

University of Michigan Journal of Law Reform

Volume 54

2021

White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self-Government

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Recommended Citation

Adam Crepelle, *White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self-Government*, 54 U. MICH. J. L. REFORM 563 (2021).

Available at: <https://repository.law.umich.edu/mjlr/vol54/iss3/2>

<https://doi.org/10.36646/mjlr.54.3.white>

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**WHITE TAPE AND INDIAN WARDS:
REMOVING THE FEDERAL BUREAUCRACY TO EMPOWER
TRIBAL ECONOMIES AND SELF-GOVERNMENT**

Adam Crepelle*

ABSTRACT

American Indians have the highest poverty rate in the United States, and dire poverty ensnares many reservations. With no private sector and abysmal infrastructure, reservations are frequently likened to third-world countries. Present-day Indian poverty is a direct consequence of present-day federal Indian law and policy. Two-hundred-year-old laws premised on Indian incompetency remain a part of the U.S. legal system; accordingly, Indian country is bound by heaps of federal regulations that apply nowhere else in the United States. The federal regulatory structure impedes tribal economic development and prevents tribes from controlling their own resources.

This Article asserts the federal regulatory “white tape” is unconstitutional. By focusing on restraints upon trust land and Indian trader laws, this Article demonstrates that contemporary federal regulations impeding tribal economic development are based upon flagrantly racist ideas. This Article explores the unique relationship between Indians and the Constitution and concludes that restrictions on tribal trust land and Indian trader laws should be subjected to strict scrutiny rather than the usual rational basis review applied to legislation relating to Indians. These regulations cannot survive strict scrutiny. Once tribes are liberated from these antiquated regulations, this Article proposes that tribes be able to craft their own land use and economic policies without federal approval.

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* Associate Professor, Southern University Law Center; Managing Fellow, Native American Law and Policy Institute. I would like to thank the Renewing Indigenous Economies Workshop at the Hoover Institution at Stanford University for allowing me to discuss the ideas that became this paper. I would also like to thank Professor Joseph Singer for reviewing an early draft of this paper.

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“The biggest obstacle to Indian economic development is white tape.”

– Ernest Sickey,
former Chairman of the
Coushatta Tribe of Louisiana

INTRODUCTION

President Reagan said, “The nine most terrifying words in the English language are: I’m from the Government, and I’m here to help.”¹ Nobody knows this better than the Indians.² For thousands of years before European contact, Indians had robust free market economies.³ Indians developed a legal system to facilitate commerce,⁴ and goods flowed over a thousand miles from their sites of

1. Ronald Reagan, The President’s News Conference (Aug. 12, 1986).

2. Indian is used in this Article to denote the indigenous peoples of present-day North America. This article uses the term “Indian” rather than “Native American” because it is the proper legal term as well as the preferred term of many Indians. See, e.g., *Mississippi Band of Choctaw Indians*, CHOCTAW, choctaw.org (last visited Apr. 20, 2021); S. UTE INDIAN TRIBE, <https://www.southernute-nsn.gov/> (last visited Apr. 20, 2021); QUINAULT INDIAN NATION, <http://www.quinaltindiannation.com/> (last visited Apr. 20, 2021).

3. Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTREPRENEURSHIP & L. 413, 418 (2019) (“Indians wanted a greater variety of goods than were available on their land; hence, indigenous societies went to great lengths to facilitate commerce.”); Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 765 (2001) (“Indians also regularly traded goods with other peoples from near and far both for survival and to make life as comfortable as possible. The majority, if not all, of this trade was conducted in free market situations where private individuals voluntarily came together to buy and sell items they had manufactured for sale and which they exchanged by barter and sometimes even sold for money.”).

4. Crepelle, *supra* note 3, at 419 (“Tribes also developed laws to facilitate commerce that among other things, enabled individuals to purchase items on credit.”); Miller, *supra* note 3, at 792 (“Some Indians also gave guarantees on their products and on brides, and had well-established rules of trade.”); Adam Crepelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST.

origin.⁵ Thanks to dynamic economies, Indians were healthy and prosperous.⁶ Indians understood economics; thus, Indians easily incorporated Europeans into their trade networks.⁷

Soon after the nation's inception, the United States implemented a series of laws governing Indian trade.⁸ The laws were supposedly designed to protect Indians from unscrupulous dealings with non-Indians because Indians were deemed incompetent.⁹ In 1823, the U.S. Supreme Court decided that the United States owned the

315, 341 (2017) ("These markets were governed by rules and used standardized systems of measurements.").

5. Michael Mozdy, *Cacao in Chaco Canyon*, NAT. HIST. MUSEUM UTAH: BLOG (Aug. 4, 2016), <https://nhmu.utah.edu/blog/2016/08/04/cacao-chaco-canyon> [<https://perma.cc/NCK8-KCZX>] ("Crown had found the first evidence that cacao had indeed found its way to the American Southwest, some 1200 miles north of where it grows. The Ancestral Puebloans were using cacao in much the same way as the Maya, it seems."); see also Jasmine Kabatay, *Ancient Quinoa Seeds Found in Ontario Shed Light on Indigenous Trade*, CBC NEWS (Jan. 16, 2019), <https://www.cbc.ca/news/canada/hamilton/quinoa-trading-brantford-1.4980974> [<https://perma.cc/2BRP-RRAS>]; Ann M. Carlos & Frank D. Lewis, *Exchange Among Native Americans and Europeans Before 1800: Strategies and Interactions* 10 (Oct. 26–28, 2012) (unpublished manuscript), <http://www.economichistory.ca/pdfs/2012/carlos-lewis.pdf> [<https://perma.cc/T2EW-PUBC>] ("The Northern Plains were lightly populated, yet as in other regions, aboriginal peoples developed elaborate, long-distance, trading arrangements. In a prehistoric site in South Dakota there are artifacts from Florida, the Gulf coast, and both the Atlantic and Pacific coasts.").

6. Karethy (Kay) Edwards & Beverly Patchell, *State of the Science: A Cultural View of Native Americans and Diabetes Prevention*, J. CULTURAL DIVERSITY, Spring 2009, at 32 ("Native Americans have a rich history of healthy food systems and prosperous agricultural economies."); DEVON A. MIHESUAH, *RECOVERING OUR ANCESTORS' GARDENS: INDIGENOUS RECIPES AND GUIDE TO DIET AND FITNESS* 47–54 (2005); Crepelle & Block, *supra* note 4, at 316 ("Explorers noted the American Indians were better nourished and more physically robust than the people of Europe."); *id.* at 340 ("Some Indians were better businessmen than others, so horses were unevenly distributed. Indeed, some Indians owned over 1,000 horses.").

7. Miller, *supra* note 3, at 788 ("After Europeans arrived on this continent, the extensive and well-established tribal trading networks led to the spread of European goods to many tribes long before they met their first white people."); Bill Yellowtail, *Indian Sovereignty*, PERC REPS., Summer 2006, at 10 ("Fabricating iron implements at their portable forge, they bartered them for the corn and squash that sustained the Corps of Discovery through the bitterly cold winter. A few months and a thousand miles later, Lewis was astonished to arrive in the Nez Perce community and find that one of these trade axes had proceeded him.").

8. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33 § 4, 1 Stat. 137, 138 (1790) (current version at 25 U.S.C. § 177); *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 688 (1965) ("In the very first volume of the federal statutes is found an Act, passed in 1790 by the first Congress, 'to regulate trade and intercourse with the Indian tribes,' requiring that Indian traders obtain a license from a federal official, and specifying in detail the conditions on which such licenses would be granted.").

9. *Cent. Mach. Co. v. Ariz. Tax Comm'n*, 448 U.S. 160, 163 (1980) ("In 1790, Congress passed a statute regulating the licensing of Indian traders. Act of July 22, 1790, ch. 33, 1 Stat. 137. Ever since that time, the Federal Government has comprehensively regulated trade with Indians to prevent 'fraud and imposition' upon them."); *Ewert v. Bluejacket*, 259 U.S. 129, 136 (1922) ("The purpose of the section clearly is to protect the inexperienced, dependent and improvident Indians from the avarice and cunning of unscrupulous men in official position and at the same time to prevent officials from being tempted, as they otherwise might be, to speculate on that inexperience or upon the necessities and weaknesses of these 'Wards of the Nation.'").

Indians' land and the Indians merely occupied it.¹⁰ The Supreme Court later built upon this principle to classify tribes as "domestic dependent nations" rather than full sovereigns and named the United States guardian of the Indian wards.¹¹ Indians lost their freedom.

Though the Indian wars have ended and Indians now have full rights of citizenship,¹² tribes remain shackled by an antiquated legal system designed to subjugate them. The great Indian law scholar Felix Cohen found that Indians are subject to over 2,200 more regulations than other American citizens.¹³ Consequently, every transaction involving Indians on a reservation requires federal approval. As a result of these rules, it takes forty-nine steps to engage in energy production on a reservation, while the same energy production takes four steps off the reservation.¹⁴ The result is that a business can begin producing oil in about three months off a reservation, yet tribes have to wait nearly three years to drill for oil on their land.¹⁵ Likewise, an act as simple as executing a mortgage on the reservation requires the approval of the Secretary of the Interior.¹⁶ As one federal court put it, the federal government's attitude towards the Indians "can only be characterized as bureaucratic imperialism."¹⁷

Indian country's¹⁸ nonsensically complex regulatory framework was not born of indigenous ingenuity; rather, Indian country's byzantine legal landscape is a consequence of centuries-old colonial ideology. That is, the red tape is not red at all—it's white. Indeed,

10. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 584–85 (1823) ("It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.")

11. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

12. 8 U.S.C. § 1401(b).

13. Felix Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 *YALE L.J.* 348, 352 (1953).

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

15. U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFS., *TRANSCRIPT OF TRIBAL CONSULTATION, IDENTIFYING ECONOMIC PRIORITIES IN INDIAN COUNTRY* 5 (Aug. 17, 2017) ("When they're drilling off reservation, it takes them about four months to get all the permitting process off reservation On reservation, it takes 31 months for no other reason than it's our fault.")

16. 25 U.S.C. § 5135(a); 25 C.F.R. § 152.34 (2019).

17. *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.")

18. 18 U.S.C. § 1151.

the trust land system was predicated upon Indian imbecility, and its goal was to transfer Indian land to whites.¹⁹ Nonetheless, trust land remains Indian country's dominant land tenure system.²⁰ Indian trader laws are even blunter in their racial categories of "white persons" and "full blood Indians," yet Indian trader laws remain part of the U.S. Code.²¹ Though the United States has disavowed racist ideology,²² laws rooted in Indian inferiority are the dinosaur that won't die.²³

The Constitution does not apply to Indian tribes,²⁴ but Congress is bound by the Constitution and constrained by the Fifth Amendment when legislating in Indian affairs.²⁵ The Fifth Amendment prohibits the United States from enacting arbitrary laws or laws that discriminate based upon race without a compelling rationale.²⁶ The trust land restrictions and Indian trader laws are overtly racist by design; moreover, both laws are irrational and further no legitimate government purpose in their current form.²⁷ Accordingly, the constitutionality of the unjust trust land and trader regulations—which do nothing but trap Indians in poverty—should be challenged. The laws should be struck down as obsolete impediments to tribal self-government and economic development.

19. See *infra* Section IV.A for a discussion of allotment.

20. FED. RESRV. BANK OF MINNEAPOLIS, *Navigating Land Issues, in* TRIBAL LEADERS HANDBOOK ON HOMEOWNERSHIP 79, 79 (2018) (noting trust lands are "[t]he most common form of land tenure in Indian country.").

21. 25 U.S.C. §§ 261–264.

22. *E.g.*, Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17); Civil Rights Act of 1968, Pub. L. No. 90–284, 82 Stat. 73 (codified as amended in scattered sections of 18 U.S.C., 25 U.S.C., & 42 U.S.C.); *see, e.g.*, 42 U.S.C. §§ 3601–3619; *see also* Chinese Exclusion Acts, ch. 126, Pub. L. No. 47-126, 22 Stat. 58 (1882), *repealed by* An Act to Repeal the Chinese Exclusion Acts, ch. 344, Pub. L. No. 78-199, 57 Stat. 600 (1943).

23. Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 532 (2021); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 123 (2005); U.N. Comm. on the Elimination of Racial Discrimination, 59th Sess., 1475th mtg. at 9, U.N. Doc. CERD/C/SR.1475 (Aug. 6, 2001) (describing the U.S. Indian policy as "out of step with contemporary legal developments in indigenous rights").

24. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.").

25. *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 73–74 (1977).

26. *See infra* Part III.

27. *But see* Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV'T L. REV. 1, 34 (2017) (noting trust land continues to exist because "in part because most Indian nations want it to continue to exist. They support it because the restraint on alienation preserves the tribal land base"). Preserving tribal land bases is unquestionably rational as the United States agreed to this much in hundreds of treaties; however, the regulations currently encumbering trust land are irrational. A far simpler and better option is discussed *infra*.

Once the unconstitutional white tape is peeled from Indian country, tribes must be empowered to self-govern. In 1970, President Nixon sought to grant tribal governments greater control over their economic and political destinies because even well-meaning federal programs “have frequently proved to be ineffective and demeaning.”²⁸ Congress adopted a policy of tribal self-determination in 1975.²⁹ Every President and Congress since has embraced tribal self-determination.³⁰

Thirteen years after President Nixon announced tribal self-determination as the United States’ Indian policy, however, President Reagan stated:

[S]ince 1975, there has been more rhetoric than action. 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 decision making, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency.³¹

President Reagan expressed a desire to remove impediments to tribal self-government and economic development;³² nevertheless, the year 2021 has come, and President Reagan’s remarks are just as relevant.

Tribal self-determination and Orwellian federal oversight are entirely at odds. Federal Indian law and its nearly two-century-long interdiction of tribes is the greatest inhibitor of tribal self-

28. Special Message on Indian Affairs, 213 PUB. PAPERS 564, 565 (July 8, 1970).

29. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203, amended by 25 U.S.C. §§ 5301-5423.

30. See, e.g., Alys Landry, *Jimmy Carter: Signed ICWA into Law*, INDIAN COUNTRY TODAY (Sept. 12, 2017), <https://newsmaven.io/indiancountrytoday/archive/jimmy-carter-signed-icwa-into-law-GtsQUN5tRkG1iNzMVHJP8g/> [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.”); Remarks on Signing the Indian Self-Determination Assistance Act Amendments of 1988, 2 PUB. PAPERS 1284, 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. 6, 2000); Statement on Signing the Executive Order on Consultation and Coordination With Indian Tribal Governments, 3 PUB. PAPERS 2487, 2487-88 (Nov. 6, 2000); Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177, 2177 (Sept. 23, 2004); EXEC. OFF. OF THE PRESIDENT, 2016 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT: A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS 4 (2017), https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf [https://perma.cc/XR6V-W2X5].

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

32. *Id.*

determination and economic development.³³ Without the legal capacity to control their land and resources, tribes cannot choose their own paths. Self-determination cannot occur while tribes remain laden with the yoke of wardship.³⁴ As long as federal Indian law remains underpinned by archaic assumptions about the United States' indigenous peoples and that might makes right, Indians will remain a conquered people living under an immiserating colonial regime.³⁵

This Article asserts that displacing antiquated federal rules with tribal law is the key to tribal economic development. Tribal ownership and sovereignty over tribal land must be recognized in lieu of the current tribal trust land system. Similarly, tribes must be free to enact and apply their own economic regulations to all persons within their territory. Controlling land and the people within it is the essence of sovereignty,³⁶ and the United States signed hundreds of treaties affirming tribes' right to exist as sovereigns.³⁷ As Justice Neil Gorsuch recently wrote, honoring tribal treaty rights "is the least we can do."³⁸ Making tribal law the preeminent authority in Indian country furthers the U.S. policy of tribal self-determination and will ignite long dormant tribal economies.

The rest of the paper proceeds as follows. Part I provides data on Indian poverty and natural resources. Part II discusses the trust land and Indian trader framework. Part III examines how the Constitution applies to Indians, and Part IV argues that the trust land and Indian trader scheme is unconstitutional. Part V explores tribal governance once Indian trader laws and trust land restrictions are removed.

33. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (explaining that tribes are like wards of the federal government).

34. See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) ("Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991))).

35. *E. Band of Cherokee Indians v. Torres*, No. CR 03-1443, 2005 WL 6437828, at *8 (Eastern Cherokee Sup. Ct. 2005) (Philo, J., concurring); Crepelle, *supra* note 23, at 571 ("Principles of justice are not the determinative factor in contemporary federal Indian law cases; instead, federal Indian law cases often hearken to the Melian Dialogue wherein mighty Athens told Melos, '[R]ight, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.'").

