/24/un-american-reservations/ [https://perma.cc/M9DG-KHS8] ("But before Indians ever made contact with modern European cultures, they employed market principles—most notably, property rights and trade.").

[17] Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law without Government*, 9 J. LIBERTARIAN STUD. 1, 1 (1989) [hereinafter Benson, *Enforcement*] ("Even strongly market-oriented economists typically note that the market can function effectively only within a system of well-defined and enforced private property rights and that government is therefore needed to establish and enforce these 'rules of the game.'").

[18] Crepelle, *Decolonizing*, *supra* note 11, at 135.

[19] Bruce L. Benson, *An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary Indian Law*, 5 REV. OF AUSTRIAN ECON. 41, 50 (1991) [hereinafter Benson, *Primitive Law*] ("A canoe owner had exclusive rights of use of the canoe."); Crepelle & Block, *supra* note 10, at 338 ("Outside of earthen property, Amerindians privately owned all of their possessions."); Miller, *Economic Development*, *supra* note 16, at 773 ("Of course, all Indians privately owned their personal property such as their animals, clothing, cooking utensils, housing, tools, weapons and any goods they produced.").

[20] Crepelle & Block, *supra* note 10, at 337 ("The Indians who cultivated the land maintained their usufructuary rights as long as they continued to work the land.").

[21] Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1573 (2001) ("Societies whose members ranged over vast territories were the least likely to recognize property rights in land, although even these tribes recognized property rights in cultivated lands.").

[22] Miller, *Economic Development*, *supra* note 16, at 769 ("The people of the Creek and Cherokee Tribes from the Southeast farmed their own plots and put the harvested crops into their own privately owned storehouses.").

platforms,[23] clam gardens,[24] flower gardens,[25] and irrigation canals.[26] Indians could also sell and rent land.[27] Property rights were respected because they incentivized production.[28]

Private property rights in tangible objects were far from the only private laws tribes possessed. Individual Indians held intellectual property rights to songs, spells, dances, and images.[29] In some instances, a mother would require her children to purchase the right to use images she possessed.[30] Additionally, virtually all rights were enforced through personal actions.[31] Tribes recognized the torts of trespass[32] and property damage.[33] Tribes also recognized negligence actions, such as holding private prop-

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[23] Robert J. Miller, *Sovereign Resilience: Reviving Private-Sector Economic Institutions in Indian Country*, 2018 BYU L. REV. 1331, 1344 (2019) [hereinafter Miller, *Sovereign Resilience*] ("Columbia River salmon fishing sites of man-made wooden platforms or well-located rocks were individually and family-owned properties that were passed down by established inheritance principles.").

[24] Anderson & Parker, *supra* note 16 ("They also had property rights to 'clam gardens' created by removing rocks on sandy beaches to make more room for clams.").

[25] *Id.* ("Similarly in eastern Indian tribes, which practiced sedentary agriculture requiring long-term investment in cultivation, private garden plots were common."); Russel Barsh & Madrona Murphy, *Coast Salish Camas Cultivation*, HISTORYLINK.ORG (Apr. 26, 2016), https://historylink.org/File/11220 [https://perma.cc/H3WD-6MPR] ("Gardens were privately owned and processed camas was an important item of trade.").

[26] Miller, *Economic Development*, *supra* note 16, at 769 (noting the Cherokee and Creek held crops in "privately owned storehouses.").

[27] Benson, *Primitive Law*, *supra* note 19, at 51 ("However, he could sell a temporary right of use to a second party if he wished."); Crepelle & Block, *supra* note 10, at 338.

[28] Benson, *Primitive Law*, *supra* note 19, at 54 ("For one thing, these California Indians were ' . . . a busy and creative people . . . [and] poverty was not found here.' If incentives were in place to induce "busy and creative" behavior it is likely that individuals and their private property rights were quite well protected."); Crepelle, *Decolonizing*, *supra* note 11, at 423; Crepelle & Block, *supra* note 10, at 339 ("Plains Indians would mark their arrows so hunters could identify their kills.").

[29] Crepelle, *Decolonizing*, *supra* note 11, at 422; Robert H. Lowie, *Incorporeal Property in Primitive Society*, 37 YALE L.J. 551, 555 (1928) ("First of all, the buyers obtained the right to perform a specific dance . . . .").

[30] Lowie, *supra* note 29, at 558 ("Greybull... had once acquired the painting privilege from his own mother, paying her an ermine shirt, a horse, quilts, and money. He sold the right to Plenty-coups for four horses.").

[31] Benson, *Enforcement*, *supra* note 17, at 9 ("Since there was no formalized social unit, all offenses were against the person (torts).").

[32] Benson, *Primitive Law*, *supra* note 19, at 53-54 (discussing a feud over use of privately beachfront property among the Yurok).

[33] *Id.* at 50 ("If someone used a canoe without permission, or in some way misused or harmed the canoe, the owner could collect damages.").

erty owners liable for personal injuries arising from slip and falls on their land.[34] Exchange occurred through consensual contractual relationships,[35] and tribes developed secured transactions laws to help protect contract rights.[36] Violations of person, property, or contract could be settled through compensation.[37]

In addition to laws, tribes developed infrastructure and institutions to facilitate commerce. Tribes built roads to ease the flow of goods and for ceremonial purposes.[38] Likewise, rivers played a major role in pre-contact commerce in the Americas.[39] Exchange did not occur exclusively by barter in indigenous America; rather, goods and services were also purchased with currencies such as wampum, dentalia shells, turquoise,[40] and feathers.[41] Some indigenous currencies, particularly wampum, even

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[34] E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS 54 (1954) ("[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 him from injury.").

[35] Benson, *Enforcement*, *supra* note 17, at 12 ("In the process, the arrangements may have been improved upon and become more formal (contractual) and effective.").

[36] *See* Crepelle, *Decolonizing*, *supra* note 11, at 419 ("Tribes also developed laws to facilitate commerce that among other things, enabled individuals to purchase items on credit.").

[37] Benson, *Enforcement*, *supra* note 17, at 9 ("Every invasion of person or property could be valued in terms of property, however, and each required exact compensation.").

[38] Blake De Pastino, *Ceremonial 'Axis' Road Discovered in Heart of Ancient City of Cahokia*, W. DIGS (Dec. 31, 2015), http://westerndigs.org/ceremonial-axis-road-discovered-in-heart-of-ancient-city-of-cahokia/ [https://perma.cc/W99U-YYCV] ("The road, dubbed the Rattlesnake Causeway, is an elevated embankment about 18 meters wide that stretches from Cahokia's Grand Plaza south through the center of the city . . . "); Tom Magnuson, *Trails and Trading Routes*, NCPEDIA (Jan. 01, 2007), https://www.ncpedia.org/history/colonial/trade-routes [https://perma.cc/8NRP-Q4SN] ("Long before Europeans showed up, American Indians maintained extensive networks of trading paths.").

[39] David Dary, *Oklahoma Rivers Were Early Means of Transport, Trade*, The Norman Transcript, (Oct. 10, 2014), https://www.normantranscript.com/news/oklahoma-rivers-were-early-means-of-transport-trade/article_c5f2044b-ddc7-5332-8b5c-dda1b9bc4e78.html ("From before the arrival of the first Europeans the Arkansas River was used as a major avenue of commerce. Indians traversed the river and its tributaries in a variety of boats carrying trading goods or going to hunting grounds.").

[40] Miller, *Sovereign Resilience*, *supra* note 23, at 1354.

[41] Saba Naseem, *The Evolution of Money, From Feathers to Credit Cards*, SMITHSONIAN MAG. (July 15, 2015), https://www.smithsonianmag.com/smithsonian-institution/evolution-money-feathers-credit-cards-180955602/, [https://perma.cc/8AGE-DJUJ] ("It was ille-

suffered from inflation.[42] Not only did tribes have currencies, tribes had institutions that functioned like fractional reserve banking[43] and charged interest on loans.[44] Tribes also used standardized measurement systems.[45] Goods were often sold with warranties.[46] Disputes were settled in judicial proceedings.[47]

Well-established commercial laws and institutions enabled goods to flow across the Americas despite the dog being the only pack animal prior to 1492.[48] Shark teeth from the oceans reached the middle of the present-day United States over a thousand years ago.[49] Obsidian from the Northwestern United States reached the present-day state of Mississip-

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gal to kill the bird, but its feathers were once used as currency, usually to purchase gold.").

[42] Jeff Desjardins, *The History of Money in America: From Beads to Virtual Currency*, VISUAL CAPITALIST (June 06, 2016), https://www.visualcapitalist.com/the-history-of-money-in-america-from-beads-to-virtual-currency/ [https://perma.cc/YK3C-T75S] ("As an interesting side note, wampum had tremendous inflation issues."); *Native American Money: Native American Money Was Evidence of Sophisticated Trade Among Tribes and Colonists*, INDIANS.ORG, http://indians.org/articles/native-american-money.html [https://perma.cc/8F6P-M8JB] ("Wampum, the Native American money that became the most famous form of currency developed by American Indians eventually fell into disuse, initially among the colonists, because of inflation.").

[43] D. Bruce Johnsen, *The Potlatch as Fractional Reserve Banking, in* UNLOCKING THE WEALTH OF INDIAN NATIONS 61 (Terry Anderson ed. 2016).

[44] Miller, *Sovereign Resilience*, *supra* note 19, at 1354 ("Some native peoples extended credit, engaged in lending currencies and goods, and charged interest on these loans.").

[45] *Id.* at 1353 ("Some Indian businesspeople and the regional trade fairs used standardized measurements and had well-established rules.").

[46] *Id.* at 1353-54 ("Some Indians even gave guarantees on goods.").

[47] Benson, *Primitive Law*, *supra* note 19, at 51 ("These Indians, nonetheless, had a well-developed system of private judging.").

