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Sovereign Resilience: Reviving Private-Sector Economic Institutions in Indian Country

Robert J. Miller

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Sovereign Resilience: Reviving Private-Sector Economic Institutions in Indian Country

*Robert J. Miller**

CONTENTS

I. INTRODUCTION	1332
II. CURRENT ECONOMIC CONDITIONS IN INDIAN COUNTRY	1335
III. TRADITIONAL AMERICAN INDIAN PRIVATE-SECTOR INSTITUTIONS	1339
A. Private Rights in Real Property	1341
B. Personal Property	1347
C. Trade	1349
D. Native Business Skills	1353
E. Indian Currencies.....	1354
F. Accumulating Wealth.....	1356
IV. REVIVING INDIGENOUS INSTITUTIONS FOR PRIVATE-SECTOR ECONOMIC DEVELOPMENT IN INDIAN COUNTRY	1358
A. Strategies for Private-Sector Development in Indian Country	1359
1. Financial literacy	1359
2. Develop human capital.....	1360
3. Create entrepreneurs.....	1362
4. Funding private businesses	1364
5. Tribal and federal Buy Indian acts	1366
6. Legal infrastructure.....	1369
7. Physical infrastructure.....	1373
8. Attracting human and financial capital investments	1376
9. Nonprofit and nongovernmental social welfare organizations.....	1379
B. Lessons from Indian Nations' Economic Development.....	1380
C. Lessons from Eastern Europe and China	1384

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V. THE PRIVATE PROPERTY RIGHTS PANACEA?	1386
A. Private Property Rights Approach.....	1387
B. Allotment and Assimilation Era.....	1391
C. Communally Owned Lands in Scotland.....	1397
VI. CONCLUSION.....	1401

I. INTRODUCTION

American Indians and Indian country¹ are desperately poor. Across the United States, more American Indian families per capita live below the poverty line than any other racial or ethnic group.² Economic conditions are even worse on the more than 300 Indian reservations where unemployment reaches 80–90%, inadequate housing and the absence of housing are at the highest rates anywhere in the United States, and health conditions and life expectancy rates are the worst in America.³ In fact, many commentators, including President Bill Clinton in 1999, have compared reservations to “third-world countries.”⁴

In contrast, before contact with Europeans, most Indian nations and peoples were fairly prosperous and healthy, and had thriving societies that existed for hundreds and thousands of years with well-established governmental and economic systems.⁵ Most Indian peoples supported themselves primarily through agriculture and lived in permanent or semipermanent towns and settlements.⁶ Other tribal peoples were somewhat nomadic, engaging in buffalo hunting or fishing for example, but even these nations and peoples

1. “Indian country” includes all lands within the boundaries of a reservation, no matter who owns it, and all other lands held by tribes and individual Indians if the United States has an ownership interest in the land. 18 U.S.C. § 1151 (2012).

2. See *infra* notes 12–16 and accompanying text.

3. See *infra* notes 12–25 and accompanying text.

4. Brenda Norrell, *Clinton’s New Market Focus on Indian Country*, INDIAN COUNTRY TODAY, May 3, 2000, at A1; Michelle M. Taggart, *Challenging the Traditional View of Tribal Economics*, AM. INDIAN REP., Oct. 1999, at 17; accord John M. Glionna, *Rural Tribe Gives New Meaning to ‘Wireless,’* OREGONIAN, Aug. 12, 2001, at A25, A29 (citing Yurok tribal chairwoman that her people live in third-world conditions).

5. E.g., ROBERT J. MILLER, RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 9–23 (2012); Richard H. Steckel & Joseph M. Prince, *Nutritional Success on the Great Plains: Nineteenth-Century Equestrian Nomads*, 33 J. INTERDISC. HIST. 353, 362–67 (2003).

6. See *infra* notes 28–37 and accompanying text.

lived what are called “seasonal rounds” and traveled annually to identical locations to live, harvest fish runs and animal migrations, and take ripening roots, nuts, and berries.⁷ These peoples were not nomads in the sense of being lost and wandering aimlessly about. All Indians pursued economic activities and created the foods and resources they needed to survive in a systematic and intelligent manner.

Indian nations and societies also developed governmental institutions that controlled their economic activities and rights. Tribal peoples had well-established legal rules that recognized private property rights in, for example, the ownership of homes, tools, art, crops, horses, captured animals, fish, and land.⁸ Individual American Indians also conducted extensive trade across the continent and at regularly scheduled trade fairs that were held annually at various locations and tribal towns. For example, in 1804–06, Lewis and Clark were impressed by the Indian trade they observed during their expedition—especially the trade and objects for sale at the Mandan and Hidatsa villages in modern-day North Dakota and The Dalles in modern-day Oregon.⁹ William Clark recorded in 1806 that The Dalles “is the Great Mart of all this Country.”¹⁰ This trade was carried on by individual Indians through their own private initiative, manufacturing, and economic efforts to earn “profits” to support themselves and their families by producing, selling, and enjoying necessary and luxury products.

In light of the current poverty and negative economic and social conditions prevalent on most reservations, tribal governments are heavily focused on economic development today. But one tribal institution that I fear has been overlooked by almost all Indian nations, the federal government, and reservation communities is the historic institution of the tribal/reservation private-sector economy. It is long overdue for Indian peoples and governments to revive their traditional institutions that promoted and protected

7. See *infra* notes 35–37 and accompanying text.

8. See *infra* notes 33–79, 115–125 and accompanying text.

9. 12 SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS 395, 403 (Deward E. Walker, Jr. ed., 1998) (stating that Lewis and Clark observed extensive trade at The Dalles in dentalia, salmon, horses, roots, dried fish, buffalo robes, plains clothing, and other products).

