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IT SHOULDN'T BE THIS HARD: THE LAW AND ECONOMICS OF BUSINESS IN INDIAN COUNTRY

Adam Crepelle*

Abstract

Indian reservation economies have been in shambles for generations. Although some tribes operate successful gaming enterprises, no tribe has a vibrant private sector economy. Law and economics help explain why. Economics is the study of choices, and Indian country's complex legal rules deter businesses from investing on tribal land. After all, no business wants to spend a year waiting for the federal government to approve a land lease on reservation when land is easily accessible off reservation. Likewise, jurisdictional rules are clear off reservation, but within Indian country, simply determining whether to file a breach of contract suit in tribal, state, or federal court can take years. Complications like this cause private investors to avoid Indian country.

This Article uses an economic lens to explain how the rules governing Indian country trap tribes in poverty. This Article explains the inefficiencies created by federal Indian law are a consequence of the federal government undermining tribal sovereignty. Accordingly, this Article suggests tribes revitalize their legal institutions to improve their business climates.

INTRODUCTION

Federal Indian law is complicated.¹ Lynn Becker learned this the hard way. In 2004, Becker entered a management contract with the Ute Indian Tribe of the Uintah and Ouray Reservation's ("Tribe") Energy and Minerals Department.² The contract declared Utah law governed disputes arising from the agreement, and the contract named the United States District Court for the District of Utah as the forum to resolve contractual disputes.³ The Tribe also agreed to a limited waiver of its

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¹ See, e.g., *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) ("Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases."); Adam Crepelle, *Concealed Carry to Reduce Sexual Violence Against American Indian Women*, 26 KAN. J.L. & PUB. POL'Y 236, 239 (2017) ("Indian country criminal jurisdiction is a bewildering mess."); Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L.J 115, 118–19 (2017) ("Federal Indian law is complicated.").

² *Becker v. Ute Indian Tribe*, 7 F.4th 945, 948 (10th Cir. 2021), *cert. denied, sub nom. Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 143 S. Ct. 273 (2022).

³ *Id.* at 949.

sovereign immunity in the contract.⁴ In 2013, Becker filed a breach of contract in Utah's federal district court.⁵ Despite the forum selection clause and waiver of sovereign immunity, the contract dispute produced five different lawsuits in three separate court systems: federal court, state court, and tribal court.⁶ In August of 2021, the Tenth Circuit Court of Appeals remanded the case to the tribal court to determine whether the tribe properly waived its sovereign immunity.⁷ If Becker is dissatisfied with the tribal court's ruling, he has the right to challenge the tribal court's jurisdiction in federal court.⁸

Becker's jurisdictional and procedural quagmire could only happen in Indian country.⁹ Hence, businesses avoid Indian country¹⁰ because its rules are far too complicated.¹¹ As Navajo Nation President Jonathan Nez wrote in 2021, "[T]he federal government subjects us to crippling oversight whenever we dig a hole."¹² Furthermore, tribes' "domestic dependent" status has resulted in diminished jurisdiction.¹³ Consequently, Indian country's jurisdictional rules are riddled with uncertainty. For example, does the state or tribe zone a parcel of land? Can the state tax a transaction? In which court should a breach of contract claim be filed, and can the tribal entity be sued? Does the tribe have its own laws? Then, there is often the even more fundamental question: Does the land in question legally qualify as Indian country?

This Article argues private capital avoids Indian country because the rules governing Indian country discourage efficient productivity. The rule of law is

⁴ *Id.* at 949–50.

⁵ *Id.* at 950.

⁶ *Id.* at 947.

⁷ *Id.* at 955 ("But that waiver provision is only applicable if the Agreement itself is determined to be valid, and, as we have noted, the Tribe has asserted nonfrivolous challenges to the validity of the Agreement.").

⁸ *Id.* ("If [and when] the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, [Becker] may challenge that ruling in the District Court.") (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 22 (1987)).

⁹ *See, e.g., Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985) ("They further assert that the underlying tort action has turned into a procedural and jurisdictional nightmare because petitioners did not pursue their readily available Tribal Court remedies." (internal quotation marks omitted)).

¹⁰ 18 U.S.C. § 1151 (defining "Indian country").

¹¹ *See* Adam Creppelle, *White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self-Government*, 54 U. MICH. J.L. REFORM 563, 578 (2021) [hereinafter Creppelle, *White Tape*].

¹² Jonathan Nez, *Biden's Budget Will Be a Boon to Tribes—as Long as Red Tape Doesn't Strangle Us*, WASH. POST (June 29, 2021, 11:34 AM EDT), <https://www.washingtonpost.com/opinions/2021/06/29/biden-budget-tribes-red-tape/> [https://perma.cc/T4BC-STM9].

¹³ *See, e.g., United States v. Cooley*, 141 S. Ct. 1638, 1642–43 (2021).

supposed to provide legal certainty;¹⁴ accordingly, the Supreme Court has noted jurisdictional rules should be clear.¹⁵ Indian country's rules are not. Justice Souter described Indian country's jurisdictional rules as an "unstable jurisdictional crazy quilt,"¹⁶ and Justice Douglas lamented Indian country's jurisdictional rules benefit only "those who benefit from confusion and uncertainty."¹⁷ Thus, Indian country is laden with volatility, which repels investment.¹⁸ The perils of uncertainty are magnified by the layers of federal bureaucracy that apply nowhere else in the United States.¹⁹ This "bureaucratic imperialism"²⁰ serves only to add transaction costs, which makes commercial endeavors more expensive and occur at a slower pace than outside of Indian country.

Though the federal government deserves the lion's share of the blame, tribes are responsible for some of Indian country's economic troubles. There are currently 574 federally recognized tribes, each a distinct sovereign.²¹ Tribes have not universally adopted uniform laws relating to business, so there is no general legal template for entities operating in Indian country. While tribes have the sovereign right to reject

¹⁴ See *What Is the Rule of Law*, U.N., <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> [<https://perma.cc/8LAP-DUU3>] (last visited June 29, 2023) ("It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency."); Isabel Lifante-Vidal, *Is Legal Certainty a Formal Value?*, 11 JURIS. 456, 456 (2020) ("Legal certainty is a central requirement for the rule of law. Legal systems should both enable those subject to law to predict human behavior and institutional reactions and to prevent an arbitrary use of state power against them.").

¹⁵ See *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002) ("Motives are difficult to evaluate, while jurisdictional rules should be clear."); see also Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTREPRENEURSHIP & L. 413, 447 n.154 (2019) (listing Supreme Court decisions that call for straightforward jurisdictional rules) [hereinafter Crepelle, *Decolonizing*].

¹⁶ *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring).

¹⁷ *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 466–67 (1975) (Douglas, J., dissenting) (criticizing the Court's endorsement of a system of "checkerboard jurisdiction" that had allowed homesteaders to settle on various parts of Indian territory).

¹⁸ See *United States v. Stump Home Specialties Mfg.*, 905 F.2d 1117, 1122 (7th Cir. 1990) ("To the risk averse—and most people are risk averse in most of their important personal and business dealings—uncertainty is a bad, and to be relieved from uncertainty is therefore a good.").

¹⁹ See Crepelle, *White Tape*, *supra* note 11, at 573. ("Indian country's immense resource wealth remains untapped due to a complex regulatory framework that applies nowhere else in the United States.").

²⁰ *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.D.C. 1976) ("This attitude, which can only be characterized as bureaucratic imperialism, manifested itself in deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by § 28 of the Act.").

²¹ Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636–41 (Jan. 28, 2022).

uniformity, the absence of consistent rules produces unnecessary transaction costs as entirely new legal systems must be learned to operate throughout Indian country. Additionally, tribal laws are not always easily accessible which leads to unpredictability.²² Businesses are leery of operating in jurisdictions with unknown laws.

Fortunately, tribes can take measures to transform their economies. Adopting uniform, publicly available commercial laws is one path forward. Although each tribe is different, business has many global norms. Laws governing contracts and corporation formation are largely similar throughout the world. Likewise, tribes have long histories of enforcing contracts for commercial purposes. An intertribal business court could help lower uncertainty and decrease transaction costs too, as the intertribal tribunal would help investors predict where their disputes will be litigated. Tribes can also improve their commercial climate by using federal law to clarify regulatory and jurisdictional authority on their land. When tribes are federally authorized to perform a government function, this eliminates the uncertainty over which sovereign is responsible for the action. Plus, tribes have routinely shown themselves to outperform the federal government.²³ By taking these steps, tribes can improve the economic conditions on their land.

The remainder of the Article proceeds as follows. Part I provides background on how the absence of businesses impacts tribes and their citizens. Part II discusses how economic reasoning factors into business decision-making. Part III applies an economic lens to doing business in Indian country thereby highlighting the transaction costs and uncertainty that keep businesses away from reservations. Part IV examines how Indian country became so complex, and Part V sets forth recommendations to improve tribal economies.

²² *Tribal Law*, LIBR. OF CONG., <https://guides.loc.gov/american-indian-law/Tribal-Law> [<https://perma.cc/5PQB-E9R5>] (last visited June 29, 2023) (“With over 570 federally-recognized tribes across the United States, it can be challenging to find tribal laws, which are not published in a consolidated resource.”).

²³ *Sovereignty Matters: The Future of Nation Building*, HARV. KENNEDY SCH. PROJECT ON INDIGENOUS GOVERNANCE & DEV., <https://indigenousgov.hks.harvard.edu/> [<https://perma.cc/S8WF-3WWZ>] (last visited on Aug. 17, 2023) (“When Native nations make their own decisions about what development approaches to take, they consistently outperform external decision makers—on matters as diverse as governmental form, natural resource management, economic development, health care and social service provision.”); Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 201 (2017) (“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.”).

I. THE IMPACTS OF LACK OF BUSINESSES ON TRIBES

The absence of private businesses is a major reason why the average reservation unemployment rate was fifty percent even before the COVID-19 pandemic.²⁴ A consequence of unemployment is poverty, and Indians have the highest poverty rate in the United States.²⁵ Due to poverty, approximately one-third of reservation homes are overcrowded.²⁶ Forty percent of reservation homes are considered substandard compared to six percent throughout the United States;²⁷ in fact, nearly fifty percent of tribal homes lack access to safe water or solid waste disposal facilities.²⁸ Inadequate housing combined with poverty related health maladies made Indians extremely susceptible to COVID-19.²⁹ Poverty also results in thirteen percent of Indians lacking access to an automobile, compared to six percent of white Americans and nine percent of all Americans.³⁰ This means reservation residents are likely to have difficulty leaving the reservation for basic tasks, such as commuting to work and buying groceries.³¹

Not having businesses within their borders causes governance problems for tribes. Without businesses, tribes cannot rely on tax revenue to fund government operations. This means tribes must depend on federal appropriations or start businesses.³² Though tribes are entitled to federal support pursuant to hundreds of

²⁴ *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affs.*, 111th Cong. 1–2 (2010) (statement of Sen. Byron L. Dorgan, Chairman, S. Comm. on Indian Affs.).

²⁵ *American Indian and Alaska Native Heritage Month: November 2017*, U.S. CENSUS BUREAU (Oct. 6, 2017), <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html> [<https://perma.cc/8DUK-GL4Z>].

²⁶ *Housing & Infrastructure*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/policy-issues/economic-development-commerce/housing-infrastructure> [<https://perma.cc/8LWJ-E389>] (last visited June 29, 2023).

²⁷ *Id.*

²⁸ Democratic Staff of the H. Comm. on Nat. Res., 114th Cong., *Water Delayed Is Water Denied: How Congress Has Blocked Access To Water For Native Families* 1 (2016), https://democrats-naturalresources.house.gov/imo/media/doc/House%20Water%20Report_FINAL.pdf [<https://perma.cc/M3SG-MHP9>] (“According to data from the Indian Health Service (IHS), nearly half (48%) of all homes on tribal land lack access to adequate drinking water, sewage, or solid waste disposal facilities.”).

²⁹ Adam Creppelle, *Tribes, Vaccines, and COVID-19: A Look at Tribal Responses to the Pandemic*, 49 *FORDHAM URB. L.J.* 31, 36–37 (2021).

³⁰ *Car Access United States*, NAT'L EQUITY ATLAS, https://nationalequityatlas.org/indicators/Car_access#/ [<https://perma.cc/W3YE-5S3A>] (last visited Dec. 3, 2022).

³¹ See Gavin Clarkson & Alisha Murphy, *Tribal Leakage: How the Curse of Trust Land Impedes Tribal Economic Self-Sustainability*, 12 *J.L. ECON. & POL'Y* 177, 178 (2016) (illustrating how residents of Navajo Nation must drive an hour or more to purchase groceries and other necessities off the reservation).

³² See Adam Creppelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 *U. PA. J. BUS. L.* 683, 685–86 (2021) [hereinafter Creppelle, *How Federal Indian Law Prevents*].

treaties, the federal government persistently underfunds tribal governments.³³ Inadequate federal funding forces tribes to operate their own businesses. There is no guarantee of business success, so relying on corporate profits to finance a government is risky. Additionally, tribally owned businesses are often “arms of the tribe”³⁴ and entitled to sovereign immunity.³⁵ The sovereign immunity of tribal corporations is frequently challenged, and challenges to sovereign immunity imperil tribal sovereignty.³⁶ If tribes had businesses to tax, sovereign immunity would not be placed in jeopardy.³⁷

II. LAW, ECONOMICS, AND BUSINESS

Businesses consider many factors when determining where to locate. While natural resources and population density matter, the legal institutions governing an area may be even more important for fostering investment.³⁸ For example, the easier

³³ U.S. COMM’N ON C.R., *BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS* 12–13 (2018) <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf> [<https://perma.cc/NEU7-VVHB>] [hereinafter *BROKEN PROMISES*] (“As part of entering into treaties, the federal government acquired Native American lands and agreed to provide Native Americans with certain services such as the preservation of law and order, education, housing, and health care.”).

³⁴ To determine whether an entity qualifies as an “arm of the tribe,” courts weigh a variety of factors including ownership and control of the entity as well as how its profits are distributed. Restatement of the Law of American Indians § 51 (“Factors for discerning ‘arm of tribe’ status. In cases where the close connection between an Indian tribe and its unincorporated subdivision, agency, or instrumentality is not plain, the subdivision, agency, or instrumentality in question will be deemed to be an ‘arm of the tribe’ and, therefore, imbued with the tribe’s sovereign immunity if (1) the entity is controlled by the governing body of the tribe, (2) the tribe owns the entity, and (3) a substantial portion of the net revenues earned by the entity inure to the tribe.”).

³⁵ *Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 705 n.1 (2003) (“The United States maintains, and the County does not dispute, that the Corporation is an ‘arm’ of the Tribe for sovereign immunity purposes.”); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (“When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe.”).

³⁶ Crepelle, *How Federal Indian Law Prevents*, *supra* note 32, at 704.

³⁷ *Id.* (“Private businesses help tribes become less reliant on tribally owned enterprises; consequently, more private businesses reduce the threat to tribal sovereign immunity.”).

³⁸ Jeffrey Frankel, *The Natural Resource Curse: A Survey of Diagnoses and Some Prescriptions* 20 (Ctr. for Int’l Dev. at Harvard Univ., Working Paper No. 233, 2012), <https://www.hks.harvard.edu/sites/default/files/centers/cid/files/publications/faculty-working-papers/233.pdf> [<https://perma.cc/M7Y5-WFZN>] (“Commodity endowments lead to autocratic [sic] and oligarchic institutions, characterized by corruption, inequality, class structure, and absence of rule of law.”); *Rule of Law and Economic Development*, RULE OF L. ALL., <http://rolalliance.org/rol-alliance-impact/rule-of-law-economic-development/> [<https://perma.cc/V2RC-T5J8>] (last visited June 29, 2023) (“The rule of law is not a mere

it is to acquire property, the easier it is to conduct business in a jurisdiction.³⁹ Likewise, lower tax burdens and swifter permitting are attractive to industry.⁴⁰ Businesses also take into account the jurisdiction's contract enforcement, based upon the speed and fairness in which claims are resolved.⁴¹ Capital is the lifeblood of commerce, so businesses are more likely to operate where capital is easier to access.⁴² Industry considers labor market regulations as well as the difficulty of trading across borders when deciding where to locate.⁴³ In addition to legal infrastructure, businesses care about physical infrastructure, such as whether a site has stable electricity, water, and paved roads.⁴⁴

Each of the aforementioned factors can be explained by economics. Economics is the study of how people make choices.⁴⁵ People must make choices because humans exist in a world of scarcity—limited time, money, and other resources.⁴⁶ Scarcity means each choice comes with a tradeoff, forgoing one opportunity for another.⁴⁷ When making tradeoffs, economists assume people act rationally.⁴⁸ Whether this assumption is warranted is debatable, but in the classical sense,

adornment to development; it is a vital source of progress. It creates an environment in which the full spectrum of human creativity can flourish, and prosperity can be built.”)

³⁹ See WORLD BANK GROUP, *DOING BUSINESS 2019: TRAINING FOR REFORM* 23–24 (16th ed. 2019), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf [<https://perma.cc/D2QJ-7LKL>].