[48] Miller, *Economic Development*, *supra* note 16, at 788 ("In fact, the dog was the only pack animal Indians had until Spanish horses spread across North America."); Magnuson, *supra* note 38 ("Men, women, boys, and girls all served as porters, because the Indians around the South did not have draft animals like horses or mules."); *Native Americans: Prehistoric: Woodland: Economy: Trade*, ILL. STATE MUSEUM (2000), http://www.museum.state.il.us/muslink/nat_amer/pre/htmls/w_trade.html [https://perma.cc/7DP6-8CL6] ("Like their ancestors, Woodland people walked everywhere they went, except for trips along streams and rivers when they may have used dugout canoes.").

[49] *Investigators: Laura Kozuch*, GREATER CAHOKIA ARCHAEOLOGY: 21ST CENTURY INQUIRIES INTO ANCIENT AM., http://www.cahokia.illinois.edu/investigators/kozuch.html [https://perma.cc/8BYZ-HT3U] (last visited Feb. 20, 2021).

pi.[50] Quinoa from the southeastern United States travelled as far north as present-day Ontario.[51] Cacao beans made their way from Central America to the Four Corners region of the United States.[52] Seashells from the Gulf of Mexico reached the Great Plains and Southwestern United States.[53] Shells from the Pacific Ocean reached the contemporary state of Missouri by the year 350 A.D.[54] Copper from Lake Superior was transported to Florida.[55] The Huron would regularly embark on trade missions over a thousand miles from Huronia.[56] These great journeys often led to great destinations.

Commerce did not simply occur by chance meetings; instead, indigenous trade occurred at economic centers and trading fairs. Between 1050 and 1250 A.D, Cahokia, near contemporary St. Louis, was larger than many European cities of the era.[57] The city covered six square miles[58] and contained an earthwork structure larger than the Great Pyramid of Giza.[59] The population was composed of people indigenous to the

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[50] Zoe McDonald, *The Mystery of Winterville Mounds,* UNCONQUERED & UNCONQUERABLE: PART I MISS.'S INDIANS 80, 83 (2016), https://issuu.com/meekschool/docs/chickasawnation_1_2016_web/83 [https://perma.cc/UYZ6-5QNZ].

[51] *See* Jason Daley, *3000-Year-Old Quinoa Found in Ontario*, SMITHSONIAN MAG.: SMART NEWS (Jan. 23, 2019), https://www.smithsonianmag.com/smart-news/3000-year-old-quinoa-found-ontario-180971330/ [https://perma.cc/42A4-HQNH].

[52] Wynne Parry, *Sweet Trading: Chocolate May Have Linked Prehistoric Civilizations*, LIVE SCI. (Apr. 1, 2011), https://www.livescience.com/13533-prehistoric-chocolate-trade-cacao-chaco-canyon-puebloans.html [https://perma.cc/83D4-XVD9].

[53] Miller, *Economic Development*, *supra* note 16, at 787 n.97.

[54] *Intertribal Trade*, TRAILTRIBES.ORG, https://trailtribes.org/kniferiver/intertribal-trade.htm [https://perma.cc/XWY2-QCJJ] (last visited Feb. 20, 2021) ("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.").

[55] GEORGE T. HUNT, THE WARS OF THE IROQUOIS: A STUDY IN INTERTRIBAL TRADE RELATIONS 17 (3d ed. 1960) ("Fontaneda found copper, probably from Lake Superior, in Florida.").

[56] *Id.* at 61 ("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 letter being delivered to Three Rivers from the north.").

[57] Owen Jarus, *Cahokia: North America's First City*, LIVE SCI. (Jan. 12, 2018), https://www.livescience.com/22737-cahokia.html [https://perma.cc/U7UY-SM3H].

[58] *Id.*

[59] Grant Delin & Karen Wright, *Uncovering America's Pyramid Builders*, DISCOVER MAG. (Feb. 20, 2021), https://www.discovermagazine.com/the-sciences/uncovering-americas-pyramid-builders [https://perma.cc/YDP7-BF2R] ("Monks Mound is bigger than any of the three great pyramids at Giza outside Cairo.").

region as well as immigrants from many distant regions such as the Gulf Coast.[60] Vast amounts of intercultural exchange led North America's indigenous inhabitants to become multilingual.[61] Furthermore, tribes developed languages to facilitate trade with diverse peoples.[62] Other trade centers existed before European contact including Chaco Canyon,[63] The Dalles,[64] and the Mandan Villages.[65] Extensive markets enabled some tribes to specialize in manufacturing[66] and individual Indians to specialize in occupations,[67] including as middlemen in deals.[68]

Tribes well understood market forces, so tribes had no difficulty trading with newly arrived Europeans.[69] Indeed, the desire to acquire European goods was a major reason Indians permitted embryonic European settlements to exist.[70] Tribes rapidly absorbed European items into

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[60] Jarus, *supra* note 57 ("Recent research shows that many of the people who lived at Cahokia were immigrants who came from across the Midwest, possibly traveling from as far away as the Great Lakes and Gulf Coast, a study of their teeth shows.").

[61] See 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, 172 (2018) [hereinafter Standing Rock in the Swamp] ("The Houma certainly would have spoken Mobilian as well as Choctaw, Chickasaw, and other languages used by tribes throughout the southeastern United States.").

[62] Crepelle, *Decolonizing*, *supra* note 11, at 418 ("Tribes developed trade languages in order to enable exchange with diverse peoples.").

[63] *New Mexico: Chaco Culture National Historical Park*, NAT'L PARK SERV. (Aug. 7, 2017), https://www.nps.gov/articles/chaco.htm [https://perma.cc/DJ9C-CDSV].

[64] Alexander Ross, *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 visited Feb. 20, 2021).

[65] *Mandan*, NAT'L PARK SERV. (June 22, 2020), https://www.nps.gov/knri/learn/historyculture/mandan.htm [https://perma.cc/TE43-X5VF].

[66] Hunt, *supra* note 55, at 18 ("There were evidently tribes who did nothing but manufacture even in that early day.").

[67] Crepelle, *Decolonizing*, *supra* note 11, at 422 ("Individual Indians would specialize in their fields of work including horse training, manufacturing, and medicine.").

[68] Miller, *Sovereign Resilience*, *supra* note 23 at 1354 (n.19) ("Many Indians and tribal governments also understood the economic value of gaining monopolies, controlling trade routes, and becoming the middlemen in commercial transactions.").

[69] Crepelle, *White Tape*, *supra* note 11, at 564-65.

[70] Crepelle, *Decolonizing*, *supra* note 11, at 421 ("Tribes embraced the opportunity to trade with Europeans, and the ability to obtain European wares was a primary reason that tribes allowed the fledging European outposts to exist.").

their cultures,[71] and many societies transformed by incorporating European goods.[72] For example, acquisition of the gun led some tribes to abandon the bow and arrow completely by the early 1700s.[73] Tribes even integrated firearms into their traditional ceremonies.[74] In order to obtain guns, tribes discontinued their traditional economic pursuits and started enslaving other tribes, as this was currency Europeans desired for arms.[75] Tribes also developed new laws to help prevent the overhunting of beaver in response to the European fur trade.[76] Tribal economies ingested European goods so efficiently that Indians usually encountered European goods before seeing a European.[77]

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[71] Hunt, *supra* note 55, at 19 ("The native who had known and used the keen steel tools of the white man was unlikely to renounce them and was shortly unable to do so, so swiftly did the skills of the Stone Age vanish.").

[72] Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009, 1029-30 (2007) ("Many tribes pride themselves on their ability to adapt: the Navajos developed a thriving weaving industry using wool from sheep brought over by Europeans, the Plains Indians incorporated European horses into their culture, and the Choctaw claim that if the Europeans 'had brought aluminum foil with them Choctaws would have been cooking with it while the other tribes were still regarding it with suspicion.'"); Shane Lief, *Singing, Shaking, and Parading at the Birth of New Orleans*, 28 JAZZ ARCHIVIST 15, 18 (2015) (noting Jesuit missionary Father Pierre de Charlevoix description of the Tunica Chief he encountered in the early 1700s as "dressed in the French fashion [and] carries on trade with the French, supplying them with horses and poultry, and is very expert at business . . . He has long since stopped wearing Indian clothes, and takes great pride in always appearing well-dressed." (internal quotation marks omitted)); Miller, *Economic Development*, *supra* note 16, at 788 ("Tribes and individual Indians had no problem incorporating newly arrived Europeans into their trading networks.").

[73] Adam Crepelle, *Shooting Down Oliphant: Self-Defense as An Answer to Crime in Indian Country*, 22 LEWIS & CLARK L. REV. 1283, 1310 (2018) ("Guns became so essential to some tribes that they forgot how to manufacture and hunt with bows and arrows by the early 1700s.").

[74] *Id.* ("Many tribes also utilized firearms for ceremonial purposes.").

[75] DAVID J. SILVERMAN, THUNDERSTICKS: FIREARMS AND THE VIOLENT TRANSFORMATION OF NATIVE AMERICA 57 (2016) ("Competition for captives [to sell as slaves] and control of European markets galvanized intertribal arms races in the Southeast as they had in the North.").

[76] Miller, *Economic Development*, *supra* note 16, 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."); Anderson & Parker, *supra* note 16 ("When Indians in the Northeast discovered the high price they could get for beaver pelts in the 18th century they developed property rights to trapping territories in order to encourage stewardship and to prevent the 'tragedy of the commons' from depleting beaver populations.").

[77] Miller, *Economic Development*, *supra* note 16, at 788 ("After Europeans arrived on this continent, the extensive and well-established tribal trading net-

However, tribal sovereignty also weakened as a result of Western goods. Efficient trading networks meant items containing European pathogens hastily spread throughout the Americas.[78] Untold numbers of Indians died from Old World diseases carried through commerce.[79] Alcohol took a similarly deleterious toll on many tribes.[80] Tribes had so completely absorbed European goods that tribes became dependent on them and were forced to accept the newly formed United States' sovereignty because tribal economies were now wed to United States trade.[81] This worked well for the United States as one of the nation's objectives was to acquire Indian land and resources.[82]

The United States enacted laws designed to solidify its control over Indian trade. The Articles of Confederation of 1781 granted the United States Congress "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians."[83] Following its victory in the Revolutionary War, the United States enacted a Constitution

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works led to the spread of European goods to many tribes long before they met their first white people."); Bill Yellowtail, *Indian Sovereignty*, 24 PERC REPS.: MAG. FREE MKT. ENVIRONMENTALISM 10, 10 (2006) ("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.").