10. William Clark, *Journal Entry (Apr. 16, 1806)*, in 7 THE JOURNALS OF THE LEWIS & CLARK EXPEDITION 129 (Gary E. Moulton ed., 1991).

private economic activities, and to look to their historical roots and traditions of individual Indian and Indian family economic development efforts. Thus, this Article is not arguing for some new or radical idea to address the negative economic conditions in Indian country. Instead, this Article is calling for Indian nations and Native Americans to revive their historical and traditional customs, laws, values, behaviors, structures, and mechanisms for engaging in economic activities and to restore their institutions and legal regimes that promoted, supported, and protected Indian individual and family economic activities.

This endeavor will not be easy because Indian country is proceeding from such a low economic baseline and such dire poverty and deficits. Creating private-sector economies on reservations will take the intelligent and coordinated efforts of tribal governments, Indian individuals, reservation communities, the United States, and nonprofit organizations. Indian nations and Indians will have to revive their private business skills, their legal regimes for promoting and protecting private economic activities, and their historic support for reservation-based entrepreneurs and businesses. The upside to such efforts is limitless, and success in this field will create untold benefits for reservation communities and economies, individual Indians, families, and their nations.¹¹ Creating functioning reservation-based, private-sector economies will go a long way toward diversifying economic activities on reservations and will benefit everyone as the “multiplier effect” of keeping money circulating and re-circulating in Indian country creates more businesses, more jobs, more income, and better conditions for everyone. There can be no higher goal than to improve the living conditions on reservations, guarantee the future livability of reservations as Indian homelands, and, ultimately, ensure the continued existence of Indian nations and peoples. These improvements will only occur if tribal governments and Indian peoples can revive their traditional institutions that support private-sector

11. See, e.g., Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 76, 84 (2006) (stating that firms create “shared value” – value for both business and society); JANE NELSON, INT’L BUS. LEADERS FORUM, ECONOMIC MULTIPLIERS: REVISITING THE CORE RESPONSIBILITY AND CONTRIBUTION OF BUSINESS TO DEVELOPMENT 3 (Policy Paper No. 4, 2003) (arguing that private business activities create numerous “multiplier effects” that provide beneficial social and economic development for the communities and areas where they operate).

economic activities. Needless to say, without some minimal level of economic activities, jobs, and money in Indian country, reservations will not be sustainable homelands for Indian nations, Indian peoples, and Indian cultures into the future.

Part II briefly lays out the current depressed state of economic conditions in Indian country and demonstrates the crying need for tribal governments and individual Indians to take dramatic steps to alleviate them. Part III then details the historical and traditional institutions of Indian private economic activities that supported native nations and Indian peoples for hundreds and thousands of years. Part IV examines how Indian nations, individuals, and organizations can revive their institutions to promote private-sector, reservation-based economies. Part V takes on the currently popular private property rights cure for economic conditions in Indian country. Lastly, Part VI concludes with my opinions on the absolute imperative that tribal nations and American Indians improve their economic conditions in any way possible. Redeveloping and reviving traditional private-sector economies and the tribal institutions that promoted, supported, and sustained Indians for centuries are efficient and effective methods to pursue the laudable goal of ensuring reservations as Indian and Indian-nation homelands for the centuries and generations yet to come.

II. CURRENT ECONOMIC CONDITIONS IN INDIAN COUNTRY

The desperate economic conditions that currently exist in Indian country highlight the crucial need for Indian nations and Indian peoples to correct these issues by building institutions that create and support functioning reservation economies. As already stated, if Indian families cannot attain some modest income levels, and produce adequate housing and education services on reservations, then Indian country will no longer be a sustainable place for Indian governments, cultures, and peoples to survive and thrive.

The employment rates across Indian country are uniformly bad. A 2013 American Indian labor report from the U.S. Department of the Interior showed only a 49-50% full- or part-time employment rate for American Indians sixteen or older who lived on or near

reservations.¹² Thus, fully half of Indian peoples living on or near reservations were unemployed. In contrast, the United States unemployment rate was below 4% as of June 2018.¹³ In addition, many other studies and reservations report unemployment rates as high as 90% on some reservations.¹⁴ It is difficult to imagine how a society and community can exist with such horrific unemployment. Is it any wonder that many reservations suffer from the social pathologies imposed by poverty? American Indians who live in urban areas also suffer from a lack of jobs, income, and family wealth, and furthermore experience home ownership at rates that are far below United States averages.¹⁵

With these statistics in mind, it is no surprise that the percentage of American Indian families living below the poverty line is higher than any other ethnic or racial group in the United States.¹⁶

12. U.S. DEP'T OF THE INTERIOR, OFFICE OF THE ASSISTANT SEC'Y-INDIAN AFFAIRS, 2013 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT 10 (2014), <https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc1-024782.pdf>. Earlier federal reports found similar rates of employment on reservations. U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, 2003 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT, at ii (2003), <https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc-001777.pdf>; U.S. DEP'T OF THE TREASURY CMTY. DEV. FIN. INSTS. FUND, THE REPORT OF THE NATIVE AMERICAN LENDING STUDY 13-14 (2001), https://www.cdfifund.gov/Documents/2001_nacta_lending_study.pdf; see also Shelly Hagan, *Where U.S. Unemployment Is Still Sky-High: Indian Reservations*, BLOOMBERG (Apr. 5, 2018, 10:30 AM), <https://www.bloomberg.com/news/articles/2018-04-05/where-u-s-unemployment-is-still-sky-high-indian-reservations> (in twenty-seven counties where Indians or Alaska Natives are the majority, two-thirds of the counties had unemployment rates in 2017 above the national average, and nine counties had 10% unemployment or higher; the national jobless rate was 4.1% in February 2018).