⁴⁰ *Id.* at 23.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*; Charles L. Carlyle, *Native American Reservations Need Basic Infrastructure to Be Economically Sustainable*, PHOENIX BUS. J. (Oct. 18, 2016), <https://www.bizjournals.com/phoenix/news/2016/10/18/native-american-reservations-basic-infrastructure.html#:~:text=%E2%80%8BNative%20American%20reservations%20need%20basic%20infrastructure%20to%20be%20economically%20sustainable&text=When%20infrastructure%2C%20such%20as%20roads,revenue%20to%20fund%20these%20projects> [<https://perma.cc/5GE6-PYPH>] (“That’s because government officials and policymakers know that sufficient infrastructure has always been a key factor in attracting and retaining business interests.”); Robert Puentes, *Why Infrastructure Matters: Rotten Roads, Bum Economy*, BROOKINGS (Jan. 20, 2015), <https://www.brookings.edu/articles/why-infrastructure-matters-rotten-roads-bum-economy/#:~:text=Cities%2C%20states%20and%20metropolitan%20areas,the%20way%20they%20do%20business> [<https://perma.cc/C2GD-UD7E>].

⁴⁵ ROBERT L. SEXTON, *EXPLORING ECONOMICS* 3 (8th ed. 2020) (“Precisely defined, economics is the study of the choices we make among our many wants and desires given our limited resources.”); *What Is Economics?*, ECONLIB, <https://www.econlib.org/library/Topics/College/whatis-economics.html> [<https://perma.cc/J3TU-LQV5>] (last visited June 29, 2023) (“Economics is about making choices.”).

⁴⁶ *Scarcity*, ECONLIB, <https://www.econlib.org/library/Topics/College/scarcity.html> [<https://perma.cc/9VTE-PQ2C>] (last visited June 29, 2023).

⁴⁷ See Paul M. Johnson, *Trade-off*, A GLOSSARY OF POL. ECON. TERMS, <http://webhome.auburn.edu/~johnspm/gloss/trade-off.phtml> [<https://perma.cc/4MNX-2D4P>] (last visited June 29, 2023).

⁴⁸ SEXTON, *supra* note 45, at 6–7.

rationality imports people make the best choice for themselves under their particular circumstances. The rationality assumption means individuals respond to incentives, the perceived consequences of taking an action.⁴⁹ A rational individual's goal is to make the efficient choice whereby efficiency denotes the benefits outweigh the costs.⁵⁰

Behind the scenes of every choice lie transaction costs and uncertainty. Simply put, transaction costs are the costs of executing a transaction and broadly fall into three categories—search, bargaining, and enforcement costs.⁵¹ Search costs are the time, energy, and resources an individual expends acquiring information about whether to enter into a transaction.⁵² Bargaining costs are the effort it takes to negotiate an agreement.⁵³ Enforcement costs are the expense associated with ensuring a party complies with an agreement.⁵⁴ Transaction costs are essentially economic friction; consequently, they make transactions less efficient.⁵⁵ Uncertainty is related to transaction costs. The key distinction between uncertainty and risk is that risk can be quantified whereas uncertainty means the potential outcomes are unknown.⁵⁶ Less uncertainty results in higher quality choices.

Economic reasoning influences the choices businesses make; that is, businesses respond to incentives. Indeed, the entire theory of the firm is premised on the idea

⁴⁹ STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 16 (2009) (“We all learn to respond to incentives, negative and positive, at the outset of life.”); See SEXTON, *supra* note 45, at 7.

⁵⁰ PAUL HEYNE, PETER BOETTKE & DAVID PRYCHITKO, *THE ECONOMIC WAY OF THINKING* 23 (13th ed. 2013).

⁵¹ Paul M. Johnson, *Transaction Costs*, A GLOSSARY OF POL. ECON. TERMS, http://webhome.auburn.edu/~johnspm/gloss/transaction_costs.phtml [<https://perma.cc/3CXK-Q8BU>] (last visited June 29, 2023).

⁵² *Transaction Costs*, CORP. FIN. INST. (June 28, 2023), <https://corporatefinanceinstitute.com/resources/economics/transaction-costs/> [<https://perma.cc/A98A-MK6B>] (“These are the costs associated with looking for relevant information and meeting with agents with whom the transaction will take place.”).

⁵³ *Id.* (“These are the costs related to coming to an agreement that is agreeable to the parties involved in drawing up a contract.”).

⁵⁴ *Id.* (“These are the costs associated with making sure that the parties in the contract keep their word and do not default on the terms of the contract.”).

⁵⁵ Lucas Downey, *What Are Transaction Costs? Definition, How They Work, and Example*, INVESTOPEDIA (Mar. 26, 2023), <https://www.investopedia.com/terms/t/transaction-costs.asp> [<https://perma.cc/7CDS-RPEF>] (“When transaction costs diminish, an economy becomes more efficient, and more capital and labor are freed to produce wealth.”); Rolf T. Wigand, *Electronic Commerce*, ENCYC. OF INT’L MEDIA AND COMM’NS (2003), <https://www.sciencedirect.com/topics/economics-econometrics-and-finance/transaction-costs-theory> [<https://perma.cc/3K77-LAGY>] (“Transaction costs may be viewed as the economic equivalent of friction in a physical system; i.e., if friction is too great, no or at least impeded movement will occur, suggesting that if transaction costs are high, no or little economic activity is likely to occur.”).

⁵⁶ Tim Kastle, *Few People Understand the Difference Between Risk and Genuine Uncertainty*, BUSINESS INSIDER (Mar. 27, 2013, 2:38 PM GMT), <https://www.businessinsider.com/difference-between-risk-and-uncertainty-2013-3> [<https://perma.cc/B7CX-THYP>].

that organizing as a business reduces transaction costs.⁵⁷ As rational actors, businesses respond to regulatory burdens because regulations increase transaction costs.⁵⁸ For example, Los Angeles' request for pornographic film permits declined by ninety-five percent after the city imposed a condom mandate.⁵⁹ The condom mandate complicated film production,⁶⁰ and performers believed the condom mandate made them less safe.⁶¹ Thus, porn producers fled Los Angeles to jurisdictions with fewer regulations or filmed without permits.⁶²

Rather than increase regulations, states and cities often lower taxes and reduce regulatory burdens—meaning lower transaction costs—in attempts to attract businesses.⁶³ Florida created the Reedy Creek Improvement District (“RCID”) in 1967 to help develop Walt Disney World.⁶⁴ The RCID grants Disney control over

⁵⁷ See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

⁵⁸ Hanna Almlöf & Per-Olaf Bjuggren, *A Regulation and Transaction Cost Perspective on the Design of Corporate Law*, 47 *EUR. J.L. & ECON.* 407 (2019).

⁵⁹ Kathleen Miles, *LA Porn Industry Disappears After Condom Law*, HUFFPOST (Nov. 20, 2013), https://www.huffpost.com/entry/la-porn-permits-condom_n_4298679 [<https://perma.cc/BYD9-44V2>] (“The number of film permits issued to pornography producers has dropped 95 percent in Los Angeles County since a condom mandate went into effect last January.”).

⁶⁰ Casey Calvert, *Why I Don't Want Condoms: A Porn Performer's Perspective*, HUFFPOST (Aug. 3, 2014), https://www.huffpost.com/entry/why-i-dont-want-condoms-a-porn-performers-perspective_b_5425635 [<https://perma.cc/N4K2-63K8>] (“It's because condoms make my job harder.”); Maria L. La Ganga, *Why a Porn Star Is Fighting California's Condom Law: 'It's a Women's Rights Issue'*, *GUARDIAN* (Oct. 18, 2016 6:00 AM EDT), <https://www.theguardian.com/us-news/2016/oct/18/porn-tasha-reign-california-condom-law-proposition-60> [<https://perma.cc/3XEK-SXBH>] (“The logistical hurdles are endless.”).

⁶¹ Kevin Shaffer, *That's a Wrap: Exploring Los Angeles County's Adult Film Condom Requirement*, 80 *BROOK. L. REV.* 1579, 1604 (2015) (“Many within the adult film industry have protested Measure B because they believe the industry's own testing standards and self-policing are more than effective controls on the spread of sexually transmitted diseases among performers.”); Calvert, *supra* note 60.

⁶² Mandalit del Barco, *Porn Industry Turned Off by L.A. Mandate for Condoms on Set*, NPR (Jan. 15, 2013, 5:18 PM ET), <https://www.npr.org/2013/01/15/169423027/porn-industry-turned-off-by-l-a-mandate-for-condoms-on-set#:~:text=Damian%20Dovarganes%20FAP-,The%20Los%20Angeles%20based%20AIDS%20Healthcare%20Foundation%20says%20a%20county,actors%20from%20sexually%20transmitted%20diseases> [<https://perma.cc/7DUB-LRZW>] (“And Kross says producers will go underground or move out of California, rather than comply with any condom laws.”); Miles, *supra* note 59 (“So it could be that porn producers are still in LA and just filming without either public health or film permits.”).

⁶³ Thaddeus Swanek, *States Focus on Pro-Business Policies to Attract Companies, Talent*, U.S. CHAMBER OF COM. (Jan. 19, 2021), <https://www.uschamber.com/small-business/states-focus-pro-business-policies-attract-companies-talent> [<https://perma.cc/QE33-USZT>].

⁶⁴ *About*, REEDY CREEK IMPROVEMENT DIST., <https://www.rcid.org/about/> [<https://perma.cc/9F96-5Z3A>] (last visited June 28, 2023).

building codes, zoning, and other municipal functions⁶⁵ within an approximately forty-square-mile area.⁶⁶ Hence, the RCID enables Disney to operate much more quickly and at a lower cost than other businesses who are forced to go through standard municipal regulatory procedures.⁶⁷ More recently, in their bids to land an Amazon headquarters, cities across the United States offered the corporate giant massive tax breaks, which would allow Amazon to operate at lower costs.⁶⁸ Twenty-seven states have created business courts to entice private investors—the theory being specialized courts increase certainty and lower enforcement costs in commercial disputes.⁶⁹

Though regulations can make commercial operations more onerous, regulations are needed for markets to function. To illustrate, property rights are essential for private enterprise,⁷⁰ and they require legal definition.⁷¹ Other regulations serve to protect individuals from the spillover effects of commercial activity, such as rules

⁶⁵ Henry Grabar, *Florida's Law Punishing Disney Has a Billion-Dollar Problem*, SLATE (Apr. 29, 2022, 11:14 AM), <https://slate.com/business/2022/04/ron-desantis-law-punishing-disney-has-a-billion-dollar-problem.html> [<https://perma.cc/43KA-YP9Q>] (“For 55 years, Disney has run its own fiefdom south of Orlando, a ‘special district’ in which the company effectively controls zoning, permitting, and building codes; builds roads and bridges; and runs utilities and services.”).

⁶⁶ REEDY CREEK IMPROVEMENT DIST., *supra* note 64.

⁶⁷ James Call, *A Smaller World for Disney? Florida Lawmakers Revoke Special Self-Governing Status*, TALLAHASSEE DEMOCRAT (Apr. 21, 2022, 6:20 PM ET), <https://www.tallahassee.com/story/news/politics/2022/04/21/florida-disney-ron-desantis-reedy-creek-tallahassee-house-senate-governor-republicans-vote/7386485001/> [<https://perma.cc/L3KG-K3LX>] (“House sponsor Rep. Randy Fine, R-Brevard, said the special district designation provides an unfair competitive advantage over other tourist attractions.”).

⁶⁸ Nicky Woolf, *“The Hunger Games for Cities” – Inside the Amazon HQ2 Bid Process*, NEW STATESMAN (June 18, 2019), <https://www.newstatesman.com/culture/2019/06/the-hunger-games-for-cities-inside-the-amazon-hq2-bid-process> [<https://perma.cc/9EEY-32HY>] (“[I]n the event HQ2 was granted to Fresno, in California’s Central Valley, 85 percent of all city taxes would get put into a ‘community fund’ to be jointly controlled by the city and the company.”).

⁶⁹ See generally Adam Creppelle, *An Intertribal Business Court*, 60 AM. BUS. L.J. 61 (2023) [hereinafter Creppelle, *Intertribal Business Court*] (encouraging Native American Tribes to create an intertribal business court to allay the business sector’s mistrust of tribal courts).

⁷⁰ Armen A. Alchian, *Property Rights*, ECONLIB, <https://www.econlib.org/library/Enc/PropertyRights.html> [<https://perma.cc/4SLD-7C24>] (last visited June 29, 2023) (“One of the most fundamental requirements of a capitalist economic system—and one of the most misunderstood concepts—is a strong system of property rights.”).

⁷¹ JOSEPH WILLIAMS SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS 95 (2015) (“Property rights do not exist without a legal framework. No regulation, no property. Property can exist only if we have relatively clear rules about who owns what. That means we need rules to allocate and define property rights. This requires a lot more law than we may imagine.”).

limiting the amount of pollution a factory can emit.⁷² Rules governing property and pollution control can help allocate resources efficiently. However, many regulations imposed on businesses are impractical and irrational.⁷³ Louisiana's floral licensing law⁷⁴ is an exemplar of arbitrary regulation because the law makes it more difficult to sell flowers than a firearm in Louisiana.⁷⁵ Irrational regulations are particularly unappealing to businesses as they do nothing more than impose transaction costs.

III. THE LAW AND ECONOMICS OF BUSINESS IN INDIAN COUNTRY

Indian country is a veritable ocean of uncertainty and transaction costs. Using land and operating a business on reservations can require heaps of federal approvals. Moreover, there is uncertainty over whether the tribe, state, or federal government has authority over reservation activities. Determining which sovereign has authority can require years of costly, unpredictable litigation. Indian country's legal uncertainty is exacerbated by the inaccessibility of tribal law. Part III examines how the above factors impact Indian country commerce.

A. Land and Regulation

Indian country's regulatory structure is complex, and this is particularly true of land tenure. There are three primary types of land in Indian country—fee simple, trust lands, and restricted fee lands.⁷⁶ The first type, fee simple land,⁷⁷ is land an individual personally holds title to which they may freely alienate.⁷⁸ Fee simple is

⁷² Transcript, The Economic Lowdown Podcast Series, *Externalities*, FED. RES. BANK OF ST. LOUIS, <https://www.stlouisfed.org/education/economic-lowdown-podcast-series/episode-11-externalities> [<https://perma.cc/C4J5-FJFE>] (last visited June 29, 2023).

⁷³ E.g., DEP'T OF THE TREASURY OFF. OF ECON. POL'Y, COUNCIL OF ECON. ADVISORS, & DEP'T OF LAB., *Occupational Licensing: A Framework for Policymakers* 7 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_none_mbargo.pdf [<https://perma.cc/F222-PMJB>] (“Yet while licensing can bring benefits, current systems of licensure can also place burdens on workers, employers, and consumers, and too often are inconsistent, inefficient, and arbitrary.”).

⁷⁴ LA. STAT. § 3:3808(B).

⁷⁵ Cynthia Joyce, *An Illegal Arrangement*, LEGAL AFFS. (June 2004), https://www.legalaffairs.org/issues/May-June-2004/scene_joyce_mayjun04.msp [<https://perma.cc/FH8T-254Z>] (“It's easier to sell a gun than a bouquet in Louisiana, whose largest city, New Orleans, has the nation's highest per-capita murder rate.”).

⁷⁶ See Crepelle, *White Tape*, *supra* note 11, at 573–74.

⁷⁷ *Id.* at 574.

⁷⁸ *Id.*; see also CTR. FOR INDIAN COUNTRY DEV. OF THE FED. RES. BANK OF MINNEAPOLIS & ENTER. CMTY PARTNERS, TRIBAL LEADERS HANDBOOK ON HOMEOWNERSHIP 80 (Patrice H. Kunesh ed., 2018), <https://www.minneapolisfed.org/~/media/files/community/indiancountry/resources-education/cicd-tribal-leaders-handbook-on-homeownership.pdf?la=en> [<https://perma.cc/8BL5-B8PL>] [hereinafter TRIBAL LEADERS HANDBOOK].

the most common land tenure form in the United States.⁷⁹ However, Indian country's predominant form is the second type: trust land.⁸⁰ Individuals cannot own trust land; rather, they can acquire use rights for it while title remains with the federal government.⁸¹ Thus, trust land cannot be conveyed without federal approval.⁸² The final primary type of land in Indian country is restricted fee land.⁸³ Although an individual Indian or the tribe owns restricted land, interests in restricted fee land are nontransferable absent federal approval.⁸⁴ Hence, restricted fee land is the functional equivalent of trust land.⁸⁵ Even if only a small portion of a tract of land is held in trust or restricted status, a transaction that predominately involves fee simple land is unlawful without first gaining the Secretary of the Interior's approval.⁸⁶ Discerning land status can require lengthy searches of treaties, statutes, and other documents.⁸⁷ This takes time and money that usually does not have to be expended on land outside of Indian country.

Assuming a business wishes to operate on trust land, the Bureau of Indian Affairs' ("BIA") permission is required⁸⁸ and obtaining the BIA's permission can take over a year.⁸⁹ Indeed, the BIA must approve the lease price of individual Indian

⁷⁹ Jim Kimmons & Hannah Hottenstein, *What Is Fee Simple Ownership?*, THE BALANCE (Jan. 13, 2023), <https://www.thebalancesmb.com/fee-simple-ownership-in-real-estate-2866601> [<https://perma.cc/6568-Z6F6>] ("Fee simple is one of the most popular forms of ownership in the U.S. and has been used for centuries. Most residential property in the U.S. is fee simple."); Cara O'Neill, *Common Types of Real Property Ownership*, NOLO, <https://www.nolo.com/legal-encyclopedia/common-types-real-property-ownership.html> [<https://perma.cc/HE4Y-DV4R>] (last visited June 29, 2023) (noting fee simple "is the most common type of interest."); PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, *Real Estate Rights and Registration in the USA*, LEXOLOGY (Nov. 12, 2018), <https://www.lexology.com/library/detail.aspx?g=712d86cf-a278-471f-9785-c3fc170caf9f> [<https://perma.cc/8646-HLBL>] ("Fee simple title and ground leasehold title are the most common forms of US commercial real estate ownership.").