[78] *AD 1493–1550s: Native peoples begin dying from European diseases*, NAT'L LIBR. MED.: NATIVE VOICES, https://www.nlm.nih.gov/nativevoices/timeline/169.html [https://perma.cc/TN8T-6A8Z] (last visited Feb. 20, 2021); John W. Kincheloe III, *Earliest American Explorers: Adventure and Survival*, 47 TAR HEEL JUNIOR HISTORIAN 6, 7 (2007) ("Sometimes the illnesses spread through direct contact with colonists. Other times, they were transmitted as Indians traded with one another."); Mariel Rivera, *The Cultural Implications of European Disease on New World Populations: With Primary Focus on the Abenaki, Powhatan, and Taino Groups*, 1 SCHOLARS' DAY REV. 22, 22 (2013) ("Some researchers speculate that these diseases may have been transmitted to other adjacent tribes by way of long-standing trade routes.").

[79] Crepelle & Block, *supra* note 10, at 316-17 ("Diseases from Europe brought immeasurable harm to American Indian societies. . . . Smallpox was the deadliest of the old-world diseases, and it reduced tribal populations by up to 90 percent.").

[80] FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 40 (abr. ed. 1986) [hereinafter PRUCHA, GREAT FATHER] ("One of the great sources of difficulty in the Indian trade was whiskey.").

[81] FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 7 (1994) ("In fact, economic dependence was in large part the reason that the Indians were forced to accept United States suzerainty.").

[82] Crepelle, *Decolonizing*, *supra* note 11, at 423.

[83] Articles of Confederation of 1781, art. IX, para. 4.

granting the federal government limited powers[84] and regulating trade with the Indian tribes was among those powers.[85] Accordingly, one of the very first laws enacted by Congress restricted Indian economic liberty in 1790.[86] The law barred non-Indians from trading with Indians without a license from the federal government.[87] Tribes, however, still had the heft to forbid federally-licensed Indian traders from operating within tribal lands.[88] During the early years of the United States, tribal law was superior to federal law in tribal commercial matters as tribes openly disregarded federal laws restraining their economic liberty.[89] Indian trader laws also barred individual Indians and tribes from selling their land without the express permission of the United States.[90] Indian trader laws remain a part of the United States Code.[91]

Indian land rights were a peculiar subject. Indians obviously inhabited the land, and as righteous Christians, it was difficult for Europeans to justify taking land *owned by the Indians*.[92] Thus, Europeans concocted *terra nullius*.[93] *Terra nullius* meant the land was open for the taking if it was being used by non-Europeans.[94] Empty earth opened the path for the Doctrine of Discovery which enabled Christian European nations to acquire superior property rights in indigenous peoples' lands by merely marking a tree or planting a flag.[95] The Supreme Court held that Discov-

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[84] U.S. CONST. amend. X; THE FEDERALIST NO. 84, at 421 (Alexander Hamilton) (Lawrence Goldman ed., Oxford University Press 2008) (c. 1788) ("For why declare that things shall not be done which there is no power to do?").

[85] U.S. CONST. art. I, § 8, cl. 3.

[86] An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. § 177 (2018)).

[87] *Id.* § 1.

[88] Matthew L.M. Fletcher & Leah K. Jurss, *Tribal Jurisdiction—A Historical Bargain*, 76 MD. L. REV. 100, 107 (2017) ("Tribes barred traders from accessing the market without permission.").

[89] *Id.* ("Even Congress, at times, seemed to understand that tribal regulations were of greater import than federal Indian trader statutes, which proved to be an ineffective means to govern Indian trade.").

[90] An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, § 4, 1 Stat. 137 (1790).

[91] 25 U.S.C. § 177 (2018); 25 U.S.C. §§ 261-264 (2018).

[92] ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY 27 (Bruce E. Johansen ed., 2008) ("One chaplain for the Virginia Company even asked, 'By what right or warrant can we enter into the land of these Savages [and] take away their rightful inheritance?'").

[93] *Id.*

[94] *Id.* at 4.

[95] Crepelle & Block, *supra* note 10, at 317 ("American Indians did not qualify for any rights under this theory, so European nations claimed lands in America by merely seeing the ground before any other European nation, and then performing a possessory ritual such as marking a tree or a planting a flag.").

ery is the foundation of all land title in the United States in 1823.[96] This decision, along with the Indian trader laws, granted the United States a monopsony on Indian land purchases and prevented Indians from selling their land at a fair price.[97]

Andrew Jackson's election as president in 1828 brought disputes over Indian land and sovereignty to the fore. Jackson championed the Indian Removal Act of 1830 which empowered the president to negotiate the removal of tribes in the eastern United States.[98] Emboldened by Jackson and the Removal Act, Georgia began encroaching upon the Cherokee Nation's sovereignty.[99] The Cherokee Nation responded by requesting the Supreme Court issue an injunction preventing Georgia from annexing treaty-guaranteed Cherokee lands.[100] Justice Marshall, however, side-stepped the issue by holding the Court lacked jurisdiction over the case because the Cherokee Nation was not a bona fide nation but rather a "domestic dependent nation."[101] Thus, the Cherokee Nation, and by implication every other tribe, was no longer a full sovereign. In-

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[96] *Johnson v M'Intosh* 21 U.S. (8 Wheat.) 543, 591 (1823) ("However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.").

[97] Eric Kades, *History and Interpretation of the Great Case of* Johnson v. M'Intosh, 19 L. & HIST. REV. 67, 111 (2001).

[98] Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830); *Andrew Jackson-Key Events*, UVA MILLER CTR., https://millercenter.org/president/andrew-jackson/key-events [https://perma.cc/LZ2L-BJAS]_(last visited Feb. 20, 2021) ("This Indian Removal Act was Jackson's creature. He worked behind the scenes to get his friends and allies appointed to the proper Congressional committees, in order to produce a bill congruent with his desires."); *Presidency*, ANDREW JACKSON'S HERMITAGE: HOME PEOPLE'S PRESIDENT, https://thehermitage.com/learn/andrew-jackson/president/presidency/ [https://perma.cc/KVL4-6JCX] (last visited Feb. 20, 2021) ("Jackson also espoused removing Indian tribes in the United States to the west of the Mississippi River as one of his reforms."); *Indian Removal*, TEACHUSHISTORY.ORG, http://www.teachushistory.org/indian-removal [https://perma.cc/GUD2-XMWY] (last visited Feb. 20, 2021) ("The 1830 Indian Removal Bill, backed by President Andrew Jackson, was the first step towards removing the Cherokees from their land for good.").

[99] PRUCHA, GREAT FATHER, *supra* note 80, at 192 ("Assured of presidential sympathy, Georgia took new action against the Cherokees.").

[100] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831) ("This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.").

[101] *Id.* at 17.

stead, tribes' relationships to the United States were like "that of a ward to his guardian."[102] Nearly 200 years later, tribes remain domestic dependent nations.

Although Georgia prevailed, the dispute between the state and the Cherokee Nation was not settled. Georgia enacted a law forbidding white persons from entering the Cherokee Nation without a license from the state.[103] Georgia invaded the Cherokee Nation and arrested all unlicensed missionaries to stop them from aiding the Cherokee Nation's peaceful political resistance to removal.[104] The state offered the missionaries pardons, and all but two accepted—Samuel Worcester and Elizur Butler.[105] Convicted, the pair appealed, and this time the Court had jurisdiction because Worcester and Butler were white men.[106] Worcester and Butler's courage was rewarded with a victory for the Cherokee Nation. The Court declared "the laws of Georgia can have no force" inside the Cherokee Nation.[107] Nonetheless, the Cherokee Nation's sovereignty was held to be subordinate to the federal government.[108] Jackson also refused to enforce the decision; consequently, the Cherokee Nation was ultimately removed from Georgia.[109] Approximately one-third of the Cherokee Nation died during its forced march to Oklahoma.[110]

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[102] *Id.* at 17.

[103] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 537 (1832) ("The indictment charges the plaintiff in error, and others, being white persons, with the offence of 'residing within the limits of the Cherokee nation without a license,' and 'without having taken the oath to support and defend the constitution and laws of the state of Georgia.'")

[104] PRUCHA, GREAT FATHER, *supra* note 80, at 211; Tim A. Garrison, *Worcester v. Georgia*, NEW GA. ENCYC. (Feb. 20, 2018), https://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832 ("Over time Worcester became a close friend of the Cherokee leaders and often advised them about their political and legal rights under the Constitution and federal-Cherokee treaties.").

[105] Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 520 (1969) ("Nine of them accepted pardons, but Worcester and Elizur Butler rejected offers of freedom in order to get the Cherokees their second day in Court.").

[106] Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases*, *in* INDIAN L. STORIES 61, 74 (Goldberg et. al eds., 2011) ("The arguments in *Worcester v. Georgia* began on February 20, 1832, with Wirt setting forth the jurisdictional basis of this suit between a state and a citizen of another states. The court raised no question of jurisdiction and moved directly to the merits of the case.").

[107] *Worcester*, 31 U.S. at 561.

[108] *Id.* ("The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.").

[109] Burke, *supra* note 105, at 520.

[110] Ellen Holmes Pearson, *A Trail of 4,000 Tears*, TEACHINGHISTORY.ORG, http://teachinghistory.org/history-content/ask-a-historian/25652

The Cherokee and numerous other tribes were relocated to reservations by treaties.[111] Treaties are the constitutional mechanism for making agreements between sovereigns[112] and are the supreme law of the land.[113] Treaties were the United States' preferred method of dealing with tribes because tribes were nations[114] and a formidable military force.[115] Ac-

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[https://perma.cc/5GYZ-LEWG] (last visited Feb. 20, 2021); *The Trail of Tears*, PBS, https://www.pbs.org/wgbh/aia/part4/4h1567.html [https://perma.cc/M4PY-ER78] (last visited Feb. 20, 2021) ("Over 4,000 out of 15,000 of the Cherokees died."); *The Trail of Tears—The Indian Removals: Age of Jackson*, US HIST. http://www.ushistory.org/us/24f.asp [https://perma.cc/JSY8-SKPS] (last visited Feb. 20, 2021).