13. *Unemployment Rate Rose to 4.0 Percent in June 2018*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (July 11, 2018), <https://www.bls.gov/opub/ted/2018/unemployment-rate-rose-to-4-point-0-percent-in-june-2018.htm>.

14. Glionna, *supra* note 4, at A29 (stating that unemployment on the Yurok reservation is 80%); Richard Read, *Economic Forecast: Gloomy*, OREGONIAN, June 21, 2011, at A1; Richard Read, *With 63% Unemployment, Oregon Tribe Clings to Hope*, OREGONIAN, Dec. 5, 2009, at A1; Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, ATLANTIC (July 30, 2016), <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941> (stating that unemployment is 78% on the Northern Cheyenne Reservation and the BIA reports 46.5% unemployment on the Crow Reservation); Kenneth E. Robbins, *Reflecting on the Numbers: Media Hype Breeds Misperception*, AM. INDIAN REP., Sept. 2000, at 22 (stating that the average reservation unemployment nationwide was 50.42% compared to 6.3% in the United States).

15. Mark Fogarty, *Study: More Data Needed on Urban Indian Issues*, INDIAN COUNTRY TODAY, Apr. 14, 2008, at 17.

16. SUZANNE MACARTNEY ET. AL., U.S. DEP'T OF COMMERCE & U.S. CENSUS BUREAU, ACSBR/11-17, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007-2011, at 2 (2013); MIRIAM JORGENSEN, NATIVE NATIONS INST., ACCESS

As a group, American Indians also have the lowest educational attainment level in the United States.¹⁷ Further, reservation-based Indian families suffer from the highest rates of substandard housing in the United States.¹⁸ And, especially egregious, reservation-based Indians suffer the shortest life spans, highest infant mortality rates, and worst malnutrition rates in the country.¹⁹

Moreover, basic services and infrastructure that most Americans take for granted are missing on many reservations. Adequate roads, clean water, housing, sanitation, telephones, and electricity are in short supply in Indian country.²⁰ A 2001 Department of the Treasury report showed that more than 66% of reservation roads

TO CAPITAL AND CREDIT IN NATIVE COMMUNITIES 4 (2016) (stating that between 2006 and 2010 American Indian poverty rates were 32% compared to 14% for non-natives); Glionna, *supra* note 4 (stating that 85% of Yurok people live below the poverty level); Robbins, *supra* note 14, at 22 (stating that the poverty rate on reservations was 31.6% compared to 6.3% for the rest of the United States).

17. *E.g.*, 143 CONG. REC. S5876 (daily ed. June 17, 1997) (statement of Sen. Domenici) (“[O]ver 50 percent of American Indian fourth graders scored below the basic level in reading proficiency, compared with 42 percent of all students . . . Indian students have the highest dropout rate of any racial ethnic group (36 percent) and the lowest high school completion and college attendance rates of any minority group.”); Raymond Cross, *American Indian Education: The Terror of History and the Nation’s Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 943 (1999) (reporting that over 10% of Indian children are not enrolled in school; over 75% of Indian children are at least one grade behind in school; Indians have a significantly higher high school drop-out rate than other minorities); *see also* Ward Churchill & Winona LaDuke, *Native North America: The Political Economy of Radioactive Colonialism*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 246 (M. Annette Jaimes ed., 1992) (noting that Indians have the lowest level of formal education of any group in the United States).

18. U.S. DEP’T OF HOUSING & URBAN DEV., *ASSESSMENT OF AMERICAN INDIAN HOUSING NEEDS AND PROGRAMS: FINAL REPORT*, at i, xii, 66–67, 76–78, 80 (May 1996) (reporting that Indians have the worst housing problems in the United States; 40% live in substandard housing as compared to 6% of the U.S. population); SAR A. LEVITAN & BARBARA HETRICK, *BIG BROTHER’S INDIAN PROGRAMS—WITH RESERVATIONS* 11–13, 189, 197–98 (1971) (noting BIA and Census figures showing median family income for reservation Indians at about 40% of white families; reservations have “chronically depressed economic conditions” and “substandard housing”); Robbins, *supra* note 14 (stating that reservation housing without plumbing was 20% compared to 1% in the United States).

19. Churchill & LaDuke, *supra* note 17 (claiming reservations have the highest rates of infant death, unemployment, and malnutrition; shortest life expectancy; and lowest per capita incomes in the United States).

20. U.S. DEP’T OF THE TREASURY CMTY. DEV. FIN. INSTS. FUND, *supra* note 12, at 14, 39–40; *see also* *California’s Largest Tribe Deploys 1st White Space Broadband*, NEWS FROM INDIAN COUNTRY, June 2011, at 23; Glionna, *supra* note 4; Norrell, *supra* note 4; Jodi Rave, *U.S. Senators Seek \$2B for Tribes*, MISSOULIAN (Dec. 11, 2008), https://missoulian.com/jodirave/u-s-senators-seek-b-for-tribes/article_416848df-2c2a-5771-b271-f71dcd9d6a04.html; Taggart, *supra* note 4.

were unimproved and caused fatality rates more than four times the national average.²¹ A mere 47% of reservation Indian households had telephones, compared to 94% for non-native rural Americans.²² And only 9% of rural Indian houses had personal computers with a meager 8% having internet access. Furthermore, only 14% of Indian lands had financial institutions. In fact, more than one in six American Indians had to travel over 100 miles to find a bank, and one-third of Indians had to travel at least 30 miles to reach an ATM or bank.²³ A 2008 book reports that Indian housing in general, and reservation housing in particular, is in deplorable condition and that native peoples live in overcrowded conditions and lack adequate plumbing and kitchen facilities at rates that far exceed the national average for Americans.²⁴ The Department of Energy reported in 2000 that 14.2% of Indian homes on reservations had no access to electricity, compared to just 1.4% of U.S. households.²⁵

In light of these statistics, it is understandable why there is a shortage of economic activity on reservations and why there are very few private-sector economies in Indian country. Almost none of the over 300 reservations in the lower forty-eight states, or the more than 200 Alaska Native villages, have functioning private economies. For example, few reservations have large grocery stores or retail outlets, and there is an almost complete absence of businesses where people can obtain the necessities and luxuries of life. In fact, there are very few privately owned businesses on most reservations. Not surprisingly, Indians own private businesses at the lowest rate per capita for any ethnic or racial group in the United States, and the businesses they own produce less income on average than others.²⁶

Conditions such as these demand solutions.