⁸⁰ TRIBAL LEADERS HANDBOOK, *supra* note 78, at 79.

⁸¹ Crepelle, *White Tape*, *supra* note 11, at 573.

⁸² TRIBAL LEADERS HANDBOOK, *supra* note 78, at 80.

⁸³ Crepelle, *White Tape*, *supra* note 11, at 573.

⁸⁴ TRIBAL LEADERS HANDBOOK, *supra* note 78, at 80.

⁸⁵ Crepelle, *White Tape*, *supra* note 11, at 573–74.

⁸⁶ *Pitts v. Earling*, No. APCV-073-93, 1994 Mont. Salish & Kootenai Tribe LEXIS 6, at *21 (Confederated Salish & Kootenai Tribes Civ. Ct. of App. Dec. 5, 1994) ("The attempted sale of the undivided trust interest was unlawful because it did not have the required prior approval of the Secretary. Since part of the object of the contract was unlawful, the entire contract is void and unenforceable under MCA 28-2-603.").

⁸⁷ 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 21.02[3] (Nell Jessup Newton ed., 2023) [hereinafter COHEN'S HANDBOOK].

⁸⁸ 25 C.F.R. §§ 162.001, 162.005(a).

⁸⁹ *The GAO Report on Indian Energy Development: Poor Management by BIA has Hindered Development on Indian Lands: Hearing Before the S. Comm. on Indian Affs.*, 114th Cong. 31 (2015) (statement of Hon. Grant Stafne, Councilman, Fort Peck Assiniboine and Sioux Tribes) ("As noted above, it can unfortunately take months and sometimes even years

trust land⁹⁰ as well as the method by which the individual Indian is paid.⁹¹ The BIA will not authorize a business lease without “[e]nvironmental and archeological reports, surveys, and site assessments as needed to facilitate compliance with applicable Federal and tribal environmental and land use requirements.”⁹² Relevant federal laws include the National Historic Preservation Act,⁹³ the Archeological Resources Protection Act,⁹⁴ the Native American Graves Protection and Repatriation Act⁹⁵ and the National Environmental Policy Act (“NEPA”).⁹⁶

NEPA is triggered by “major federal actions.”⁹⁷ Ninety-five percent of major federal actions receive categorical exclusions,⁹⁸ and the projects can proceed in two days.⁹⁹ However, the Environmental Protection Agency notes, “Activities in Indian country and in other tribal areas often require a greater level of NEPA involvement than the same activities in non-tribal areas when these activities occur on tribal lands held in trust by the federal government.”¹⁰⁰ This means, at minimum, an environmental assessment (“EA”) is usually required in Indian country.¹⁰¹

for a successful bidder to secure BIA approval of a mineral lease.”); U.S. GOV’T ACCOUNTABILITY OFF., GAO/RCED-99-165, INDIAN PROGRAMS: BIA SHOULD STREAMLINE ITS PROCESSES FOR ESTIMATING LAND RENTAL VALUES 14 (1999); U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-502, INDIAN ENERGY DEVELOPMENT: POOR MANAGEMENT BY BIA HAS HINDERED ENERGY DEVELOPMENT ON INDIAN LANDS 21 (2015) (“For example, in 2011, the President for the Rosebud Sioux Tribe in South Dakota, reported that it took 18 months for BIA to review a wind lease.”); Elizabeth Ann Kronk Warner, *Tribal Renewable Energy Development Under the HEARTH Act: An Independently Rational, But Collectively Deficient, Option*, 55 ARIZ. L. REV. 1031, 1046 (2013) (“Under the existing scheme, it can take six months to two years for the Department of the Interior to approve the lease of land in Indian country.”).

⁹⁰ 25 C.F.R. § 162.421(a).

⁹¹ *Id.* § 162.426(c).

⁹² *Id.* § 162.438(g).

⁹³ 54 U.S.C. § 302701.

⁹⁴ 16 U.S.C. § 470aa(b).

⁹⁵ 25 U.S.C. §§ 3001–3013.

⁹⁶ 25 C.F.R. § 162.439.

⁹⁷ 42 U.S.C. § 4332; 40 C.F.R. § 1508.1(q).

⁹⁸ U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-369, NATIONAL ENVIRONMENTAL POLICY ACT: LITTLE INFORMATION EXISTS ON NEPA ANALYSES 7 (2014).

⁹⁹ *Id.* at 15. If a categorical exclusion determination does not apply to activities in Indian country because of the “greater level of NEPA involvement,” then the next level is undertaking an environmental assessment in Indian Country. *NEPA in Indian Country*, *infra* note 100.

¹⁰⁰ *National Environmental Policy Act in Indian Country*, U.S. EPA (May 25, 2023), <https://www.epa.gov/tribal/national-environmental-policy-act-indian-country> [<https://perma.cc/P9YF-ASWD>] [hereinafter *NEPA in Indian Country*].

¹⁰¹ BUREAU OF INDIAN AFFS., 52 IAM 14-H, BUSINESS LEASING ON INDIAN LANDS HANDBOOK 5 (2021), https://www.bia.gov/sites/default/files/dup/assets/public/raca/handbook/pdf/52%20IAM%2014-H_Business%20Leasing%20Handbook_FINAL_signed_w.footer_508.pdf [<https://perma.cc/9F4C-GYZH>] (“Either an Environmental Assessment (EA) or

According to the Government Accountability Office (“GAO”), the average cost to complete an EA is \$301,000¹⁰² and can easily take six months.¹⁰³ Many Indian country projects will require full environmental impact statement (“EIS”). The GAO estimates the average EIS costs \$6.6 million¹⁰⁴ and takes 4.6 years to complete.¹⁰⁵ While a business is open and churning a profit outside of Indian country, the same business in Indian country is suffocating in red tape.¹⁰⁶

Indian country land use has the potential to get even more complex. Due to a long rebuked federal policy,¹⁰⁷ Indian land ownership has often passed down to multiple heirs in undivided interests.¹⁰⁸ Today, most Indian allotments have several owners.¹⁰⁹ This fractionated ownership scheme makes land use inefficient because it can require the consent of numerous owners.¹¹⁰ Getting these approvals can be exceedingly difficult. Locating each of potentially hundreds of owners can take an exorbitant amount of time.¹¹¹ Owners also have an incentive to negotiate for better

an Environmental Impact Statement (EIS) will be required.”); *see also NEPA in Indian Country*, *supra* note 100.

¹⁰² U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-369, *supra* note 98, at 12.

¹⁰³ *Id.* at 14–15.

¹⁰⁴ *Id.* at 12.

¹⁰⁵ *Id.* at 13.

¹⁰⁶ *See, e.g., Crepelle, White Tape*, *supra* note 11, at 566 (explaining how an off-reservation business could start drilling for oil within three months, while a business on an Indian reservation might wait nearly three years to go through the equivalent process).

¹⁰⁷ *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998) (“The allotment era has long since ended, and its guiding philosophy has been repudiated. Tribal communities struggled but endured, preserved their cultural roots, and remained, for the most part, near their historic lands. But despite the present-day understanding of a ‘government-to-government relationship between the United States and each Indian tribe,’ *see, e.g., 25 U.S.C. § 3601*, we must give effect to Congress’ intent in passing the 1894 Act.”); *What Is Fractionation?*, U.S. DEP’T OF THE INTERIOR, INDIAN AFFS., <https://www.bia.gov/bia/ots/dt/lc/fractionation> [<https://perma.cc/W226-AP4Z>] (last visited June 29, 2023) (“Fractionation results from the repudiated Federal Indian policy of Allotment.”); *Fractionation*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/buybackprogram/fractionation> [<https://perma.cc/TA2Y-7DUH>] (last visited June 29, 2023).

¹⁰⁸ *Babbitt v. Youpee*, 519 U.S. 234, 238 (1997) (“In the 1960’s, congressional studies revealed that approximately half of all allotted trust lands were held in fractionated ownership; for over a quarter of allotted trust lands, individual allotments were held by more than six owners to a parcel.”).

¹⁰⁹ Jessica A. Shoemaker, *Complexity’s Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 490 (2017) (“In addition, in large part because of the restrictiveness of this status, today many Indian trust properties suffer the practical realities of extreme co-ownership or fractionation, perpetuated by many generations of intestate distributions to multiple heirs and the lack of flexible inter vivos transfer options.”).

¹¹⁰ 25 C.F.R. § 162.012.

¹¹¹ *Hodel v. Irving*, 481 U.S. 704, 707 (1987) (“Thus 40–, 80–, and 160–acre parcels became splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners.”).

prices. For example, an allotment with five or fewer owners cannot proceed without the consent of ninety percent of the ownership interest,¹¹² so a single individual can hold out for an above market price.¹¹³ Eminent domain is regularly used to address holdout problems outside of Indian country;¹¹⁴ nevertheless, solutions to fractionated Indian land ownership have proven more difficult.¹¹⁵ Hence, the transaction costs associated with fractionation can render land economically worthless.¹¹⁶

Fractionation and bureaucracy are only two causes of land use uncertainty. A 2009 Supreme Court decision cast a cloud over whether tribes recognized after 1934 can have reservations,¹¹⁷ and based upon this decision, the Department of Interior revoked the Mashpee Wampanoag's reservation in 2020.¹¹⁸ Lack of certainty over whether land qualifies as a reservation deters investment¹¹⁹ because different rules apply inside Indian country.¹²⁰ Another issue is contracts that encumber Indian lands for seven or more years must be approved by the Secretary of the Interior.¹²¹ Secretarial approval is a transaction cost. Moreover, the requirement's application adds uncertainty because "[t]here is no clear answer as to whether a construction or

¹¹² 25 C.F.R. § 162.012.

¹¹³ Thomas J. Miceli & C.F. Sirmans, *The Holdout Problem, Urban Sprawl, and Eminent Domain*, 16 J. HOUS. ECONS. 309 (2007).

¹¹⁴ *Id.* at 316–18.

¹¹⁵ *E.g.*, *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Indian Land Consolidation Program*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFS., <https://www.bia.gov/regional-offices/great-plains/indian-land-consolidation-program> [<https://perma.cc/Z6SW-NZ3Z>] (last visited Nov. 7, 2022).

¹¹⁶ U.S. DEP'T OF THE INTERIOR, INITIAL IMPLEMENTATION PLAN: LAND BUY BACK PROGRAM FOR TRIBAL NATIONS 5–6 (2012), <https://www.doi.gov/sites/doi.gov/files/migrated/buybackprogram/upload/Initial-Implementation-Plan.pdf> [<https://perma.cc/94CC-K3JU>] (“As a result, highly-fractionated tracts lie idle, unable to be used for any economically beneficial purpose or for direct use by tribal nations for the benefit of their members.”); Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 731 (2003) (“Fractionation prevents efficient use of property, impedes individual and community economic development, and fundamentally bars realization of successful tribal self-determination and self-governance—the promotion of which is said to be the current national goal.”).

¹¹⁷ *Carcieri v. Salazar*, 555 U.S. 379 (2009).

¹¹⁸ Rory Taylor, *Trump Administration Revokes Reservation Status for Mashpee Wampanoag Tribe amid Coronavirus Crisis*, VOX (Apr. 2, 2020, 10:30 AM EDT), <https://www.vox.com/identities/2020/4/2/21204113/mashpee-wampanoag-tribe-trump-reservation-native-land> [<https://perma.cc/N4N3-NP84>].

¹¹⁹ *A Path Forward: Trust Modernization and Reform for Indian Lands: Hearing Before the S. Comm. on Indian Affs.*, 114th Cong. 24 (2015) (statement of Hon. Brenda Lintinger, Councilwoman, Tunica-Biloxi Tribe of La.) (“Because of *Carcieri* and resulting legal challenges, Tribes are finding it increasingly difficult to secure financing and attract investors for economic development projects as questions are raised about the status of lands on which these projects would be located.”).

¹²⁰ *See infra* Part III.E.

¹²¹ 25 U.S.C. § 81(b).

design contract is one ‘relative to’ their lands.”¹²² Adding further complication to Indian land, federal law prohibits tribes from selling land they have purchased on the private real estate market.¹²³ Though the law is seldom enforced,¹²⁴ attempting to buy land from an Indian tribe subjects the would-be purchaser to federal sanctions.¹²⁵ These factors add uncertainty to the already tumultuous rules governing Indian country land and drive businesses away from Indian country.

If a business manages to lease trust land, the business must then obtain an Indian trader license to lawfully operate in Indian country.¹²⁶ Acquiring the license requires the business to establish its qualifications to operate in Indian country including the amount of capital to be invested as well as the applicant’s relevant business experience.¹²⁷ A license only applies to a single location within a reservation¹²⁸ and is nontransferable.¹²⁹ Thus, transfer or expansion add the transaction cost of applying for an entirely new Indian trader license to cover the same business.

Once the license is obtained, there are additional operational considerations. The business cannot purvey—or even possess—any goods the federal government provides to Indians.¹³⁰ The price of items sold by licensed traders must be “fair and reasonable” as determined by a federal inspection rather than the market.¹³¹ Additionally, the establishment of licensed Indian traders must be managed by someone who is a habitual resident of the reservation.¹³² Although enforcement of the Indian trader licensing requirement is rare,¹³³ the penalty for failure to obtain the license is real—forfeiture of all merchandise in the business’ possession.¹³⁴ Thus, Indian trader laws serve as a perpetual sword of Damocles for businesses operating

¹²² See PHILIP L. BRUNER & PATRICK J. O’CONNOR, BRUNER & O’CONNOR ON CONSTRUCTION LAW § 7:222 n.18 (2022). See also 116 AM. JUR. *Trials* 395 § 14 (2010) (“Indeed, Interior Secretary approval is needed if an Indian tribe is one of the contracting parties and the contract is ‘relative to’ Indian lands.”).

¹²³ 25 U.S.C. § 177. However, federal legislation authorizes some tribes to sell their privately owned land. See COHEN’S HANDBOOK, *supra* note 87, § 15.06[4], n.62.

¹²⁴ COHEN’S HANDBOOK, *supra* note 87, § 15.08[1], [2].

¹²⁵ 25 U.S.C. §§ 177, 202.

¹²⁶ 25 C.F.R. § 140.11.

¹²⁷ *Id.* § 140.9.

¹²⁸ *Id.* § 140.14.

¹²⁹ *Id.* § 140.15.

¹³⁰ *Id.* § 140.16.

¹³¹ *Id.* § 140.22.

¹³² *Id.*

¹³³ Matthew L.M. Fletcher & Leah K. Jurss, *Tribal Jurisdiction—A Historical Bargain*, 76 MD. L. REV. 593, 598 (2017) (“Indian trader statutes are still extant, though it is not clear if the United States continues to license traders in the twenty-first century.”). Indian trader licenses are still available. See *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046 (W.D. Wash. 2018); *Dep’t of Tax’n & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994).

¹³⁴ 25 U.S.C. § 264; 25 C.F.R. § 140.3.

Indian country.¹³⁵ While Indian trader licenses may have served a valid purpose in the nineteenth century when many Indians did not speak English, the laws serve no purpose in the twenty-first century other than adding transaction costs and uncertainty to Indian country business.¹³⁶

B. Jurisdictional Uncertainty

Jurisdictional uncertainty has long been identified as an impediment to doing business in Indian country.¹³⁷ Jurisdictional problems arise because tribes have limited jurisdiction over non-Indians. In *Montana v. United States*,¹³⁸ the Supreme Court held tribes can only assert civil jurisdiction over non-Indians on fee lands within their reservations in two circumstances.¹³⁹ *Montana*'s first prong allows tribes to assert civil jurisdiction over non-Indians who enter consensual relationships with

¹³⁵ Crepelle, *White Tape*, *supra* note 11, at 596 (“The very existence of Indian trader laws leaves room for selective enforcement that creates uncertainty and harms tribal economies.”); *see also* Timothy Meyer, *Free Trade, Fair Trade, and Selective Enforcement*, 118 COLUM. L. REV. 491, 494–95 (2018) (“I define selective enforcement in the commercial context as the systematic enforcement of laws against some producers but not others that (1) compete with the targets of enforcement and (2) engage in or benefit from the same allegedly unlawful conduct.”); Emily Ekins, *Myriad Vague and Selectively Enforced Laws Are Not Ideal for Economic Growth*, REASON (Aug. 9, 2012, 10:24 AM), <https://reason.com/2012/08/09/myriad-vague-and-selectively-enforced-la-2/> [<https://perma.cc/P3ZJ-5LLM>] (“Uncertainty with what laws are on the books, how those laws are interpreted, and how they will be enforced is not the ideal recipe for a thriving economic climate.”); Will Wilkinson, “*Socialism*” vs. “*Capitalism*” Is a False Dichotomy, VOX (Aug. 16, 2018, 1:00 PM EDT), <https://www.vox.com/the-big-idea/2018/8/16/17698602/socialism-capitalism-false-dichotomy-kevin-williamson-column-republican-ocasio-cortez> [<https://perma.cc/MJZ4-S349>] (“The problem is that markets are defined by an incomprehensible jumble of regulatory kludges—an accumulation of individually reasonable but cumulatively stifling technocratic fixes—that strangle economic freedom for ordinary people, allowing the powerful to capture the economy by writing and selectively enforcing the rules to their advantage.”).

¹³⁶ *See* Crepelle, *White Tape*, *supra* note 11, at 567.

¹³⁷ Presidential Comm’n on Indian Rsrv. Econ.’s, Exec. Off. of the President, ED252342, Report and Recommendations to the President of the United States 85–91 (1984).