[111] William C. Canby Jr., AMERICAN INDIAN LAW IN A NUTSHELL 22 (7th ed. 2020); Crepelle & Block, *supra* note 10, at 322 ("The reservations tribes were placed on by treaties proved ruinous for Amerindians."); Tim Wright, *A History of Treaties and Reservations on the Olympic Peninsula, 1855-1898: A Curriculum Project for Washington Schools*, U. WASH. LIBR., https://content.lib.washington.edu/curriculumpackets/A_History_of_Treaties_and_Reservations.pdf [https://perma.cc/B39F-NU2E] (last visited Feb. 20, 2021) (discussing territorial governor Isaac Stevens and Commissioner of Indian Affairs George Manypenny's plan create a reservation system in Oregon and Washington through treaties).

[112] U.S. CONST. art. II, § 2, cl. 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.").

[113] U.S. CONST. art. VI, § 2.

[114] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832) ("The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."); *Nation to Nation: Treaties Between the United States and American Indian Nations*, SMITHSONIAN NAT'L MUSEUM OF THE AM. INDIAN (2016), http://nmai.si.edu/nationtonation/ [https://perma.cc/AR47-U3WS]; Karla E. General, *Treaty Rights and the UN Declaration on the Rights of Indigenous Peoples*, INDIAN L. RESOURCE CTR https://indianlaw.org/content/treaty-rights-and-un-declaration-rights-indigenous-peoples [https://perma.cc/3JZT-FU8C] (last visited Feb. 20, 2021) ("Simply put, a treaty is an agreement between two nations or sovereigns.").

[115] Crepelle & Block, *supra* note 10, at 320 ("Tribes on the Great Plains often had strong warrior cultures which made seizing their lands immensely difficult for the government."); 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) ("Those Lakota who refused to accept alteration of their treaty and loss of the Black Hills held out for more than a year of fighting, killing twice as many enemy combatants as were killed by the US. Army in what came to be known as the Great Sioux War.").

cordingly, purchasing land via treaty was economically efficient for the United States.[116] As time went on, American numbers and technology increased while tribal populations suffered from epidemics and the federal government's deliberate destruction of their food sources.[117] Treaties became more unequal as American power grew.[118] Nevertheless, tribes were able to negotiate for tools, education, healthcare, and other benefits in treaties.[119] Tribes also retained all sovereign powers not explicitly surrendered in treaties.[120] Tribes honored their end of treaties, but the Unit-

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[116] Letter from George Washington, President, to James Duane, Head of Comm. of Indian Affairs of the Cont'l. Cong. (Sept. 7, 1783) (on file with the National Archives), https://founders.archives.gov/documents/Washington/99-01-02-11798 [https://perma.cc/4FSU-4HLY] ("I am clear in my opinion, that policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country"); Williams Least Heat-Moon, *A Stark Reminder of How the U.S. Forced American Indians into a New Way of Life*, SMITHSONIAN MAG., (Nov. 2013), https://www.smithsonianmag.com/history/a-stark-reminder-ofhow-the-us-forced-american-indians-into-a-new-way-of-life-3954109/ [https://perma.cc/MH89-HKCF] ("[I]n the 1850 Annual Report of the Commissioner of Indian Affairs: 'It is, in the end, cheaper to feed the whole flock for a year than to fight them for a week.'"); Lorraine Boissoneault, *How the 1867 Medicine Lodge Treaty Changed the Plains Indian Tribes Forever*, SMITHSONIAN MAG., (Oct. 23, 2017), https://www.smithsonianmag.com/history/how-1867-medicine-lodge-treatychanged-plains-indian-tribes-forever-180965357/ [https://perma.cc/SK7V-LSD8] ("Sherman's concern about nomadic Indians was echoed in Congress, where members claimed it cost upwards of $1 million a week to fund the militias defending frontier populations. A peace treaty seemed like a much less costly alternative, especially if the tribes agreed to live on reservations.").

[117] *See* Crepelle & Block, *supra* note 10, at 320-21.

[118] *See* Terry L. Anderson & Fred S. Mc Chesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 J.L. & ECON. 39, 39 (1994).

[119] *See* Crepelle, *Decolonizing*, *supra* note 11, at 430-31.

[120] United States v. Wheeler, 435 U.S, 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."); Las Vegas Tribe of Paiute Indians v. Phebus, 5 F. Supp. 3d 1221, 1228 (D. Nev. 2014) ("Congressionally recognized tribes retain all aspects of sovereignty . . . with three exceptions: (1) they may not engage in foreign commerce or foreign relations; (2) they may not alienate fee simple title to tribal land without the permission of Congress; and (3) Congress may strip a tribe of any other aspect of sovereignty at its pleasure.") (internal citations omitted); 38 CAL. JUR. 3D *Indians* § 2 ("Indian tribes have a status higher than that of states; they are subordinate and dependent nations possessed of all powers except to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.").

ed States persistently failed to uphold its side.[121] Congress ended treaty making in 1871, choosing to deal with Indians as wards rather than nations.[122]

Reservation life was brutal. For millennia, Indians were free and self-reliant, but there was no freedom on reservations.[123] White reservation superintendents exercised unbridled power over their Indian wards.[124] Tribal cultural practices were outlawed.[125] Indians were forced

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[121] *See* Crepelle & Block, *supra* note 11, at 319; Sarah K. Elliot, *How American Indian Reservations Came to Be*, PBS: ANTIQUES ROADSHOW (Oct. 18, 2016) https://www.pbs.org/wgbh/roadshow/stories/articles/2015/5/25/how-american-indian-reservations-came-be/ [https://perma.cc/2VM3-W3ZD] ("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.").

[122] Eick, *supra* note 115, at 40 ("However, the little-noticed change that Congress adopted in 1871, to go into effect in 1872, would have a profound impact on Indians by canceling their status as independent nations and emphasizing that they were 'wards' of the U.S. government.").

[123] Crepelle, *Decolonizing*, *supra* note 11, at 432 ("On the reservation, people who were independent and self-reliant since time immemorial suddenly had no means to support their families.").

[124] *Interior Dept. Appropriations Bill for 1949, Hearings Before the Subcomm. for the H. Comm. on Appropriations*, 80th Cong. 705 (1948) (statement of Robert Yellowtail, Delegate, Crow Tribal Council) ("The reservation superintendent exercises an authority under these controls that is comparable to a dictator."); *Dismissal of Wade Crawford, Superintendent Klamath Indian Reservation., Oreg., Hearings Before the S. Comm. on Indian Affairs*, 75th Cong. 158 (1937) (statement of Robert Marshall, Chief of Recreation & Lands, Forest Service, Department of Agriculture) ("I want to say briefly that the concentrated opinion of 90 percent of the Indians on the reservation, and my opinion also, was that Mr. Crawford was dictatorial . . . "); Crepelle, *Decolonizing*, *supra* note 11 at 432, n.95.

[125] Kristen A. Carpenter, *Individual Religious Freedoms in American Indian Tribal Constitutional Law*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 159, 160 (Kristen A. Carpenter et al. eds., 2012); C. Blue Clark, *How Bad It Really Was Before World War II: Sovereignty,* 23 OKLA. CITY U. L. REV. 175, 185 (1998) ("It was a part of the growing opposition to native religious ceremonies that increased under missionary pressure after the Civil War and crested with the BIA code against Indian offenses in 1883. Missionaries, government agents, and even troops interfered with and halted sun dances, peyote ceremonies, and other native religious practices."); Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y. REV. 191, 201 (2001) ("Thus, until rescinded by the 1934 Indian Reorganization Act, multiple federal policies such as allotment, criminalization of Native religion, forcible removal of Native children to remote boarding schools (where they were forbidden to speak their languages and, in many cases, to see their relatives), were constructed to obliterate Indian cultures and, in the process, destroy the separate political identity of In-

to farm land that, by the white reservation superintendents' own admissions, was not arable.[126] With no agricultural success, tribes sought to hunt, but this liberty was sharply curtailed.[127] Paltry amounts of abysmal quality food were only available with the reservation superintendent's permission.[128] Starvation and illness ran rampant on reservations.[129] Destitution compelled Indian women to barter sex for bread and clothing.[130] This was by the United States' design as gaunt, half-clad Indians had no leverage during land negotiations with a Great Plains winter en route.[131]

Indians were not losing their land fast enough to keep pace with white demands.[132] Supposedly well-meaning whites, the so-called "Friends of the Indian," believed that Indians needed to abandon their culture and become private property owning farmers for their own

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dian people."); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 28 (1991) ("[T]he government took affirmative steps to check the religious fervor of the Lakota.").

[126] Jeffrey Ostler, *"The Last Buffalo Hunt" And Beyond Plains Sioux Economic Strategies in The Early Reservation Period*, 21 GREAT PLAINS Q. 115, 120 (2001) ("For decades US government officials had talked about a future in which Indian people would support themselves through agriculture. This fantasy was especially absurd when it came to people living on the northern Great Plains where the growing season was short, the soil often poor, and rainfall usually scarce. Most government agents who actually lived in the region eventually grasped these facts.").

[127] Elliott, *supra* note 121 ("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.").

[128] Crepelle, *Decolonizing*, *supra* note 11, at 432-33.

[129] Elliott, *supra* note 121 ("Illness, starvation, and depression remained a constant for many.").

[130] *See* Gabrielle Mandeville, *Sex Trafficking on Indian Reservations*, 51 TULSA L. REV. 181, 184-85 (2015); Mary Annette Pember, *Native Girls Are Being Exploited and Destroyed at an Alarming Rate*, INDIAN COUNTRY TODAY, (May 16, 2012), https://newsmaven.io/indiancountrytoday/archive/native-girlsare-being-exploited-and-destroyed-at-an-alarming-rate-4r1HLmefEWEoSpGM9DXyA/ [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.").