21. U.S. DEP'T OF THE TREASURY CMTY. DEV. FIN. INSTS. FUND, *supra* note 12, at 40.

22. *Id.*; see also Norrell, *supra* note 4; Robbins, *supra* note 14, at 22.

23. U.S. DEP'T OF THE TREASURY CMTY. DEV. FIN. INSTS. FUND, *supra* note 12, at 14, 39-40.

24. HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 253-55, 344 (2008).

25. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, SR/CNEAF/2000-01, ENERGY CONSUMPTION AND RENEWABLE ENERGY DEVELOPMENT POTENTIAL ON INDIAN LANDS ix (2000).

26. U.S. CENSUS BUREAU, STATISTICS FOR ALL U.S. FIRMS BY INDUSTRY, GENDER, ETHNICITY, AND RACE FOR THE U.S., STATES, METRO AREAS, COUNTIES, AND PLACES: 2012 SURVEY OF BUSINESS OWNERS (2012), <https://factfinder.census.gov/bkmk/table/1.0/en/SBO/2012/00>

III. TRADITIONAL AMERICAN INDIAN PRIVATE-SECTOR INSTITUTIONS

American Indian nations and cultures developed and possessed institutions that promoted and supported private economic activities for centuries. “Institutions” include the common-law principles, traditions, behaviors, rights, laws, structures, mechanisms, moral beliefs, practices, customs, and governmental practices and norms of a culture and society.²⁷ As mentioned above, this Article is calling for a revival of historical and traditional customs to promote economic activities rather than a new or radical idea to address the negative economic conditions in Indian country. This Part will briefly highlight the historical evidence regarding Indian private-sector economic activities, successes, and ingenuity.

History demonstrates clearly that the indigenous nations and peoples located in what is now the United States supported themselves for thousands of years with all sorts of private economic activities. Many American Indians engaged in hunter-gatherer activities, but a majority of tribal communities worked in small family groups and through privately initiated individual efforts to grow and create as necessary for their daily needs and to operate manufacturing projects that helped sustain their lives. Indians did not survive in North America for millennia just by living off the natural bounty of the land. In fact, one historian noted that in the 1600s the Indians of the New England area produced 65% of their diet from agriculture.²⁸ When Europeans arrived on this continent,

CSA01/0100000US|0400000US41; see also STATISTICAL RECORD OF NATIVE NORTH AMERICANS 812 (Marlita A. Reddy ed., 2d ed. 1995) (Indian-owned businesses produce smaller amounts of revenue on average than all other racial groups); Mark Fogarty, *Many Indian Entrepreneurs, but Revenue Is Lagging*, INDIAN COUNTRY TODAY, Jan. 5, 2011 (business magazine insert at 16); Felecia Fonseca, *Navajo Nation Reaches Out to Entrepreneurs*, NEWS FROM INDIAN COUNTRY, Mar. 3, 2008, at 13; Courtenay Thompson, *Adviser ‘Stands on Both Sides of River,’* OREGONIAN, May 17, 1998, at C1, C6 (1992 Census shows white Oregonians owned 81.8 businesses per 1000, while Native Americans owned 14.7 businesses per 1000—half the rate for Oregon’s Latinos and African Americans).

27. E.g., SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 9 (1968) (institutions are “stable, valued, recurring patterns of behavior”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1171 (1981); *Institution*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Institution> (last visited Jan. 22, 2019).

28. Thomas R. Wessel, *Agriculture, Indians, and American History*, 50 AGRIC. HIST. 9–10 (1976).

the lives and economies of Indian peoples and nations primarily relied on agriculture and long-distance trade, specialized labor, and manufacturing.²⁹ Clearly then, Indian peoples worked in an organized and intelligent fashion to create the foods and material goods necessary to maintain their lives and families. They also developed, as do all societies, property rights systems to protect the assets and items that individuals and families created. As one professor has noted, “aboriginals everywhere have had sophisticated property rights and trading traditions.”³⁰

Native peoples obviously understood, appreciated, and developed principles that today we call private property rights and entrepreneurship. Historians note that almost all Indian assets were privately owned; “truly communal property was scant” among Indians.³¹ Indian individuals voluntarily participated in producing excess crops, manufacturing goods, and engaging in trade. Indian peoples across North America regularly traded goods near and far for survival and comfort. The extensive trade that took place across the continent for several thousand years was conducted in free-market situations where private individuals voluntarily came together to buy and sell items they had manufactured or amassed