36. See, e.g., *Sovereignty*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/sovereignty> [<https://perma.cc/8A6M-GDE4>].

37. See Hansi Lo Wang, *Broken Promises on Display at Native American Treaties Exhibit*, NPR: CODESWITCH (Jan. 18, 2015, 4:57 PM), <https://www.npr.org/sections/codeswitch/2015/01/18/368559990/broken-promises-on-display-at-native-american-treaties-exhibit> [<https://perma.cc/CNX9-ZL9U>].

38. *Wash. Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1021 (2019) (Gorsuch, J., concurring); see also *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word.").

I. INDIAN POVERTY AND NATURAL RESOURCES

The opening line of a 1928 report on the condition of Indians infamously states, “An overwhelming majority of the Indians are poor, even extremely poor”³⁹ Fortunately the majority of Indians are no longer poor. Poverty, however, remains a significant problem for Indians, as they have the highest poverty rate in the United States at twenty-six percent compared to fourteen percent for the United States overall.⁴⁰ The Indian median income is \$39,719 versus the overall U.S. median income of \$57,617.⁴¹ These figures do not distinguish between Indians based upon residence on or off the reservation. Due to institutional differences discussed later in this Article, the poverty rate is worse on reservations.⁴² For example, eight of the ten poorest counties in the United States are majority Indian,⁴³ though Indians compose less than two percent of the United States’ population.⁴⁴ The Indian poverty rate is high because there are few jobs on reservations.⁴⁵ The average reservation unemployment rate was fifty percent even before COVID-19⁴⁶—twice the U.S. unemployment rate during the Great Depression.⁴⁷

39. THE INST. FOR GOV'T RSCH., *THE PROBLEM OF INDIAN ADMINISTRATION* 3 (1928).

40. *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/L46H-BW9J>].

41. *Id.*

42. *Making Indian Country Count: Native Americans and the 2020 Census: Hearing Before the S. Comm. on Indian Affs.*, 115th Cong. 26 (2018) (statement of James T. Tucker, Pro Bono Voting Rights Couns., Native Am. Rights Fund), <https://www.indian.senate.gov/sites/default/files/documents/CHRG-115shrg29840.pdf> [<https://perma.cc/5YDQ-ZHWA>] (“Native Americans have the highest poverty rate of any population group, at 26.6 percent. On federally recognized Indian reservations in Alaska Native villages, that rate is 38.3 percent.”).

43. *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. 2 (2010) [hereinafter *S. Hearing, Unemployment*] (statement of Sen. Byron L. Dorgan, Chairman, S. Comm. On Indian Affs.).

44. *Facts for Features: American Indian and Alaska Native Heritage Month: November 2015*, U.S. CENSUS BUREAU (Nov. 2, 2015), <https://www.census.gov/newsroom/facts-for-features/2015/cb15-ff22.html> [<https://perma.cc/G78L-WU2U>].

45. See *Living Conditions*, NATIVE AM. AID, http://www.nativepartnership.org/site/PageServer?pagename=naa_livingconditions [<https://perma.cc/MGB2-MTJX>] (“The scarcity of jobs and lack of economic opportunity mean that, depending on the reservation, four to eight out of ten adults on reservations are unemployed.”); *Problems Within the Indian Reservation, IT’S A HARD LIFE FOR US*, <https://lifeonthereservation.weebly.com/reservation-problems.html> [<https://perma.cc/B5VA-L4ZA>] (“Finding jobs and finding success is difficult on the reservation.”).

46. *S. Hearing, Unemployment*, *supra* note 43, at 1.

47. See Kimberly Amadeo, *Unemployment Rate by Year Since 1929 Compared to Inflation and GDP*, BALANCE (Feb. 7, 2020), <https://www.thebalance.com/unemployment-rate-by-year-3305506> [<https://perma.cc/N7Q9-T57Q>].

Prior to the pandemic, the United States as a whole had an unemployment rate of approximately four percent.⁴⁸

Reservation poverty redounds into other areas that deter economic development. Most of the roads in Indian country are “unimproved earth and gravel”⁴⁹ and regarded as the worst in the United States.⁵⁰ Indian country’s water conditions are even worse than the roads, as a 2016 House Committee on Natural Resources Report found that “Over a half million people - nearly forty-eight percent of tribal homes - in Native communities across the United States do not have access to reliable water sources, clean drinking water, or basic sanitation.”⁵¹ Similarly, many reservation residents lack electricity;⁵² hence, thirty-five percent of Indian country residents lack access to broadband.⁵³ This lack of infrastructure cripples Indian country economic development efforts.⁵⁴ Despite hav-

48. *Databases, Tables & Calculators by Subject*, U.S. BUREAU OF LAB. STATS. (Feb. 9, 2020, 12:05:33 PM), <https://data.bls.gov/timeseries/LNS1400000> [<https://perma.cc/ZD2A-PVK6>].

49. *Examining Tribal Transportation in Indian Country: Hearing Before the S. Comm. on Indian Affs.*, 111th Cong. 14 (2010) (statement of Hon. Jefferson Keel, President, Nat’l Cong. of Am. Indians).

50. *See, e.g., Enhancing Tribal Self-Governance and Safety of Indian Roads: Hearing Before the Comm. on Indian Affs.*, 116th Cong. 21 (2019) (statement of Hon. Joe Garcia, Head Councilman, Ohkay Owingeh Pueblo) (“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 . . .”).

51. DEMOCRATIC STAFF OF H. COMM. ON NAT. RES., 114TH CONG., WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED ACCESS TO WATER FOR NATIVE FAMILIES, at i (Oct. 10, 2016), https://naturalresources.house.gov/imo/media/doc/House%20Water%20Report_FINAL.pdf [<https://perma.cc/VKR8-MVLW>].

52. *Native Energy: Rural Electrification on Tribal Lands*, ROCKY MOUNTAIN INST. (June 24, 2014), https://rmi.org/blog/2014_06_24_native_energy_rural_electrification_on_tribal_lands [<https://perma.cc/E9AD-JEDR>] (“If I told you about a place where almost 40 percent of the people live without electricity, over 90 percent live below the poverty line, and the unemployment rate exceeds 80 percent, you might be picturing a rural village in Africa or some other developing country. However, this community is actually within U.S. borders. I’m talking about the Pine Ridge Reservation in South Dakota, home to the Oglala Lakota.”); Laurel Morales, *For Many Navajos, Getting Hooked Up to the Power Grid Can Be Life-Changing*, NPR (May 29, 2019, 5:00 AM), <https://www.npr.org/sections/health-shots/2019/05/29/726615238/for-many-navajos-getting-hooked-up-to-the-power-grid-can-be-life-changing> [<https://perma.cc/RA45-LAXB>] (“About 10% of Navajos on the reservation live without electricity.”); *Energy and Minerals*, NAT’L. CONG. AM. INDIANS, <http://www.ncai.org/policy-issues/land-natural-resources/energy-and-minerals> [<https://perma.cc/DMD8-WREQ>] (“Many tribal homes lack access to electricity and affordable heating sources.”).

53. U.S. FED. COMM’NS COMM’N, FCC 18-10, INQUIRY CONCERNING DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY TO ALL AMERICANS IN A REASONABLE AND TIMELY FASHION 22 (2018).

54. U.S. COMM’N ON CIV. RTS., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 169 (2018), <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf> [<https://perma.cc/RTE7-U2SK>] (“Unfortunately, with dangerous conditions due to impassible roads and a lack of public transportation options, Native Americans encounter issues traveling to and from a job, traveling to school, accessing health care and emergency services, and even accessing the ballot box, all of which create barriers to economic development and growth in Indian Country.”); Seth Tupper, *Where Water Is Life, Many on the Pine Ridge Reservation Go Thirsty*, HIGHCOUNTRYNEWS (May 27, 2019),

ing trust and treaty obligations to provide suitable and safe conditions on reservations,⁵⁵ the United States drastically fails to fund services and infrastructure for Indian tribes.⁵⁶

The dire economic conditions of Indians on reservations are particularly troublesome because tribes hold significant natural resources.⁵⁷ In fact, Indian reservations contain a substantial portion of the United States' oil, gas, uranium, and coal reserves.⁵⁸ Tribes are rich in renewable resources as well. For example, fifty million homes could be powered by wind energy generated by Great Plains

<https://www.hcn.org/articles/tribal-affairs-where-water-is-life-those-on-the-pine-ridge-reservation-go-thirsty> [<https://perma.cc/K2H9-HNQ6>] (“Historically, a dearth of water and related infrastructure have contributed to persistent poverty on the reservations.”).

55. MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 181–82 (2016) (“The general trust relationship simply obligates and authorizes the federal government to protect tribal and Indian property rights, preserve and enhance tribal self-governance, guarantee law and order in Indian country, and provide government services to Indian people.”); ROBERT J. MILLER, RESERVATION CAPITALISM 40 (2012) (“This [trust] duty requires Congress and the executive branch to exercise the responsibilities of a guardian on behalf of Indians and tribes.”); *Frequently Asked Questions*, U.S. DEP’T INTERIOR, BUREAU INDIAN AFFS., <https://www.bia.gov/frequently-asked-questions> [<https://perma.cc/HNV6-2DBC>] (“The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages.”).

56. *E.g.*, NAT’L CONG. OF AM. INDIANS & THE LEADERSHIP CONF. EDUC. FUND, TRIBES AND TRANSPORTATION: POLICY CHALLENGES AND OPPORTUNITIES 2 (2013), http://civilrightsdocs.info/pdf/reports/Tribes_and_Transportation_Report.pdf [<https://perma.cc/W9FR-A3YA>] (“Due to pronounced and ongoing funding discrepancies, state governments spend between \$4,000 and \$5,000 per road mile on state road and highway maintenance. In contrast, road maintenance spending in Indian Country is less than \$500 per road-mile.”); Adam Creppelle, *Reservation Water Crisis: American Indians and Third World Water Conditions*, 32 TUL. ENV’T L.J. 157, 174 (“[T]he United States drastically underfunds tribal water safety— tribes receive only \$0.75 for every \$100 needed from the Safe Drinking Water Revolving Fund, which is less than a third of what the least-funded state receives. The United States consistently spends substantially more money improving water safety in foreign countries than it does improving drinking water quality on Indian reservations.”).

57. U.S. GOV’T. ACCOUNTABILITY OFF., GAO–15–502, INDIAN ENERGY DEVELOPMENT: POOR MANAGEMENT BY BIA HAS HINDERED ENERGY DEVELOPMENT ON INDIAN LANDS 1 (2015), <https://www.gao.gov/assets/680/670701.pdf> [<https://perma.cc/59J7-5KHY>] [hereinafter INDIAN ENERGY DEVELOPMENT] (“Indian energy resources hold significant potential for development, but remain largely undeveloped. For instance, Indian tribes and tribal members, collectively, are the third largest owner of domestic mineral resources, including oil, gas, and coal.”); MAURA GROGAN, REBECCA MORSE & APRIL YOUPEE-ROLL, REVENUE WATCH INST., UNITED STATES NATIVE AMERICAN LANDS AND NATURAL RESOURCE DEVELOPMENT 4 (2011), https://resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf [<https://perma.cc/WUF6-TCE5>] (“American Indian lands contain vast amounts of natural resources—both renewable and nonrenewable . . .”).

58. Regan & Anderson, *supra* note 14, at 196; *see also* SHAWN REGAN & TERRY L. ANDERSON, PROP. & ENV’T RSCH. CTR, GEORGE W. BUSH INST., THE ENERGY WEALTH OF INDIAN NATIONS 2 (2013), <https://www.perc.org/wp-content/uploads/old/GWBI-EnergyWealthIndianNations.pdf> [<https://perma.cc/4WM5-8WEK>] (“Indian reservations contain almost 30% of the nation’s coal reserves west of the Mississippi, 50% of potential uranium reserves, and 20% of known oil and gas reserves . . .”).

tribes.⁵⁹ Tribes also have tremendous potential to produce energy using biomass, geothermal, solar, and hydroelectric means.⁶⁰ Nevertheless, Indian country's energy potential has barely been touched.⁶¹

Indian country's immense resource wealth remains untapped due to a complex regulatory framework that applies nowhere else in the United States. That framework is the subject of Part II.

II. WHITE TAPE: THE REGULATORY FRAMEWORK IN INDIAN COUNTRY

Navigating the regulatory framework in Indian country is tricky due to peculiar federal rules governing trade and land use. From a legal and business perspective, the most crucial factor is determining the status of the land at issue, as the land within Indian country comes in a variety of categories. Trust land is the most common type of land in Indian country.⁶² The federal government holds title to trust land, while the tribe or an individual Indian is the beneficiary of the trust.⁶³ Restricted fee land is owned by an individual Indian or the tribe; however, restricted fee land cannot be alienated without federal approval.⁶⁴ Restricted fee land operates under

59. Peter Meisen & Trevor Erberich, GLOBAL ENERGY NETWORK INST., *Renewable Energy on Tribal Lands*, <https://www.geni.org/globalenergy/research/renewable-energy-on-tribal-lands/Renewable-Energy-on-Tribal-Lands.pdf> [<https://perma.cc/3FSA-K724>] (“In fact, according to the Intertribal Council on Utility Policy, the wind resources on Tribal lands in the Great Plains alone could power over 50 million homes.”).

60. *Indian Energy and Economic Development, Renewable and Distributed Generation*, U.S. DEP'T INTERIOR, BUREAU INDIAN AFFS., <https://www.indianaffairs.gov/as-ia/ieed/division-energy-and-mineral-development/renewable-energy> [<https://perma.cc/5JEB-QSEK>]; *Indian Energy Development: Hearing Before the S. Comm. on Indian Affs.*, 110th Cong. 47 (2008) (statement of Dr. Robert W. Middleton, Dir., Off. of Indian Energy & Econ. Dev., Off. of the Assistant Sec'y, Indian Affs., U.S. Dep't of the Interior), <https://www.indian.senate.gov/sites/default/files/upload/files/May12008.pdf> [<https://perma.cc/VYZ8-NF4H>].

61. INDIAN ENERGY DEVELOPMENT, *supra* note 57, at 1 (noting Indian energy resources “remain largely undeveloped”); Shawn Regan, *Tribal Energy Resources: Reducing Barriers to Opportunity*, PROP. & ENV'T RSCH. CTR. (July 23, 2018), https://www.perc.org/2018/07/23/tribal-energy-resources-reducing-barriers-to-opportunity/#_ftnref10 [<https://perma.cc/CWH5-5H6T>] (“88 percent of Indian lands with energy potential have yet to be developed.”).

62. CTR. FOR INDIAN COUNTRY DEV., FED. RSRV. BANK OF MINNEAPOLIS, TRIBAL LEADERS HANDBOOK ON HOMEOWNERSHIP 79 (Patrick H. Kumesh ed., 2018), [https://www.minneapolisfed.org/~media/files/community/indiancountry/resources-education/cicd-tribal-leaders-handbook-on-homeownership.pdf?la=en](https://www.minneapolisfed.org/~/media/files/community/indiancountry/resources-education/cicd-tribal-leaders-handbook-on-homeownership.pdf?la=en) [<https://perma.cc/D7BQ-WUBB>].

63. *Id.*; *Definition of “Indian Country,”* NAT. RES. CONSERVATION SERV., U.S. DEP'T AGRIC., https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs141p2_024362.pdf [<https://perma.cc/ELU3-RDK5>].

64. TRIBAL LEADERS HANDBOOK ON HOMEOWNERSHIP, *supra* note 62, at 80.

the same constraints as trust land.⁶⁵ Then there's plain old fee land, where an individual owns title to the land and can freely sell the land.⁶⁶ Fee land is the predominant land tenure form throughout the United States.⁶⁷

Curiously, the law applied on fee lands within a reservation depends on whether the land is owned by an Indian or a non-Indian—tribal law applies if it is owned by an Indian, while state law applies if the owner is a non-Indian.⁶⁸ All three types of land are frequently intermixed resulting in “checkerboarding,” alternating tracts of fee and trust land.⁶⁹ Checkerboarding creates an extremely impractical jurisdictional scheme that only benefits those “who benefit from confusion and uncertainty.”⁷⁰ Further muddling the system, jurisdictional disputes relating to whether land is Indi-

65. Thomas M. Fitzpatrick, Wash. Ass'n Prosecuting Att'ys, *Land Use Regulation on Reservation Fee Lands: Where Do We Go From Here?*, MRSC.ORG (June 21, 2003), <http://mrsc.org/getmedia/12b1a3a4-2b95-43a8-a5b9-815b97a2853a/LandUseRegReservation.pdf.aspx> [<https://perma.cc/KDM3-DJ38>].