[131] South Dakota v. Yankton Sioux Tribe, 522 US 329, 346-47 (1998); Eick, *supra* note 115, at 35 ("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 US. Army would be 'persuaded' to sign away the Black Hills in order to get food. The United States would use food as a weapon.").

[132] *See* Crepelle, *Decolonizing*, *supra* note 11, at 434.

good.[133] Converting lands guaranteed to tribes for all time into fee simple parcels was immensely popular among the American public.[134] However, the Indians nearly universally opposed privatization of their reservations.[135] Indians were not necessarily averse to private land so much as the erosion of tribal sovereignty that would accompany reservation partition. In any event, tribes had no legal power to protect their land rights.[136] Some members of Congress opposed allotment too;[137] nevertheless, proponents of privatization prevailed.

The General Allotment Act of 1887 (GAA) shattered immense reservations into 160-acre parcels of fee simple land.[138] Indian land was placed in trust for a twenty-five-year period, exempting it from state taxes.[139] Indians would then own the land in fee simple and become tax-

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[133] *See* Bobroff, *supra* note 21, at 1565.

[134] PRUCHA, GREAT FATHER, *supra* note 80, at 659 ("The upsurge of humanitarian concern for the Indian reform in the post-Civil War era gave a new impetus to the severalty principle, which was almost universally accepted and aggressively promoted, until Congress finally passed a general allotment law.").

[135] *See* Bobroff, *supra* note 21, at 1604-05; Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?,* 71 STAN L. REV. 791, 816 (2019) ("The historical record reveals that tribes and individual Indians often vociferously rejected allotment, realizing that it was likely to bring greater poverty and despair."); *Life on The Reservations*, U.S. HIST., https://www.ushistory.org/us/40d.asp [https://perma.cc/N5CV-3EEW] (last visited Feb. 20, 2021) ("The Dawes Act was widely resisted. Tribal leaders foretold the end of their ancient folkways and a further loss of communal land.").

[136] *See, e.g.,* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Steven Paul McSloy, *Revisiting the "Courts of the Conqueror:" American Indian Claims Against the United States*, 44 AM. U. L REV. 537, 584 (1994) ("Indian people had been barred from suit against the United States, absent a special jurisdictional act of Congress, until at least 1946.").

[137] H.R. REP. NO. 46-1576, at 7-10 (1880) ("We have said that this bill has no practical basis and is a mere legislative speculation; but it may be added that the experiment it proposes has been partially tried, and has always resulted in failure.").

[138] *See, e.g.,* South Dakota v. Yankton Sioux Tribe, 522 U.S, 329, 336 (1998) ("In accordance with the Dawes Act, each member of the Yankton Tribe received a 160-acre tract from the existing reservation, held in trust by the United States for 25 years."); Squire v. Capoeman, 351 U.S. 1, 3 (1956).

[139] *Capoeman*, 351 U.S. at 3 (" . . . 25 years after allotment the allottees were to receive the lands discharged of the trust under which the United States had theretofore held them, and to obtain a patent 'in fee, discharged of said trust and free of all charge or incumbrance whatsoever,' though the President might extend the period."); *Land Tenure History*, INDIAN LAND TENURE FOUND., https://iltf.org/landissues/history/ [https://perma.cc/U8U4-7R45] (last visited Feb. 20, 2021) ("[T]he Act stated that 25 years after the allotment was issued, Indian allottees would be given complete, fee simple ownership of the land.").

paying farmers and American citizens at the period's conclusion.[140] Once Indian heads of household received their allotments, the remainder of the land was opened to white settlement. Being in the proximity of whites was supposed to encourage Indians to jettison their culture and take up white ways.[141] Indeed, Indians had to eschew their tribal identities prior to acquiring citizenship through allotment by swearing an oath: "You have shot your last arrow. That means that you are no longer to live the life of an Indian. You are from this day forward to live the life of the white man."[142]

The GAA did not transform Indians into farmers. All it did was transfer nearly ninety million acres of Indian lands to whites.[143] Of the roughly forty-eight million acres remaining in Indian control, most was unsuitable for farming.[144] Furthermore, Indians were not provided seeds or the tools necessary to become farmers.[145] The GAA also stripped tribes of their ability to craft new rules suited for their new circumstances[146] or exercise any meaningful rights of land ownership.[147] Forty years

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[140] *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 MICH. L. REV. 955, 959 (1972) ("The general theory underlying the allotment policy was that an individual Indian who owned his own plot of land would thereby be transformed into a farmer or livestock operator."); *Allotment*, ENCYC. OF THE GREAT PLAINS, http://plainshumanities.unl.edu/encyclopedia/doc/egp.na.002 [https://perma.cc/2PQQ-NJQF] (last visited Feb. 20, 2021) ("Reformers believed that individualized landownership (private property) would help transform Native Americans into farmers, thereby integrating them into the American economy."); *Reservations, Exploitation of Native Americans, Life for Native Americans*, BBC BITESIZE, https://www.bbc.com/education/guides/zshwv9q/revision/2 [https://perma.cc/YT4R-U85R] (last visited Feb. 20, 2021) ("The aim of this act was to create responsible farmers in the white man's image.").

[141] 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.").

[142] Jared Farmer, *Last Arrow Ceremony,* JARED FARMER (Oct. 16, 2016) https://jaredfarmer.net/curios/last-arrow-ceremony/ [https://perma.cc/9F93-SQB8].

[143] Crepelle, *Decolonizing*, *supra* note 11, at 436 n.108.

[144] *Dawes Act*, ENCYC OF THE GREAT PLAINS, http://plainshumanities.unl.edu/encyclopedia/doc/egp.law.015 [https://perma.cc/69NQ-F2FZ] (last visited Feb. 20, 2021) ("By the time the allotment process was stopped in 1934, the amount of Indian-held land in the United States had dropped from 138 million acres to 48 million acres, and, of the remaining Indian-owned land, almost half was arid or semi-arid.").

[145] Crepelle, *Decolonizing*, *supra* note 11, at 436 n.106.

[146] Bobroff, *supra* note 21, at 1563 ("From that moment on, changing a tribe's property law has required, quite literally, an act of Congress.").

after the GAA, a government report found that "[a]n overwhelming majority of the Indians are poor, even extremely poor. . . ."[148] The GAA is universally considered the most calamitous law in the history of United States' Indian policy.[149]

Tribal self-government had reached its nadir during the years following allotment;[150] however, U.S. Indian policy drastically changed with the Indian Reorganization Act of 1934 (IRA).[151] The IRA ended allotment and placed tribal lands in permanent trust status.[152] The IRA also established mechanisms to promote tribal economic development[153] and formalized tribal governments.[154] Although the IRA was designed to promote self-government,[155] the IRA imposed culturally incompatible governance structures upon tribes.[156] Furthermore, the IRA did not in-

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[147] H.R. REP. NO. 46-1576, at 9 (1880) ("[P]rovisions intended to prevent him from exercising any of the rights of a land-owner except that of working and living on his allotment.").

[148] LEWIS MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION 3 (1928).

[149] Crepelle, *Decolonizing*, *supra* note 11, at 437 n. 110.

[150] Clark, *supra* note 125, at 176 ("The period 1887-1934 witnessed Indian governmental independence and autonomy plunge to their lowest point."); Judith Royster, *The Legacy of Allotment* 27 ARIZ. ST. L.J. 1, 17-18 (1995) ("The vast majority of lands that had passed into fee during the allotment years remains in fee today: the legacy of allotment that gives rise to the modem Court decisions divesting tribes of both territory and sovereignty.").

[151] The Indian Reorganization Act – 75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the S. Comm. on Indian Affs., 112th Cong. 1 (2011) (statement of Daniel K Akaka, Sen. from Haw.) ("When Congress enacted the Indian Reorganization Act in 1934, its intent was very clear. Congress intended to end Federal policies of termination and allotment and begin an era of empowering tribes by restoring their homelands and encouraging self-determination."); *Id.* at 5 (statement of Frederick E. Hoxie, Swanlund Chair/History Professor, Univ. of Ill.) ("In short, the IRA was intended to initiate a new era in which the United States would support Indian people and tribal communities as continuing and dynamic members of a modern American nation."); Tribal Self-Government and the Indian Reorganization Act of 1934, *supra* note 140, at 955 ("A major reversal of governmental policy and approach toward Indian affairs was effectuated by the IRA."); The Indian Reorganization Act, ROOSEVELT INST. FOR AM. STUD., https://www.roosevelt.nl/indian-reorganization-act [https://perma.cc/CK77-42GA] (last visited Feb. 20, 2021) ("Between 1887 and 1934, a noticeable shift occurred in government policy towards the original inhabitants of America.").

[152] Wheeler-Howard Act of 1934 (Indian Reorganization Act) ch. 576, §§ 2-3, 48 Stat. 984 (codified as amended at 25 USC §§ 5102-5102 (2018)).

[153] *Id.* § 10; *id.* § 17.

[154] *Id.* § 16.

[155] Morton v. Mancari, 417 U.S. 535, 542 (1974); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973).

[156] Canby, *supra* note 111, at 26; Crepelle, *Standing Rock in the Swamp*, *supra* note 61, at 155-56 ("[M]any traditional tribal governments did not have Western style central governments."); Clark, *supra* note 125, at 187 ("Through-

crease individual Indian liberty because it granted the Secretary of the Interior complete control over all reservation activities.[157] Federal bureaucrats retained immense power under the IRA, allegedly even the power to set Indian bedtimes.[158]

Following World War II, the IRA tumbled in favor of an assimilationist Indian policy—the termination era.[159] The federal government went to work legislatively terminating over 100 tribes; that is, ending the nation-to-nation relationship between the tribe and the United States.[160]

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out the decade, the BIA arbitrarily set up tribal governing councils and their constitutions.").