29. Wessel, *supra* note 28, at 9–10, 14; see also PETER C. MANCALL, *VALLEY OF OPPORTUNITY: ECONOMIC CULTURE ALONG THE UPPER SUSQUEHANNA, 1700–1800*, at 39–40, 125 (1991); 15 SMITHSONIAN INST., *HANDBOOK OF NORTH AMERICAN INDIANS: NORTHEAST* 58, 162, 325 (William C. Sturtevant ed., 1978) (noting that Indians in Virginia, Delaware and the Carolinas had well-developed farming; European explorers from 1524, 1605, 1606, and 1614 gave full descriptions of Indian horticulture and were impressed by the extent of farming in New England; corn, beans, sunflowers, tobacco, and squash were found in abundance in New York dating from 1070 A.D.); EDWARD H. SPICER, *CYCLES OF CONQUEST* 9–14, 119, 153, 541 (1962); Linda Barrington, *The Mississippians and Economic Development Before European Colonization*, in *THE OTHER SIDE OF THE FRONTIER: ECONOMIC EXPLORATIONS INTO NATIVE AMERICAN HISTORY* 86 (Linda Barrington ed., 1999); Leonard A. Carlson, *Learning to Farm: Indian Land Tenure and Farming Before the Dawes Act*, in *PROPERTY RIGHTS AND INDIAN ECONOMIES* 67, 70–71 (Terry L. Anderson ed., 1992); Neal Salisbury, *The Indians’ Old World: Native Americans and the Coming of Europeans*, in *AMERICAN ENCOUNTERS: NATIVES AND NEWCOMERS FROM EUROPEAN CONTACT TO INDIAN REMOVAL 1500–1850*, at 5–10 (Peter C. Mancall & James H. Merrell eds., 2000); Vernon L. Smith, *Economy, Ecology, and Institutions in the Emergence of Mankind*, in *OTHER SIDE OF THE FRONTIER*, *supra* at 57, 70–71.

30. Smith, *supra* note 29, at 70.

31. JULIAN H. STEWARD, BUREAU OF AM. ETHNOLOGY, BULLETIN 120: BASIN-PLATEAU ABORIGINAL SOCIOPOLITICAL GROUPS 253 (1938).

and which they exchanged by barter and even sold for exchange mediums that we would call “money” or “currencies.”³²

A. Private Rights in Real Property

At the time of contact with Euro-Americans, the majority of Indian societies lived permanently or semipermanently in towns and villages and supported themselves primarily through farming activities.³³ In the eleventh through thirteenth centuries, for example, some American Indian cities were larger and controlled by more sophisticated societies than European countries of the time.³⁴ Even tribal groups who might be considered nomadic followed “seasonal rounds” in which they moved to nearly identical locations year after year to utilize food sources.³⁵ For example, tribal peoples would move to take advantage of seasonal salmon runs, animal migrations, and ripening wild crops. Many of these peoples also planted domestic crops and returned to harvest them as part of their seasonal rounds.³⁶ These “nomadic” peoples recognized property rights in cultivated and gathered foods, their

32. OTHER SIDE OF THE FRONTIER, *supra* note 29, at 5, 72, 74, 108; RICHARD WHITE, THE ROOTS OF DEPENDENCY: SUBSISTENCE, ENVIRONMENT, AND SOCIAL CHANGE AMONG THE CHOCTAWS, PAWNEES, AND NAVAJOS 184, 198 (1988); CLARK WISSLER, INDIANS OF THE UNITED STATES 37, 39–41 (rev. ed. 1966); Wessel, *supra* note 28, at 9–10, 13–14.

33. E.g., E. RICHARD HART, AMERICAN INDIAN HISTORY ON TRIAL: HISTORICAL EXPERTISE IN TRIBAL LITIGATION 18, 63, 147, 185, 190–91, 193 (2017) (citing the Coeur d’Alene people of modern-day Idaho who lived year-round on Coeur d’Alene Lake, the Hualapai and Pueblos of the Southwest, and the Klamath in southern Oregon); 9 SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS 332 (William C. Sturtevant ed., 1979) (stating that all Pueblo societies were sedentary farmers living in permanent villages).

34. Salisbury, *supra* note 29, at 5–10; see also WILBUR R. JACOBS, DISPOSSESSING THE AMERICAN INDIAN: INDIANS AND WHITES ON THE COLONIAL FRONTIER 5–9, 111 (1972); MANCALL, *supra* note 29, at 39–40, 125; 15 SMITHSONIAN INST., *supra* note 29, at 58, 162; SPICER, *supra* note 29, at 9–14, 153.

35. 7 SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS: NORTHWEST COAST 547, 548 (Wayne Suttles ed., 1990) (stating the Kalapuya lived in permanent villages during winter and during other seasons they lived in transitory camps as they followed their foods); 12 SMITHSONIAN INST., *supra* note 9, at 378, 380, 448–49 (explaining that tribes mostly lived year-round on the Columbia River but moved annually to dig roots and pick huckleberries; they were not nomadic in the sense of wandering in search of food without an established home base and range; they harvested a diverse array of species and resources according to the season; the Klamath and Modocs lived an annual round in tune with seasonal runs of fish, waterfowl, movement of game, and maturing of plant and roots species; and fishing was a year-round activity).

36. JACOBS, *supra* note 34, at 5–9 (commenting that even semi-nomadic tribes planted crops of corn, beans, squash, and tobacco).

hunting and gathering territories, and the home sites they returned to year after year.

Almost all American Indian tribes and societies recognized various forms of permanent and semipermanent usufructuary rights in lands.³⁷ A usufructuary right is the right to use land that belongs to another and is considered a private right under both Anglo-American property law and tribal property rights.³⁸ Most American Indian societies considered land to be communal property of the tribal group. However, tribal governments did not prevent individual citizens and families from acquiring and exercising rights to use specific pieces of land. Under Anglo-American property law, and under tribal property rights systems, usufructuary rights are private property.

There are many examples across history and across tribal nations of the widespread recognition of private usufructuary rights in Indian cultures. Among the Choctaw people of Mississippi, each family had its own small farming plot near its cabin, and “most Choctaws had specific fields marked out within the communally-prepared town lands. . . . A family . . . could take any uncultivated land they thought suitable and hold it as long as they used it.”³⁹ Further, Pawnee women planted corn, beans, melons, and squash in multi-acre plots that had been assigned them by chiefs. The women were then entitled to the lands and crops they produced as long as they wished, but the land would revert to the tribal government upon a woman’s death.⁴⁰ In many other tribes, individual Indians and families who commenced farming, hunting, or trapping on unused lands in effect made those communal lands their own private property when they began individually developing and working them.