¹³⁸ *Montana v. United States*, 450 U.S. 544 (1981).

¹³⁹ *Id.* at 565–66.

tribes or their citizens.¹⁴⁰ *Montana*'s second prong permits tribes to exercise jurisdiction over non-Indians who are engaged in conduct jeopardizing a tribe's general welfare.¹⁴¹ Both exceptions have been interpreted narrowly;¹⁴² indeed, the limitation may have been extended from fee lands to trust lands too.¹⁴³

*Dollar General Corporation v. Mississippi Band of Choctaw Indians*¹⁴⁴ epitomizes the unpredictability of tribal jurisdiction. Dollar General leased trust land on the Mississippi Choctaw reservation.¹⁴⁵ The lease contained a forum selection clause naming the tribal court as the exclusive forum.¹⁴⁶ The lease also stated the agreement would be governed by Choctaw law.¹⁴⁷ A Choctaw youth interned at the Dollar General, and the store's manager allegedly molested the child.¹⁴⁸ The child's family filed a civil suit in tribal court in 2005 against Dollar General and the non-Indian store manager.¹⁴⁹ Under *Montana*, the tribal court should have possessed unquestioned jurisdiction over the defendants because Dollar General indisputably consented to tribal court jurisdiction satisfying *Montana*'s first prong.¹⁵⁰ A business harboring a pedophile who preys upon tribal children would seem to jeopardize tribal welfare and meet *Montana*'s second prong. Nonetheless, Dollar General challenged the tribal court's authority.¹⁵¹ In 2016, the Supreme Court divided four-to-four over whether the facts of the case provided a basis for tribal court jurisdiction.¹⁵² This meant the Fifth Circuit's two-one decision in favor of tribal jurisdiction was upheld.¹⁵³

¹⁴⁰ *Id.* at 565.

¹⁴¹ *Id.* at 566.

¹⁴² WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 249 (7th ed. 2020) ("These exceptions were susceptible to being broadly read (especially the second one, with its echoes of the police power of a State), but that has not proved to be the case.").

¹⁴³ *See Nevada v. Hicks*, 533 U.S. 353, 360 (2001) ("The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is necessary to protect tribal self-government or to control internal relations. . . . But the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." (internal quotation marks omitted)).

¹⁴⁴ *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 579 U.S. 545 (2016) (per curiam).

¹⁴⁵ *DolgenCorp v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014) *DolgenCorp, Inc. and Dollar General Corp. brought a collective action in this case. Id.*

¹⁴⁶ *Id.* at 174 n.4.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 169.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 174 n.4 ("[T]he agreement provides that '[e]xclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians.'").

¹⁵¹ *Dolgen Corp. v. Miss. Band of Choctaw Indians*, No. 4:08CV22TSL-JCS, 2008 U.S. Dist. LEXIS 103409, at *2-3 (S.D. Miss. Dec. 19, 2008).

¹⁵² *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 579 U.S. 545, 546 (2016) (per curiam).

¹⁵³ *Id.*; *DolgenCorp*, 746 F.3d at 169.

Dollar General is not an anomaly.¹⁵⁴ Non-Indians have a federal common law right to challenge tribal jurisdiction¹⁵⁵ and regularly exercise this right.¹⁵⁶ Litigating whether a tribal, state, or federal court has jurisdiction can take a decade.¹⁵⁷ Meanwhile, the business is paying attorneys and mired in uncertainty as to its potential liability. Although forum selection clauses can help prevent jurisdictional disputes,¹⁵⁸ *Dollar General* reveals even a clear forum selection clause may not preclude jurisdictional squabbles on tribal land.¹⁵⁹

Forum selection clauses may fail because tribal court jurisdiction is primarily a question of subject matter jurisdiction.¹⁶⁰ Parties cannot cure subject matter jurisdiction defects by consent¹⁶¹—which is confusing in the tribal court context

¹⁵⁴ See, e.g., *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Lawrence*, 22 F.4th 892, 897 (10th Cir. 2022).

¹⁵⁵ *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852–53 (1985) (holding that non-Indians challenging tribal court's power to exercise civil subject-matter jurisdiction had an action "arising under" federal law within the meaning of 28 U.S.C. § 1331).

¹⁵⁶ CANBY, *supra* note 142, at 259 ("Frequently, when a nonmember (usually a non-Indian) is sued in tribal court, he or she will bring an action in federal court either to challenge the tribal court's jurisdiction or to attempt to litigate the underlying dispute in federal court."); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1191 (2010) ("Nonmember defendants challenge even seemingly clear examples of legitimate tribal jurisdiction.").

¹⁵⁷ See, e.g., *Murphy v. Royal*, 875 F.3d 896, 905–12 (10th Cir. 2017), *aff'd sub nom.*, *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (mem.) (per curiam); *Petition for Writ of Certiorari at 12–15, Royal v. Murphy*, 140 S. Ct. 2412 (2020) (No. 17-1107). One issue in *Murphy* was whether the land qualified as Indian country. See *Murphy*, 875 F.3d at 937 ("We conclude Congress has not disestablished the Creek Reservation."); see also *Land Tenure Issues*, INDIAN LAND TENURE FOUND., <https://iltf.org/land-issues/issues/> [<https://perma.cc/92RE-ZWBC>] (last visited June 29, 2023) ("Jurisdictional challenges are common on checkerboard reservations, as different governing authorities – county, state, federal, and tribal governments for example – claim the authority to regulate, tax, or perform various activities within reservation borders.").

¹⁵⁸ E.g., *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 346 (2008) (Ginsburg, J., dissenting) ("Had the Bank wanted to avoid responding in tribal court or the application of tribal law, the means were readily at hand: The Bank could have included forum selection, choice-of-law, or arbitration clauses in its agreements with the Longs, which the Bank drafted.").

¹⁵⁹ See *DolgenCorp v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 174 n.4 (5th Cir. 2014).

¹⁶⁰ Crepelle, *How Federal Indian Law Prevents*, *supra* note 32, at 713 ("Forum selection clauses cannot create subject matter jurisdiction over an action; thus, forum selection clauses are unable to circumvent subject matter jurisdiction issues involving Indian country matters.").

¹⁶¹ *Brenner v. Manson*, 383 U.S. 519, 523 (1966) ("This concert of opinion does not settle the basic question because jurisdiction cannot be conferred by consent of the parties."); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167 (1939) ("The jurisdiction

because consent is an express basis for tribal court jurisdiction under Supreme Court precedent.¹⁶² The uncertainty extends to torts¹⁶³ and basic procedural issues like service of process and joinder of claims.¹⁶⁴ Thus, simple legal matters like contract enforcement can easily get murky in Indian country.¹⁶⁵ Mercurial jurisdiction in contract enforcement is bad for business, especially when contract enforcement is straightforward off the reservation.¹⁶⁶

Limited tribal jurisdiction creates volatility over which law governs Indian country activities.¹⁶⁷ The Constitution was crafted in part to prevent states from asserting authority over Indian affairs;¹⁶⁸ however, the Supreme Court long ago

of the federal courts — their power to adjudicate — is a grant of authority to them by Congress and thus beyond the scope of litigants to confer.”)

¹⁶² *Plains Com. Bank*, 554 U.S. at 337 (majority opinion) (“Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions.”); *United States v. Cooley*, 141 S. Ct. 1638, 1643 (2021) (“First, we said that a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” (internal quotation marks omitted)); *Smith v. W. Sky Fin., LLC*, 168 F. Supp. 3d 778, 782 (E.D. Pa. 2016) (“While consent may be sufficient to establish personal jurisdiction over a party to a contract, a tribal court’s authority to adjudicate claims involving nonmembers concerns its subject matter jurisdiction, not personal jurisdiction.” (citation omitted)).

¹⁶³ *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 438–39 (1997) (holding tribal courts do not have jurisdiction over accidents occurring on state-owned highways through tribal land).

¹⁶⁴ *See generally* Crepelle, *How Federal Indian Law Prevents*, *supra* note 32, at 710–11 (explaining how a matter could end up in two separate court systems simultaneously because it is unclear if tribal courts have jurisdiction over counterclaims).

¹⁶⁵ *Id.* at 709 (“This unnaturally narrow construction of consensual relations transforms what should be a straightforward basis for tribal court jurisdiction into a roll of the dice.”).

¹⁶⁶ *See* AMS, SOC’Y & COUNCIL OF THE AMS, WORKING GRP., RULE OF LAW, ECONOMIC GROWTH AND PROSPERITY 73 (2007) (“The absence of reliable, low-cost contract enforcement in many developing countries has been cited as one of the primary causes of economic stagnation and underdevelopment.”).

¹⁶⁷ Adam Crepelle, *Getting Smart About Tribal Commercial Law: How Smart Contracts Can Transform Tribal Economies*, 46 DEL. J. CORP. L. 469, 489 (2022) [hereinafter Crepelle, *Getting Smart*].

¹⁶⁸ *See, e.g., Worcester v. Georgia*, 31 U.S. 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.”); James Madison, *Vices of the Political System of the United States, April 1787*, in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-09-02-0187> [<https://perma.cc/CP4L-VH4E>] (“2. Encroachments by the States on the federal authority. Examples of this are numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation. Among these examples are the wars and Treaties of Georgia with the Indians.”); *From George Washington to the Seneca Chiefs, Dec. 29, 1790*, in FOUNDERS ONLINE, NAT’L

abandoned the bright line rule that states have no authority on tribal land.¹⁶⁹ As a result, states often attempt to impose their laws on tribal lands.¹⁷⁰ There is no clear answer as to when state or tribal law governs reservation conduct. In the words of Chief Justice Roberts:

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.¹⁷¹

Thus, a business operating in Indian country may not know something as basic as which zoning laws apply—tribal or state.¹⁷² And as Chief Justice Roberts notes, the outcome of each case is highly fact dependent, meaning precedent is not particularly valuable. The absence of clear rules makes litigation likely, clouding business

ARCHIVES, <https://founders.archives.gov/documents/Washington/05-07-02-0080> [<https://perma.cc/VZN5-H4TH>] (“[T]he 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.”).

¹⁶⁹ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141–42 (1980) (“Long ago the Court departed from Mr. Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries.” (citations omitted)); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (“The conceptual clarity of Mr. Chief Justice Marshall’s view in *Worcester v. Georgia*, 6 Pet. 515, 556–561, 8 L.Ed. 483 (1832), has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government.”).

¹⁷⁰ *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204–06 (1987) (describing how California and Riverside County sought to apply their laws to the Cabazon and Morongo Bands of Mission Indians); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); Maya Srikrishan, Shannon Shaw Duty and Joaqlin Estus, *Tribes Need Tax Revenue. States Keep Taking It.*, THE CTR FOR PUB. INTEGRITY (Dec 20, 2022), <https://publicintegrity.org/podcasts/integrity-out-loud/tribes-need-tax-revenue-states-keep-taking-it/> [<https://perma.cc/67JX-4LSF>]; Creppelle, *How Federal Indian Law Prevents*, *supra* note 32, at 724 (“Although some states and tribes have amicable relations, states often attempt to undermine tribal self-governance and economic endeavors.”).

¹⁷¹ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2501 (2020) (Roberts, C.J., dissenting) (internal citation omitted).

¹⁷² *See, e.g., Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (discussing whether the county or the Indian nation had zoning authority over fee land located within the reservation).

operations in uncertainty.¹⁷³ Outside of Indian country, the answer is simple—the local government zones the land. Territorial jurisdiction makes doing business much more efficient outside of Indian country.

C. Taxation

Taxation may be the most inefficient aspect of Indian country business. Tribes have the inherent sovereign right to levy taxes on activities occurring within their borders.¹⁷⁴ There are two near categorical exceptions to state taxation in Indian country. First, tribes are exempt from state taxation for activities conducted upon tribal lands.¹⁷⁵ Second, a tribe's citizens are exempt from state taxes while on the tribe's reservation.¹⁷⁶ Other than these exceptions, states can usually impose taxes on Indian country commerce.¹⁷⁷ If both the tribe and state impose a tax, then the activity is more expensive on reservation than off—where only the state tax applies.¹⁷⁸ Tribes can preempt state tax impositions,¹⁷⁹ however, states merely have

¹⁷³ Bright line rules create certainty and reduce the likelihood of litigation. Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265, 1273 (2002) (“Thus, there are two potential explanations for cases going to trial. The first is mistake and the second is uncertainty in the state of the law.”); *see, e.g.*, *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 626 (1990) (“Thus, despite the fact that he manages to work the word ‘rule’ into his formulation, Justice BRENNAN’s approach does not establish a rule of law at all, but only a ‘totality of the circumstances’ test, guaranteeing what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum’s competence.”).

¹⁷⁴ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (“The power to tax is an essential attribute of Indian sovereignty . . . [and] it derives from the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction . . .”).

¹⁷⁵ COHEN’S HANDBOOK, *supra* note 87, § 8.03[1][b] (noting “the categorical nature of tribal and Indian immunity from state taxation within Indian country”).

¹⁷⁶ *See, e.g.*, *Okl. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (“A State is without power to tax reservation lands and reservation Indians.” (citation omitted) (internal quotation marks omitted)); *Okl. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 128 (1993) (“Absent explicit congressional direction to the contrary, we presume against a State’s having the jurisdiction to tax within Indian country”); *Okl. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 507 (1991) (holding that a state may not tax sales occurring on Indian lands to Indians); Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1007 (2020) [hereinafter Crepelle, *Taxes, Theft, and Indian Tribes*].

¹⁷⁷ Crepelle, *Taxes, Theft, and Indian Tribes*, *supra* note 176, at 1007, 1023.

¹⁷⁸ *Id.* at 1017, 1030.

¹⁷⁹ *See* KELLY S. CROMAN & JONATHAN B. TAYLOR, WHY BEGGAR THY INDIAN NEIGHBOR? THE CASE FOR TRIBAL PRIMACY IN TAXATION IN INDIAN COUNTRY 13 (2016), https://www.bia.gov/sites/default/files/dup/assets/as-ia/raca/pdf/2016_Croman_why_beggar_thy_Indian_neighbor.pdf [https://perma.cc/3F5L-8XAF] (“As noted above, under the Bracker analysis, if an Indian country-based tribal business provides a service or adds value to a product, the sale of that service or good may be immune from state taxation in that tribe’s

to place the legal incidence of the tax on a non-Indian for courts to uphold the tax.¹⁸⁰ Legal incidence has no relationship to which party actually bears the economic incidence of the tax.¹⁸¹ Moreover, most courts simply require the state to claim it provides a service on the reservation to tip the scales in favor of state taxation.¹⁸² Therefore, most tribes do not collect taxes because doing so would double a business' tax transactions and further disincentivize reservation commerce.¹⁸³

After a court permits a state to impose taxes on tribal commerce, courts then compel tribal retailers to collect the tax.¹⁸⁴ This gets tricky because the tribe's citizens are exempt from the state duty but everyone else must pay the state tax.¹⁸⁵ Consequently, reservation businesses are required to check tribal identification in order to verify the tax on each purchase.¹⁸⁶ Tribal retailers must also keep records of the name of each tribal citizen who purchases goods and the time of the transaction for state inspection purposes.¹⁸⁷ The Supreme Court has described this as "a minimal burden,"¹⁸⁸ but having to verify the identification and record the name and date of

Indian country if the balance of interests favors the tribe."); Morgan, *supra* note 1, at 121–22.

¹⁸⁰ Crepelle, *Taxes, Theft, and Indian Tribes*, *supra* note 176, at 1007–08, 1016.

¹⁸¹ *Id.* at 1016.

¹⁸² See *Flandreau Santee Sioux Tribe v. Houdyshell*, 50 F.4th 662 (8th Cir. 2022); *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046, 1060–61 (W.D. Wash. 2018) (accepting the defendants' arguments that providing public schools, social services, and jails to the general population was adequate to justify obtaining taxes generated by Quil Ceda); *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 189 (1989) ("Cotton's most persuasive argument is based on the evidence that tax payments by reservation lessees far exceed the value of services provided by the State to the lessees, or more generally, to the reservation as a whole.").

¹⁸³ Crepelle, *Taxes, Theft, and Indian Tribes*, *supra* note 176, at 1017–18.

¹⁸⁴ COHEN'S HANDBOOK, *supra* note 87, § 6.03[1][b]; Crepelle, *Taxes, Theft, and Indian Tribes*, *supra* note 176, at 1015.

¹⁸⁵ *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 507 (1991) ("We conclude that under the doctrine of tribal sovereign immunity, the State may not tax such sales to Indians, but remains free to collect taxes on sales to nonmembers of the tribe.").

¹⁸⁶ COHEN'S HANDBOOK, *supra* note 87, §§ 6.03[1][b], 8.05; CROMAN & TAYLOR, *supra* note 179, at 12.

¹⁸⁷ *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 159 (1980) ("With respect to nontaxable sales, the operator must record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made, and the dollar amount and dates of sales.").

¹⁸⁸ *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Rsrv.*, 425 U.S. 463, 483 (1976) ("The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax."); *Dep't of Tax'n & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73 (1994) ("In particular, these cases have decided that States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians.").

each Indian purchaser adds transaction costs that do not exist off reservation.¹⁸⁹ The transaction costs are amplified by the uncertainty over whether businesses owned by a tribe's citizens are exempt from state taxation—particularly if the business has a tribal citizen and non-Indian owners.¹⁹⁰ Indian country's tax rules make business operation much more inefficient than off reservation.