[157] Canby, *supra* note 111, at 28 (noting tribal self-government existed at the whim of the Secretary of the Interior); Crepelle & Block, *supra* note 10, at 324 ("The [IRA] . . . did relatively little to improve tribal sovereignty because the Secretary of the Interior was granted power over virtually all tribal activities."); *The Indian Reorganization Act*, *supra* note 151 (quoting Seneca Indian Alice Lee Jemison stating, "She argued that Collier's Act had changed their status from 'involuntary wards' to 'voluntary wards' of the US government, and that the promises of self-government were in the end worthless: according to her, the government purchased lands and then assigned individual pieces of it to Indians, who in the end had no formal ownership of it – 'all final power and authority rests in the hands of Mr. Dictator Secretary of the Interior [Harold L. Ickes].'").

[158] Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction,* 46 ARIZ. ST. L.J. 779, 787-88 (2014) ("Meanwhile, the federal government's late nineteenth-century bureaucracy began to intrude on the daily operations of many, if not most, Indian tribes, so much so that, by the 1950s, federal bureaucrats purported to control even the bedtimes of some reservation Indians.").

[159] Robert A. Williams Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 221 (1986) ("Many Indians, however, doubted the sincerity of efforts to 'Americanize' them by terminating their federally recognized status as sovereign, self-defining peoples."); Donald Lee Fixico, Termination and Relocation: Federal Indian Policy in the 1950's (1980) (Ph.D. dissertation, University of Oklahoma) (on file electronically at https://shareok.org/handle/11244/4767 [https://perma.cc/7YH7-824F]) ("Emphasis on education, acquiring materialistic items of white American culture , and competing with other Americans for jobs and positions in society were viewed as Americanization of Indians.").

[160] William J. Lawrence, *In Defense of Indian Rights*, *in* BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 391, 396 (Abigail Thernstrom & Stephen Thernstrom eds., 2002) ("By 1970, when the termination policy unofficially ended, almost 100 tribes, with an approximate total tribal membership of only 13,000 (less than 2 percent of the total Indian population), had their relationship to the federal government terminated"); Crepelle, *Standing Rock in the Swamp*, *supra* note 61, at 150-51; Alysa Landry, *Harry S. Truman: Beginning of Indian Termination Era*, INDIAN COUNTRY TODAY (Aug. 16, 2016), https://newsmaven.io/indiancountrytoday/archive/harry-s-truman-beginning-ofindian-termination-era-Ma3YnfYy_U-AFyBGsUxzCw/

Tribal sovereignty in five states and the Alaska Territory was rebuked by Public Law-280 (PL-280), which extended state criminal laws and civil adjudicatory jurisdiction into Indian country.[161] PL-280 gave other states the ability to unilaterally impose their laws on tribes within their borders.[162] The imposition of state law undercut tribal self-governance. To solve reservation poverty, Congress gave Indians one-way bus tickets to big cities.[163] Indians were promised help with job hunting and housing; however, the United States provided no such assistance.[164] During the termination era, extremely high numbers of Indian children were taken from their families and placed in white homes by state and federal agencies to further assimilate Indians.[165]

Federal Indian policy forever changed in 1970. President Richard Nixon was a Quaker, and Quakers have a long history of supporting Indian rights.[166] Moreover, his greatest influence was his college football coach Wallace Newman, a Luiseno Indian.[167] With this background, Nixon issued a Special Message on Indian Affairs in 1970.[168] He castigated tribal termination as wrongheaded and acknowledged that well-

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[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.").

[161] 18 U.S.C. § 1162 (2018); 28 U.S.C. § 1360 (2018).

[162] An Act of Aug 15, 1953, Pub. L. No. 83-280, ch. 505 §§ 2, 4, 67 Stat. 590 (codified as amended at 18 U.S.C. § 1162 (2018), 28 U.S.C. § 1360 (2018), and 25 U.S.C. §§ 1321-1326 (2018)).

[163] Indian Relocation Act of 1956, Pub. L. No. 959, 70 Stat. 986; Crepelle, *Standing Rock in the Swamp, supra* note 61, 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/G58B-B83Q] (last visited Feb. 20, 2021) ("Typically, a reservation Indian was given a one-way bus or train ticket to a distant urban center, usually a West Coast city, and told to check in with the local office of the BIA in order to land a job, find lodging, and to start a new life.").

[164] Crepelle, *Decolonizing, supra* note 133, at 441.

[165] 25 U.S.C § 1901(4) (2018); *Indian Adoption Project*, ADOPTION HISTORY PROJECT, https://pages.uoregon.edu/adoption/topics/IAP.html [https://perma.cc/R4UP-PXGZ] (last updated Feb. 24, 2012).

[166] Dean Chavers, *Richard Nixon's Indian Mentor*, INDIAN COUNTRY TODAY, (Sept. 13, 2018), https://indiancountrytoday.com/archive/richard-nixons-indian-mentor [https://perma.cc/HBH5-NJTM] ("And Quakers had been pro-Indian since their early days in Pennsylvania."); *Rights of Indigenous Peoples*, QUAKERS IN THE WORLD, https://www.quakersintheworld.org/quakers-in-action/158/Rights-of-Indigenous-Peoples [https://perma.cc/BF9U-PSL2] ("Quakers have a long history of arguing for the rights of indigenous people.").

[167] *See* Chavers, *supra* note 166.

[168] Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970).

intentioned federal Indian programs "have frequently proved to be ineffective and demeaning."[169] Nixon ushered in the era of tribal self-determination;[170] in fact, he advocated for legislation that would have allowed tribes to completely control all federal tribal programs.[171] The bill did not become law, but it did lay the foundation for the Indian Self-Determination and Education Assistance Act of 1975.[172]

Every Congress and President since 1975 has embraced tribal self-determination.[173] Congress has curtailed the damage done by PL-280 by requiring tribal consent before states can extend their laws into Indian country,[174] and Congress enacted legislation fortifying tribal environmental rights.[175] Congress responded to states stealing Indian children by affirming exclusive tribal court jurisdiction over Indian adoption and foster care proceedings.[176] Long repressed Indian religious practices

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[169] *Id.*

[170] *See id.* at 565("The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.").

[171] PRUCHA, GREAT FATHER, *supra* note 76, at 1112.

[172] Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C §§ 5301-5423 (2018)); *Public Law 93-638 Contracting and Compacting*, U.S. DEPT. INTERIOR, https://www.doi.gov/ost/tribal_beneficiaries/contracting [https://perma.cc/CYQ4-YK4F] (last visited Feb. 20, 2021); PRUCHA, GREAT FATHER, *supra* note 76, at 1114.

[173] Alysa Landry, *Jimmy Carter: Signed ICWA into Law*, INDIAN COUNTRY TODAY (Sept. 13, 2018), https://indiancountrytoday.com/archive/jimmy-carter-signed-icwa-into-law [https://perma.cc/X4HS-9FDQ] ("During his presidential campaign in 1976, Carter's staff reached out to the National Congress of American Indians and the National Tribal Chairmen's Association. Carter met briefly with some leaders and his staff drafted a position paper that endorsed Indian self-determination policy, already in force."); Presidential Statement on Signing the Indian Self-Determination Assistance Act Amendments of 1988, 2 PUB. PAPERS 1284-85 (Oct. 5, 1988); Presidential Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662-63 (June 14, 1991); Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000); Memorandum on Government-to-Government Relationship With Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004); EXEC. OFF. PRESIDENT, 2016 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT: A RENEWED ERA OF FEDERAL TRIBAL RELATIONS, (Jan. 2017), https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf [https://perma.cc/439W-2QWH]; Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 Daily Comp. Pres. Doc. No. 00091 (Jan. 26, 2021)..

[174] 25 U.S.C §§ 1321-1322 (2018).

[175] Adam Crepelle, *The Reservation Water Crisis: American Indians and Third World Water Conditions*, 32 TUL. ENV'T L.J. 157, 164-66 (2019).

[176] 25 U.S.C. § 1911(a) (2018).

were granted federal protection.[177] Since 1975, the federal government has supported tribal economic development efforts in the face of state hostility[178] and enacted legislation to spur tribal economies.[179]

Tribes proactively responded to tribal self-determination. Soon after Nixon's Special Message, tribes began using their sovereignty to pursue economic development opportunities.[180] Tribes have taken over many functions formerly performed by the federal government; moreover, tribes are consistently outperforming the feds.[181] Tribes have also implemented governance reforms and have sought aid in creating model laws.[182] Similarly, tribes have made significant efforts to strengthen their

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[177] 42 U.S.C. § 1996 (2018).

[178] California v Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) ("The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) ("As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development").

[179] 25 U.S.C. § 2701(1) (2018); 25 U.S.C. § 1451 (2018); 25 U.S.C. § 4301 (2018); 25 U.S.C. § 5302(c) (2018).

[180] Eric Henderson, *Indian Gaming: Social Consequences,* 29 ARIZ. ST. L.J. 205, 209-10 (1997) ("During the 1970s, tribal governments sought new paths to economic independence. Before turning to gaming as an enterprise, many of these tribes sought to generate revenue through the sale of tobacco products. On-reservation sales of cigarettes were exempt from state taxation, which created a competitive advantage over non-Indian sellers."); Susan Woodrow & Fred Miller, *Lending in Indian Country: The Story Behind the Model Tribal Secured Transaction Law*, 15 BUS. L. TODAY 38, 39 (2005) ("The growing movement of tribal self-determination over the last couple of decades has concurrently led to an increase in gaming and other tribal economic development pursuits, such as the development of tribal natural resources.").

[181] Kevin K Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 201 (2017) [hereinafter Washburn, *Changing Landscape*] ("As tribal governmental powers have increased and tribes have entered contracts to perform more federal functions, tribal governments have proven more institutionally competent than the federal government in serving Indian people."); Terry Anderson & Wendy Purnell, *The Bonds of Colonialism*, HOOVER INST. (Apr. 26, 2019), https://www.hoover.org/research/bonds-colonialism [https://perma.cc/QFS2-PQ9F] ("Terry Anderson and Dean Lueck find evidence that agricultural productivity on 39 western reservations was highest on fee simple lands, with individual trust lands being 30 to 40 percent less productive and tribal trust lands being 80 to 90 percent less productive.").