37. *E.g.*, TERRY L. ANDERSON, SOVEREIGN NATIONS OR RESERVATIONS? AN ECONOMIC HISTORY OF AMERICAN INDIANS 8 (1995) (acknowledging that Indians always held and recognized private property rights).

38. A “usufruct” is “the legal right of using and enjoying the fruits or profits of something belonging to another.” WEBSTER’S DICTIONARY, *supra* note 27, at 1299.

39. WHITE, *supra* note 32, at 20.

40. ANDERSON, *supra* note 37; MELVILLE J. HERSKOVITS, THE ECONOMIC LIFE OF PRIMITIVE PEOPLES 362 (2d ed. 1952); WHITE, *supra* note 32, at 159; Julian H. Steward, *Ethnography of the Owens Valley Paiute*, 33 AM. ARCHAEOLOGY & ETHNOLOGY 253 (1934).

Indian private use and property rights in communal lands are also demonstrated by the Pueblos of the Southwest, where farming rights were allotted to individuals by tribal leaders.⁴¹ Commentators have characterized these rights for Pueblo and Hopi families and individuals as private property rights to use the lands and to own any improvements they built, including the sophisticated irrigation systems that some native peoples built communally to serve tribal lands.⁴² The Pima Tribe, for example, worked cooperatively to build irrigation systems; village headmen would assign specific farming plots to individuals, and the lands became the permanent property of the assignees and their heirs.⁴³ And the Havasupai Tribe also considered portions of communal tribal lands privately owned by individuals as long as the land was put to a productive use.⁴⁴

The Navajo Nation in the American Southwest also considered agricultural lands as private property that individuals or families claimed by using them.⁴⁵ Modern-day Navajo Nation court cases demonstrate clearly that this type of "ownership" is still recognized by Navajo people and their laws. The Navajo Supreme Court stated, "While it is said that land belongs to the clans, more accurately it may be said that the land belongs to those who live on it and depend upon it for their survival."⁴⁶ Additionally, in 1986, the Navajo Supreme Court also stated:

Land use on the Navajo Reservation is unique and unlike private ownership of land off the reservation. While individual tribal members do not own land similar to off reservation, there exists a possessory use interest in land which we recognize as customary

41. GRAHAM D. TAYLOR, *THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-1945*, at 69-70 (1980).

42. 9 SMITHSONIAN INST., *supra* note 33, at 554-57 (claiming that the Hopis assigned exclusive rights to land to matrilineal clans and the plots were marked by boundary stones); Carlson, *supra* note 29, at 71.

43. 9 SMITHSONIAN INST., *supra* note 33, at 554-57; FOOD, FIBER, AND THE ARID LANDS 58 (William G. McGinnies ed., 1971); Carlson, *supra* note 29, at 70.

44. ANDERSON, *supra* note 37, at 32-34; ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES 13-14* (1970); Carlson, *supra* note 29, at 70-71.

45. HERSKOVITS, *supra* note 40, at 362 (recognizing that among the Navajo, the first person to farm a plot of land retained permanent possession; Navajo marked their land with boundaries and others needed permission even to farm a plot next to it); Carlson, *supra* note 29, at 71.

46. *Tome v. Navajo Nation*, 4 Navajo Rptr. 159, 161 (Navajo D. Ct. 1983).

usage. An individual normally confines his use and occupancy of land to an area traditionally inhabited by his ancestors.⁴⁷

Furthermore, many eastern and southeastern tribes produced the majority of their subsistence by farming, and individuals and families held usufructuary rights to specific lands.⁴⁸ The Creek and Cherokee peoples from the American Southeast farmed their own lands and put their crops into privately owned storehouses.⁴⁹ Moreover, farming plots among native peoples of New England and Virginia “were either owned outright by families or held in usufruct by them.”⁵⁰ In fact, all tribal communities that practiced agriculture “definitely recognized exclusive land use.”⁵¹

In addition, American Indian institutions, laws, and cultures recognized other types of private rights in land than just agriculture. Indian nations that relied heavily on fishing developed and protected individual and private property rights in these resources. Columbia River salmon fishing sites of man-made wooden platforms or well-located rocks were individually and family-owned properties that were passed down by established inheritance principles.⁵² Others could fish at these sites only with permission from the owner.⁵³ Other native cultures also developed

47. *In re Estate of Wauneka Sr.*, 5 Navajo Rptr. 79, 81 (Navajo 1986).

48. Carlson, *supra* note 29, at 70–71.

49. DEBO, *supra* note 44, at 13–14.

50. 15 SMITHSONIAN INST., *supra* note 29, at 84.

51. ANDERSON, *supra* note 37, at 32–34; Carlson, *supra* note 29, at 70–71; *accord* DEBO, *supra* note 44, at 13–14.

52. *United States v. Washington*, 384 F. Supp. 312, 353 (W.D. Wash. 1974) (“Generally, individual Indians had primary use rights in the territory where they resided.”), *aff’d*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 185 (1992); Bruce L. Benson, *Customary Indian Law: Two Case Studies*, in *PROPERTY RIGHTS AND INDIAN ECONOMIES*, *supra* note 29, at 27 (“Indians had well developed legal systems that emphasized individual rights and individual ownership.”); Robert Higgs, *Legally Induced Technical Regress in the Washington Salmon Fishery*, in *RESEARCH IN ECONOMIC HISTORY* 59–60 (Paul Uselding ed., 1982) (positing that some tribes recognized individual ownership of river fishing spots and platforms on the Columbia River and reef locations in the ocean were inheritable individual properties passed from father to son); Leslie Spier & Edward Sapir, *Wishram Ethnography*, 3 U. WASH. PUBLICATIONS ANTHROPOLOGY 151, 175 (1930) (right to fish particular localities was owned by families among the Wasco, Cascades, and Wishram peoples). That is still the case on the Hoopa Valley Reservation. MILLER, *RESERVATION “CAPITALISM,” supra* note 5, at 14.