D. Infrastructure

The inability to tax hinders tribes' ability to provide physical infrastructure and other government services.¹⁹¹ Physical infrastructure plays a vital role in promoting economic development.¹⁹² Well-developed roads make transportation much faster and safer. Access to reliable electricity and water are vital to most businesses. Likewise, the internet is essential to many businesses. Despite the United States' treaty and trust obligations to provide Indian country with infrastructure funding, the federal government persistently fails to support tribal infrastructure.¹⁹³ In fact, a group of Senators estimated reservations had unmet infrastructure needs of \$50 billion in 2009.¹⁹⁴ Lack of funds has resulted in Indian country's roads being among the worst in the United States.¹⁹⁵ Three quarters of federally maintained and ninety-three percent of tribally maintained reservation roads are unpaved.¹⁹⁶ This is

¹⁸⁹ See CROMAN & TAYLOR, *supra* note 179, at 12.

¹⁹⁰ *Id.* at 13 (“Even more complexity arises if, instead of a household, the question involves an Indian-owned entity doing business on the Quinault Reservation.”).

¹⁹¹ U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFS., ADDRESSING THE HARMS OF DUAL TAXATION IN INDIAN COUNTRY THROUGH MODERNIZING THE INDIAN TRADER REGULATIONS 1 (Feb. 15, 2017), <https://www.bia.gov/sites/default/files/dup/assets/as-ia/raca/pdf/39%20-%20Ewiiapaayp%20Band%20of%20Kumeyaay%20Indians%20of%20of%204.pdf> [<https://perma.cc/EFC2-7ZQJ>] (“Or, tribes collect no taxes and suffer inadequate roads, schools, police, courts and health care.”).

¹⁹² *Infrastructure*, BUS. ROUNDTABLE, <https://www.businessroundtable.org/policy-perspectives/infrastructure> [<https://perma.cc/EUH4-3G3R>] (last visited June 29, 2023) (“A modern physical infrastructure is a critical driver of increased investment, job creation and overall economic growth.”).

¹⁹³ U.S. COMM'N ON C.R., A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 51 (2003), <https://www.usccr.gov/files/pubs/na0703/na0204.pdf> [<https://perma.cc/7QQ9-FAQM>] (commenting on the slow response of the federal government to address housing needs on reservations).

¹⁹⁴ NAT'L CONG. OF AM. INDIANS, TRIBAL INFRASTRUCTURE: INVESTING IN INDIAN COUNTRY FOR A STRONGER AMERICA 3 (2017), <https://www.ncai.org/NCAI-InfrastructureReport-FINAL.pdf> [<https://perma.cc/EH9A-KQZK>].

¹⁹⁵ *Enhancing Tribal Self-Governance and Safety of Indian Roads: Hearing Before the S. Comm. on Indian Affs.*, 116th Cong. 21 (2019) (statement of Hon. Joe Garcia, Head Councilman, Ohkay Owingeh Pueblo Council) (“Altogether, the 42,000 miles of roads in Indian Country are still among the most underdeveloped, unsafe, and poorly maintained road networks in the nation . . .”).

¹⁹⁶ BROKEN PROMISES, *supra* note 33, at 168 (“There are 13,650 miles of roads and

particularly problematic because Indian country is often located in remote areas, which makes driving essential.¹⁹⁷ Lack of running water is not uncommon in Indian country,¹⁹⁸ and much of Indian country lacks steady electricity.¹⁹⁹ Indian country lags behind in internet access too.²⁰⁰ Inadequate infrastructure makes operating in Indian country much less efficient than in other parts of the United States where physical infrastructure is taken for granted.

E. Tribal Law

Without businesses, tribes have little incentive to develop their commercial codes. Accordingly, many tribes have not created corporate codes or other business laws.²⁰¹ Other tribes have poorly developed, impractical corporate laws that stifle

trails that are owned and maintained by Indian tribes (93 percent of which are unpaved), and about 29,400 miles of roads owned and maintained by BIA (75 percent of which are unpaved).”).

¹⁹⁷ See, e.g., INDIAN L. & ORD. COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 79 (2013), https://www.aisc.ucla.edu/iloc/report/files/a_roadmap_for_making_native_america_safer-full.pdf [<https://perma.cc/ZH6Z-JG5B>] (explaining how far some tribes are from federal courthouses); Adam Creppelle, *The Law and Economics of Crime in Indian Country*, 110 GEO. L.J. 569, 596 (2022) [hereinafter Creppelle, *Law and Economics*] (“Non-Indian police forces are commonly over 100 miles from Indian Country.”).

¹⁹⁸ Adam Creppelle, *The Reservation Water Crisis: American Indians and Third World Water Conditions*, 32 TUL. ENV’T L.J. 157, 158–59 (2019) [hereinafter Creppelle, *Water Crisis*].

¹⁹⁹ Kelly Cannon, *Practical Hurdles, Cultural Distrust in Native Communities Could Hamper Vaccine Distribution*, NBC NEWS (Nov. 20, 2020, 3:00 AM MST), <https://www.nbcnews.com/news/us-news/practical-hurdles-cultural-distrustnative-communities-could-hamper-vaccine-distribution-n1248308> [<https://perma.cc/B4FU-X9D5>] (“Power supply is always a concern, brownouts are common, and generators are a luxury.”); Joseph Lee, *Living in the Dark: Native Reservations Struggle with Power Shortages in Pandemic*, GUARDIAN (Aug. 12, 2020, 6:00 AM EDT), <https://www.theguardian.com/environment/2020/aug/12/native-americans-energy-inequality-electricity> [<https://perma.cc/YAP4-PWH6>]; *Some Navajo Residents Have Waited Years for Electricity. They’re Finally Getting Hooked to Grid.*, 12NEWS (Apr. 12, 2022, 4:58 PM MST), <https://www.12news.com/article/news/regional/native-america/some-navajo-residents-are-finally-getting-access-to-electricity/75-0152b690-3c8a-44d4-8d5a-95ad44b7f2fd> [<https://perma.cc/7QBK-TJWN>].

²⁰⁰ *Expanding Broadband Access*, U.S. DEP’T OF THE INTERIOR, INDIAN AFFS., <https://www.bia.gov/service/infrastructure/expanding-broadband-access> [<https://perma.cc/ZN7L-5TLZ>] (last visited June 29, 2023).

²⁰¹ See Robert J. Miller, *Inter-Tribal and International Treaties for American Indian Economic Development*, 12 LEWIS & CLARK L. REV. 1103, 1111 (2008) (“[M]any Indian nations lack business laws and regulatory codes, such as incorporation codes and the Uniform Commercial Code, and court systems that are experienced in litigating principles of business and contract law.”); Stephen Cornell, *Tribal-Citizen Entrepreneurship: What Does It Mean for Indian Country, and How Can Tribes Support It?*, FED. RSRV. BANK OF MINNEAPOLIS (July 1, 2006), <https://www.minneapolisfed.org/article/2006/tribalcitizen->

business development.²⁰² Even if tribes have promulgated laws, they may not be easily accessible.²⁰³ The tribal bureaucrats implementing the laws can use their discretion to thwart progress too.²⁰⁴ To illustrate, the Navajo Nation requires businesses have a reservation resident as their agent.²⁰⁵ Establishing residence requires proof of address, but not all homes on the Navajo Nation have addresses²⁰⁶—as is common throughout Indian country.²⁰⁷ Residences that have no address are required to draw a map.²⁰⁸ Whether a map satisfies the Navajo Nation’s quality standards is up to the bureaucrat reviewing the application.²⁰⁹ Indeed, a Google Map may not be up to snuff.²¹⁰ Bureaucratic adventures such as this do nothing more than create uncertainty and add transaction costs to potential reservation businesses.

entrepreneurship-what-does-it-mean-for-indian-country-and-how-can-tribes-support-it#:~: text=It%20means%20that%20tribal%20citizens,in%20restoring%20the%20nation’s%20economy [https://perma.cc/PR9W-4XXA] (“Many reservations have no commercial codes.”).

²⁰² Crepelle, *Decolonizing*, *supra* note 15, at 451 (“Among the tribes that have adopted corporations codes, some tribes make starting a business a hassle-free process while other tribes make incorporating a business a Sisyphean task.”); Cornell, *supra* note 201, at 4 (“If you want to start a business, you need to lease a site from the nation, but the site-leasing process has more than 100 steps and typically takes more than a year to complete.”).

²⁰³ See *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (“Although some modern tribal courts mirror American courts and are guided by written codes, rules, procedures, and guidelines, tribal law is still frequently unwritten” (internal quotation marks omitted)); *DolgenCorp v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 181 (5th Cir. 2014) (Smith, J., dissenting) (“The elements of Doe’s claims under Indian tribal law are unknown to DolgenCorp and may very well be undiscoverable by it.”); Kelly Kunsch, *A Legal Practitioner’s Guide to Indian and Tribal Law Research*, 2 AM. INDIAN L.J. 484, 508 (2014) (“Published print copies of tribal codes have long been rarities.”).

²⁰⁴ See Crepelle, *Getting Smart*, *supra* note 167, at 491; Cornell, *supra* note 201, at 3 (“How the tribal bureaucracy deals with you may depend on who you voted for or who your relatives are.”).

²⁰⁵ Joseph Austin, *How Many Lawyers Does It Take to Register a Business on the Navajo Nation?*, OLEA, SOLÓRZANO & AUSTIN (Aug. 6, 2020), <https://www.team-osa.com/blank-7/2020/08/11/how-many-lawyers-does-it-take-to-register-a-business-on-the-navajo-nation> [https://perma.cc/WRJ3-9LBC] (“Under the Navajo business laws, businesses on the Navajo Nation must have a statutory agent who lives on the reservation and has a reservation address.”).

²⁰⁶ *Id.* (“A lot of people living on the reservation don’t have street addresses but instead use a P.O. box.”).

²⁰⁷ Crepelle, *Law and Economics*, *supra* note 197, at 596.

²⁰⁸ Austin, *supra* note 205 (“I was informed that I needed to draw a map.”).

²⁰⁹ *Id.* (“I was questioned heavily regarding the accuracy of the map . . . and asked with skepticism if I actually lived on the reservation.”).

²¹⁰ *Id.* (“I responded that the map I submitted was obtained via Google Maps. I made markings and notes on the map using a marker and even typed directions above it. How more accurate can you get?”).

Inadequate corporate law is often just the beginning of businesses' fears of tribal law. Tribes are not bound by the U.S. Constitution²¹¹ and have the ability to design their governments as they see fit.²¹² While many tribes have three branches of government,²¹³ not all have separation of powers.²¹⁴ Some tribal governments experience rapid turnover which can cause drastic policy changes.²¹⁵ Investor concerns are exacerbated by fear tribes will use their sovereignty to alter contracts because most tribes lack a constitutional or statutory contracts clause.²¹⁶ Businesses' skepticism of tribal law extends to their perceptions of tribal courts, which businesses assume are partial to tribal citizens.²¹⁷ Hence, uncertainty about tribal legal institutions deters business from investing Indian country.

Although businesses may not know much about tribal law, they often know about the one nearly universal tribal commercial law that increases the transaction

²¹¹ Crepelle, *Getting Smart*, *supra* note 167, at 487 (“Tribes surrendered no powers at the Constitutional Convention nor are tribes bound by the United States Constitution.”).

²¹² See 25 U.S.C. §§ 1301(2), 1302 (establishing the limited Constitutional rights that self-governing Indian tribes must protect). ICRA does not have an Establishment Clause, so tribes can operate theocratic governments. See *American Indian Religious Freedom Act – Part I: Oversight Hearing Before the Subcomm. on Native Am. Affs. of the H. Comm. on Nat. Res.*, 103rd Cong. 19 (1993) (statement of James S. Hena, Chairman of the All Indian Pueblo Council) (“Today, our theocratic governments stand strong, as we face difficult times and arduous decisions that effect and affect our very future.”).

²¹³ *How Are Tribal Governments Organized?*, U.S. DEP’T OF THE INTERIOR, INDIAN AFFS. (Aug. 19, 2017), <https://www.bia.gov/faqs/how-are-tribal-governments-organized#:~:text=Contemporary%20tribal%20governments%20are%20usually,Legislative%2C%20Executive%2C%20and%20Judicial> [<https://perma.cc/7JGH-S3AF>].

²¹⁴ Angelique EagleWoman, *Jurisprudence and Recommendations for Tribal Court Authority Due to Imposition of U.S. Limitations*, 47 MITCHELL HAMLINE L. REV. 342, 352 (2021) (“The BIA developed boilerplate tribal constitutions based on club associations with bylaws as available for adoption by tribal governments. The tribal constitutions did not create the counterbalance of three branches of government similar to the U.S. governmental system. Rather, the governmental power resided in one body, the Tribal Council, as the executive and legislative authority, with oversight of the judicial power.” (citation omitted)); *Developments in the Law—Tribal Executive Branches: A Path to Tribal Constitutional Reform*, 129 HARV. L. REV. 1662, 1662 (2016) (“IRA constitutions usually lack separation of powers”).

²¹⁵ Crepelle, *Decolonizing*, *supra* note 15, at 453 (“Political instability coupled with the absence of laws to protect against political whims chill investment in Indian country.”).

²¹⁶ The Contracts Clause provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .” U.S. CONST. art. I, § 10, cl. 1. See also 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. 315, 330 (2017) (“Most tribal constitutions do not contain provisions prohibiting the tribal government from violating contracts.”); Robert J. Miller, *Sovereign Resilience: Reviving Private-Sector Economic Institutions in Indian Country*, 2018 BYU L. REV. 1331, 1370 (2019) (“[V]ery few tribal nations . . . have constitutional provisions that prevent the tribal government from impairing the obligation of contracts . . .”).

²¹⁷ Crepelle, *Intertribal Business Court*, *supra* note 69, at 88.

costs of operating in Indian country—Tribal Employment Rights Ordinances (“TERO”).²¹⁸ The precise contours of TERO vary from tribe to tribe, but usually require businesses within Indian country to hire the tribe’s citizens.²¹⁹ TERO can extend into subcontracting and procuring.²²⁰ Businesses must comply with TERO even when operating on privately-owned, fee simple lands within a reservation.²²¹ TERO exists to help create job opportunities for Indians;²²² nevertheless, it often creates difficulties for businesses. TERO can force a business to alter its usual hiring practices.²²³ Even businesses in compliance with TERO are mired in red tape because they must continuously update tribes on employment and contracting decisions.²²⁴ Waivers from TERO are seldom granted²²⁵ and violations can receive harsh sanctions including fines, lost wages, and property forfeiture.²²⁶ Due to years of federal neglect and poverty, reservation residents may not have the experience or skillset needed to fill the positions. Therefore, many businesses view TERO as an unadulterated transaction cost.

²¹⁸ Alvina Earnhart, *Regulation of Employment: Tribal Employment Rights Ordinances and the NLRB*, 2017 No. 4 RMMLF-INST 3, *3-10 (“TEROs vary in how tribal and/or Indian preference is applied. Some TEROs require Indian preference for all enrolled members of federally-recognized tribes, while other tribes establish a priority system whereby tribal preference is first given to enrolled members of that tribe.”); Roger Birdbear, *Making Preferential Hiring Practices Work for You*, INDIAN COUNTRY TODAY (Sept. 12, 2018), <https://ictnews.org/archive/making-preferential-hiring-practices-work-for-you> [<https://perma.cc/V3RA-TGL6>] (“While the exact wording may differ from reservation to reservation, their general theme is constant: those who wish to do business on a reservation must make efforts to hire tribal members and their companies.”).

²¹⁹ Earnhart, *supra* note 218, at I(a) (“TEROs are tribal laws adopted by tribal governmental bodies to regulate the employment activities of ‘covered employers’ on the reservation or within the territory over which such tribes exercise jurisdictional authority.”).

²²⁰ Lea Anne Burke, *The Basics of Tribal Employment Rights Ordinances (TERO)*, THE W. PLANNER, <https://www.westernplanner.org/2020/articles/2020/10/17/the-basics-of-tribal-employment-rights-ordinances-tero> [<https://perma.cc/PD74-67ZS>] (last visited June 29, 2023) (“TERO Ordinances require that all employers who are engaged in operating a business on reservations give preference to qualified Indians in all aspects of employment, contracting and other business activities.”).

²²¹ See COHEN’S HANDBOOK, *supra* note 87, § 21.02[5][c].

²²² Earnhart, *supra* note 218, at II (“TEROs were initially enacted by tribes in the late 1970’s to encourage Indian preference in the hiring of Indian workers for businesses operating on the reservation.”).

²²³ Burke, *supra* note 220 (“In a nutshell, TERO can have a direct impact on hiring staff and contracting with businesses.”).

²²⁴ Earnhart, *supra* note 218, at II(c) (“Employers have an obligation to notify the TERO Office when they are seeking to fill employment positions or award contracts through the bidding process.”).

²²⁵ *Id.* (“Waiver of preference requirements or fees can seriously affect the integrity of the TERO, the fee and the tribal government itself; therefore, they are rarely granted.”).

²²⁶ *Id.* at II(e) (“Violation of TERO may result in severe sanctions.”).

F. Sovereign Immunity

Sovereign immunity is another feature that gives businesses apprehension when operating in Indian country. Like other sovereigns, tribes are immune from suit without their consent.²²⁷ This protects tribal budgets from being seized in lawsuits;²²⁸ however, sovereign immunity also prevents business partners from recouping their investment if the tribe violates an agreement.²²⁹ Tribes often waive their sovereign immunity to help facilitate commerce.²³⁰ Nevertheless, controversy can arise about whether the tribe clearly waived its immunity in a contract²³¹ and also over whether the tribal representative was authorized to waive immunity.²³² Aside from the waiver, it is not always clear whether a particular party is acting for the tribe and entitled to sovereign immunity.²³³ The possibility that an investor could be without recourse against a tribe increases the risk of doing business with a tribe.²³⁴ Accordingly, sovereign immunity can hinder outside investment in Indian country.