[182] *Model Tribal Business Corporation Code*, U.S. DEP'T OF INTERIOR BUREAU OF INDIAN AFF., https://www.bia.gov/sites/bia.gov/files/assets/asia/ieed/ieed/pdf/idc1-024556.pdf [https://perma.cc/LM4M-ND8L] (last visited Feb. 20, 2021); National Conference of Commissioners on Uniform Laws, *Model Tribal Secured Transaction Act*, U.S. DEP'T OF INTERIOR BUREAU OF

court systems.[183] Tribal court systems are now widely seen as fair arbiters of justice.[184] Self-determination is the only policy that has been unequivocally proven to improve tribal welfare.[185]

Thanks to the federal tribal self-determination policy, tribal economies have grown tremendously. Indian gaming alone generates over $30 billion a year,[186] and tribes are significant players in several other industries as well.[187] Nevertheless, tribal enterprise is not private enterprise. This means virtually every job in Indian country is provided by the tribal or federal government.[188] Private companies do not invest in Indian country because of the complexities of federal Indian law.[189] For exam-

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INDIAN AFF. (Aug., 2005), https://www.bia.gov/sites/bia.gov/files/assets/asia/ieed/ieed/pdf/idc1-024559.pdf [https://perma.cc/GGH7-8MWX].

[183] Fletcher, *supra* note 158, at 825.

[184] Bethany R. Berger, *Justice and the Outsider: Jurisdiction Over Non-Members in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); Alexander S. Birkhold, *Predicate Offenses, Foreign Convictions, and Trusting Tribal Courts*, 114 MICH. L. REV. ONLINE 155, 159 (2016), http://michiganlawreview.org/wpcontent/uploads/2017/03/114MichLRevFI155.pdf [https://perma.cc/6Y8G-QN7G] ("Tribal court convictions result from fair and reliable proceedings; Congress and tribes have guaranteed criminal defendants in tribal courts the right to due process.").

[185] Joseph Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self Rule* 1 (Harv. U. John F. Kennedy Sch. of Gov't Rsch. Working Paper, Paper No. 04-016, 2004).

[186] 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].

[187] Adam Crepelle, *Tribal Lending and Tribal Sovereignty,* 66 DRAKE L. REV. 1 (2018); *Our Purpose*, RED WILLOW PRODUCTION CO., https://www.rwpc.us/ [https://perma.cc/8TTM-HT72] (last visited Jul. 29, 2022); Tripp Baltz, *Mining Tribal Land Weighs on Crow Family as Cost of Prosperity*, BLOOMBERG L. (Mar. 12, 2020), https://news.bloomberglaw.com/environment-and-energy/mining-tribal-land-weighs-on-crow-family-as-cost-of-prosperity [https://perma.cc/X4R9-9XU4] ("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.").

[188] Miller, *Economic Development*, *supra* note 16, 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.").

[189] Brief Amicus Curiae of the S.D. Bankers Ass'n in Support of Petitioners at 2, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (No. 13-1496) 2015 WL 5261542 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*

ple, most reservation land is held in trust status by the federal government resulting in bureaucratic obstacles that make energy production take ten times longer in Indian country than outside.[190] Trust land can only be mortgaged with the Secretary of the Interior's approval.[191] Plus, state regulations can apply within Indian country.[192] Businesses do not know whether to comply with tribal or state law.[193] No business wants to deal with these issues.

Tribal law is the blade needed to slice through Indian country's regulatory Gordian knot. However, tribal law faces a serious problem—it usually does not apply to non-Indians. This began, curiously, in 1978 when the Supreme Court held that tribal courts do not have criminal jurisdiction over non-Indians.[194] In *Oliphant v. Suquamish Indian Tribe*, the Court admitted tribes had never explicitly lost the power to prosecute non-Indians but believed tribes had been implicitly divested of this sovereign authority.[195] Three years later, the Court extended *Oliphant*'s much-maligned reasoning[196] to tribal civil jurisdiction in *Montana v. United States*, holding tribal courts generally lack civil jurisdiction over

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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.").

[190] Shawn E. Regan & Terry L. Anderson, *The Energy Wealth of Indian Nations*, 3 LSU J. OF ENERGY L. & RES. 195, 208 (2014) ("On Indian lands, companies must go through four federal agencies and 49 steps to acquire a permit to drill, compared with only four steps when drilling off of the reservation"); *Transcript of Tribal Consultation, Identifying Economic Priorities in Indian Country*, U.S. DEP'T OF INTERIOR BUREAU OF INDIAN AFFS. 5 (August 17, 2017) https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/raca/pdf/08-17-17.Albuquerque%20NM%20Transcript_Indian%20Traders%2025%20CFR%20140.pdf [https://perma.cc/QQ8G-FWG7] ("When they're drilling off reservation, it 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.").

[191] 25 U.S.C. § 5135(a) (2018).

[192] Crepelle, *Decolonizing*, *supra* note 11, at 448-51.

[193] Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L., 705-30 (forthcoming) [hereinafter Crepelle, *How Federal Indian Law Prevents*].

[194] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[195] *Id.* at 204 ("While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.").

[196] Adam 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 529 (2021).

non-Indians.[197] The Court declared that tribes could only assert civil jurisdiction over non-Indians who enter a consensual relationship with the tribe or its citizens and over non-Indians engaged in conduct that poses a threat to "the political integrity, the economic security, or the health or welfare of the tribe."[198] These two exceptions seem to leave ample room for tribal private law, but this has not been the case.

The Supreme Court has read *Montana* in an immensely restrictive manner. In *Strate v. A-1 Contractors*, the Court addressed whether a car crash within the boundaries of the Fort Berthold Indian Reservation, home of the Mandan, Hidatsa, and Arikara Nations (MHA), qualified for tribal court jurisdiction.[199] The wreck involved Gisela Fredericks and a vehicle owned by A-1 Contractors. A-1 Contractors, a non-Indian owned business, was on the reservation because it was doing business with a corporation owned by MHA.[200] While Fredericks was not an Indian, she was married to a tribal citizen, mother to five tribal citizens,[201] and a lifelong MHA reservation resident.[202] Thus, Fredericks filed a negligence action in the MHA court. The Supreme Court held the tribal court lacked jurisdiction over the dispute. It dismissed *Montana*'s consensual relationship exception because A-1 did not have a consensual relationship with Fredericks rendering the MHA "strangers to the accident."[203] Although negligent driving within a reservation seems to flagrantly implicate *Montana*'s health and welfare exception, the Court stated, "But if *Montana*'s second exception requires no more, the exception would severely shrink the rule."[204] Thus, the Court refused to recognize tribal jurisdiction over an action that reasonably fit within *Montana*'s framework.

Montana's exceptions were next tested in a tax dispute on the Navajo Nation in *Atkinson Trading Co. v. Shirley*.[205] The Atkinson Trading Post hotel operated on land located within the boundaries of the Navajo Nation. Approximately one hundred of Atkinson's employees were Navajo citizens, and the hotel's location possessed "overwhelming Indian character."[206] Moreover, the Navajo Nation provided governmental ser-

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[197] Montana v. United States, 450 U.S. 544 (1981).

[198] *Id.* at 565-66.

[199] Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

[200] *Id.* at 443.

[201] *Id.*

[202] DAVID GETCHES, ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 629 (7th ed. 2016).

[203] *Strate*, 520 U.S. at 457 ("Although A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a 'consensual relationship' with the Tribes, 'Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident.'").

[204] *Id.* at 458.

[205] Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

[206] *Id.* at 657.

vices to Atkinson, including police.[207] Despite benefiting from the Navajo Nation's citizens and services, Atkinson refused to pay its taxes, so the Navajo Nation sued in tribal court to collect the taxes. The Supreme Court held the tribe lacked jurisdiction. Regarding *Montana*'s consensual prong, the Court stated receiving government services was not consent to the Navajo Nation's jurisdiction nor was Atkinson's acquiring federal Indian trader status.[208] The Court flatly rejected *Montana*'s second exception asserting it was implausible that hotel operation "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[209] *Atkinson* adds uncertainty over tribes' ability to regulate the businesses operating within their borders.

In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, the Supreme Court once again rejected tribal jurisdiction.[210] The Longs operated a business on the Cheyenne River Sioux Indian Reservation and obtained a loan from Plains Commerce Bank (PCB).[211] PCB regularly did business on the Reservation, including initiating claims in tribal court.[212] After the Longs defaulted, PCB filed an eviction suit in South Dakota court.[213] The Longs responded by filing an action in tribal court alleging PCB violated several tribal laws, including discriminating against the Longs by offering non-Indians more favorable loan terms.[214] PCB contested tribal jurisdiction over the discrimination claim, and the Supreme Court held the tribal court lacked jurisdiction. The Court stated tribes cannot regulate the sale of fee lands within their reservation even though a *Montana* consensual relationship existed in this case.[215] The Court noted the land in question had been privately owned by non-Indians for over fifty years, so the land sale did not impact tribal self-government, meaning *Montana*'s second exception was not satisfied.[216]

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[207] *Id.* at 654-55.

[208] *Id.* at 655-56.

[209] *Id.* at 657.

[210] Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008).

[211] *Id.* at 321.

[212] Brief for Amicus Curiae Cheyenne River Sioux Tribe in Support of Respondents at 29-31, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008) (No. 07-411), 2008 WL 782553 at *29-31 ("Of particular significance to this case, the Bank has often prevailed in tribal court or settled cases on favorable terms . . . ").

[213] *Plains Commerce Bank*, 554 U.S. at 322.

[214] *Id.*

[215] *Id.* at 338 ("But whatever the Bank anticipated, whatever 'consensual relationship' may have been established through the Bank's dealing with the Longs, the jurisdictional consequences of that relationship cannot extend to the Bank's subsequent sale of its fee land.").

[216] *Id.* at 341 ("The land's resale to another non-Indian hardly 'imperil[s] the subsistence or welfare of the tribe.'").