66. TRIBAL LEADERS HANDBOOK ON HOMEOWNERSHIP, *supra* note 62, at 80.

67. 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/5M7N-79TU>] (“Fee simple title and ground leasehold title are the most common forms of US commercial real estate ownership.”); James Kimmons, *Fee Simple Ownership in Real Estate: Definition and Exceptions*, BALANCE SMALL BUS. (July 25, 2019), <https://www.thebalancesmb.com/fee-simple-ownership-in-real-estate-2866601> [<https://perma.cc/Y5CV-9YHZ>] (“This is by far the most common form of ownership in the U.S., and most single-family homes fall under this type of ownership.”); 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/UUJ7-PLN7>] (noting fee simple “is the most common type of interest.”).

68. CTR. FOR INDIAN COUNTRY DEV., *supra* note 62, at 80 (“When owned by a tribe or individual within the boundaries of a reservation, fee lands are subject to tribal jurisdiction.”); Jessica A. Shoemaker, *Complexity’s Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 489 (2017) (“Property jurisdiction varies parcel by parcel depending on factors invisible to an outside observer, including the owner’s identity and the land’s legal tenure status.”).

69. *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (discussing the jurisdictional problems caused by the “impractical pattern of checkerboard jurisdiction”); *Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255, 1262 (10th Cir. 2016) (noting the jurisdictional difficulties arising from “‘checkerboard’ jurisdiction”); *Hydro Res., Inc. v. USEPA*, 608 F.3d 1131, 1135–36 (10th Cir. 2010) (“The land at issue in this case lies in what is commonly known as the ‘checkerboard’ region of northwestern New Mexico. . . . And a checkerboard it is, marked by alternating parcels of land owned by the state, the federal government, the Navajo Nation, individual Navajos, and private persons and entities.”) (internal citations omitted).

70. *DeCouteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 467 (1975) (Douglas, J., dissenting).

an country are common,⁷¹ and land status disputes can take years to resolve.⁷²

The bulk of the regulatory trouble lies with trust land. Trust land is not freely alienable,⁷³ so those who wish to use trust land must lease it.⁷⁴ Since the federal government holds title to trust land,⁷⁵ obtaining a lease on trust land is an adventure in federal bureaucracy. The Bureau of Indian Affairs (BIA) has designed specific regulations for business leases.⁷⁶ A business lease on trust land cannot take place without the BIA's approval.⁷⁷

To obtain the BIA's approval for a business lease on trust land, a company must provide a litany of documents including archeological and environmental "reports, surveys, and site assessments" that apply to federal and tribal land⁷⁸ as well as "a restoration and reclamation plan."⁷⁹ Business leases must also contain a clause requiring the company to immediately cease activity if a previously unknown cultural item is discovered on the leased property.⁸⁰ If a business lease includes permanent improvements, the lease must specify the location and type of improvement in addition to a construction schedule.⁸¹ An enterprise that fails to complete a permanent improvement within the specified time is required to explain

71. *Land Tenure Issues*, INDIAN LAND TENURE FOUND., <https://iltf.org/land-issues/issues> [<https://perma.cc/BBD2-VYAT>] ("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.").

72. *See, e.g.*, *Murphy v. Royal*, 875 F.3d 896, 903 (10th Cir. 2017), *aff'd sub. nom.*, *Sharp v. Murphy*, 140 S. Ct. 2412 (mem.) (2020); *see also* *Petition for Writ of Certiorari, Royal v. Murphy*, 140 S. Ct. 2412 (2018) (No. 17-1107), 2018 WL 776368, at *12 ("On August 28, 1999, Patrick Murphy mutilated and murdered his girlfriend's former lover, a man named George Jacobs.") The only issue in *Murphy* was whether the land qualified as Indian country.

73. Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RES. J. 317, 363 (2006) (noting conventional mortgages are not available on trust land due to constraints on alienation); Stacy L. Leeds, *Moving Toward Exclusive Tribal Autonomy over Lands and Natural Resources*, 46 NAT. RES. J. 439, 445 (2006) ("Lands that are held in trust are subject to federal restraints against alienation and encumbrances.").

74. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFS., DIV. OF REAL ESTATE SERV., PROCEDURAL HANDBOOK: LEASING AND PERMITTING CHAPTER 1 – GENERAL INFORMATION 2 (2006), https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Procedural-HB-Leasing-and-Permitting_Chapter-1-General-Information_OIMT.pdf [<https://perma.cc/9KNH-F6UN>] ("While there is no statutory requirement that Indian lands held in trust by the U.S. Government be leased, the Secretary of the Interior has a fiduciary obligation to 'protect and preserve Indian trust assets from loss, damage, unlawful alienation, waste, and depletion,' and to make decisions concerning trust lands that are in the best interest of the Indian landowner.").

75. 25 U.S.C. §§ 5105, 5108; 42 C.J.S. *Indians* § 93 (2019).

76. *See* 25 C.F.R. §§ 162.401–.703 (2019).

77. 25 C.F.R. § 162.438 (2019).

78. *Id.* § 162.438(g).

79. *Id.* § 162.438(h).

80. *Id.* § 162.413(c)(4).

81. *Id.* §§ 162.414, 162.438(j).

the cause of delay to the BIA.⁸² Leases can be amended to account for changes of circumstances; however, the BIA must authorize the amendment.⁸³ The lease requirements are different for agricultural,⁸⁴ residential,⁸⁵ and wind and solar projects.⁸⁶ The federal leasing regulations can also vary from reservation to reservation.⁸⁷

Obtaining a business lease is just step one. Federal regulations require non-Indians to obtain an Indian trader license to engage in business relations with Indians on a reservation.⁸⁸ The license will not be issued until the lease is obtained.⁸⁹ To obtain a license, prospective licensees must prove they are of good moral character, have business experience, have the capital to invest, and more.⁹⁰ The license only applies to a single store, meaning an individual must obtain a separate license to open the same exact enterprise at different coordinates within the same reservation.⁹¹ In the event a licensee wishes to sell the business to another person, the licensee cannot simply transfer her license.⁹² Rather, she must get the BIA's approval for the transfer; otherwise, the purchaser of the business must go through the hassle of getting the license on his own.⁹³ Companies operating without an Indian trader license may be shut down by the BIA,⁹⁴ and failure to obtain a license places the enterprise at risk of forfeiture of "all merchandise offered for sale to the Indians or found in his possession."⁹⁵

The bureaucracy continues even after a licensed company opens a store in Indian country. Within Indian country, businesses cannot engage in commerce for—or even possess—any item the United States has provided the Indians for their welfare.⁹⁶ Businesses cannot even independently set their own prices, as the Code of Federal Regulations declares:

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superinten-

82. *Id.* § 162.417(a).

83. *Id.* § 162.447.

84. *Id.* §§ 162.101–.256.

85. *Id.* §§ 162.301–.374.

86. *Id.* §§ 162.501–.599.

87. *Id.* §§ 162.600–.703.

88. *Id.* §§ 262-264, 140.1–.26.

89. *Id.* § 140.11.

90. *Id.* § 140.9.

91. *Id.* § 140.14.

92. *Id.* § 140.15.

93. *See id.*

94. *Id.* § 140.13.

95. *Id.* § 264, § 140.3.

96. *Id.* § 140.16.

dent or inspecting officials the original invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.⁹⁷

Establishments operated by licensed traders “must be managed by the bonded principal” who is a habitual resident of the reservation where the business is located.⁹⁸ The Indian trader regulations even limit the methods by which traders can pay Indians⁹⁹ and grant the President authority to block goods from entering Indian reservations.¹⁰⁰ Like the Indian country leasing regulations, different federal Indian trader regulations apply to different reservations.¹⁰¹

As with trust land, whether a person is Indian impacts how Indian trader laws apply. “Full blood” Indians are exempt from Indian trader license requirements.¹⁰² Only individuals who are not “pure Indian” must obtain the license to conduct business with Indians on a reservation.¹⁰³ Race is an overt factor for employees of Indian traders too, as the law states “[t]hat no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.”¹⁰⁴ The law does not define “white person,” leaving unanswered: Who is a “white person”?¹⁰⁵

97. *Id.* § 140.22.

98. *Id.* § 140.14.

99. *Id.* § 140.24.

100. *Id.* §§ 263, 140.2.

101. *Id.* §§ 140.1, 140.3, 264.

102. *Id.* §§ 264, 140.3.

103. *Id.*

104. *Id.*; *Id.* § 140.3 (“That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affairs.”).

105. The United States has a dubious history of defining “white person.” See *Loving v. Virginia*, 388 U.S. 1, 5 n.4 (1967) (“For the purpose of this chapter, the term ‘white person’ shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.”); *United States v. Bhagat Singh Thind*, 261 U.S. 204, 214–15 (1923) (“What we now hold is that the words ‘free white persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word ‘Caucasian’ only as that word is popularly understood.”).

These federal regulations make starting a business in Indian country much more difficult than opening a business outside of Indian country. These regulations¹⁰⁶ needlessly increase transaction costs, adding uncertainty and expense to Indian country commerce.¹⁰⁷ These regulations—that apply only to Indian country—are crippling reservation economies.¹⁰⁸ Accordingly, these regulations should be challenged in court as unconstitutional impediments to tribal economic development. The following Part examines the unique constitutional position of Indians.

III. UNCONSTITUTIONAL RESTRAINTS ON TRIBAL ECONOMIC DEVELOPMENT

Overturing legislation in the field of Indian affairs has been nearly impossible¹⁰⁹ because Congress is said to have plenary power over Indian affairs.¹¹⁰ Plenary power over Indian affairs is not sup-

106. *E.g.*, 25 U.S.C. § 81(b) (requiring the Secretary of the Interior's approval prior to leasing lands for seven years or more); *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."); 25 U.S.C. § 177 (arguably prevents tribes from transferring fee lands without federal approval); Mark A. Jarboe & Daniel B. Watts, *Can Indian Tribes Sell or Encumber Their Fee Lands Without Federal Approval?*, 0 AM. INDIAN L.J. 10 (2012).

107. *See, e.g.*, Lucas Downey, *Transaction Costs*, INVESTOPEDIA (Jan. 19, 2021), <https://www.investopedia.com/terms/t/transactioncosts.asp> [https://perma.cc/C599-XL3E] ("When transaction costs diminish, an economy becomes more efficient, and more capital and labor are freed to produce wealth."); *Reduce Transaction Costs In Your Small Business*, NASDAQ (Feb. 1, 2017, 10:06 AM), <https://www.nasdaq.com/articles/reduce-transaction-costs-your-small-business-2017-02-01> [https://perma.cc/NKA2-ZQT9] ("Any business that can reduce its transaction costs has a better chance of being profitable."); *Transaction Costs Theory*, SCIEDIRECT, <https://www.sciencedirect.com/topics/economics-econometrics-and-finance/transaction-costs-theory> [https://perma.cc/L529-4YNR].

108. Shoemaker, *supra* note 68, at 490–91.

109. Gregory H. Bigler, *Traditional Jurisprudence and Protection of Our Society: A Jurisgenerative Tail*, 43 AM. INDIAN L. REV. 1, 45 (2018) ("This is most particularly exemplified by the plenary power that allows Congress to take actions towards tribes, such as termination of their tribal status, without risk of the actions being found unconstitutional. This is because the federal-tribal relationship is political in nature and thus not reviewable by the federal courts."); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PENN. L. REV. 195, 195 n.1 (1984) ("In only one case did the Court invalidate a congressional law as violating Indian property rights, but it was careful to distinguish earlier cases by stressing that the rights at issue were individual and not tribal property rights.")

110. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."); *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 501 (1979) ("It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes.")

ported by the text of the Constitution;¹¹¹ rather, the plenary power doctrine is predicated on the belief in Indian racial and cultural inferiority.¹¹² Federal laws pertaining to Indian economic activity are permitted by the plain text of the Constitution's Commerce Clause, however.¹¹³ This would seem to make all laws relating to Indian commerce constitutional. Not so. The Fifth Amendment contains a Due Process Clause.¹¹⁴ Due process prohibits the government from passing arbitrary laws,¹¹⁵ and the Fifth Amendment

111. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1015 (2015) ("Both the exclusive and plenary power doctrines rest on unstable foundations. When the Court first enunciated the plenary power doctrine in 1886, it considered, and rejected, the Indian Commerce Clause as the doctrine's source. Since then, many scholars have questioned whether the Clause could be read to grant the federal government unbridled power to regulate tribes' internal affairs."); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 35 (1996) ("*Kagama* was the first case in which the Supreme Court essentially embraced the doctrine that Congress has plenary power over Indian affairs. Its apparent inconsistency with the most fundamental of constitutional principles[—]the *McCulloch* understanding that Congress ordinarily possesses only that authority delegated to it in the Constitution[—]is an embarrassment of constitutional theory. Its slipshod method of bootstrapping a congressional plenary power over Indian affairs is an embarrassment of logic. Its holding, which intimates that congressional power over Indian affairs is limitless, is an embarrassment of humanity."); Newton, *supra* note 109, at 196 ("The judiciary's frequent invocation of federal plenary power over Indian affairs is curious since the Constitution does not explicitly grant the federal government a general power to regulate Indian affairs.").

112. *United States v. Bryant*, 136 S. Ct. 1954, 1968–69 (2016) (Thomas, J., concurring) ("[U]ntil the Court rejects the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all-encompassing control over the 'remnants of a race' for its own good."); FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 46 (2009) ("Plenary authority in Indian affairs is not rooted in the text or history of the Constitution but in the text and history of colonialism—a colonialism in which a 'conquered people' only has authority at the 'sufferance' of the 'conqueror.'"); WILLIAMS, *supra* note 23, at 72 ("Significantly, the plenary power doctrine was generated directly out of the principles of white racial superiority affirmed by the Marshall model's originating precedents in a series of major nineteenth-century Supreme Court decisions that followed the Marshall Trilogy."); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 163 (2002) ("Indeed, this section demonstrates how the so-called federal Indian plenary power doctrine under which Congress claims complete, virtually unlimited, legislative control over any matter involving Indians, including the very continued existence of the Indian tribes, merely constitutes a racist American relic of 'white man's burden' arguments employed to justify American colonialism."); Newton, *supra* note 109, at 236 ("[A]n important rationale for the Plenary Power Doctrine was the perceived racial and cultural inferiority of Indians.").

113. U.S. CONST. art. I, § 8, cl. 3.

114. U.S. CONST. amend. V ("[N]or be deprived of life, liberty, or property, without due process of law.").

115. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) ("But is it 'due process of law'? The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will.").

has been interpreted as mandating equal protection of the law.¹¹⁶ Towards this end, legislation must have a logical relationship to the furthering of a legitimate governmental purpose.¹¹⁷

Based upon the classification made in a law, the Supreme Court applies different levels of scrutiny to determine whether the law is constitutional.¹¹⁸ Laws involving racial classifications result in the courts applying a heightened standard of scrutiny; that is, race-based legislation must be narrowly tailored to serve a compelling government interest.¹¹⁹ Laws that treat females differently than males are subjected to intermediate scrutiny, meaning the gender-based classifications must further a substantial governmental interest.¹²⁰ Rational basis review is the lowest level of scrutiny and only requires that laws have some conceivable connection to a valid governmental objective.¹²¹ When used in legislation, the term Indian is not usually a racial classification. Rather, Indian is used in

116. *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 75 n.1 (1977); *Substantive Due Process*, LEGAL INFO. INST., CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/amendment-5/substantive-due-process> [<https://perma.cc/FB7T-2CD6>].

117. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (“All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.”); *Heller v. Doe*, 509 U.S. 312, 320 (1993) (“Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”); *New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (“Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.”).

118. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. CONST., amend. XIV, § 1, we apply different levels of scrutiny to different types of classifications.”); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 228 (2002) (discussing “[t]he three main standards of review . . .”); Desiree Palomares, *The Fallacy of the Intermediate Scrutiny Analysis*, DENV. L. REV. ONLINE (2019), <https://www.denverlawreview.org/dlr-online-article/the-fallacy-of-the-intermediate-scrutiny-analysis> [<https://perma.cc/7YDF-T48N>] (“In cases alleging discrimination under the Equal Protection Clause, the Supreme Court has outlined three different levels of scrutiny for courts to employ depending on the nature of the classification: strict, intermediate, and rational basis.”).

119. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“We have held that all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’ This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”) (internal citation omitted); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”); GOV. DISCRIMINATION *Tier III: Strict Scrutiny: The Compelling State Interest Test* § 4:27 (West 2021).

120. 16B AM. JUR. 2d *Constitutional Law* § 861.

121. *Id.* § 858.

connection with tribal citizenship, so Indian classifications receive the lowest level of constitutional scrutiny: rational basis review.¹²²

Indians occupy an anomalous position in the constitutional landscape. Indian tribal governments existed long before European contact,¹²³ and Europeans recognized the inherent sovereignty of tribal governments by entreating with Indian tribes.¹²⁴ The Founding Fathers recognized tribal sovereignty as well, memorializing it in the Articles of Confederation,¹²⁵ the Northwest Ordinance,¹²⁶ and twice in the Constitution itself.¹²⁷ This distinction, along with a potent dose of racism, resulted in tribes being denoted “domestic dependent nations” in 1831,¹²⁸ a position tribes still occupy.¹²⁹

Even if “dependent nations,” Indians have long been regarded as separate peoples.¹³⁰ Tribes entered into “hundreds of treaties” with the United States,¹³¹ and the Founding Fathers denoted treaties as the mechanism for transacting foreign relations in the Con-

122. *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (“As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.”).

123. *McClanahan v. Ariz. Tax Comm’n*, 411 U.S. 164, 172 (1973) (“It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542–43 (1832) (“America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.”).

124. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 7 (1984) (“It is in the treaties that one sees best the acceptance by Europeans of the nationhood of the Indian groups that became a fixed principle in the national policy of the United States.”).

125. ARTICLES OF CONFEDERATION OF 1777, art. IX, para. 4.

126. NORTHWEST TERRITORIAL GOVERNMENT, ORDINANCE art. III (July 13, 1787) (“The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.”).

127. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 8, cl. 3.

128. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

129. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *Quinault Indian Nation v. Pearson*, 868 F.3d 1093, 1096 (9th Cir. 2017).

130. *See, e.g.*, Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 556 (2000) (“Native Americans were considered to be members of an alien, uncivilized race, whose values were antithetical to those of the dominant white civilization. Conversely, many Native Americans had no desire to become a part of white society, or to be subject to the rules of that society.”).

131. Rory Taylor, *6 Native Leaders on What It Would Look Like if the US Kept Its Promises*, VOX (Sept. 23, 2019, 8:30 AM), <https://www.vox.com/first-person/2019/9/23/20872713/native-american-indian-treaties>.

stitution.¹³² Indians' status as distinct peoples was confirmed by the Fourteenth Amendment, which made all persons born within the United States citizens of the nation—except for Indians.¹³³ The legislative history of the Fourteenth Amendment reveals that its language was engineered to recognize tribal sovereignty and the United States' moral duty to tribes.¹³⁴ Due to tribes' sovereign status, the Supreme Court held in 1881 that Indians could only acquire U.S. citizenship through a statute or treaty.¹³⁵ All Indians were granted U.S. citizenship in 1924.¹³⁶

U.S. citizenship, nonetheless, did not impair the distinctive rights Indians possess.¹³⁷ Federally recognized Indian tribes maintain a direct government-to-government relationship with the United States.¹³⁸ This means individual Indians are citizens of their tribe¹³⁹—not mere members of a club¹⁴⁰ or corporation.¹⁴¹ Accordingly, Indians have rights as tribal citizens that remain intact unless expressly abrogated by Congress and require compensation upon

132. U.S. CONST. art. II, § 2, cl. 2; THE FEDERALIST NO. 75 (Alexander Hamilton) (“They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign”); Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F. 93, 98 (2014) (“The treaty power is a carefully devised mechanism for the federal government to enter into agreements with foreign nations.”).

133. *Elk v. Wilkins*, 112 U.S. 94, 103 (1884) (“Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being ‘naturalized in the United States,’ by or under some treaty or statute.”).

134. Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1197 (2010) (“The written Constitution, while far from unambiguous, provides textual support for this special relationship and the distinctive status of native peoples under the Fourteenth Amendment. The proponents of the Fourteenth Amendment, moreover, recognized the political status of tribes in the American constitutional system, the consistency of this status with the Fourteenth Amendment, and the legal and moral obligations placed on the federal government as a result.”).

135. *Elk*, 112 U.S. at 103 (“Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being ‘naturalized in the United States,’ by or under some treaty or statute.”).

136. H.R. Res. 6355, 68th Cong., Ch. 233 (1924) (enacted).

137. *Id.* (“*Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.” (emphasis in original)).

138. Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

139. Adam Creppelle, *Standing Rock in the Swamp: Oil, the Environment, and the United Houma Nation's Struggle for Federal Recognition*, 64 LOYOLA L. REV. 141, 148 (2018); K.W. James, *Tribal Citizenship: A Primer*, DARTMOUTH REV. (May 1, 2019), <http://dartreview.com/tribal-citizenship-a-primer/> [https://perma.cc/HUQ4-J2QQ]; Abi Fain & Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-Adoptive Couple Challenges to the Constitutionality of ICWA*, 43 WM. MITCHELL L. REV. 801, 871 (2017) (“Thus, for ICWA to apply, either the child must already be an enrolled citizen at the time of the state proceedings or the child's parent must be an enrolled citizen and the child herself must be eligible for citizenship under her Tribe's unique citizenship requirements.”).

140. *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (“Indian tribes within ‘Indian country’ are a good deal more than ‘private, voluntary organizations’”).

141. 43 U.S.C. § 1606.

termination.¹⁴² Legislation singling out Indians will survive constitutional scrutiny as long as the law is “reasonably and directly related to a legitimate, nonracially based goal”¹⁴³ Moreover, the Court has stated that legislation must “be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.”¹⁴⁴ Furthering tribal self-determination satisfies this criterion. Bureaucracy for bureaucracy’s sake does not. The next Part explains why Indian trader laws and federal restrictions on trust land use are unconstitutional impediments to tribal self-government.

IV. CUTTING THE WHITE TAPE

Many of the contemporary laws dealing with Indians were enacted over a century ago on the grounds of Indian incompetence.¹⁴⁵ As a result of this belief, Indians remain subject to more federal laws than other U.S. citizens.¹⁴⁶ Many of these laws do little more than complicate life for Indians. Indian trader laws and tribal trust land fall into this category.

The Olympic-level bureaucratic obstacle course created by trust land and Indian trader laws is rooted in racism and serves no purpose other than to strangle the red man in white tape. These restrictions impede tribal economic development and undermine tribal sovereignty. Accordingly, these laws should be challenged on

142. *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968) (“We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians.”); *United States v. Sioux Nation*, 448 U.S. 371, 415 n.29 (1980) (“The principles we set forth today are applicable only to instances in which ‘Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently.’ In such instances, ‘compensation must be paid for subsequent taking.’”) (internal citations omitted).

143. *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

144. *Id.* at 555.

145. *Cent. Mach. Co. v. Ariz. Tax Comm’n*, 448 U.S. 160, 163 (1980) (“In 1790, Congress passed a statute regulating the licensing of Indian traders. Act of July 22, 1790, ch. 33, 1 Stat. 137. Ever since that time, the Federal Government has comprehensively regulated trade with Indians to prevent ‘fraud and imposition’ upon them.”); *Keeble v. United States*, 412 U.S. 205, 210 (1973) (noting the Major Crimes Act “reflected a view that tribal remedies were either non-existent or incompatible with principles that Congress thought should be controlling.”); *Rice v. Rehner*, 463 U.S. 713, 722 (1983) (“Congress imposed complete prohibition by 1832, and these prohibitions are still in effect subject to suspension conditioned on compliance with state law and tribal ordinances.”).

146. *Cohen*, *supra* note 13, at 352 (“But these rights are limited, in practice, by more than 2200 regulations now in force issued by the Commissioner of Indian Affairs.”); STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* 4 (3d. ed. 2002) (“No other ethnic or cultural group is so heavily regulated.”); Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, *THE ATLANTIC* (July 30, 2016), <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941> [<https://perma.cc/5E9L-QQEB>] (“‘We are the highest regulated race in the world,’ said Stewart.”).

constitutional grounds because they are irrational and serve no valid government purpose.

A. *Trust Land Is Racist and Furthers No Purpose in Its Current Form*

Racism has played a significant role in United States-Indian relations, and nowhere is this more obvious than the “trust relationship.” The trust relationship has been repeatedly recognized by all three branches of the federal government.¹⁴⁷ What the federal government fails to mention is that the trust relationship is overtly predicated on notions of Indian inferiority.¹⁴⁸ In fact, the trust relationship is little more than a euphemistic rephrasing of Chief Justice John Marshall’s pronouncement that the relationship between Indian tribes and the United States “resembles that of a ward to his guardian.”¹⁴⁹

Contemporary Indian trust land can be traced to the 1823 decision of *Johnson v. M’Intosh*.¹⁵⁰ In this case, the Court held that Indian tribes lost ownership of their land when Europeans arrived on the continent; however, the Indians maintained the right to occupy their land.¹⁵¹ The Court reached this conclusion by resorting to

147. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 192 (2011) (Sotomayor, J., dissenting) (“Our decisions over the past century have repeatedly reaffirmed this ‘distinctive obligation of trust incumbent upon the Government’ in its dealings with Indians. Congress, too, has recognized the general trust relationship between the United States and Indian tribes. Indeed, ‘[n]early every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.’”) (alteration in original) (internal citations omitted).

148. *See, e.g.*, Mary C. Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 358 (2013) (“Judges, attorneys, and scholars often describe the trust duty of protection as a principle deriving from a guardian-ward relationship between the federal government and tribes.”); *see also* Heather Whitney-Williams & Hillary M. Hoffmann, *Fracking in Indian Country: The Federal Trust Relationship, Tribal Sovereignty, and the Beneficial Use of Produced Water*, 32 YALE J. ON REG. 451, 474 (2015) (“The guardian/ward relationship established in *Kagama* has evolved, not in substance, but in form, into what the Supreme Court refers to as a “trust” relationship between the federal government, as trustee, and the tribes, as beneficiaries.”); Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115, 115-16 (1997) (“The ‘trust doctrine’ is rooted in Chief Justice Marshall’s opinions in the “Cherokee Cases,” *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, where he described the relation of the Indian tribes to the United States as resembling ‘that of a ward to his guardian.’”).

149. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Federal Trust Responsibility, FEMA*, [<https://perma.cc/UED2-SRJ3>] (noting the trust relationship “was first discussed by Chief Justice John Marshall in *Cherokee Nation v. Georgia* (1831)”).

150. 21 U.S. (8 Wheat.) 543 (1823).

151. *Id.* at 574 (“While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in

the Doctrine of Discovery,¹⁵² a doctrine of international law that authorizes the subjugation of non-Christian Europeans at the hands of Christian kingdoms.¹⁵³ Chief Justice Marshall stated that the Indians' "character and religion" justified the "superior genius of Europe"¹⁵⁴ claiming control of all lands in the Americas. Despite factual errors and patently racist language, *Johnson v. M'Intosh* remains binding precedent.¹⁵⁵

The General Allotment Act of 1887 was designed to destroy Indian culture by erasing Indian reservations and forcing Indians into the U.S. mainstream.¹⁵⁶ Under the Act, each head of household received 160 acres of fee land that was placed in trust for twenty-five years.¹⁵⁷ At the end of the period, the theory was that Indians would become farmers like their white counterparts and own the land outright in fee simple.¹⁵⁸ None of this came to bear, and this was no surprise. The legislative history of the Allotment Act reveals the bill's authors intended the law to be a transfer of Indian lands to whites.¹⁵⁹

possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.”).

152. *Id.* at 572 (“This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.”).

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

154. *Johnson*, 21 U.S. (8 Wheat.) at 573.

155. ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY* 54 (Bruce E. Johansen ed., 2006) (“The federal courts have continued to follow the precedent of *Johnson v. M'Intosh*, and have enforced the Doctrine of Discovery against the Indian Nations and the states . . .”); *see also*, e.g., *City of Sherill v. Oneida Indian Nation*, 544 U.S. 197, 203 n.1 (2005).

156. *See* *United States v. Mitchell*, 445 U.S. 535, 544 n.5 (1980); *Mattz v. Arnett*, 412 U.S. 481, 496 (1973); Theodore Roosevelt, First Annual Message to Congress (Dec. 3, 1901), <https://history.state.gov/historicaldocuments/frus1901/message-of-the-president> [<https://perma.cc/4EQJ-77VD>].

157. Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 521 (2013).

158. *Id.* at 521–22; *see also* *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 335–36 (1998) (“Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers.”); *Mattz v. Arnett*, 412 U.S. 481, 496 (1973) (“Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.”).

159. H.R. REP. NO. 46-1576, at 10 (1880) (“The real aim of this bill is to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indians are but the pretext to get at the lands and occupy them If this were done in the

Allotment proved to be an unmitigated disaster for Indians.¹⁶⁰ Agricultural implements were supposed to accompany allotments; however, the United States failed to deliver on this promise, making it quite difficult for poor Indians to become farmers.¹⁶¹ Furthermore, the majority of land the Indians were allotted was unsuitable for farming.¹⁶² The valuable land went to whites.¹⁶³ In total, Indians lost ninety million acres of their treaty-guaranteed land through the General Allotment Act.¹⁶⁴ A government report published four decades after the Allotment Act found that all the Act did was cast Indians into tremendous economic despair.¹⁶⁵

Race played a vital role in the United States' Indian land policy as elucidated in 1906 legislation. The Clapp Amendment removed land restrictions on "mixed blood" Indians of the White Earth Reservation but kept "full blood" Indians of the White Earth Reservation under federal wardship until "the Secretary of the Interior

name of greed it would be bad enough; but to do it in the name of humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him like ourselves whether he will or not is infinitely worse.").

160. Pommersheim, *supra* note 157, at 522 ("The results were truly devastating."); Hodel v. Irving, 481 U.S. 704, 707 (1987) ("The policy of allotment of Indian lands quickly proved disastrous for the Indians."); Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251, 276 (1992) ("Allotment and the subsequent sale or lease of Indian lands accomplished what the 'genocide' of epidemics, war, and bootlegged alcohol had not been able to do: a systematic 'ethnocide' brought about by a loss of Indian identity with the loss of land.").

161. Pommersheim, *supra* note 157, at 522 ("It was grossly undercapitalized, sometimes providing less than ten dollars per allottee for implements, seeds, and instructions."); DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR. & MATTHEW L.M. FLETCHER, CASES AND MATERIALS ON FEDERAL INDIAN LAW 198 (7th ed. 2016) ("It was not true that the Government made no efforts whatever to equip the Indians for farming. But it made very slight efforts."); Stephen J. Gunn, *Indian General Allotment Act (Dawes Act) (1887)*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/indian-general-allotment-act-dawes-act-1887> [https://perma.cc/SE94-LP8X] (last updated Feb. 18, 2020) ("The government made only minimal efforts to provide farming equipment to the indigenous peoples. Its annual appropriations for that purpose were often no more than \$10.00 per Native."); *Native American Agriculture*, ENCYCLOPEDIA GREAT PLAINS, <http://plainshumanities.unl.edu/encyclopedia/doc/egp.ag.052> [https://perma.cc/3XLQ-Q5RM] (noting the United States failed to provide resources in order to give Indians the opportunity to become successful farmers on their allotments).

162. WILLIAM CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 23 (6th ed. 2014); Crespelle & Block, *supra* note 4, at 322 (noting that much of the lands tribes retained after allotment was "unsuitable for farming."); Gunn, *supra* note 161 ("Most allotted lands were not suitable for agriculture.").

163. See Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1557, 1609–10 (2001), <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1879&context=vlr> [https://perma.cc/7N4X-25M2] ("Reservations receiving more rain, with more land suitable for commercial farming, and located nearer white population centers were allotted first, making much of their land immediately available to white farmers and homesteaders.").

164. CANBY, *supra* note 162, at 24; Pommersheim, *supra* note 157, at 522; *Land Tenure Issues*, *supra* note 71.

165. THE INST. FOR GOV'T RSCH., *supra* note 39, at 3 ("An overwhelming majority of the Indians are poor, even extremely poor . . .").