53. WILKINSON, *supra* note 52, at 185.

principles of private property that included the right to exclude others from communally owned lands.⁵⁴ These kinds of property rights were firmly established in many tribes that are now located in Oregon and California, for example. Owners could pass on their privately owned rights by inheritance, and fishing sites could be rented out or sold by the owners.⁵⁵ One historian commented that “Indians had well developed legal systems that emphasized individual rights and individual ownership.”⁵⁶ A U.S. judge even wrote in 1974, “Generally, individual Indians had primary use rights in the territory where they resided.”⁵⁷ Moreover, these principles still apply in modern times: the Chairman of the Hoopa Valley Tribe in California stated in 2009 that many fishing sites on the Hoopa Reservation, which is owned in common by the Tribe, are still held today as private property by Hoopa individuals and families.⁵⁸

The Inuits in modern-day Alaska and Canada, and other tribes, also enforced precise concepts of private ownership in tribally owned hunting and fishing territories. Some Canadian tribes controlled overhunting by assigning exclusive use rights in territories to individuals.⁵⁹ For instance, the James Bay Cree Tribe and the Montagnais

54. 7 SMITHSONIAN INST., *supra* note 35, at 536–37 (positing that fishing areas were traditionally controlled by a group); Peter Collings, *The Cultural Context of Wildlife Management in the Canadian North*, in CONTESTED ARCTIC: INDIGENOUS PEOPLES, INDUSTRIAL STATES, AND THE CIRCUMPOLAR ENVIRONMENT 22 (Eric Alden Smith & Joan McCarter eds., 1997); Andrew P. Vayda, *Pomo Trade Feasts*, in TRIBAL AND PEASANT ECONOMIES 494, 495–96, 498 (George Dalton ed., 1967) (claiming that some California tribes allotted sections of rivers on tribal lands to individuals who owned all the fish caught in that section).

55. STEPHEN DOW BECKHAM, ETHNOHISTORICAL CONTEXT OF RESERVED INDIAN FISHING RIGHTS: PACIFIC NORTHWEST TREATIES, 1851–1855, at 40–41 (1984) (“[For Oregon tribes] fishing stations were highly prized and passed by inheritance. . . . No one else was allowed to fish at a particular station without permission.”); E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN 52, 55 (1954) (acknowledging that California tribes on the Klamath River had exclusive use of fishing spots and would rent them out); Vayda, *supra* note 54, at 498 (noting that some California Indians traded clam shell beads to other Indians for the right to fish at certain river sites).

56. Benson, *supra* note 52, at 27.

57. *Washington*, 384 F. Supp. at 353.

58. Interview with Clifford Lyle Marshall, Chairman Hoopa Valley Tribe (March 19, 2009), in MILLER, RESERVATION “CAPITALISM,” *supra* note 5, at 14; accord Benson, *supra* note 52, at 27; Smith, *supra* note 29, at 71; Vayda, *supra* note 54, at 495–96, 498.

59. Eleanor Leacock, *The Montagnais’ Hunting Territory and the Fur Trade*, 73 AM. ANTHROPOLOGIST 56 (1954); Julius E. Lips, *Naskapi Law*, in TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY 379 (1947); John C. McManus, *An Economic Analysis of Indian Behavior*

recognized exclusive individual ownership of fishing sites. Tribes that became involved in the European fur trade also developed principles of private property in rivers to control overharvesting and allotted hunting territories to specific individuals.⁶⁰

The Nootka peoples of the Pacific Northwest “carried the concept of ownership to an incredible extreme.”⁶¹ Under the laws of these cultures, individuals held as “privately owned property”⁶² land, houses, clam beds, beaches, salvage rights, river fishing spots, and even fishing locations and sea lion rocks in the ocean.⁶³ The Tlingit Tribe in modern-day Alaska also protected private rights in hunting grounds, salmon streams, sealing rocks, and the accumulation of individual wealth, and most of these rights were inheritable.⁶⁴

In the vast majority of Indian nations, individuals and families privately owned their housing and their home sites.⁶⁵ Many tribal cultures also recognized exclusive property rights to valuable plants such as berry patches and fruit and nut trees.⁶⁶ The property

in the North American Fur Trade, 32 *TASKS ECON. HIST.* 36, 39 (1972); Ronald L. Trosper, *That Other Discipline: Economics and American Indian History*, in *NEW DIRECTIONS IN AMERICAN INDIAN HISTORY* 210, 212 (Colin G. Calloway ed., 1988).

60. 6 *SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS* 181 (William C. Sturtevant et al. eds., 1981) (“[U]sfructuary rights to trap in specific territories became established.”); see also 15 *SMITHSONIAN INST., supra* note 29, at 84; Leacock, *supra* note 59, at 56; McManus, *supra* note 59, at 39.