Notably, the Court's opinion did not address whether PCB was subject to tribal court jurisdiction for the breach of contract and bad faith claims.[217]

Dollar General v. Mississippi Band of Choctaw Indians[218] is the Court's most recent examination of tribal civil jurisdiction over non-Indians in a commercial context. Dollar General opened a store on the Choctaw Reservation. This required Dollar General to obtain a tribal business license and to lease tribal land. In the lease agreement,[219] Dollar General explicitly agreed to a forum selection clause naming Choctaw tribal court as the exclusive forum as well as the application of Choctaw law.[220] A Dollar General employee allegedly molested a Choctaw youth who was interning for the store.[221] When a civil suit was filed in tribal court, Dollar General opposed tribal jurisdiction. Justice Scalia died while the case was pending, resulting in a four-to-four split.[222] Consequently, the Fifth Circuit Court's decision in favor of tribal jurisdiction was affirmed.[223] Though a tribal victory, the four-to-four split creates uncertainty because *Montana*'s consensual relations prong was seemingly satisfied by the forum selection clause. Similarly, *Dollar General* creates uncertainty over whether child molestation occurring at a reservation business implicates *Montana*'s health and welfare prong.

Tribal jurisdiction is unclear not only over non-Indians but also over nonmember Indians. In *Washington v. Confederated Tribes of the Colville Indian Reservation,*[224] the Supreme Court held tribal citizens were exempt from state taxes on their tribe's reservation, but Indians from other tribes must pay state taxes.[225] The Court reasoned, "For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation."[226] Following this rationale, the Court held that tribes lack criminal jurisdiction over nonmember Indians.[227] Con-

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[217] *Id.* at 339 ("The Longs are the first to point out that their breach-of-contract and bad-faith claims, which *do* involve the Bank's course of dealings, are not before this Court.").

[218] 579 U.S. 545, 546 (2016) (per curiam).

[219] Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 169 (5th Cir. 2014) ("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.").

[220] *Id.* at 174.

[221] *Id.* at 169 ("Pursuant to this program, John Doe, a thirteen-year-old tribe member, was assigned to the Dollar General store. Doe alleges that Townsend sexually molested him while he was working at the Dollar General store.").

[222] Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 579 U.S. 545, 546 (2016) (per curiam).

[223] *Id.*

[224] 447 U.S. 134 (1980).

[225] *Id.* at 160-61.

[226] *Id.* at 161.

[227] Duro v. Reina, 495 U.S. 676 (1990).

gress quickly reversed this holding,[228] but the Court continues to use the term "nonmember" when discussing tribal civil jurisdiction.[229] This leaves room for Indians to challenge tribal jurisdiction in all tribes but their own.

Accordingly, tribes can fully develop and publish laws, but the laws' effectiveness is uncertain and essentially limited to the tribe's citizens. Tribal codes are often incomplete because tribes have better things to do than promulgate laws most people are immune from.[230] This creates significant economic problems because absent developed commercial codes, businesses do not know which laws they must follow.[231] Businesses do not like uncertainty, so businesses simply avoid Indian country.[232] This means tribes have no businesses to tax,[233] and money imme-

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[228] 25 U.S.C. § 1301(2) (2018).

[229] 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."); 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."); Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997) ("This case concerns the adjudicatory authority of tribal courts over personal injury actions against defendants who are not tribal members.").

[230] National Conference of Commissioners on Uniform Laws, *Modal Tribal Secured Transaction Act*, U.S. DEP'T OF INTERIOR BUREAU OF INDIAN AFF. (Aug., 2005), https://www.bia.gov/sites/bia.gov/files/assets/asia/ieed/ieed/pdf/idc1-024559.pdf [https://perma.cc/GGH7-8MWX] ("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.").

[231] Brief for Amicus Curiae Retail Litigation Center, Inc. Supporting Petitioners, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians at 14-15, 136 S. Ct. (2016) (No. 13-1496) 2015 WL 5244347 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 Amicus Curiae of the S.D. Bankers Ass'n in Support of Petitioners at 2, 136 S. Ct. 2159 (2016) (No. 13-1496) 2015 WL 5261542 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.'"); Christensen *supra* note 189, at 1261 ("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.").

[232] Crepelle, *How Federal Indian Law Prevents*, *supra* note 193, Part IV.

[233] Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999 (2022).

diately flows away from Indian country.[234] Tribes will never reach their full potential so long as tribal law does not fully apply to all persons within their borders.

Tribal civil jurisdiction over all persons within their borders must be recognized as the exclusive regulatory force on tribal land.[235] This is not a novel concept. One of the earliest and most fundamental principles of federal Indian law is that state law stops where Indian country begins.[236] As originally proposed, reservations were intended to be jurisdictions wherein tribes were allowed to govern themselves.[237] Tribal law is required for self-governance;[238] indeed, federal policies aimed at destroying tribes sought to obliterate tribal law.[239] Nonetheless, neither treaty nor federal legislation ever circumscribed tribal civil jurisdiction over non-Indians.[240] Thus, federal courts, including the Supreme Court, going back to the early 1900s recognized tribal civil jurisdiction over non-

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[234] *Cf.* JP Sevilla, *On the Potential Impact of Value Pricing by Developing Countries on Allocative and Dynamic Efficiency in the Global Pharmaceutical Industry,* 12 J. L. ECON. & POL'Y 147 (2016).

[235] Crepelle, *White Tape*, *supra* note 11, at 602-03.

[236] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832) ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."); President George Washington, Address to Seneca Indians (Dec. 29, 1790), https://pages.uoregon.edu/mjdennis/courses/hist469_senecas.htm [https://perma.cc/F384-8PQR] ("The general Government only has the power, to treat with the Indian Nations, and any treaty formed and held without its authority will not be binding.").

[237] President Andrew Jackson, First Annual Message to Congress (Dec. 8, 1829), https://millercenter.org/the-presidency/presidential-speeches/december-8-1829-first-annual-message-congress [https://perma.cc/2CR8-877G] ("As a means of effecting this end I suggest for your consideration the propriety of setting apart an ample district west of the Mississippi, and without the limits of any state or territory now formed, to be guaranteed to the Indian tribes as long as they shall occupy it, each tribe having a distinct control over the portion designated for its use. 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.").

[238] Williams v. Lee, 358 U.S. 217, 220 (1959) ("Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

[239] Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination,* 84 N.C. L. REV. 779, 827 (2006) ("Thus, while most of the original intentions of Congress in the Major Crimes Act reflected hostility to tribal sovereignty, government, and culture . . . ").

[240] Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 855 n.17 (1985).

Indians.[241] The Court continues to recognize tribes' right to exclude non-Indians from their land.[242] There is no good reason why tribes cannot enforce their laws against all persons within their borders—anything less authorizes non-Indians to break tribal law on tribal land.

Tribal civil jurisdiction can be restored by the Supreme Court or Congress. The Court can simply overturn its recent jurisprudence on tribal civil jurisdiction, and there is good reason for it to do so. Countless scholars have lambasted the Court for its head-scratching tribal civil jurisdiction decisions;[243] plus, the Court's decisions are contrary to the legislative and executive branches' tribal self-determination policy. If the Court aligns itself with the other branches of government, it will affirm tribal civil jurisdiction over all persons in Indian country because the Court itself has acknowledged that tribal courts are vital instruments of tribal self-government.[244]

Alternatively, Congress can enact legislation affirming tribal civil jurisdiction over all persons in Indian country. Congress reaffirmed tribes'

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[241] Morris v. Hitchcock, 194 U.S. 384 (1904); Maxey v. Wright, 3 Ind. T. 243, 54 S.W. 807, 809–10 (Indian Terr. 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.").

[242] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them.") (emphasis added).

[243] JANE M. SMITH, CONG. RSCH. SERV., R43324, TRIBAL JURISDICTION OVER NONMEMBERS: A LEGAL OVERVIEW 5 (2013) ("Tribal civil jurisdiction over nonmembers is complicated for several reasons."); Fletcher, *supra* note 158, at 780 ("The Supreme Court's decision-making, by its own admission, is piecemeal in these cases, and too often turns on vague assumptions about tribal governance."); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1191 (2010) ("Second, despite the emergence of some clarity in the law, it is apparent that the process of litigating tribal court cases against nonmembers has become unduly cumbersome.").

[244] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14-15 (1987) ("Tribal courts play a vital role in tribal self-government and the Federal Government has consistently encouraged their development.") (citation omitted); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."); United States v. Wheeler, 435 U.S. 313, 332 (1978) ("Thus, tribal courts are important mechanisms for protecting significant tribal interests.").

inherent criminal jurisdiction over non-Indians for three crimes in 2013.[245] By all accounts, tribal criminal jurisdiction over non-Indians has been a smashing success;[246] hence, Congress recently expanded tribal criminal jurisdiction.[247] If tribes can put non-Indians in jail for nine years,[248] there should be little controversy over tribal adjudication of private law disputes involving non-Indians.

The evidence is clear. Tribal law worked for centuries. Indigenous legal institutions built flourishing economies long before European arrival and were able to quickly change to accommodate European goods. Tribal troubles began when the United States imposed restrictions on tribal sovereignty. While tribal sovereignty is at its highest point in the last 200 years,[249] tribal private law lags because tribal civil jurisdiction is inhibited. Fetters on tribal civil jurisdiction create a regulatory kaleidoscope resulting in jurisdictional clashes between tribes, states, and the federal government. These feuds undermine tribal law and tribal sovereignty. Affirming tribal law as the governing force in Indian country is the key to transforming tribal economies and improving the lives of thousands of American Indians.

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[245] 25 U.S.C. § 1304 (2018).

[246] Adam Crepelle, *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, 78 (2020) ("Hence, tribal VAWA implementation is widely considered a tremendous success.").

[247] 25 U.S.C. § 1304 (2018); Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, Title VIII, 136 Stat. 49, 895.

[248] 25 U.S.C. § 1302(b) (2018).

[249] Washburn, *Changing Landscape*, *supra* note 181, at 202 ("After more than two centuries of persisting side by side with the federal government, tribal governments in the United States today have more authority and relative economic power than any time since the earliest days of that relationship.").