[was] satisfied that said adult full-blood Indians are competent to handle their own affairs.”¹⁶⁶ Congress also forbade citizens of the Five Civilized Tribes who were “full-blood Indian” from conducting any land transaction on their allotments without congressional approval.¹⁶⁷ And, through the Burke Act, the twenty-five-year trust period could be discarded if the Indian allottee was deemed “competent” as determined by a federal “competency commission.”¹⁶⁸ One of the mechanisms used to measure competency was degree of Indian blood; in fact, the U.S. Secretary of the Interior adopted a policy that Indians with “less than one-half Indian blood” were presumed to be competent.¹⁶⁹ Contrarily, “all adult Indians of one-half or more Indian blood” could only be found competent “after careful investigation.”¹⁷⁰

Allotment and its assimilationist ideology ended in 1934 with passage of the Indian Reorganization Act (IRA).¹⁷¹ Allotment was predicated on the notion that Indian tribes should vanish, whereas the IRA was premised on the belief that tribes should exist.¹⁷² Hence, the IRA authorized the restoration and expansion of tribal lands.¹⁷³ In passing the IRA, the United States acknowledged that the nation’s prior Indian policies had been patronizing and demeaning and had devastatingly deleterious effects on Indians.¹⁷⁴

166. *United States v. First Nat’l Bank of Detroit*, 234 U.S. 245, 257 (1914).

167. *Tiger v. W. Inv. Co.*, 221 U.S. 286, 302 n.1 (1911) (quoting from the statute “That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress.”).

168. Pommersheim, *supra* note 157, at 521–22.

169. *Nichols v. Rysavy*, 809 F.2d 1317, 1322 (8th Cir. 1987) (quoting “A Declaration of Policy” from the Commissioner of Indian Affairs) (“To all able-bodied adult Indians of less than one-half Indian blood; there will be given as far as may be under the law full and complete control of all their property.”).

170. *Id.* (“Patents in fee shall be issued to all adult Indians of one-half or more Indian blood who may, after careful investigation, be found competent, provided, that where deemed advisable patents in fee shall be withheld for not to exceed 40 acres as a home.”).

171. Wheeler-Howard Act of 1934 § 2, 25 U.S.C. § 461 (current version at 25 U.S.C.S. § 5101 (LEXIS through Pub. L. No. 116-220)); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 339–40 (1998) (“Although formally repudiated with the passage of the Indian Reorganization Act in 1934, 48 Stat. 984, 25 U.S.C. § 461, the policy favoring assimilation of Indian tribes through the allotment of reservation land left behind a lasting legacy.”).

172. Crepelle, *supra* note 3, at 437 (“The IRA was predicated on the theory that tribes should exist.”); *see* Gover, *supra* note 73, at 329 (“A reform movement, led by John Collier, originated outside of government in the 1920s with the rise of reformers who thought that Indian tribal existence should not be destroyed.”).

173. Wheeler-Howard Act, ch. 576, §§ 1, 3, 48 Stat. 984 (current version at 25 U.S.C. § 5103(a)).

174. *See* *Morton v. Mancari*, 417 U.S. 535, 553 (1974) (“Congress in 1934 determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies. The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests.”).

The Supreme Court has described the IRA's purpose as "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."¹⁷⁵ Though the IRA is not without flaws,¹⁷⁶ it is undoubtedly positive legislation for tribes. Nonetheless, a superabundance of federal regulations remain on tribal lands.¹⁷⁷

The gobs of land regulations that apply nowhere else but Indian country are irrational and serve no legitimate purpose. Trust land came into existence because Indians were deemed racially inferior and consequently incompetent to own their land.¹⁷⁸ This bigoted belief remains the cornerstone of Indian trust land.¹⁷⁹ Today, Indians are still required to prove competency in order to liberate their land from trust status,¹⁸⁰ and degree of Indian blood remains a factor when an Indian seeks to liberate her land from the federal trust relationship.¹⁸¹ The federal government's application of Indian blood rather than citizenship in a federally recognized tribe distinguishes it from the constitutional tribal citizenship framework.¹⁸²

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

176. *Crepelle*, *supra* note 3, at 438–39; *Gover*, *supra* note 73, at 330 (noting "[t]he pervasive and intrusive administration of Indian programs by the Bureau of Indian Affairs").

177. *See supra* Part II; *infra* Part IV.

178. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 576–77 (1823) ("Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery."); James Warren, *A Victory for Native Americans?*, *THE ATLANTIC* (June 7, 2010), <https://www.theatlantic.com/national/archive/2010/06/a-victory-for-native-americans/57769/> [<https://perma.cc/6YX2-C9YE>] ("The Indians were given beneficial ownership but the government managed the land, believing Indians couldn't handle their affairs."); UNITED S. & E. TRIBES, INC., *MODERNIZING THE TRUST: REDEFINING THE UNITED STATES-TRIBAL GOVERNMENT-TO-GOVERNMENT RELATIONSHIP AND ADVANCING TRUST ASSET REFORM, KEY PRINCIPLES OF INDIAN TRUST MODERNIZATION 1* (Oct. 2015), https://www.usetinc.org/wp-content/uploads/2019/02/2.E-General-Trust-Modernization-Principles-FINAL-10_15_15-1.pdf [<https://perma.cc/2NGS-MFFK>] ("The current trust model is broken and based on faulty and antiquated assumptions from the 19th Century that Indian people were incompetent to handle their own affairs and that Indian Tribes were anachronistic and would gradually disappear.").

179. *See, e.g., 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. . . . 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."); *see also City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 n.1 (2005) (citing the Doctrine of Discovery and relying upon it to rule against the Oneida in a land taxation case).

180. 25 U.S.C. § 349.

181. 25 C.F.R. § 153.3(b) (2019); 25 C.F.R. § 152.9 (2019).

182. *See, e.g., United States v. Antelope*, 430 U.S. 641, 646 (1977) ("Indeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe."); *Fisher v. Dist. Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 390 (1976) ("The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law."); *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

Thus, arguably, the restrictions on trust land should be subjected to strict scrutiny due to their racist origins. Regardless, the federal restrictions cannot survive under rational basis review because the bureaucratic constraints on tribal land use are irrational.

The federal restrictions on trust land incapacitate tribal economies and frustrate tribal self-governance. Unlike the Indian employment preference that was upheld in *Morton v. Mancari*,¹⁸³ federal trust land regulations do not further tribal self-government. Rather, trust land does just the opposite because trust land requires tribes to seek federal approval for nearly all activity on trust land.¹⁸⁴ Federal overlordship is the antithesis of Indian self-government. The bureaucratic fetters that encumber trust land thwart virtually all efforts at Indian country economic development.¹⁸⁵ Studies consistently show that non-Indian fee land is significantly more productive than adjacent trust land,¹⁸⁶ and as additional proof of the failure of trust land, the United States has “lost” billions of dollars from Indian trust land accounts.¹⁸⁷ In the true

183. *Morton*, 417 U.S. at 554.

184. *See, e.g.*, *United States v. Navajo Nation*, 556 U.S. 287, 295 (2009) (describing the federal regulatory scheme over coal as granting the federal government “ ‘comprehensive control’ over Indian coal”); *White Mountain Apache v. Bracker*, 448 U.S. 136, 145 (1980) (“At the outset we observe that the Federal Government’s regulation of the harvesting of Indian timber is comprehensive. That regulation takes the form of Acts of Congress, detailed regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs.”); *see also* Brett Robinson, *Native American Trust Lands Explained*, 1ST TRIBAL LENDING, <https://www.1tribal.com/native-american-trust-lands/> [<https://perma.cc/M23P-6JM6>] (“Even though the tribes are allowed to make their own governments, there is a limitation to how they can use the land and require federal approval when it comes to most actions, including taking out mortgages for home, building on the land, and renovating existing buildings.”).

185. Crepelle, *supra* note 3, at 443; Terry Anderson & Dominic Parker, *Un-American Reservations*, HOOVER INST. (Feb. 24, 2011), <https://www.hoover.org/research/un-american-reservations> [<https://perma.cc/R34C-DHLP>] (“Not only does trusteeship saddle Indian lands with bureaucratic oversight, it prevents Indians from using their land as collateral for borrowing.”); Crepelle & Block, *supra* note 4, at 326–27 (“Nothing can happen in Indian country without the BIA’s approval.”).

186. Crepelle & Block, *supra* note 4, at 331 (“Similarly, private land adjacent to reservations outproduces reservation land by 30 to 90 percent because property rights are stronger there.”); 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.”); Terry Anderson & Wendy Purnell, *The Bonds of Colonialism*, HOOVER INST. (Apr. 26, 2019), <https://www.hoover.org/research/bonds-colonialism> [<https://perma.cc/LYE3-7H7D>] (“Terry Anderson and Dean Lueck find evidence that agricultural productivity on 39 western reservations was highest on fee simple lands, with individual trust lands being 30 to 40 percent less productive and tribal trust lands being 80 to 90 percent less productive.”).

187. *Cobell v. Norton*, 240 F.3d 1081, 1089 (D.D.C. 2001) (“Concern over federal mismanagement of the IIM trust funds is not new. The General Accounting Office, Interior Department Inspector General, and Office of Management and Budget, among others, have all condemned the mismanagement of the IIM trust accounts over the past twenty years.”); Sarah Tory, *The Latest: Feds Pay Final Installments of \$3.4 Billion Settlement to Native Americans*, HIGH COUNTRY NEWS (Oct. 13, 2014), <https://www.hcn.org/issues/46.17/feds-pay-final>

spirit of inept federal bureaucracy, the cost of administering trust land is often far more than the value of the land itself.¹⁸⁸ Tribes do not benefit when the federal government controls their land.

The federal government is terrible at managing Indian land and resources because the United States has no incentive to behave. Although the trust relationship between federally recognized tribes and the United States is legally enforceable,¹⁸⁹ the Supreme Court has gone to tremendous lengths to shield the federal government from liability for even the most extreme mismanagement of Indian resources.¹⁹⁰ The Supreme Court has held that a tribe cannot sue the United States when a federal official engages in overtly corrupt behavior to the tribe's detriment¹⁹¹ and has also ruled that tribes cannot even access documents to determine whether the United States has mismanaged a tribe's resources.¹⁹² Decrying the Supreme Court's refusal to hold the United States accountable for mismanaging tribal resources, Justice Sotomayor has written, "had this type of mismanagement taken place in any other trust arrangements such as Social Security, there would be war."¹⁹³

installments-of-3-4-million-settlement-to-native-americans [https://perma.cc/7QFF-93AF] ("In 1996, Elouise Cobell, a member of Montana's Blackfeet Tribe, filed a class action lawsuit on behalf of 500,000 Native landowners. Cobell's lawyers argued that the federal government had deprived them of at least \$170 billion in mineral royalty payments on reservation land, due to over a century of mismanagement by the Indian Trust system.").

188. *Hodel v. Irving*, 481 U.S. 704, 713 (1987) ("If the tract were sold (assuming the 439 owners could agree) for its estimated \$8,000 value, he would be entitled to \$.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at \$17,560 annually."); U.S. GOV'T. ACCOUNTABILITY OFF., GAO/RCED-92-96BR, INDIAN PROGRAMS: PROFILE OF LAND OWNERSHIP AT 12 RESERVATIONS 24-25 (1992), <https://www.gao.gov/assets/80/78281.pdf> [https://perma.cc/43DC-Q7VG] ("On the basis of this official's estimate, maintaining the ownership records for the 12 reservations would cost BIA from \$40 million to \$50 million per year. The original estimate also suggests that maintaining more than 620,000 Indian individual ownership interests of 2 percent or less for the 12 reservations would cost between \$24 million and \$31 million annually.").

189. *United States v. Mitchell*, 463 U.S. 206, 226 (1983) ("This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust."); *United States v. White Mountain Apache*, 537 U.S. 465, 474 (2003) ("The 1960 Act goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach.").

190. *E.g.*, *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 181-82 (2011); *United States v. Navajo*, 556 U.S. 287, 289 (2009); *United States v. Navajo*, 537 U.S. 488, 514 (2003); *United States v. Mitchell*, 445 U.S. 535, 542 (1980).

191. *United States v. Navajo*, 556 U.S. 287, 289 (2009); *United States v. Navajo*, 537 U.S. 488, 514 (2003).

192. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) ("For that reason, the Tribe must point to a right conferred by statute or regulation in order to obtain otherwise privileged information from the Government against its wishes.").

193. *Id.* at 208 (Sotomayor, J., dissenting).

As a result of the Secretary of the Interior's consistently abhorrent supervision of Indian trust land and resources, one federal court opined:

Alas, our "modern" Interior department has time and again demonstrated that it is a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.¹⁹⁴

The federal government's totalitarian control of Indian trust land must come to an end. Land restrictions based upon the belief that Indians are incompetent have no place in the twenty-first century United States.¹⁹⁵ Plus, the federal government has proven itself profoundly incapable of administering Indian land. The current trust land regulations are irrational and promote no legitimate government purpose. The current federal restrictions on Indian trust land are unconstitutional.

B. *Indian Trader Regulations Do Nothing but Complicate Tribal Business*

Restrictions on non-Indians trading with Indians have been in place since the founding of the American colonies.¹⁹⁶ As seizing control of Indian wealth was a primary objective of the United States' earliest Indian policy,¹⁹⁷ the Constitution of the newly

194. *Cobell v. Norton*, 229 F.R.D. 5, 7 (D.D.C. 2005), *vacated sub nom.*, *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006).

195. *Gover*, *supra* note 73, at 318 ("The assumptions underlying the trust are invalid, and it necessarily follows that the specifics of the trust hold little value in the making of modern Indian policy. The trust responsibility must be modernized to meet the new reality.")

196. *Rice v. Rehner*, 463 U.S. 713, 722 (1983) ("The colonists regulated Indian liquor trading before this Nation was formed, and Congress exercised its authority over these transactions as early as 1802."); *United States ex rel. Keith v. Sioux Nation Shopping Ctr.*, 488 F. Supp. 496, 499 (D.S.D. 1980) ("Trade with Indians has been regulated in this country since the 1600s."); Adam Creppelle, *Shooting Down Oliphant: Self-Defense as an Answer to Crime in Indian Country*, 22 LEWIS & CLARK L. REV. 1283, 1310 (2018) ("Fears of armed indigenous resistance caused most of the American colonies to enact laws prohibiting the armament of Indians.")

197. *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 686 (1965) ("Long before that, in fact from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference, and had exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes."); Sidney L. Harring, *The Distorted History That Gave Rise to the "So Called" Plenary Power Doctrine: The Story of United States v. Kagama in INDIAN LAW STORIES* 149–51 (Carole Goldberg et al. eds., 2011); Creppelle, *supra* note 3, at 423.

formed United States specifically authorized the federal government to regulate trade with the Indian tribes.¹⁹⁸ Hence, an Indian trader law was amongst the first laws passed by Congress.¹⁹⁹ The law required individuals seeking to trade with Indian tribes to obtain a license from the federal government.²⁰⁰ Congress enacted further regulations on Indian trade during the 1800s.²⁰¹ These laws remain part of the U.S. Code,²⁰² resulting in the dense regulatory scheme summarized supra.²⁰³ Indian trader laws were, and supposedly remain, a beneficence bestowed by the federal government upon its Indian wards to protect them from unscrupulous dealings with whites.²⁰⁴

It is time to end the racist and paternalistic Indian trader laws. Indian trader laws allow “full blood” Indians to do business in Indian country without a license.²⁰⁵ Indian trader laws categorize individuals by Indian blood rather than tribal citizenship, and this brings Indian trader laws outside of the constitutional tribal citizenship framework.²⁰⁶ Likewise, the Indian trader laws overtly forbid “white persons” from serving as clerks for Indian traders without a license,²⁰⁷ raising the question: Can people of African, Asian,

198. U.S. CONST. art. I, § 8, cl. 3.

199. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33 § 4, 1 Stat. 137, 138 (1790) (current version at 25 U.S.C. § 177).

200. *Id.* § 1.

201. *Warren Trading Post Co.*, 380 U.S. at 688–89 (“Existing statutes make specific restrictions on trade with the Indians, and one of them, passed in 1876 and tracing back to comprehensive enactments of 1802 and 1834 . . .”).

202. 25 U.S.C. §§ 261–264.

203. 25 C.F.R. §§ 140.1–26 (2019).

204. *Cent. Mach. Co. v. Ariz. Tax Comm’n*, 448 U.S. 160, 165 (1980) (“One of the fundamental purposes of these statutes and regulations— to protect Indians from becoming victims of fraud in dealings with persons selling goods”); *Ewert v. Bluejacket*, 259 U.S. 129, 136 (1922) (“The purpose of the section clearly is to protect the inexperienced, dependent and improvident Indians from the avarice and cunning of unscrupulous men in official position and at the same time to prevent officials from being tempted, as they otherwise might be, to speculate on that inexperience or upon the necessities and weaknesses of these ‘Wards of the Nation.’”); *United States v. Hutto*, 256 U.S. 524, 528 (1921) (“The purpose was to protect the Indians from their own improvidence; relieve them from temptations due to possible cupidity on the part of persons coming into contact with them as representatives of the United States; and thus to maintain the honor and credit of the United States, rather than to subserve its pecuniary interest.”).