²²⁷ COHEN'S HANDBOOK, *supra* note 87, § 7.05[1][a].

²²⁸ *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 376 (8th Cir. 1895) (“As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it.”); Christopher B. Phillips, *Patently Unjust: Tribal Sovereign Immunity at the U.S. Patent Office*, 92 S. CALIF. L. REV. 703, 722 (2019) (“While the protection of sovereign funds has been mostly abandoned as a reason to protect states and the federal government via sovereign immunity, it still provides a normative basis for tribal sovereign immunity.”).

²²⁹ ROBERT J. MILLER, RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 96 (2012) (“Due to fears of sovereign immunity, many businesses shy away from reservation opportunities due to the impression that tribal immunity is a major problem.”).

²³⁰ *See, e.g., Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002) (noting that Congress allowed Section 17 corporations to waive sovereign immunity for the purpose of “facilitating business transactions and fostering tribal economic development and independence”); *Meyer & Assocs. v. Coushatta Tribe of Louisiana*, 992 So.2d 446, 451 (La. 2008) (“The Chairman testified that the waivers found in the various contracts and MOU’s were necessary to induce the contracting entities to do business with and make substantial financial commitments to the Tribe.”).

²³¹ 42 C.J.S. *Indians* § 50 (2023) (“Waivers of tribal sovereign immunity are strictly construed in favor of the tribal sovereign.”).

²³² *Id.* (“A claim that a tribe waived its tribal immunity requires a showing that the person or entity is authorized to so act.”).

²³³ *See Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1653–54 (2018) (discussing but ultimately declining to answer the question of whether an Indian Tribe can assert sovereign immunity in a suit relating to immovable property located in the territory of another sovereign); *Lewis v. Clarke*, 581 U.S. 155, 161–62 (2017) (“Our cases establish that, in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit.”).

²³⁴ *See supra* notes 231–233 and accompanying text.

G. How Transaction Costs Impact Tribal Economies

The aforementioned transaction costs make doing business in Indian country more costly than operating in other United States jurisdictions. Consequently, investors must anticipate a particularly large return to place their capital in Indian country, or a tribe must offer some peculiar feature that does not exist in another jurisdiction. Evidence bears this out; indeed, the industry most associated with tribes is gaming.²³⁵ Indian gaming arose because tribal sovereignty enabled tribes to enact different laws than the surrounding state.²³⁶ While location is a major variable,²³⁷ casinos are highly profitable ventures.²³⁸ Thus, outside investors have been actively involved in tribal gaming from the outset.²³⁹ Oil and gas is another example. The oil industry is highly profitable, and oil deposits are immobile.²⁴⁰ This means a company that wants oil must go where the oil is. Even still, oil companies would prefer to produce oil off reservation than tango with Indian country's complex rules.²⁴¹ Aside

²³⁵ See Tim Hyde, *Has Tribal Gaming Been a Boon for American Indians?*, AM. ECON. ASS'N (Aug. 24, 2015), <https://www.aeaweb.org/research/has-tribal-gaming-been-a-boon-for-american-indians.php> [<https://perma.cc/KWA6-S828>]; see also Creppelle, *How Federal Indian Law Prevents*, *supra* note 32, at 702.

²³⁶ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204–05, 217–20 (1987), *superseded by* the Indian Gaming Regulation Act (“IGRA”), *as stated in Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794–95 (2014), *as recognized in Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014).

²³⁷ Gavin Clarkson, Katherine A. Spilde & Carma M. Claw, *Online Sovereignty: The Law and Economics of Tribal Electronic Commerce*, 19 VAND. J. ENT. & TECH. L. 1, 6 (2016) (noting many tribes are located too far from population centers to reap rewards from casinos); Jenadee Nanini, *Tribal Sovereignty and FinTech Regulations: The Future of Co-Regulating in Indian Country*, 1 GEO. L. TECH. REV. 503, 504 (2017) (acknowledging casinos are not profitable for remotely located tribes).

²³⁸ J.B. Maverick, *Why Does the House Always Win? A Look at Casino Profitability*, INVESTOPEDIA (Nov. 29, 2022), <https://www.investopedia.com/articles/personal-finance/110415/why-does-house-always-win-look-casino-profitability.asp> [<https://perma.cc/8W6R-4M6P>] (“That’s because all casino games are designed to provide the house with a built-in edge, diminishing the chances and sizes of potential payouts.”).

²³⁹ Michael Nelson, *The Quest to Be Called a Tribe*, LEGAL AFFS. (Sept./Oct. 2003), https://www.legalaffairs.org/issues/September-October-2003/review_nelson_sepoct03.msp [<https://perma.cc/YB52-38JT>].

²⁴⁰ *Oil Giants Rake in Record Profits as Energy Prices Remain High*, CBS NEWS (Oct. 28, 2022, 12:21 PM), <https://www.cbsnews.com/news/big-oil-profits-2022-joe-biden-exxon-chevron-soaring-gas-energy-prices/> [<https://perma.cc/K8H2-PTR4>].

²⁴¹ U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-502, *supra* note 89, at 24 (“[T]he added complexity of the federal process stops many developers from pursuing Indian oil and gas resources for development.”); OFF. OF INSPECTOR GEN., U.S. DEP'T OF THE INTERIOR, NO. CR-EV-BIA-0001-2011, OIL AND GAS LEASING IN INDIAN COUNTRY: AN OPPORTUNITY FOR ECONOMIC DEVELOPMENT 4 (2012), <https://www.doi.gov/sites/default/files/2021-migration/CR-EV-BIA-0001-2011Public.pdf> [<https://perma.cc/93QH-D7LS>]; Adam Creppelle, *Finding Ways to Empower Tribal Oil Production*, 22 WYO. L. REV. 25, 27 (2022)

from gaming and extractive industries, Indian country's main ventures are those severely regulated by the surrounding state, such as online lending²⁴² and fireworks.²⁴³

For these reasons, tribes themselves are the primary business owners in Indian country.²⁴⁴ Tribally owned enterprises are a rational response to the regulations imposed on tribes.²⁴⁵ Tribes as well as tribally owned enterprises that are “arms of the tribe” are entitled to sovereign immunity.²⁴⁶ Hence, tribal corporations can use their immunity to minimize liability exposure which increases profitability. Another advantage tribal enterprises possess is their exemption from federal income taxes regardless of where they operate, and this gives tribal corporations an advantage over other businesses²⁴⁷—though to be fair, states routinely grant large corporations tax breaks.²⁴⁸ Tribal corporations also experience less bureaucracy as the federal government is far less involved when a tribe is operating on its own land than when

(noting that “[p]rivately-owned oil companies . . . prefer to operate outside of Indian country”) [hereinafter Crepelle, *Finding Ways to Empower*].

²⁴² See generally Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1 (2018) (discussing various issues related to short-term lending by Indian tribes) [hereinafter Crepelle, *Tribal Lending*].

²⁴³ Amy Harris, *On Tribal Lands, Fireworks Business Is Booming*, SEATTLE TIMES (July 3, 2011, 10:34 PM), <https://www.seattletimes.com/seattle-news/on-tribal-lands-fireworks-business-is-booming/> [https://perma.cc/GMD3-MCFS].

²⁴⁴ James Robert Colombe & Rory Taylor, *Tribal Enterprises Drive Economic Activity in Indian Country and Beyond*, FED. RES. BANK OF MINNEAPOLIS (July 6, 2021), <https://www.minneapolisfed.org/article/2021/tribal-enterprises-drive-economic-activity-in-indian-country-and-beyond> [https://perma.cc/LZ28-3S3H].

²⁴⁵ CROMAN & TAYLOR, *supra* note 179, at 18 (“To paraphrase the complaint of at least one tribal CEO, federal law forces tribes to be socialist in the ownership of production.”); Adam Crepelle & Ilia Murtazashvili, *Polycentricity: A Simple Rule for Governing Indian Country*, 10 COSMOS + TAXIS, no. 9 & 10, 2022, at 68, 75 (“Although many enterprises in Indian country are tribally owned and share revenues with tribal citizens, these tribally owned enterprises are rational responses to market incentives created by current federal Indian law.”).

²⁴⁶ See KAREN J. ATKINSON & KATHLEEN M. NILLES, OFF. OF INDIAN ENERGY & ECON. DEV., TRIBAL BUSINESS STRUCTURE HANDBOOK II-1 (2008), https://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf [https://perma.cc/5MNS-8RGK]; Crepelle, *Tribal Lending*, *supra* note 242, at 24.

²⁴⁷ See 26 U.S.C. § 7871; ATKINSON & NILLES, *supra* note 246, at III-1, Chart: Structure at a Glance.

²⁴⁸ See, e.g., NORTON FRANCIS, STATE TAX INCENTIVES FOR ECONOMIC DEVELOPMENT, URBAN INST. 1 (2016), <https://www.urban.org/sites/default/files/publication/78206/2000636-state-tax-incentives-for-economic-development.pdf> [https://perma.cc/R7JH-9SCF]; Crepelle, *Taxes, Theft, and Indian Country*, *supra* note 176, at 1014; Reid Wilson, *States, Cities Rethink Tax Incentives After Amazon HQ2 Backlash*, HILL (Feb. 17, 2020, 2:15 PM ET), <https://thehill.com/homenews/state-watch/483127-states-cities-rethink-tax-incentives-after-amazon-hq2-backlash/> [https://perma.cc/BT4K-5FSK] (“[Tax incentives] typically involved states, counties and cities giving companies subsidies or allowing them to forgo paying some taxes . . .”).

a third-party is operating on a tribe's land.²⁴⁹ Likewise, the cost of complying with TERO is far lower for a tribe than an outside business because a tribe can more easily access information about its citizenry. Then tribal law is no problem because the tribal government can promulgate laws as needed to serve the tribal enterprises' goals.²⁵⁰ Consequently, tribal enterprise is the primary force in tribal economies.

IV. HOW DOING BUSINESS IN INDIAN COUNTRY BECAME COMPLICATED

Doing business in Indian country was not always complicated. For thousands of years, the Americas' indigenous peoples engaged in complex commercial relationships.²⁵¹ Tribes developed legal institutions to facilitate exchanges with distant and diverse peoples.²⁵² Tribes respected private property rights,²⁵³ enforced contracts,²⁵⁴ and even used currencies.²⁵⁵ Individual Indian entrepreneurs provided warranties on their goods and sold items on credit.²⁵⁶ The rule of law enabled Indians to thrive; hence, several vibrant cities existed in pre-contact North America including Cahokia, Chaco Canyon, Moundville, The Dalles, and Aztalan.²⁵⁷ These cities, as well as smaller villages, had access to goods produced hundreds of miles away.²⁵⁸ While many experiences with Europeans were perilous, North America's indigenous peoples skillfully engaged in trade with Europeans when the opportunity presented itself.²⁵⁹ Indeed, many Europeans acknowledged Indians as sophisticated businessmen.²⁶⁰

²⁴⁹ BUREAU OF INDIAN AFFS., U.S. DEP'T OF THE INTERIOR, TRANSCRIPT OF TRIBAL ENERGY RESOURCE AGREEMENT (TERA) CONSULTATION 33 (2019), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/7-11-19_Transcript_Catoosa-OK_508.pdf [<https://perma.cc/5RDG-F78V>].

²⁵⁰ Morgan, *supra* note 1, at 120–21 (highlighting the growth of tribal law and the resulting expansion of solutions and sovereignty).

²⁵¹ Crepelle, *How Federal Indian Law Prevents*, *supra* note 32, at 683–85.

²⁵² Crepelle, *Decolonizing*, *supra* note 15, at 419.

²⁵³ *Id.* at 417–18.

²⁵⁴ *Id.* at 419.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Adam Crepelle, *The Time Trap: Addressing the Stereotypes that Undermine Tribal Sovereignty*, 53 COLUM. HUM. RTS. L. REV. 189, 227–28 (2021) [hereinafter Crepelle, *The Time Trap*].

²⁵⁸ *Id.* at 231–32.

²⁵⁹ *Id.* at 233.

²⁶⁰ Bill Yellowtail, *Indian Sovereignty*, PERC REPS., June 2006, at 10 (“Lewis and Clark reported to President Thomas Jefferson that native inhabitants throughout the Louisiana Territory were a thoroughly independent, businesslike lot—sharp entrepreneurs and shrewd dealers. The point to be extracted is that American Indians never have been strangers to the American entrepreneurial spirit.”); Shane Lief, *Singing, Shaking, and Parading at the Birth of New Orleans*, 28 JAZZ ARCHIVIST 15, 18 (2015), https://www.researchgate.net/publication/287204530Singing_Shaking_and_Parading_at_th

Doing business in Indian country became complicated soon after the United States was formed. The Constitution provided Congress with the power to regulate commerce with the Indian tribes,²⁶¹ and one of the very first laws Congress passed prohibited trade with Indian tribes without a federal license²⁶²—a law still in effect.²⁶³ The law also granted the United States a monopsony on Indian land purchases.²⁶⁴ President Washington then created Indian trading posts to further control Indian trade.²⁶⁵ The Supreme Court eroded tribal economic power in 1823 by declaring Indian tribes do not own their land but merely possess the right of occupancy, which the United States can extinguish at its whim.²⁶⁶ And in 1831, the Supreme Court denied tribes the ability to vindicate their rights in federal court.²⁶⁷ When tribes were able to access the Supreme Court through white plaintiffs, the Court respected tribes' treaty rights to be free from state intrusion.²⁶⁸ However, President Andrew Jackson refused to enforce the decision.²⁶⁹ Consequently, the law was of little value to Indian tribes.

Many tribes were forced onto reservations through the United States' destruction of their economies.²⁷⁰ The Army encouraged the unrelenting slaughter of bison to compel Plains Indians onto reservations.²⁷¹ Kit Carson's campaign against the Navajo consisted less of fighting the Navajo and more of destroying their sheep herds, razing tribal orchards, and poisoning Navajo water supplies.²⁷² On most

e *Birth of New Orleans* [<https://perma.cc/SUE5-L8UY>] (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 . . .”).

²⁶¹ U.S. CONST. art. I, §. 8, cl. 3.

²⁶² See An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, § 1, 1 Stat. 137, 138 (1790) (codified as amended at 25 U.S.C. §§ 177, 261–64).

²⁶³ See *supra* notes 126–32 and accompanying text.

²⁶⁴ An Act to Regulate Trade and Intercourse with the Indian Tribes § 4.

²⁶⁵ ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY* 45–46 (2006).

²⁶⁶ See *Johnson v. McIntosh*, 21 U.S. 543, 602–05 (1823).

²⁶⁷ See *Cherokee Nation v. Georgia*, 30 U.S. 1, 20 (1831).

²⁶⁸ See *Worcester v. Georgia*, 31 U.S. 515 (1831).

²⁶⁹ See Adam Creppelle, *Making Red Lives Matter: Public Choice Theory and Indian Country Crime*, 27 LEWIS & CLARK L. REV. (forthcoming 2023) (manuscript at 8) (on file with author) [hereinafter Creppelle, *Making Red Lives Matter*].

²⁷⁰ Adam Creppelle, *Federal Policies Trap Tribes in Poverty*, AM. BAR ASS'N (Jan. 6, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/wealth-disparities-in-civil-rights/federal-policies-trap-tribes-in-poverty/ [<https://perma.cc/K9HQ-P8CZ>] (“Trapping tribes in poverty has been a federal policy objective since the United States' founding. In fact, the United States' preferred tactic in most wars against tribes was starvation rather than armed conflict.”).

²⁷¹ *Id.*

²⁷² Frances Madeson, *Fate of Navajo, Canyon de Chelly and Sheep Is Life Celebration on Field Trip Agenda*, ICT (Sept. 13, 2018), <https://ictnews.org/archive/fate-navajo-canyon-de-chelly-sheep-life-celebration-field-trip-agenda> [<https://perma.cc/FV4M-G62D>].

reservations, Indians had no autonomy as the reservation superintendent had absolute power.²⁷³ Nevertheless, many Indians attempted to make the best of their situation,²⁷⁴ and some even became very successful ranchers.²⁷⁵ Alas, the government prevented Indians from ranching and pressed them into farming²⁷⁶—on land the United States knew was not suited for agriculture.²⁷⁷ The goal was never to convert Indians into productive farmers; rather, the United States' objective was to make Indians dependent on rations.²⁷⁸ By creating dependency, the United States could withhold food until Indians signed away more land.²⁷⁹

²⁷³ DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 221 (7th ed. 2017) (“Senator Wheeler . . . refer[red] to the local [agency superintendent] as ‘a czar.’”); Carrie McCleary, *Of Horses and Men: Superintendent Asbury’s Deadly Assault on the Crow*, TRIBAL COLL. J. AM. INDIAN HIGHER EDUC. (Feb. 15, 2003) [https://tribalcollegejournal.org/horses-men-superintendent-asbury%E2%80%99s-deadly-assault-crow/#:~:text=Of%20Horses%20and%20Men%3A%20Superintendent%20Asbury's%20Deadly%20Assault%20on%20the%20Crow,-Volume%2014%2C%20No&text=When%20the%20Office%20of%20Indian,human%20oppression%20onto%20Crow%20culture.\[https://perma.cc/R6KS-PZCK\]](https://tribalcollegejournal.org/horses-men-superintendent-asbury%E2%80%99s-deadly-assault-crow/#:~:text=Of%20Horses%20and%20Men%3A%20Superintendent%20Asbury's%20Deadly%20Assault%20on%20the%20Crow,-Volume%2014%2C%20No&text=When%20the%20Office%20of%20Indian,human%20oppression%20onto%20Crow%20culture.[https://perma.cc/R6KS-PZCK]) (“When the Office of Indian Affairs sent Superintendent Calvin Asbury to the Crow Indian Reservation in 1919, he settled in like the bone-chilling winds of that Montana winter, slowly dripping the toxic waste of human oppression onto Crow culture. The Crow Tribe remains forever affected by this zealot who deprived them of their personal freedoms and wealth while expanding his own political power.”); Tanis Thorne, *The Death of Superintendent Stanley and the Cahuilla Uprising of 1907–1912*, 24 J. CAL. & GREAT BASIN ANTHROPOLOGY 233, 244 (2004) (“We complained in the past because the government put a tyrannical man over us who disregarded our wishes and rode over our rights simply because he had the power to do so . . .”).