205. 25 U.S.C. § 264 (“Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license . . .”); 25 C.F.R. § 140.3 (2019).

206. *United States v. Antelope*, 430 U.S. 641, 646 (1977) (“Indeed, respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d’Alene Tribe.”); *Fisher v. Dist. Ct. of Sixteenth Jud. Dist.*, 424 U.S. 382, 390 (1976) (“The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.”); *Morton v. Mancari*, 417 U.S. 535, 553–54 (1974).

207. 25 U.S.C. § 264 (“That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by

or Latin American descent serve as unlicensed clerks to Indian traders?

In 1879, the Supreme Court answered the question, holding that persons of African ancestry do not count as “white persons” in Indian trader laws by reasoning that “[t]he term ‘white person,’ in the Revised Statutes, must be given the same meaning it had in the original act of 1834.”²⁰⁸ The Supreme Court openly continues to apply the racist standards of those who enacted anti-Indian legislation over a century ago in contemporary Indian law cases.²⁰⁹ Consequently, “white persons” likely means exclusively “white persons” and allows individuals of other races to engage in trade without a license. This probably makes sense by the bigoted standards of the 1700s and 1800s. White people were the folks swindling Indians during these years, and persons of mixed white and Indian ancestry could have been classified as “white.”²¹⁰ This means Indian trader laws make flagrantly racial classifications and should be subjected to strict scrutiny rather than the usual rational basis review applied to Indian legislation.

Regardless of the standard of scrutiny applied, Indian trader laws are unconstitutional because the laws serve no rational purpose. During the early days of the United States, there was a plausibly rational basis for Indian trader regulations as linguistic and cultural differences could have left Indians vulnerable to shady dealings with whites.²¹¹ There is no rational basis for these laws to-

the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.”); 25 C.F.R. § 140.3 (2019).

208. *United States v. Perryman*, 100 U.S. 235, 236 (1879).

209. *See 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. . . . 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.”); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 206 (1978) (“‘Indian law’ draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.”).

210. Jeffrey Ostler, *The Last Buffalo Hunt and Beyond Plains Sioux Economic Strategies in the Early Reservation Period*, GREAT PLAINS Q., Spring 2001, at 123 (“The best jobs went to mixed bloods and relatives of prominent leaders, especially those whom agents regarded as “progressive” or were trying to co-opt.”).

211. However, this position is debatable. Indians were trading effectively with Europeans until disease, war, and the destruction of their food sources forced the Indians onto reservations. *See, e.g.*, Yellowtail, *supra* note 7 (“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*, XXVIII JAZZ ARCHIVIST 1, 18 (2015), https://www.researchgate.net/publication/287204530_Singing_Shaking_and_Parading_at_the_Birth_of_New_Orleans [<https://perma.cc/8YAJ->

day. The overwhelming majority of Indians speak English and understand the United States' culture.²¹² Any justification that may have existed for Indian trader laws has long since vanished.

The irrationality of Indian trader laws is further evinced by their subversion of tribal economies, and this fact has been recognized by some federal courts of appeal. It is illegal to trade with Indians sans a federal license,²¹³ and obtaining an Indian trader license is ridiculously complicated. Accordingly, the Eighth Circuit Court of Appeals believed inept federal bureaucracy rendered it "impossible" to become an Indian trader on some reservations.²¹⁴ The Tenth Circuit Court of Appeals found that enforcing Indian trader regulations actually harms Indians by adding uncertainty to Indian country business transactions.²¹⁵ Although no one is allowed to engage in business on the Navajo Nation without federal approval,²¹⁶ the Ninth Circuit found the operation of the Indian trader system harms the Navajo, declaring, "The trader dominates the relationship between the Navajos and those outside the reservation to his own economic advantage."²¹⁷ The Ninth Circuit bluntly stated, "The traders have a legal monopoly, since they have a captive mar-

4LL2] (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 . . ."); Miller, *supra* note 3, at 788 ("Tribes and individual Indians had no problem incorporating newly arrived Europeans into their trading networks.").

212. Lance Morgan, *Ending the Curse of Trust*, INDIAN COUNTRY TODAY 7 (Mar. 23, 2005), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/15%20-%20Ho-Chunk%20Inc.pdf> [<https://perma.cc/9469-7LD4>] ("Besides, we speak English now.").

213. 25 U.S.C. §§ 261–264; *United States v. Parton*, 132 F.2d 886, 887 (4th Cir. 1943) ("As the defendants had not been licensed to trade on the reservation, it was unlawful for them to engage in such business . . .").

214. *United States ex rel. Keith v. Sioux Nation Shopping Ctr.*, 634 F.2d 401, 403 (8th Cir. 1980) ("From the district court's memorandum opinion it appears that bureaucratic nonfeasance makes it impossible to obtain the federal trader's license required by section 264 in the Pine Ridge area in South Dakota. Wayne Adkinson, Administrative Manager of the Pine Ridge Reservation and a Department of the Interior employee, testified that he attempted to implement the licensing program on the Reservation, but abandoned his efforts because of the administrative difficulties and adverse public opinion that resulted. For example, his office did not even have any of the license forms available.").

215. *See United States ex rel. Hornell v. One 1976 Chevrolet Station Wagon*, 585 F.2d 978, 981 (10th Cir. 1978) ("At the time suit was brought, the subject vehicle had already been sold to Indians living on the reservation. Plaintiffs assert, however, that 'the formal declaration of the forfeiture relates back to the time the station wagon was offered for sale and avoids the sale to appellants and the subsequent assignment to Merchants Bank.' Were we to accept this position, we would jeopardize the possessory rights of reservation Indians to purchased goods which were offered to them in contravention of § 264, since the goods would be subject to forfeiture irrespective of a subsequent good faith purchase. Such a doctrine would violate the spirit and intent of § 264, which was enacted for the Indians' economic protection. Plaintiffs' claim of forfeiture must consequently fail.").

216. *Rockbridge v. Lincoln*, 449 F.2d 567, 568 (9th Cir. 1971) ("No one is allowed to conduct business on the reservation without the approval of the Commissioner of Indian Affairs.").

217. *Id.*

ket and need not worry about competition. They are not subject to the controls of the free enterprise system,” and the Indian trader system, “works to the benefit of the trader and against the Navajos.”²¹⁸

The application of Indian trader laws is also odd considering their purpose. The laws are designed to protect “Indian wards” from devilish dealings with non-Indians.²¹⁹ The laws, however, only apply to transactions between non-Indians and Indians while on a reservation.²²⁰ If the laws are designed to protect Indians from corrupt business practices by non-Indians, shouldn’t the laws apply to commerce involving Indians off the reservation? Presumably, Indians are easier prey for non-Indians outside of Indian country than within it. This means that whatever justification existed for protecting Indians from non-Indians on a reservation is even stronger when Indians leave the reservation; thus, requiring a license to trade with Indians on a reservation but not requiring a license to trade with Indians off the reservation makes no sense.²²¹

Indian trader regulations need to be erased from the books. The laws do nothing but hurt Indians, and Indians have expressed desire to be liberated from the Indian trader system.²²² Though trad-

218. *Id.* at 569.

219. *E.g.*, *Ewert v. Bluejacket*, 259 U.S. 129, 136 (1922) (“The purpose of the section clearly is to protect the inexperienced, dependent and improvident Indians from the avarice and cunning of unscrupulous men in official position and at the same time to prevent officials from being tempted, as they otherwise might be, to speculate on that inexperience or upon the necessities and weaknesses of these ‘Wards of the Nation.’”).

220. *One 1976 Chevrolet Station Wagon*, 585 F.2d at 980 (“Plaintiffs have asserted a claim under 25 U.S.C. § 264, which is part of a statutory scheme designed to protect Indians living on reservations from unscrupulous trade practices.”).

221. It is worth noting that tribes must distinguish between their citizens and those not enrolled in their tribe for purposes of tax collection. Indians are exempt from state taxation while on their reservation. Individuals not enrolled in the tribe must pay state taxes on all purchases within a tribe’s reservation. Supreme Court precedent requires Indians to verify the identification of every purchaser in order that the state may extract taxes from the tribe. Presumably if incompetent Indians can distinguish between their citizens and others, states can do the same on all purchases. *Dep’t of Tax’n & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73 (1994); *Okla. Tax Comm’n v. Citizen Band Potawatomie Indian Tribe of Okla.*, 498 U.S. 505, 512–13 (1991); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 483 (1976).

222. *NAFSA Submits Comments on Indian Trader Regulations*, NATIVE AM. FIN. SERV. ASS’N (Apr. 10, 2017), <https://nativefinance.org/news/nafsa-submits-comments-on-indian-trader-regulations/> [<https://perma.cc/2L7R-ATET>]; UNITED S. & E. TRIBES, INC., REQUESTING ADMINISTRATIVE ACTION TO CLARIFY THE INDIAN TRADER REGULATIONS TO ENSURE THAT ECONOMIC ACTIVITY TAKING PLACE IN INDIAN COUNTRY GENERATES REVENUE FOR INDIAN COUNTRY, USET SPF RES. NO. 2016:029 (Feb. 11, 2016), <http://www.usetinc.org/wp-content/uploads/bvenuti/Resolutions/2016/29%20%20REQUESTING%20ADMINISTRATIVE%20ACTION%20TO%20CLARIFY.pdf> [<https://perma.cc/6DFC-A8R2>] (“The development of new regulations to implement the Indian Trader Statutes by the Department of Interior to clarify that the regulation of non-Indians engaging in commerce in Indian Country is intended to protect and promote the wellbeing of Tribal Nation communities through the preemption of state and local taxation on Tribal lands will provide a vital-

ing licenses can still be obtained,²²³ it appears the license requirement is seldom enforced.²²⁴ Aside from being seldom enforced, the licenses may be impossible to acquire. In fact, the Administrative Manager of the Pine Ridge Reservation gave up hope of getting Indian trader licenses and considered “employing local high school art students to make [Indian Trader] licenses.”²²⁵ The very existence of Indian trader laws leaves room for selective enforcement that creates uncertainty and harms tribal economies.²²⁶ Even if unenforced, the Indian trader laws are relics from eras of great injustice to the Indians. Indians deserve better than for the government to simply ignore these vestiges of bigotry. Accordingly, Indian trader laws should be struck down on constitutional grounds.

ly necessary tool for promoting Tribal economic activity, job creation and sustainable nation-building in Indian Country.”); *Proposal to Amend the Indian Trader Regulations to Support Tribal Self-Determination in Business Regulation and Taxation*, NAT’L CONG. AM. INDIANS (Dec. 8, 2016), http://www.ncai.org/policy-issues/economic-development-commerce/Broadcast_ANPR_on_Indian_Trader_Regs.pdf [<https://perma.cc/4CTW-GVE5>] (“It is long past time to bring tribal self-determination to Indian Trade and Commerce. It is no longer necessary for the Department of Interior to license traders on Indian reservations, and the regulations are an anachronistic and patriarchal burden on economic development.”).

223. Dep’t of Tax’n & Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 74 n.10 (1994) (“According to the Federal Government, there are approximately 125 federally licensed Indian traders in New York, of whom the 64 wholesalers are all non-Indians and the 61 retailers are all Indians.”); Complaint at 13, *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046 (W.D. Wash. 2018) (No. 2:15-cv-00940-MAT), <https://turtletalk.files.wordpress.com/2015/06/1-complaint4.pdf> [<https://perma.cc/4FVE-5NHZ>] (noting businesses at Quil Ceda Village must obtain Indian Trader Licenses).

224. Matthew L.M. Fletcher, *Tribal Jurisdiction—A Historical Bargain*, 76 MD. L. REV. 101, 106 (2017), <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=3746&context=mlr> [<https://perma.cc/GLY7-65PG>] (“Indian trader statutes are still extant, though it is not clear if the United States continues to license traders in the twenty-first century. The Indian trader regulations are completely out of date; they refer to federal offices that no longer exist, such as the Commissioner of Indian Affairs, and assume Indians will only pay in cash.”).

225. *United States ex rel. Keith v. Sioux Nation Shopping Ctr.*, 488 F. Supp. 496, 500 (D.S.D. 1980); *see also supra* note 214.

226. Emily Ekins, *Myriad Vague and Selectively Enforced Laws Are Not Ideal for Economic Growth*, REASON (Aug. 9, 2012), <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.”); 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.”); Will Wilkinson, “Socialism” vs. “Capitalism” Is a False Dichotomy, VOX (Aug. 16, 2018), <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.”).

V. RESPECTING TRIBAL SOVEREIGNTY: ALLOW TRIBES TO GOVERN THEIR LAND

When the Indian trader laws are stricken from the U.S. Code and the federal government begins to respect tribal land rights, true tribal self-determination can begin. Despite endorsing the United Nations Declaration on the Rights of Indigenous Peoples,²²⁷ the United States' Indian policy remains behind the times.²²⁸ The United Nations has slammed the United States' Indian policy as "out of step with contemporary legal developments in indigenous rights."²²⁹ Similarly, the Inter-American Commission of Human Rights has decried the United States failure to honor Indian property rights.²³⁰ The United States can and must do better at respecting Indian rights.²³¹

The actualization of tribal autonomy is in perfect harmony with the United States' tradition of local self-government.²³² Plus, tribes know how to govern themselves as they have a much longer tradition of self-rule than do other American governments.²³³ Tribes possess all the governmental powers that they have not been divested of;²³⁴ thus, tribes should be able to operate as islands of lib-

227. Press Release, Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Jan. 12, 2011), <https://2009-2017.state.gov/documents/organization/154782.pdf>; see also G.A. RES. 61/295 (Sept. 13, 2007), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf [<https://perma.cc/NK5Q-CHFJ>].

228. Although the United States has a long way to go when it comes to respecting tribal sovereignty, positive changes have been made in recent years such as the Tribal Law and Order Act of 2010, the Violence Against Women Reauthorization Act of 2013, and the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012.

229. Comm. On the Elimination of Racial Discrimination 59th Sess. Summary of the 1475th Meeting, at ¶ 33, CERD/C/SR/1475 (Aug. 22, 2001).

230. *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 5 rev. 1 ¶ 173 (2002).

231. See Cohen, *supra* note 13, at 390 ("Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."); see also FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 271 (quoting Secretary of Interior James Harlan in August 16, 1865: "Other nations will judge our character by our treatment of the feeble tribes to whom we sustain the relation of guardian").

232. See generally Michael Hendrix, *The Case for Local Government*, REAL CLEAR POL'Y (Mar. 4, 2019), https://www.realclearpolicy.com/articles/2019/03/04/the_case_for_local_government_111089.html [<https://perma.cc/E63R-52F6>] ("Local governments are a living tradition within the political order set out in the Constitution.").

233. *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542–43 (1832).

234. *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F. Supp. 3d 1221, 1228 (D. Nev. 2014) ("Congressionally recognized tribes retain all aspects of sovereignty . . . with three exceptions: (1) they may not engage in foreign commerce or foreign relations; (2) they may not alienate fee simple title to tribal land without the permission of Congress; and (3) Congress may strip a tribe of any other aspect of sovereignty at its pleasure.") (internal citations omitted); *Wheeler*, 435 U.S. at 323 ("Indian tribes still possess those aspects of sovereignty not

erty. That is, tribes should be free to “make their own laws and be ruled by them.”²³⁵ Tribal law should govern tribal lands as well as all activities occurring within tribal borders. This will allow tribes to experiment with new policies and serve as “laboratories” of democracy,²³⁶ furthering the principles of federalism.²³⁷

Tribes must be given the freedom to develop and implement the rules that apply to the lands within their borders. Likewise, the economic regulations that apply within Indian country should be created by tribes. The remainder of this Part discusses why Indian country’s current federal regulatory system should be replaced by tribal laws governing land use and commercial regulation, as this will allow tribes to control their economies and also furthers the U.S. policy of tribal self-determination.

A. Tribal Land Rights

Toppling the trust regime means each tribe must be free to establish its own land tenure system. Though many believe Indians simply lived in harmony with nature and recognized no property rights in land prior to 1492,²³⁸ this is completely false. Tribes developed a vast variety of land use systems centuries before any European set foot in the Americas.²³⁹ Agricultural tribes recognized individual rights in land;²⁴⁰ likewise, agrarian tribes recognized property rights in improvements to land, including crop store-

withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”); 38 JOHN A. GEBAUER, CAL. JUR. 3D *Indians* § 2 (“Indian tribes have a status higher than that of states; they are subordinate and dependent nations possessed of all powers except to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.”).

235. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

236. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 817 (2015) (“This Court has ‘long recognized the role of the States as laboratories for devising solutions to difficult legal problems.’”); *New State Ice Co., v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

237. Tivas Gupta, *The Future of Federalism*, HARV. POL. REV. (Sept. 24, 2019), <https://harvardpolitics.com/united-states/the-future-of-federalism/> [https://perma.cc/SF72-EBNZ] (“Congress allows parties to experiment with more conservative or liberal policy solutions on a state level before it would even be possible to imagine their implementation nationwide.”); Gover, *supra* note 73, at 335 (“Belief in the inferiority and incompetence of Indians has finally been discredited and policy now assumes that Indian Tribes are a permanent feature of American federalism.”).

238. Bobroff, *supra* note 163, at 1567 (“According to that story, tribal societies were ‘communist,’ recognizing no private property rights in land. Indians, the story went, were crying out to be saved by the transformative power of private property.”).

239. *Id.* at 1571 (“Rather, Indian societies have had myriad different property systems, varying widely by culture, resources, geography, and historical period.”).

240. *Id.* at 1573.

houses and irrigation canals.²⁴¹ Nomadic tribes typically did not recognize individual rights to land, as land ownership is unimportant when a society is constantly migrating.²⁴² Nevertheless, even nomadic tribes acknowledged land rights if an individual mixed her labor with the land.²⁴³ Tribal property systems evolved as social and environmental conditions changed over the years,²⁴⁴ but the current trust land tenure system kills tribes' ability to adapt.²⁴⁵

Control of tribal property law must be returned to tribes. This means the trust restrictions on tribal lands must be removed, and tribes' inherent right to control all the lands within their borders must be recognized. Under this proposal, tribes alone should regulate the activities that occur on tribal lands.²⁴⁶ Tribes must be able to lease and even sell their lands while perpetually maintaining sovereignty over the land and events occurring on it.²⁴⁷ Every other jurisdiction on the planet operates under this system,²⁴⁸ and having tribal jurisdiction eternally attached to tribal land effectively pre-

241. Crepelle, *supra* note 3, at 418 ("Rights to land improvements, such as storehouses for crops and access to irrigation systems, were held individually.").

242. See Bobroff, *supra* note 163, at 1592 ("Generally, tribes dependent upon the buffalo for their economy recognized no more than temporary property rights in seasonally occupied villages.").

243. See *id.* at 1573 ("Societies whose members ranged over vast territories were the least likely to recognize property rights in land, although even these tribes recognized property rights in cultivated lands.").

244. *Id.* ("Moreover, Indian property institutions, like property rules under English common law, were able to change and adapt to meet new social and economic challenges and conditions.").

245. *Id.* at 1563 ("When it did so, allotment did more than just disable tribal property laws. Most significant, it destroyed tribes' power to adapt their property laws to meet new social, economic, political, and ecological conditions.").

246. An exception to this would be generally applicable federal laws. For example, uranium mines on tribal lands can be required to comply with generally applicable federal laws to the same extent as uranium mines outside of Indian country. When tribes and states are held to the same level of federal regulation, federal regulation is not as offensive to tribal sovereignty.

247. Angélique EagleWoman (Wambdi A. WasteWin), *Tribal Nations and Tribal Economies: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 WASHBURN L.J. 805, 823–24 (2010) ("The U.S. government must end its assertion of federal control over the tribal land base and resources by federal recognition of tribal property systems with permanent tribal jurisdiction to regulate the land base. This step is necessary to provide for the process of freeing up the underlying asset base of Indian Country. Non-tribal members purchasing or leasing land within tribal jurisdictions would be able to do so with the acknowledgement that the land will continue to be permanently subject to tribal law and regulation."); Gover, *supra* note 73, at 363 ("Tribes should have the option of alienating land without thereby losing their authority over it. There are good reasons that Tribes might choose to alienate . . .").

248. Eaglewoman, *supra* note 247, at 824 ("This is the situation found in every jurisdiction around the world. For example, purchasing land in France is acquiescing to French laws of property ownership, zoning, and regulation."); Shoemaker, *supra* note 68, at 489 ("Characteristically, real property jurisdiction is territorial—meaning the law of the place where the property is located governs. If an Iowan purchases real property in Colorado, there is no question that Colorado governs that real property ownership.").

serves tribal land bases.²⁴⁹ Leading Indian attorney and entrepreneur Lance Morgan has proposed a similar system to “ending the curse of trust.”²⁵⁰

Under this system, each tribe will be empowered to craft land use and ownership rules suited to its unique situation. Some tribes may want to maintain their reservations as they currently are, so these tribes can copy the current federal land rules. Other tribes may wish to make their reservations more attractive to industry and will be able to implement property rules amenable to businesses. Similarly, tribes may wish to make their land easier to mortgage in order to improve reservation housing.²⁵¹ Several tribes also face severe land fractionation issues resulting from allotment.²⁵² Tribes should be able to determine how their land passes from generation to generation as with every other issue pertaining to their land.

To be abundantly clear, this is not a call to privatize the reservation and terminate tribal land bases;²⁵³ rather, this is a call to respect tribal land rights. Even in *Johnson*, Chief Justice Marshall stated, “It has never been contended, that the Indian title amounted to nothing.”²⁵⁴ The Supreme Court shed light on what Indian title means twelve years later when it declared that Indian title “is considered as sacred as the fee simple of the whites”²⁵⁵ and Indian lands “could not be taken without their consent.”²⁵⁶ Over the years, the Supreme Court has reaffirmed this maxim on multiple occa-

249. Singer, *supra* note 27, at 34 (noting tribes support trust land because it preserves tribal land bases).

250. See Morgan, *supra* note 212, at 6.

251. See David Murray, *Crisis in Our Backyard: Indian Housing*, GREAT FALLS TRIB. (Apr. 3, 2016, 7:50 PM), <https://www.greatfallstribune.com/story/news/local/2016/03/31/crisis-backyard-montanas-reservation-housing/82466032/> [<https://perma.cc/DBT6-MLRW>]; Chris Aadland, *Tribal Officials Discuss Challenges and Solutions to Addressing Reservation Housing Crisis*, CASPER STAR TRIB. (Feb. 15, 2020), https://trib.com/news/state-and-regional/tribal-officials-discuss-challenges-and-solutions-to-addressing-reservation-housing/article_1a14e02a-f4ee-513e-8ef0-94533f89f537.html [<https://perma.cc/EYH4-4AEJ>]; Julian Brave NoiseCat, *America's Forgotten Crisis: Over 50% of One Native American Tribe are Homeless*, THE GUARDIAN (Apr. 6, 2017, 6:00 AM), <https://www.theguardian.com/commentisfree/2017/apr/06/americas-forgotten-crisis-50-percent-native-american-tribe-homeless> [<https://perma.cc/VWX5-GA4D>].

252. Shoemaker, *supra* note 68, at 490 (“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.”).

253. See David Blackmon, *Trump Advisers' Plan To 'Privatize' Indian Lands: Limited Potential Gain, Heavy Political Pain*, FORBES (Dec. 6, 2016, 11:14 AM), <https://www.forbes.com/sites/davidblackmon/2016/12/06/privatization-of-indian-lands-limited-potential-gain-heavy-political-pain/#4e7251a239e1> [<https://perma.cc/3NQF-LYJE>].

254. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 603 (1823).

255. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835).

256. *Id.*

sions.²⁵⁷ Accordingly, Professor Joseph Singer has stated, “Indian title is not a license; Indian title is full ownership of land by a sovereign Indian nation.”²⁵⁸ The discombobulating federal regulations deprive tribes of their property rights as well as their sovereignty.²⁵⁹ The aim of this proposal is to enhance tribal sovereignty by allowing tribes to perpetually exercise dominion over their land. Federal control must contract in order for tribal sovereignty to expand.

As evidence that this proposal is not tribal termination part two,²⁶⁰ maintenance of current federal expenditures is called for.²⁶¹ The federal government spends over a billion dollars annually to manage activities on tribal land,²⁶² and the federal government is terribly inefficient with those funds. For example, the federal government spends more money managing allotments than allotments are worth.²⁶³ The federal government should redirect the funds it currently uses to manage trust land and resources to the control of the tribes themselves. Allowing tribes to use federal funds when taking over activities performed by the federal government has statutory precedent;²⁶⁴ plus, tribes are better at managing their land and resources than are federal bureaucrats.²⁶⁵

257. *Cnty. Of Oneida v. Oneida Indian Nation of N. Y.*, 470 U.S. 226, 235 (1985); *Oneida Indian Nation v. Cnty. Of Oneida*, 414 U.S. 661, 669 (1974); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941).

258. Singer, *supra* note 27, at 24.

259. Cf. Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99, 101 (2012), <http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2012/03/64-SLRO-99.pdf> [<https://perma.cc/8PFU-2PAN>] (“Regulatory takings, in contrast, leave landowners in possession, but subject them to restrictions on the ability to use, develop, or dispose of the land.”); ROBERT MELTZ, CONG. RSCH. SERV., RL 97-122, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY 1 (2015), <https://fas.org/sgp/crs/misc/97-122.pdf> [<https://perma.cc/M2CH-U8XR>] (“This critical expansion of takings jurisprudence to ‘regulatory takings’ acknowledged that purely regulatory interferences with property rights can have economic and other consequences for property owners as significant as appropriations and physical invasions.”).

260. Gover, *supra* note 73, at 333 (“Any policy initiative involving even the hint of a suggestion that the federal role in reservation land management should be reduced raises the suspicion that the new policy is termination in disguise.”); H.R. Res. 108, 83rd Cong., 67 Stat. B132 (1st Sess. 1953); Casey R. Kelly, *Orwellian Language and the Politics of Tribal Termination (1953–1960)*, 74 W.J. COMM. 351, 351 (2010) (“[T]ermination signaled the decline of New Deal enthusiasm for tribal sovereignty.”).

261. Actually, an increase would be ideal. Tribal governments receive far less in federal funds than other governments. See U.S. COMM’N ON CIV. RTS., *supra* note 54.

262. See U.S. DEP’T OF INTERIOR, FY 2017 FEDERAL FUNDING FOR PROGRAMS SERVING TRIBES AND NATIVE AMERICAN COMMUNITIES (2017), <https://www.doi.gov/sites/doi.gov/files/uploads/FY2017NativeAmericanCrosscut.pdf> [<https://perma.cc/V7WZ-PLJ9>].

263. *Hodel v. Irving*, 481 U.S. 704, 708 (1987).

264. See *Public Law 93-638 Contracting and Compacting*, OFF. SPECIAL TR. FOR AM. INDIANS, DEP’T OF THE INTERIOR, https://www.doi.gov/ost/tribal_beneficiaries/contracting [<https://perma.cc/B7Y4-RPVY>].

265. Regan, *supra* note 61 (“As with other forms of energy development, when tribes are afforded more control over natural resource management, the result has been significantly better management and higher output.”); Katie Tubb & Caleb Sutherlin, *Federal Government Continues to Give Native American Tribes a Bad Deal*, HERITAGE FOUND. (Apr. 23, 2018),

Moreover, the United States provides states with federal funds²⁶⁶ and spends billions of dollars on foreign aid.²⁶⁷ Accepting federal funds does not make tribes wards or dependents, especially since tribes have treaty rights to federal funds.²⁶⁸ This proposal intends to recognize tribes' inherent right to control their land and provide tribes with the resources to do it.

B. Tribal Trade Policy

The federal Indian trader laws need to be replaced with tribal laws. That is, tribes must be free to enact their own business regulatory schemes. Tribes do not need the federal government to approve who does business on their land or how. Tribes must be able to craft their own business regulatory environments. Some tribes may wish to assert heavy oversight of the businesses within their borders, while other tribes may prefer a more laissez-faire approach. The choice should be up to the tribes and the tribes alone.

In order for tribes to implement their own business laws, tribal jurisdiction needs to be recognized. Tribes lack criminal jurisdiction over non-Indians by virtue of the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*,²⁶⁹ a decision that relies upon extremely questionable reasoning and overtly racist jurisprudence.²⁷⁰ Nevertheless, the Court has also utilized *Oliphant* to restrict tribal civil jurisdiction.²⁷¹ For example, in 2001, the Court denied the

<https://www.heritage.org/government-regulation/commentary/federal-government-continues-give-native-american-tribes-bad-deal> [<https://perma.cc/FHU9-3Z3M>] (“Tribal lands, just like states, have shown time and again that they can do a better job at developing the lands than the federal government.”).

266. Samuel Stebbins, *How Much Money Does Your State Receive from the Federal Government? Check Out This List*, USA TODAY (Mar. 20, 2019, 8:34 AM), <https://www.usatoday.com/story/money/economy/2019/03/20/how-much-federal-funding-each-state-receives-government/39202299/> [<https://perma.cc/AFB6-EKF2>].

267. *Foreign Aid By Country: Who Is Getting The Most—And How Much?*, CONCERN WORLDWIDE US (Mar. 21, 2019), <https://www.concernusa.org/story/foreign-aid-by-country/> [<https://perma.cc/8W2J-QRPY>] (“Globally in 2017, the United States spent over \$46 billion in foreign aid.”).

268. Crepelle, *supra* note 3, at 430–31.

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

270. Adam Crepelle, *Tribal Courts, The Violence Against Women Act, and Supplemental Jurisdiction: Expanding Tribal Court Jurisdiction to Improve Public Safety in Indian Country*, 81 MONT. L. REV. 301, 310 (2020); Crepelle, *supra* note 23; WILLIAMS, *supra* note 23, at 97 (noting *Oliphant* “unembarrassedly perpetuates the Marshall Model’s overarching principle of white racial supremacy contained in the European colonial-era rooted doctrine of discovery”).

271. *E.g.*, *Plains Com. Bank v. Long Family Land & Cattle, Co.*, 544 U.S. 316, 238 (2008); *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) (relying on *Oliphant* for the proposition that inherent sovereign powers do not extend beyond citizens of the tribe); *Montana v. United States*, 450 U.S. 544, 565 (1981) (“Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that

Navajo Nation the right to tax a non-Indian business operating on a small parcel of fee land within the Navajo Nation despite the Navajo Nation supplying essential governmental services to the business.²⁷² This lack of jurisdiction effectively deprives tribes of their ability to regulate their economies.

Congress needs to reaffirm tribes' inherent authority to regulate all activities within their borders.²⁷³ Early Congresses recognized that tribal regulation of Indian country commerce was more important than the Indian trader laws.²⁷⁴ Though the Court has since diminished tribal court jurisdiction over non-Indians,²⁷⁵ the Court declared that tribal courts are presumed to have civil jurisdiction over non-Indians as recently as 1985.²⁷⁶ In 2013, Congress acknowledged that tribes have inherent criminal jurisdiction over non-Indians in certain circumstances.²⁷⁷ Tribal courts have treated non-Indians fairly in criminal cases,²⁷⁸ so Congress is currently considering expanding tribal criminal jurisdiction over non-Indians.²⁷⁹ In fact, Senators who opposed recognizing tribes' criminal jurisdiction over non-Indians admitted that there is no logical reason to

the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe.”).

272. *Atkinson Trading Co., Inc., v. Shirley*, 532 U.S. 645, 655 (2001) (“Although we do not question the Navajo Nation’s ability to charge an appropriate fee for a particular service actually rendered, we think the generalized availability of tribal services patently insufficient to sustain the Tribe’s civil authority over nonmembers on non-Indian fee land.”).

273. After European contact and well into the 1800s, tribes exercised both civil and criminal jurisdiction over non-Indians within their borders. *See* CANBY, *supra* note 161, at 149 (“In colonial days, the Indian territory was entirely the province of tribes, and they had jurisdiction in fact and theory over all persons and subjects present there.”); FLETCHER, *supra* note 55, at 349 (“Moreover, federal officials were aware that the Cherokee courts asserted jurisdiction over non-Indians, and in at least on instance in 1824 turned over an American citizen to the Cherokees for prosecution.”); Paul Spruhan, “*Indians, in a Jurisdictional Sense: Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*,” 1 AM. INDIAN L.J. 79 (2012) (noting Jacob West, a white man, was sentenced to hang by a Cherokee court, and the federal court refused to grant West habeas corpus in 1844); Ablavsky, *supra* note 111, at 1086 n.400 (“It also ignores historical evidence suggesting that the federal government not only permitted, but oversaw, tribal court jurisdiction exercising tribal sovereignty over non-Natives.”).