²⁷⁴ See Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV 1559, 1571–94 (2001); Jeffrey Ostler, “*The Last Buffalo Hunt*” and *Beyond: Plains Sioux Economic Strategies in the Early Reservation Period*, 21 GREAT PLAINS Q. 115, 117–19 (2001).

²⁷⁵ See Judith V. Royster, *Water, Legal Rights, and Actual Consequences: The Story of Winters v. United States*, in INDIAN LAW STORIES 81, 86 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011).

²⁷⁶ *Id.* at 85–6.

²⁷⁷ *Id.*; CANBY, *supra* note 142, at 26–27; Ostler, *supra* note 274, at 120.

²⁷⁸ See Remarks of Kevin Gover at the Ceremony Acknowledging the 175th Anniversary of the BIA September 8, 2000, TRIBAL L. & POL’Y INSTITUTE (Sept. 8, 2000), http://www.tribal-institute.org/lists/kevin_gover.htm [https://perma.cc/X6SH-H9Y7] (“After the devastation of tribal economies and the deliberate creation of tribal dependence on the services provided by this agency, this agency set out to destroy all things Indian.”).

²⁷⁹ See Crepelle, *How Federal Indian Law Prevents*, *supra* note 32, at 699 (describing how the United States created Indian country’s dependence on federal government, allowing the United States to extend further power over Indian affairs).

Once tribal economies were crushed, the United States used tribes' weakened state to justify extraconstitutional power over Indians.²⁸⁰ Likewise, the United States was able to abrogate tribal treaties²⁸¹ and rob them of ninety million acres of their best lands.²⁸² The land theft only stopped in 1934, when tribes' most valuable land had already been taken and federal bureaucrats were fearful of losing their jobs.²⁸³ Though the Indian Reorganization Act of 1934 ("IRA")²⁸⁴ was ostensibly about supporting tribal self-government, it did the opposite.²⁸⁵ The IRA preserved tribal land bases by placing it under perpetual federal control.²⁸⁶ Furthermore, the IRA, according to one of the Act's authors, provided the Secretary of the Interior with complete authority over Indian life—even the power to set Indian bedtimes.²⁸⁷ Notwithstanding, the IRA remains the core of statutory federal Indian law.²⁸⁸ Despite the IRA, the United States eliminated over one hundred tribes in the name of liberating Indians during the 1950s.²⁸⁹ But termination was less about Indian

²⁸⁰ See *United States v. Kagama*, 118 U.S. 375, 384 (1886) (acknowledging tribes are dependent on the federal government for "daily food").

²⁸¹ See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) ("When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress . . .").

²⁸² S. REP. NO. 112-166, at 4 (2012) ("The federal allotment policy resulted in the loss of over 100 million acres of tribal homelands."); CANBY, *supra* note 142, at 26–27; Rennard Strickland, *Friends and Enemies of the American Indian: An Essay Review on Native American Law and Public Policy*, 3 AM. INDIAN L. REV. 313, 314 (1975); *Land Tenure Issues*, INDIAN LAND TENURE FOUND., <https://iltf.org/land-issues/issues/> [<https://perma.cc/4P8Q-CW29>]; *The General Allotment Act*, PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/1900-allotment-act/> [<https://perma.cc/4URX-ZG88>] (last visited June 28, 2023).

²⁸³ Crepelle, *Making Red Lives Matter*, *supra* note 269, (manuscript at 11) (explaining that the Indian Reorganization Act of 1934 (IRA), enacted to end the land theft, was inspired by a report critical of the government's treatment of Indians.).

²⁸⁴ Indian Reorganization Act of 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5144 (2018)).

²⁸⁵ Crepelle, *How Federal Indian Law Prevents*, *supra* note 32, at 700 ("The Indian Reorganization Act of 1934 (IRA) was designed to support tribal existence; nonetheless, the IRA kept tribes in a state of dependency.").

²⁸⁶ Crepelle, *Making Red Lives Matter*, *supra* note 269, (manuscript at 11).

²⁸⁷ Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 360 (1953).

²⁸⁸ *Indian Reorganization Act*, BRITANNICA, <https://www.britannica.com/topic/Indian-Reorganization-Act> [<https://perma.cc/7D92-LC9Z>] ("The Reorganization Act remains the basis of federal legislation concerning Indian affairs.").

²⁸⁹ See H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953); see also LAURIE ARNOLD, *BARTERING WITH THE BONES OF THEIR DEAD: THE COLVILLE CONFEDERATED TRIBES AND TERMINATION* xi (2012) ("More than 100 tribes were terminated between 1953 and 1961 . . ."); DONALD L. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960*, at 183 (1986) ("Between 1945 and 1960 the government processed 109 cases of termination affecting 1,369,000 acres of Indian land . . ."); Adam Crepelle, *Standing Rock*

welfare than the federal government's desire to cut expenditures²⁹⁰ and exploit tribal resources.²⁹¹

President Richard Nixon formally ended the federal government's attempts to exterminate tribes in 1970²⁹² and sought to grant tribes complete sovereignty over their lands.²⁹³ However, his proposal never came to fruition. Nevertheless, Congress did adopt a policy of tribal self-determination in 1975.²⁹⁴ Every president and Congress since has embraced tribal self-determination,²⁹⁵ and numerous laws have been enacted to empower tribes.²⁹⁶

in the Swamp: Oil, the Environment, and the United Houma Nation's Struggle for Federal Recognition, 64 LOY. L. REV. 141, 150–51 (2018) (“During this abysmal era, the federal government terminated its relationship with over 100 tribes.”).

²⁹⁰ See Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 (2018)); see also Kenneth R. Philp, *Stride Toward Freedom: The Relocation of Indians to Cities, 1952–1960*, 16 W. HIST. Q. 175, 180 (1985) (detailing Indian commissioner Emmons' efforts to slash the Indian Bureau's budget); Michael C. Walch, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1188 (1983).

²⁹¹ Crepelle, *Finding Ways to Empower*, *supra* note 241, at 36.

²⁹² President Nixon, *Special Message to the Congress on Indian Affairs*, 1 PUB. PAPERS 564 (July 8, 1970).

²⁹³ FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 242–85 (abr. ed. 1986); see also Lina Mann, “*Self-Determination Without Termination*” *President Richard M. Nixon's Approach to Native American Policy Reform*, WHITE HOUSE HIST. ASS'N (Nov. 3, 2021), <https://www.whitehousehistory.org/self-determination-without-termination> [<https://perma.cc/7X9X-WYFF>] (detailing Nixon's efforts to support tribal self-determination).

²⁹⁴ See Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301–5423 (2018)).

²⁹⁵ See, e.g., Statement on Signing the Indian Self-Determination and Education Assistance Act Amendments of 1988, 2 PUB. PAPERS 1268, 1284–85 (Oct. 5, 1988); Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662, 662–63 (June 14, 1991); Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000); Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2106, 2106–07 (Sept. 23, 2004); 2016 WHITE HOUSE TRIBAL NATIONS CONF. PROGRESS REP., EXEC. OFF. OF THE PRESIDENT, A RENEWED ERA OF FEDERAL-TRIBAL RELS. (2017), https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf [<https://perma.cc/MU8J-L8YG>]; Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. NO. 00091 (Jan. 26, 2021); Alysa Landry, *Jimmy Carter: Signed ICWA into Law*, INDIAN COUNTRY TODAY (Sept. 12, 2017), <https://ictnews.org/archive/jimmy-carter-signed-icwa-into-law?redir=1> [<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.”).

²⁹⁶ E.g., 25 U.S.C. §§ 1451, 2701, 4301.

Tribes have unquestionably benefitted from the self-determination policy, but self-determination has not translated to full tribal self-government. President Reagan explained: “Instead of fostering and encouraging self-government, Federal policies have by and large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decisionmaking [sic], thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency.”²⁹⁷ President Reagan pledged to do more to empower tribes, and he did support tribal economic development efforts.²⁹⁸ Notwithstanding, tribes still remain ensnared in layers of federal regulations that apply nowhere else in the United States.²⁹⁹ Regulations that do little more than trap tribal lands in transaction costs.³⁰⁰ Hence, the tribal private sector remains dormant.

The Supreme Court began creating jurisdictional uncertainty for tribes during the 1970s.³⁰¹ In 1978, the Supreme Court divined tribes had magically lost their criminal jurisdiction over non-Indians at some undetermined point.³⁰² The Court stretched its flawed reasoning to tribal civil jurisdiction three years later,³⁰³ resulting in the labyrinthine jurisdictional scheme discussed *supra*.³⁰⁴ Likewise, the Court authorized states to tax Indian country commerce despite acknowledging “the tribal retailers will actually be placed at a competitive disadvantage, as compared to retailers elsewhere, due to the overlapping impact of tribal and state taxation.”³⁰⁵ The Court has upheld state taxation of Indian country while simultaneously admitting “tax payments by reservation lessees far exceed the value of services provided by the State to the lessees, or more generally, to the reservation as a whole.”³⁰⁶ The Supreme Court’s “modern” jurisprudence has produced a tangled and unstable jurisdictional web that bogs Indian country in uncertainty and transaction costs. As a result, investors prefer to avoid Indian country.

²⁹⁷ *Statement on Indian Policy*, 1 PUB. PAPERS 96, 96 (Jan. 24, 1983).

²⁹⁸ Dean J. Kotlowski, *From Backlash to Bingo: Ronald Reagan and Federal Indian Policy*, 77 PAC. HIST. REV. 617, 618 (2008).

²⁹⁹ Crepelle, *White Tape supra* note 11, at 573.

³⁰⁰ *Id.* at 578 (“These regulations needlessly increase transaction costs, adding uncertainty and expense to Indian country commerce.”).

³⁰¹ Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1057 (1995) (“Beginning in the 1970s and accelerating in the last decade, however, the decisions of the Supreme Court more frequently countenance expanding state authority in Indian country by limiting the historic scope of tribal authority in Indian country.”).

³⁰² *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

³⁰³ *See Montana v. United States*, 450 U.S. 544 (1981).

³⁰⁴ *See supra* Part IV.B.

³⁰⁵ *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 157 (1980).

³⁰⁶ *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 189 (1989).

V. SIMPLIFYING BUSINESS IN INDIAN COUNTRY

Improving tribal economies is a matter of reducing transaction costs and uncertainty. Towards this end, the United States should take further action to respect tribal sovereignty. Congress should legislatively affirm tribes' right to enforce contracts and zone their land. While tribes already have this power, ambiguities exist. Ambiguities lead to costly, time consuming, and unpredictable litigation. A single act of Congress can put an end to the judicial opacity about tribal jurisdiction and provide tribes with the legal stability needed to attract outside investment.³⁰⁷ Similarly, Congress should preempt state taxation of tribal commerce as state taxes indisputably add to the cost of doing business in Indian country.³⁰⁸ While a full-fledged affirmation of tribal sovereignty would be welcome, those points would be a strong and reasonable start.

Tribes are largely at the mercy of the federal government, but tribes do have the ability to improve their business climates. However, it is worth noting some tribes may have no desire to attract outside investors. Some tribes may prefer to keep their land as it is.³⁰⁹ Others may view tribal legal reform as a path towards

³⁰⁷ See, e.g., Crepelle, *How Federal Indian Law Prevents*, *supra* note 32, at 730–38 (proposing a Business Certainty Act to simplify jurisdiction and enhance clarity when conducting business in Indian country).

³⁰⁸ *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 116 (2005) (Ginsburg, J., dissenting) (“As a practical matter, however, the two tolls cannot coexist. If the Nation imposes its tax on top of Kansas’ tax, then unless the Nation operates the Nation Station at a substantial loss, scarcely anyone will fill up at its pumps. Effectively double-taxed, the Nation Station must operate as an unprofitable venture, or not at all.”) (internal citation omitted); SUBCOMM. ON DUAL TAXATION, TREASURY TRIBAL ADVISORY COMM., SUBCOMMITTEE ON DUAL TAXATION REPORT 3 (2020), <https://home.treasury.gov/system/files/136/TTAC-Subcommittee-on-Dual-Taxation-Report-1292020.pdf> [<https://perma.cc/Z5SH-6PAB>] (“Dual taxation fundamentally is state taxation on Indian lands. This situation creates additional costs on tribal land-based business and economic activity.”).

³⁰⁹ MAURA GROGAN, REBECCA MORSE & APRIL YOUPEE-ROLL, REVENUE WATCH INST., NATIVE AMERICAN LANDS AND NATURAL RESOURCE DEVELOPMENT 7 (2011), https://resourcegovernance.org/sites/default/files/documents/rwi_native_american_lands_2011.pdf [<https://perma.cc/8L3D-N9VX>] (“Some tribes, like the Northern Cheyenne, have elected not to mine their substantial coal reserves (although there is pressure even within the tribe to change that stance).”); Clara Caufield, *Northern Cheyenne and Coal—Sixty Year Love-Hate Relationship*, NATIVE TIMES (Mar. 20, 2014), <https://www.nativetimes.com/index.php/news/environment/9699-northern-cheyenne-and-coal-sixty-year-love-hate-relationship> [<https://perma.cc/YYV4-HMSN>] (“[I]n the 1960’s the Northern Cheyenne Tribe once again successfully (undermanned, underfunded, understaffed and underdog) went to war with the US Government. This time stopping development of huge tribal coal reserves, leased out by the BIA: getting Congress to cancel those leases and later winning a Supreme Court decision (the Hollowbreast Case) clarifying that the Tribe owns all reservation mineral rights (coal, oil and gas, water and timber).”); Nathan Rott, *People of Coal-Rich Northern Cheyenne Torn Between Jobs and Sacred Culture*, NPR (June 25, 2017, 7:00 AM ET), <https://www.npr.org/2017/06/25/533982860/>

assimilation.³¹⁰ This is a choice each tribe must make for itself. But it must be noted, poverty is not an indigenous tradition.³¹¹ Commerce is, and tribes have long implemented laws to facilitate trade.³¹² Tribes were historically open to new items and ways of doing business.³¹³ As tribal courts have acknowledged, tribal customs are compatible with contemporary commercial laws.³¹⁴

people-of-coal-rich-northerncheyenne-torn-between-jobs-and-sacred-culture [<https://perma.cc/2FH8-YDXT>] (“But despite high unemployment and systemic poverty, the Northern Cheyenne Tribe has never touched the coal. It has spurned developers and scuttled plans. Most recently, it sued the Trump administration for opening up the opportunity for new coal development in its corner of southeastern Montana.”).

³¹⁰ The Violence Against Women Act’s tribal jurisdiction expansion requires tribes to essentially replicate the state and federal court system. Hence, some have criticized the Act as being assimilationist. See Jessica Allison, *Beyond VAWA: Protecting Native Women from Sexual Violence Within Existing Tribal Jurisdictional Structures*, 90 U. COLO. L. REV. 225, 246 (2019) (“VAWA 2013 is an important tool in a post-colonial world, but it does not meet this standard because it completely neglects tribal culture and values in favor of following Anglo-American court processes and procedures.”); Mary K. Mullen, *The Violence Against Women Act: A Double-Edged Sword for Native Americans, Their Rights, and Their Hopes of Regaining Cultural Independence*, 61 ST. LOUIS U. L.J. 811, 812 (2017) (“I argue that, while VAWA grants Native Americans more power over non-native perpetrators, it does so with the expectation that tribal courts will conform to Anglo-American criminal procedure, creating further assimilation of tribal courts and robbing Native Americans of their cultural uniqueness.”); Catherine M. Redlingshafer, *An Avoidable Conundrum: How American Indian Legislation Unnecessarily Forces Tribal Governments to Choose Between Cultural Preservation and Women’s Vindication*, 93 NOTRE DAME L. REV. 393, 410 (2017) (“VAWA cannot necessarily be as smoothly implemented in tribes where the culture and legal tools do not so neatly align with those of the federal system.”).

³¹¹ MILLER, *supra* note 229, at 4 (“It also bears emphasizing that poverty is not an Indian cultural or historical attribute.”).

³¹² *Id.* at 5 (“First as stated above, many tribal leaders, historians, and commentators agree that economic development and business activities are not at odds with historic and traditional tribal cultures and economies.”).

³¹³ 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.”) (quoting Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 495 (2002)); Tim Giago, *Indian Country Can’t Forget the Indian Reorganization Act*, INDIANZ (Aug. 8, 2016), <https://www.indianz.com/News/2016/08/08/tim-giago-indian-countrycant-forget-the.asp> [<https://perma.cc/KCD2-8P8A>] (quoting Cahuilla historian Rupert Costo, “After all, the Indians were not and are not fools; we are always ready to improve our condition.”).

³¹⁴ *E.g.*, *Zwicke v. Houghton*, No. CV 02-66, 2005 Ho-Chunk Trial LEXIS 9, at *13 (Ho-Chunk Nation Trial Ct. Nov. 3, 2005); *Ben v. Burbank*, No. SC-CV-23-95, 1996 Navajo Sup. LEXIS 1, at *5 (Navajo Nation Sup. Ct. Sept. 2, 1996).

A. Tribal Commercial Law

To decrease legal uncertainty, tribes must adopt commercial laws. Several tribes have borrowed from state and federal law when the laws are consistent with tribal values.³¹⁵ Alternatively, model laws have been designed specifically for tribes.³¹⁶ Regardless of where the law comes from, simply putting laws on paper reduces uncertainty. The uncertainty is further reduced by making the laws easily accessible. While this may seem basic, clear and readily attainable laws will save potential investors significant time and effort. This makes it easier for businesses to make decisions. Increased investor confidence will likely lead to greater investment.

In order to maximize the benefits of tribal legal reforms, tribes should consider adopting certain uniform laws governing commercial matters such as secured transactions laws and corporate codes. While states have tremendous liberty to adopt their own laws,³¹⁷ states have largely uniform commercial laws to reduce the transaction costs of engaging in interstate commerce, as less time needs to be spent on legal research.³¹⁸ Uniform laws also decrease uncertainty because the law is comparable across jurisdictions. Tribes can reap the same benefits by adopting uniform laws.

³¹⁵ CONFEDERATED TRIBES OF GRAND RONDE, TRIBAL COURT ORDINANCE, CHAP. 302(g)(1) (2013), <https://weblink.grandronde.org/WebLink/DocView.aspx?id=33973&page=8&dbid=0&repo=Grand-Ronde&searchid=fea8bbb4-8e24-4347-898e-97347722cf96> [<https://perma.cc/CR2A-RC3F>]; *Shingoitewa v. Governing Bd. of Educ. of the Hotevilla Bacavi Cmty. Sch.*, No. 97AP000001, 1998 Hopi App. LEXIS 2, at *7–8 (Hopi App. Ct. Mar. 20, 1998).

³¹⁶ See, e.g., NAT'L CONF. OF COMM'RS ON UNIF. ST. LS., IMPLEMENTATION GUIDE AND COMMENTARY TO THE MODEL TRIBAL SECURED TRANSACTIONS ACT (2005), <https://www.bia.gov/sites/default/files/dup/assets/as-ia/ieed/ieed/pdf/idc1-024560.pdf> [<https://perma.cc/HG2K-SDSG>].

³¹⁷ See, e.g., U.S. CONST. amend X.

³¹⁸ See Daniel Liberto, *Uniform Commercial Code (UCC): Definition, Purpose, and History*, INVESTOPEDIA (Feb. 8, 2022), <https://www.investopedia.com/terms/u/uniform-commercial-code.asp> [<https://perma.cc/BR57-MXWH>] (“The Uniform Commercial Code (UCC) is important since it helps companies in different states to transact with each other by providing a standard legal and contractual framework.”); *Uniform Commercial Code*, UNIF. L. COMM'N, <https://www.uniformlaws.org/acts/ucc> [<https://perma.cc/P5GL-PEPH>] (last visited June 28, 2023) (“Because the UCC has been universally adopted, businesses can enter into contracts with confidence that the terms will be enforced in the same way by the courts of every American jurisdiction. The resulting certainty of business relationships allows businesses to grow and the American economy to thrive.”).

B. Intertribal Business Court

Uniform laws are progress, but laws are only as good as the institution enforcing them.³¹⁹ Many businesses are skeptical of tribal courts.³²⁰ Tribes can overcome this issue by forming an intertribal business court (“IBC”).³²¹ Several intertribal courts currently exist.³²² Tribes already have specialized courts too.³²³ An intertribal court merely combines existing tribal judicial practices.³²⁴ The intertribal nature of the business court will enable tribes to share operating costs.³²⁵ By pooling resources, tribes will be able to hire better personnel than each tribe could individually.³²⁶ Plus, the intertribal nature of the tribunal decreases the chances of politics influencing court administration.³²⁷ Intertribal courts also facilitate the development of intertribal common law.³²⁸ This further enhances the force of tribal positive laws by providing jurisprudential guidance on how the law applies.

An intertribal business court staffed by highly qualified judges applying easily accessible laws will decrease assaults on tribal court jurisdiction.³²⁹ Most challenges to tribal court jurisdiction are premised on tribal laws being mysterious and tribal judges being incompetent.³³⁰ An IBC can crush both arguments by having a website listing judicial biographies as well as the relevant laws.³³¹ Though businesses will retain the right to contest tribal jurisdiction, businesses may see exercising this right as a waste of time. After all, consent is a basis for tribal court jurisdiction, and most business disputes involve an element of consent.³³² Thus, businesses may prefer to forego jurisdictional challenges in order to more quickly resolve their disputes in the high-quality tribal forum. This significantly increases certainty as an outcome will be reached rather than spending years litigating which courtroom has jurisdiction over the case. Eliminating jurisdictional challenges will also drastically reduce litigation expenses.

To be sure, there are costs to implementing legal reform. However, the costs are manageable for tribes. Intertribal courts already exist, and tribes are currently borrowing commercial laws from other jurisdictions. This reform is essentially

³¹⁹ Crepelle, *Intertribal Business Court*, *supra* note 69, at 89 (“[L]aws are little more than words on paper without an adequate enforcement mechanism.”).

³²⁰ *Id.* at 88.

³²¹ *Id.* at 66.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *See id.*

³²⁷ *Id.*

³²⁸ *Id.* at 71.

³²⁹ *See id.* at 107.

³³⁰ *See id.*

³³¹ *Id.* at 106.

³³² Crepelle, *How Federal Indian Law Prevents*, *supra* note 32, at 708 (“Business often involves contractual relationships, so this would seem to place many commercial relationships within the purview of Montana Prong One.”).

codifying and expanding existing tribal practices. Federal funds are available to support the development of tribal courts and commercial codes.³³³ An intertribal business court with uniform tribal commercial laws is a realistic reform with the potential to transform tribal economies.³³⁴

C. Strengthening Tribal Jurisdiction

To further enhance certainty on their lands, tribes should capitalize on the federal laws that clarify their authority. The Violence Against Women Act (“VAWA”) provides an example, as it permits tribes to criminally prosecute non-Indians.³³⁵ The Act does not specifically address civil jurisdiction; nevertheless, the ability to place non-Indians in jail would seemingly include the capacity to hold non-Indians liable for breach of contract.³³⁶ Implementing VAWA requires tribes to abide by stringent procedural safeguards which may help signal tribal judicial legitimacy to non-Indian investors.³³⁷ VAWA also comes with federal funding for court improvements,³³⁸ and increased funding leads to better performance.³³⁹ Existing evidence indicates VAWA implementing tribes experience income growth.³⁴⁰

Similarly, tribes can increase jurisdictional certainty by implementing tribes as states (“TAS”) provisions of various federal environmental laws.³⁴¹ When implementing TAS, tribes have far greater control over environmental issues on their land.³⁴² Use of TAS has enabled several tribes to significantly improve the environmental quality of their reservations.³⁴³ From a business perspective, TAS is

³³³ 42 U.S.C. § 2991b(b)(2)(A).

³³⁴ Crepelle, *Intertribal Business Court*, *supra* note 69, at 109.

³³⁵ Violence Against Women Act Reauthorization Act of 2022, (codified as amended at 25 U.S.C. § 1304).

³³⁶ Crepelle, *Decolonizing*, *supra* note 15, at 461 n.219; Crepelle, *How Federal Indian Law Prevents*, *supra* note 32, at 735–36.

³³⁷ Crepelle, *Decolonizing*, *supra* note 15, at 460–61.

³³⁸ Press Release, U.S. Dep’t of Just., Justice Department Announces Nearly \$225 Million in Grants to Support Coordinated Community Responses to Domestic and Sexual Violence on the 28th Anniversary of the Violence Against Women Act (Sept. 13, 2022), <https://www.justice.gov/opa/pr/justice-department-announces-nearly-225-million-grants-support-coordinated-community> [<https://perma.cc/UZ5P-H5TP>]; *Office on Violence Against Women Grants Programs*, U.S. DEP’T OF JUST., <https://www.justice.gov/ovw/grant-programs> [<https://perma.cc/C2TT-PJ7E>] (last visited June 28, 2023).

³³⁹ See INDIAN L. & ORD. COMM’N, *supra* note 197, at 64–65 (recounting how increased funding and resources provided better law enforcement in Indian country); *but see* Crepelle, *Getting Smart*, *supra* note 167, at 489 (describing how a lack of funding undermines tribal courts).

³⁴⁰ See Adam Crepelle & Thomas Stratmann, *Does Expanding Tribal Jurisdiction Improve Tribal Economies: Lessons from Arizona*, 55 ARIZ. ST. L.J. 211 (2023).

³⁴¹ See, e.g., Crepelle, *Water Crisis*, *supra* note 198, at 164–66.

³⁴² *Id.* at 164–69.

³⁴³ *Id.*

much more efficient because tribes have clear environmental authority over their reservations,³⁴⁴ including non-Indian fee lands located within a tribe's reservation.³⁴⁵ Hence, greater tribal sovereignty leads to greater certainty, which reduces jurisdictional challenges thereby minimizing transaction costs.

D. Tax Compacts

Taxation may be the most difficult area for tribes to reduce transaction costs. While preemption of state taxes is possible,³⁴⁶ there is too much uncertainty in the jurisprudence to prevent litigation.³⁴⁷ Accordingly, tribes' best option at the moment is enter a tax compact with the surrounding state.³⁴⁸ Tax compacts often result in tribes and states splitting revenue,³⁴⁹ but in some cases, guarantee the state will not tax tribal commerce if the tribal levy is equal to or greater than the state rate.³⁵⁰ While tax compacts are not ideal for tribes as they grant states money that rightfully belongs to tribes,³⁵¹ tax compacts ensure tribes are able to collect some tax revenue. Equally important, tax compacts provide businesses with certainty as to their tax bill and prevent costly, time-consuming litigation.³⁵²

³⁴⁴ *Id.*

³⁴⁵ *Montana v. U.S. Env't Prot. Agency*, 137 F.3d 1135 (9th Cir. 1998).

³⁴⁶ *See, e.g., Morgan, supra* note 1, at 121–22 (discussing the issue of preemption during the process of writing tribal laws).

³⁴⁷ For a detailed discussion of the complicated issue of preemption of state taxes, see COHEN'S HANDBOOK, *supra* note 87, § 6.03[2][a].

³⁴⁸ COHEN'S HANDBOOK, *supra* note 87, § 8.05; Jerry Cornfield, *Deal Ends Legal Fight and Allows Tulalips a Cut of Sales Tax*, HERALDNET (Jan. 29, 2020, 9:13 PM), <https://www.heraldnet.com/news/deal-ends-legal-fight-and-allows-tulalips-a-cut-of-sales-tax/> [<https://perma.cc/JL4P-ZDUA>] (“The deal ‘gives us certainty moving forward with economic development and a revenue stream to pay for infrastructure and governmental services that support current and *new* business, customers and employees, and the entire community.’”).

³⁴⁹ Matthew Gregg, *Separate but Unequal: How Tribes, Unlike States, Face Major Hurdles to Access the Most Basic Public Finance Tools*, BROOKINGS (Dec. 3, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/12/03/separate-but-unequal-how-tribes-unlike-states-face-major-hurdles-to-access-the-most-basic-public-finance-tools/> [<https://perma.cc/ZA7R-6TJ2>] (“The advantage of tax compacts is that essential revenues from non-tribal economic activity within reservation boundaries are distributed back to tribes.”).

³⁵⁰ *See, e.g., CANNABIS AGREEMENT BETWEEN THE RENO-SPARKS INDIAN COLONY AND THE STATE OF NEVADA 7* (Jan. 29, 2020), <https://ccb.nv.gov/wp-content/uploads/2020/06/Reno-Sparks-Indian-Colony-Cannabis-Agreement-Executed.pdf> [<https://perma.cc/QQ77-FZ69>].

³⁵¹ Crepelle, *Taxes, Theft, and Indian Country, supra* note 176, at 1020 (recounting how tribes are required to compact with states in order to establish casinos and states reap the monetary benefit of the revenue generated by these businesses created and run by tribes).

³⁵² MARK J. COWAN, CTR. FOR INDIAN COUNTRY DEV., *STATE-TRIBAL TAX COMPACTS: STORIES TOLD AND UNTOLD* 33 (2021), <https://www.minneapolisfed.org/~media/assets/papers/cicd-policy-discussion-papers/2021/state-tribal-tax-compacts-stories-told-and-untold>.

E. Self-Governance

Tribes can also reduce transaction costs by taking over BIA functions. Since 1975, tribes have been able to use federal funds to perform federal functions on their land in lieu of the BIA.³⁵³ Over half of the 574 federally recognized tribes³⁵⁴ currently operate some form of self-governance contract,³⁵⁵ and studies consistently show tribes outperform the federal government.³⁵⁶ Particularly relevant for businesses is expediting the leases of trust land, and tribes can do this through the Helping Expedite and Advance Responsible Tribal Homeownership Act (“HEARTH Act”).³⁵⁷ The HEARTH Act permits tribes to issue leases without prior federal approval³⁵⁸ and was designed to catalyze investment in Indian country.³⁵⁹ Following implementation of the HEARTH Act, the Ho-Chunk Nation’s land lease approval time fell from eighteen months to approximately four weeks.³⁶⁰ Thus, the HEARTH Act can significantly lower the transaction costs of leasing tribal land.

pdf [<https://perma.cc/8TUW-PXEP>] (“Tax compacts between states and tribes are not perfect, but they have the potential to resolve issues in a fair manner while providing much-needed certainty to those doing business in Indian Country.”).

³⁵³ See Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301–5423 (2018)); U.S. GEN. ACCT. OFF., GAO/RCED-89-185F, INTERNAL CONTROLS: BUREAU OF INDIAN AFFAIRS’ SECTION 638 CONTRACTS WITH TRIBAL ORGANIZATIONS 1 (1989) (“Public Law 93-638 was enacted to provide a legal framework for tribal organizations to manage their own affairs.”).

³⁵⁴ See Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636–41 (Jan. 28, 2022).

³⁵⁵ *Office of Self Governance*, U.S. DEP’T OF THE INTERIOR, INDIAN AFFS., <https://www.bia.gov/as-ia/osg> [<https://perma.cc/GHA5-33HP>] (“Self Governance tribes represents approximately 50 percent of all Federally recognized tribes nationwide.”); *Tribal Nations with Self-Governance Compacts*, SELF-GOVERNANCE COMMC’N & EDUC. TRIBAL CONSORTIUM, <https://www.tribalselfgov.org/resources/participating-tribes/> [<https://perma.cc/LP2G-588C>] (“More than 370 Tribal nations redefined their relationship with the Department of the Interior and/or the Indian Health Service through Self-Governance compacts.”).

³⁵⁶ Crepelle, *The Time Trap*, *supra* note 257, at 239.

³⁵⁷ 25 U.S.C. § 415(h) (2018).

³⁵⁸ *Id.* § 415(h)(1).

³⁵⁹ Jodi Gillette, *Strengthening Tribal Communities Through the HEARTH Act*, WHITE HOUSE BLOG (July 30, 2012, 1:54 PM ET), <https://obamawhitehouse.archives.gov/blog/2012/07/30/strengthening-tribal-communities-through-hearth-act> [<https://perma.cc/P7SP-8GAM>] (“This new authority has the potential to significantly reduce the time it takes to approve leases for homes and small businesses in Indian Country. By allowing tribes to more quickly and easily lease their lands, the bill promotes investment in tribal communities and more broadly facilitates economic development.”).

³⁶⁰ *Case Study: HEARTH Act Implementation*, FED. RES. BANK OF MINNEAPOLIS, <https://www.minneapolisfed.org/indiancountry/resources/tribal-leaders-handbook-on-home-ownership/case-study-hearth-act-implementation> [<https://perma.cc/4QLA-B7VH>] (“The time it takes to acquire a lease has been dramatically reduced from as long as 18 months to four to six weeks.”).

F. Honoring Treaties

However, the most efficient way to improve Indian country's business climate is to honor the United States Constitution and hundreds of treaties with tribes. Numerous treaties ensure tribes the right to govern themselves free from outside interference on their reservations.³⁶¹ Honoring these treaties means tribes should be free to make their own laws and enforce them on all persons on their land. A natural corollary of this principle is states should be barred from exercising any authority on tribal lands. Doing this would create a bright line rule—those on tribal land abide by tribal law—and simplify business in Indian country.³⁶² And if the United States honors its treaty obligation of providing tribes with physical infrastructure, Indian tribes will be ready for business.

CONCLUSION

Doing business in Indian country is complicated, but it does not have to be. The jurisdictional uncertainty and massive bureaucratic transaction costs are federal impositions. If the federal government eliminates them, operating in Indian country will be much simpler. Similarly, tribal economies will improve if tribes bolster their legal institutions. By making easily accessible tribal laws the guiding force on tribal land, businesses will know which rules to follow. This will drastically reduce uncertainty and transaction costs and enable Indian country economies to thrive.

³⁶¹ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020) (“And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves.”); 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/A9CN-PBSH>] (“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.”).

³⁶² Adam Crepelle, *The Reservation and the Rule of Law: A Short Primer on Indian Country's Complexity*, 70 LA. BAR J., 192, 195 (Oct./Nov. 2022) (“The problem is there are too many laws in Indian country. Returning to the original principle—state authority ends where Indian country begins—is the answer. In addition to being simple, respecting tribes’ right to govern *their* land is a United States obligation pursuant to hundreds of treaties.”).