274. Fletcher, *supra* note 224, at 107 (“Even Congress, at times, seemed to understand that tribal regulations were of greater import than federal Indian trader statutes, which proved to be an ineffective means to govern Indian trade.”).

275. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001); *Nevada v. Hicks*, 535 U.S. 353, 360 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997).

276. *Iowa Mut. Ins. v. LaPlante*, 480 U.S. 9, 18 (1987) (“Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.”).

277. 25 U.S.C. § 1304.

278. *See, e.g.*, NAT’L CONG. OF AM. INDIANS, VAWA 2013’S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 19 (2018), http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [<https://perma.cc/Q9SZ-LFC8>].

279. *H.R. 1585 – Violence Against Women Reauthorization Act of 2019*, <https://www.congress.gov/bill/116th-congress/house-bill/1585> [<https://perma.cc/4G2Y-XPBD>].

limit such jurisdiction over non-Indians once it is recognized in some instances.²⁸⁰ Criminal penalties are generally considered more severe sanctions than civil penalties, so a tribe's ability to incarcerate non-Indians should translate into the ability to hold non-Indians liable for breach of contract and other civil matters. Therefore, Congress should reaffirm tribes' inherent authority to regulate economic activities within their borders.

The reaffirmation of tribal jurisdiction over non-Indians should include an acknowledgment of original principle, and still the presumptive rule, that state law has no force within Indian country.²⁸¹ States currently apply their laws within Indian country,²⁸² and states often use their authority to undermine tribal economies.²⁸³ In particular, state taxation of Indian country enterprise effectively deprives tribes of the ability to tax; after all, no business wants to pay state and tribal taxes when just paying state taxes is an option.²⁸⁴ State taxation, on top of the complex federal regulatory regime, scares businesses away from Indian country.²⁸⁵ No businesses means no businesses to tax, and, without tax revenue, tribes struggle to provide the infrastructure necessary to attract businesses to Indian country.²⁸⁶ Furthermore, the application of state law adds uncertainty to Indian country.²⁸⁷ For example, do individuals have to abide by state or tribal rules?²⁸⁸ And should individuals seek redress

280. S. REP. NO. 112-153, at 48 (2012) (“[W]hile the present bill’s jurisdiction is limited to domestic-violence offenses, once such an extension of jurisdiction were [*sic*] established, there would be no principled reason not to extend it to other offenses as well.”).

281. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (holding the laws of Georgia “have no force” inside the Cherokee Nation); 42 C.J.S. *Indians* § 92 (2018) (“A state is preempted by operation of federal law from applying its own laws to land held by the United States in trust for the tribe.”).

282. *E.g.*, 25 U.S.C. § 2710(d)(1)(B-C); Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 280 (1953) (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-1326 (1988)); *Cotton Petrol. v. New Mexico*, 490 U.S. 163, 186 (1989) (holding that states can tax oil produced within Indian country); *United States v. McBratney*, 104 U.S. 621, 624 (1882) (holding states have criminal jurisdiction over crimes within Indian country that only involve non-Indians).

283. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 51-52 (1996); *see also* Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. STATE L.J. 115, 123 (2017), http://arizonastatelawjournal.org/wp-content/uploads/2017/06/Morgan_final.pdf [<https://perma.cc/5WZX-LFLH>] (“The states can usually impose their will indirectly on tribes, ignoring conflicting tribal taxation laws because the states control the tribe’s access to the stream of commerce.”).

284. Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking Tribal-State Tax Parity*, 122 W. VA. L. REV. 999, 1017-18 (2020).

285. *Id.* at 1029.

286. *Id.*

287. Crepelle, *supra* note 3, at 448-51.

288. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 206 (1987); *Menominee Indian Tribe of Wis. v. Drug Enforcement Admin.*, 190 F. Supp. 3d 843, 845 (E.D. Wis. 2016).

for grievances in state or tribal court?²⁸⁹ No business wants to deal with this uncertainty.

Once tribal jurisdiction is recognized as exclusive over all persons in Indian country, tribes will be able to implement and apply laws that govern their economies. This means tribal courts will have the undisputed power to adjudicate all issues arising in Indian country. The ability to enforce contracts will provide tribes with an additional reason to adopt a version of the Uniform Commercial Code.²⁹⁰ Likewise, tribes will have unquestioned authority to zone all lands within their borders,²⁹¹ so tribes will be able to meaningfully designate parcels of their land as industrial or commercial.²⁹² Tribes will also be able to issue enforceable business licenses and other business regulations.²⁹³ Most significantly, tribes will be able to set their own tax rates—and will thus be able to fund themselves like other governments.

289. *E.g.*, *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 732 F.3d 409, 411 (2013); *Williams v. Lee*, 358 U.S. 217, 218 (1959).

290. A version of the Uniform Commercial Code has been designed specifically for tribes. MODEL TRIBAL SECURED TRANSACTIONS ACT, (UNIF. LAW COMM'N 2005), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/iecd/iecd/pdf/idc1-024559.pdf> [<https://perma.cc/R43G-AD93>].

291. *Cf.* *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (plurality opinion) (holding that the Yakima Indian Nation Tribe only has the authority to zone property in areas of its reservation that are closed to the general public).

292. Robert J. Miller, *Inter-Tribal and International Treaties for American Indian Economic Development*, 12 LEWIS & CLARK L. REV. 1103, 1131, <https://law.lclark.edu/live/files/9507-lcb124art7millerpdf> [<https://perma.cc/VD9L-V7M8>] (“Each Signatory Tribe shall establish at least one formal trade zone within their territory where the terms and conditions of this Treaty will apply.”).

293. *Id.* at 1122 (“[T]ribes can and will want to consider controlling in the licensing phase when they decide what types of businesses they will allow to operate on their reservations.”).

Tribal lawmaking and enforcement furthers not only tribal self-determination but also tribal economic development.²⁹⁴ For example, legal reforms served as a catalyst for economic growth in South Korea²⁹⁵ and China.²⁹⁶ Nobel Laureate Paul Romer notes that China's reforms were not novel; rather, Romer points out that all China did was "copy good rules from the rest of the world, especially its thriving neighbors in Hong Kong."²⁹⁷ Culturally relevant laws are also associated with enhanced tribal economic development.²⁹⁸

When tribes agreed to relinquish their lands in exchange for reservations, the reservations were supposed to serve as the tribes' perpetual homes.²⁹⁹ Part of a tribe's ability to foster this perpetual

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

295. Seung Wha Chang, *The Role of Law in Economic Development and Adjustment Process: The Case of Korea*, 34 INT'L L. 267, 269 (2000).

296. WORLD BANK, BUILDING ENGINES FOR GROWTH AND COMPETITIVENESS IN CHINA 12 (Douglas Zhihua Zeng ed., 2010), <http://documents.worldbank.org/curated/en/294021468213279589/pdf/564470PUB0buil10Box349496B01PUBLIC1.pdf> [<https://perma.cc/374S-WA9R>] ("The SEZs have made crucial contributions to China's success. Most of all, they—especially the first ones—successfully tested the market economy and new institutions and established role models for the rest of the country to follow."); Connie Carter, *The Success of Law and Development in China, Is China the Latest Asian Developmental State?*, in LAW AND DEVELOPMENT IN ASIA 89 (Gerald Paul McAlinn & Caslav Pejovic eds., 2012), https://edisciplinas.usp.br/pluginfile.php/302223/mod_resource/content/1/CARTER.%20The%20success%20of%20law%20and%20development%20in%20China.pdf [<https://perma.cc/2N3U-6BRN>] ("Upon succeeding Mao, Deng Xiaoping's first goal was to seek stability through law in order to foster economic growth in China. This he summarized as a 'two hands policy': on the one hand, the economy must be developed; and on the other the legal system must be strength-ened."); Lan Cao, *Rights Protection in International Criminal Law and Beyond: Charter Cities*, 27 WM. & MARY BILL RTS. J. 717, 725–26 (2019) ("China created copycat Hong Kongs first in the nearby city of Shenzhen, and then in other special economic zones (SEZs) along the western and northern parts of the Pacific coast, unleashing a great export boom that lifted an estimated 100 million Chinese above the one-dollar-a-day subsistence.").

297. PAUL ROMER, CTR. FOR GLOBAL DEV., TECHNOLOGIES, RULES, AND PROGRESS: THE CASE FOR CHARTER CITIES 4 (2010), https://www.cgdev.org/sites/default/files/1423916_file_TechnologyRulesProgress_FINAL.pdf [<https://perma.cc/7F6F-XY72>].

298. Stephen Cornell & Joseph P. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't*, in RESOURCES FOR NATION BUILDING: GOVERNANCE, DEVELOPMENT, AND THE FUTURE OF AMERICAN INDIAN NATIONS 16 (Miriam Jorgensen & Stephen Cornell eds., 2006), https://www.honigman.com/media/site_files/111_imgimgjopna_2005-02_Approaches.pdf [<https://perma.cc/4PTV-FF47>] ("Where cultural match is high, economic development tends to be more successful.").

299. See *United States v. Shoshone Tribe*, 304 U.S. 111, 113 (1938) ("The Indians agreed that they would make the reservation their permanent home."); Treaty of Fort Laramie, U.S.-Sioux, Apr. 29, 1868, art. XV ("The Indians herein named agree that when the agency house or other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere . . ."); Treaty of Fort Sumner, U.S.-Nav., June 1, 1868, art. XIII ("The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home . . .").

home lies in their ability to foster and sustain economic growth. After all, reservations will be an undesirable domicile without continued economic opportunities,³⁰⁰ and Indian country's Kafkaesque legal system keeps businesses from investing on tribal land.³⁰¹ The federal regulatory morass must be cleared in order for tribes to control their economies.³⁰² None other than President Andrew Jackson—the most anti-Indian president in U.S. history³⁰³—believed Indians should be able govern reservations with minimal federal involvement.³⁰⁴ This will allow tribes to experiment with new rules, blending their traditional commercial practices with the modern world.³⁰⁵ Moreover, the application of tribal law furthers

300. Associated Press, *Choctaw Tribe Has Risen from Poverty to Economic Success*, HERALD-TRIB. (June 29, 2003, 3:06 AM), <https://www.heraldtribune.com/article/LK/20030629/news/605214974/SH> [<https://perma.cc/TJA8-TEYZ>] (“Tribal members, drawn by better living conditions and by jobs, began returning to the reservation, tripling tribal membership to 9,000.”).

301. See Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 3 (2008) (“Substantial economic development in Indian country will not occur without significant infusions of outside capital, but investment by non-Indian and nongovernmental sources is risky, or is perceived to be so, which leads to the same practical result.”).

302. See generally *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 49 (9th Cir. 1981) (“Finally, we note that permitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation providing a homeland for the survival and growth of the Indians and their way of life.”); In re General Adjudication of All Rights, 35 P.3d 68, 76 (Ariz. 2001) (“Just as the nation’s economy has evolved, nothing should prevent tribes from diversifying their economies if they so choose and are reasonably able to do so. The permanent homeland concept allows for this flexibility and practicality.”).

303. Gale Courey Toensing, *Indian-Killer Andrew Jackson Deserves Top Spot on List of Worst US Presidents*, INDIAN COUNTRY TODAY (Sept. 10, 2017), <https://newsmaven.io/indiancountrytoday/archive/indian-killer-andrew-jackson-deserves-top-spot-on-list-of-worst-us-presidents-q-Qg-O3JJUCE1bdhzyeS-A> [<https://perma.cc/H9CH-KYKG>]; Eli Rosenberg, *Andrew Jackson Was Called Indian Killer. Trump Honored Navajos in Front of His Portrait*, WASH. POST (Nov. 28, 2017, 12:35 PM), <https://www.washingtonpost.com/news/retropolis/wp/2017/11/28/andrew-jackson-was-called-indian-killer-trump-honored-navajos-in-front-of-his-portrait/> [<https://perma.cc/99YA-4NNG>].

304. *December 8, 1829: First Annual Message to Congress*, U. VA.: MILLER CTR., <https://millercenter.org/the-presidency/presidential-speeches/december-8-1829-first-annual-message-congress> [<https://perma.cc/2CR8-877G>] (“As a means of effecting this end I suggest for your consideration the propriety of setting apart an ample district west of the Mississippi, and without the limits of any state or territory now formed, to be guaranteed to the Indian tribes as long as they shall occupy it, each tribe having a distinct control over the portion designated for its use. There they may be secured in the enjoyment of governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes.”).

305. See generally Gavin Clarkson, *Tribal Bondage: Statutory Shackles and Regulatory Restraints on Tribal Economic Development* 20 (Univ. of Mich. John M. Olin Ctr. for L. & Econ., Paper #06-006), <https://www.law.umich.edu/centersandprograms/lawandeconomics/abstracts/2006/Documents/06-006clarkson.pdf> [<https://perma.cc/7WBD-XE6D>] (“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.”).

the United States' Indian policy of tribal self-determination. Tribal law is the answer to Indian country's economic doldrums.

CONCLUSION

In debates surrounding amendments to the Indian trader laws in 1876, Congressman Martin Magninis posited:

What would be thought if the Government were to establish such a system of trade in all our villages and give to one or more traders the right to establish the prices at which goods should be sold and the rates which the working-man should receive for the product of his labor? How long would the people of this country stand it? Why should not the Indians have the benefit of that competition which everywhere is the best regulator of prices?³⁰⁶

Congressman Magninis also noted, "The history of American trade with the Indians is not a record that we can be peculiarly proud of."³⁰⁷

Over a century has passed since Congressman Magninis's remarks. Much has changed in the United States, including the nation's Indian policy. Assimilation was the Indian policy of Congressman Magninis's day. Self-determination is the United States' current Indian policy. Nonetheless, the outmoded, ineffective, and racist laws that hamstrung Indians in Congressman Magninis's era continue to undermine tribal economies.

The complexities that accompany restrictions on tribal trust land and Indian trader laws scare non-Indian investors away from Indian country.³⁰⁸ There is no logical reason why opening a hamburger stand on a reservation should require the federal government's blessing.³⁰⁹ Moreover, the federal government has a ghastly record in the realm of Indian economic development and resource

306. *Rockbridge v. Lincoln*, 449 F.2d 567, 574 (9th Cir. 1971).

307. *Id.*

308. See U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFS., IDENTIFYING ECONOMIC PRIORITIES IN INDIAN COUNTRY: TRANSCRIPT OF TRIBAL CONSULTATION 52–53 (Aug. 22, 2017), https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/raca/pdf/08-22-17.Portland%20OR%20Transcript_Indian%20Traders%2025%20CFR%20140.pdf [<https://perma.cc/59ZZ-2234>].

309. See *id.* at 69; see also Letter from Lance Morgan, CEO, Ho-Chunk, Inc., to Off. of the Assistant Sec'y – Indian Affs. 1 (Aug. 30, 2017), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/15%20-%20Ho-Chunk%20Inc.pdf> [<https://perma.cc/9469-7LD4>].

management.³¹⁰ Red tape is not the obstacle to tribal economic development; rather, the tape is white, and it needs to be cut.

310. AM. INDIAN POL'Y REV. COMM'N, AMERICAN INDIAN POLICY REVIEW COMMISSION FINAL REPORT 339 (1977), <http://files.eric.ed.gov/fulltext/ED164229.pdf> [<https://perma.cc/6ALF-JXP8>] (noting the agreements by the federal government on behalf of tribes are “among the poorest agreements ever made”); *see also* Terry L. Anderson, *Presidential Medal of Freedom Should Come with Freedom for American Indians*, FORBES (Nov. 22, 2016), <https://www.forbes.com/sites/realspin/2016/11/22/presidential-medal-offreedom-should-come-with-freedom-for-american-indians/#797109594e5c> [<https://perma.cc/A3FM-4TGE>] (“The suit alleged that the federal government as the trustee for Indian lands had withheld and even lost more than \$150 billion received for oil, timber, mineral and other leases of Indian lands. Ultimately the suit grew into a class action claim with as many as 500,000 plaintiffs claiming a federal liability of \$176 billion.”); Jerry Reynolds, *Navajo Win Another Round over Peabody*, NBC NEWS (May 5, 2004, 4:45 PM), http://www.nbcnews.com/id/4908465/ns/us_news-life/t/navajo-win-another-round-over-peabody/#.Xb-YGehKjIU [<https://perma.cc/3CCY-NP27>] (noting the Secretary of the Interior refused to increase Navajo Nation coal royalties after a private meeting with Peabody Coal representatives).