61. Phillip Drucker, *The Northern and Central Nootkan Tribes*, 144 *BUREAU AM. ETHNOLOGY BULL.* 247 (1951).

62. *Id.*

63. *Id.*; Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 *AM. INDIAN L. REV.* 165 (2001); see also ELIZABETH COLSON, *THE MAKAH INDIANS: A STUDY OF AN INDIAN TRIBE IN MODERN AMERICAN SOCIETY* 4 (1953) (noting that Makah family heads owned property rights in “fishing grounds,” “coastal strips,” and “ceremonial privileges”); FRANCES DENSMORE, *NOOTKA AND QUILEUTE MUSIC* 3 (1939) (stating that men and families owned fishing sites, land rights, water rights, and salvage rights to beached whales; these rights were inheritable); ALAN D. MCMILLAN, *SINCE THE TIME OF THE TRANSFORMERS: THE ANCIENT HERITAGE OF THE NUU-CHAH-NULTH, DITIDAHT, AND MAKAH* 13–14, 16, 22 (1999) (explaining that families owned (1) territorial boundaries that ran into the ocean for halibut banks and sea lion rocks, (2) salmon streams, (3) clam beds, and (4) salvage rights to beaches).

64. KALERVO OBERG, *THE SOCIAL ECONOMY OF THE TLINGIT INDIANS* 35 (1973).

65. *Id.* at 55; 7 *SMITHSONIAN INST., supra* note 35, at 418; Drucker, *supra* note 61.

66. COLSON, *supra* note 63; OBERG, *supra* note 64, at 55; Carlson, *supra* note 29, at 71; Ralph M. Linton, *Land Tenure in Aboriginal America*, in *THE CHANGING INDIAN* 42, 47–48 (Oliver LaFarge ed., 1942) (noting some California tribes recognized property rights to berry patches, and women who found sweet clover or cabbage had the exclusive harvesting

rights recognized in these assets were inheritable and some could even be bought and sold.⁶⁷

Indian nations, cultures, and their institutions recognized and protected a wide array of individually and family-owned private rights in land, even though the lands were owned in common by the government and community. These indigenous property systems encouraged entrepreneurial, individually directed, and privately owned food production and manufacturing activities on specific pieces of land. Individuals and their families owned the fruits of their labors as private property and left their property to their descendants under well-established tribal laws and customs. Clearly, native cultures in North America developed and enforced institutions of private property rights in land and benefited individually from exercising those rights.

B. Personal Property

All American Indian cultures recognized and protected private property rights in assets other than land. For example in some tribes, in a form of intellectual property law, individuals and families owned exclusive rights to images, dances, marriage ceremonies, names, stories, songs, medicines, masks, and rituals.⁶⁸ These property rights were inheritable. All Indian peoples owned as private and personal property their clothing, cooking utensils, housing, animals, tools, weapons, canoes, handicraft and trade goods, and the foods they produced.⁶⁹ These items were privately produced and owned by individuals and families. They were not

rights); Robert H. Lowie, *Ethnographic Notes on the Washo*, in AMERICAN ARCHAEOLOGY AND ETHNOLOGY 301, 303 (1940) (observing that families owned nut trees and seed patches and marked their ownership "by lines of rocks").

67. ANDERSON, *supra* note 37, at xiv-xv, 24; K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 213-14, 216-20, 233 (1941); *OTHER SIDE OF THE FRONTIER*, *supra* note 29, at 71, 108; 9 SMITHSONIAN INST., *supra* note 33, at 554-57; Linton, *supra* note 66, at 47-48; Carlson, *supra* note 29, at 71.

68. COLSON, *supra* note 63, at 4; McMILLAN, *supra* note 63, at 21, 33; OBERG, *supra* note 64, at 55, 62-63, 79-83, 91-94; 7 SMITHSONIAN INST., *supra* note 35, at 418; Drucker, *supra* note 61, at 247.

69. ANDERSON, *supra* note 37, at 40; HERSKOVITS, *supra* note 40, at 372-73, 376; OBERG, *supra* note 64, at 62-63, 79-83, 91-94; Benson, *supra* note 52, at 34.

tribal or communal property but were “clearly owned by the individual.”⁷⁰

The ownership of horses demonstrates clearly how Indian cultures viewed private property and economic affairs. After the arrival of the horse, some formerly sedentary agricultural tribal societies adopted semi-nomadic lifestyles in which increased buffalo hunting played a prominent and profitable role. Horses were always items of privately owned personal property. In fact, in 1855 the Cayuse people owned up to 20,000 horses with individual Cayuses owning up to 1000 horses each, and they would leave their herds to their children under tribal inheritance laws.⁷¹ Among the Pawnee, the horse “took its place as a peculiar form of property . . . [and] began to denote wealth and created the beginnings of a social standing somewhat apart from the older distinctions of birth, knowledge, and skill. Horses were personal property, and they remained unevenly distributed.”⁷² Additionally, private property rights in horses were so well protected that in some tribal societies an individual retained rights to a horse even when it was recaptured from others.⁷³ Well-trained horses were very valuable private assets, and Indians engaged in the entrepreneurial activity of leasing them for payments of up to half of the game captured or booty acquired by the lessee.⁷⁴ In addition, principles of private property gained by personal initiative are well demonstrated by the fact that even in communal hunting, raiding, and warfare activities, most tribes recognized and protected individual rights in captured items.⁷⁵

Big animal hunting also provides further examples of Indian private property rights. These kinds of food production activities and the ancillary products the animals provided were the main

70. HERSKOVITS, *supra* note 40, at 376.

71. Interview with Antone Minthorn, Chairman, Confederated Tribes of the Umatilla Indian Reservation (March 31, 2009), in MILLER, RESERVATION “CAPITALISM,” *supra* note 5, at 15–16.

72. WHITE, *supra* note 32, at 180.

73. LLEWELLYN & HOEBEL, *supra* note 67, at 225.

74. ANDERSON, *supra* note 37, at 43, 62; LLEWELLYN & HOEBEL, *supra* note 67, at 229; Alan M. Klein, *Political Economy of the Buffalo Hide Trade: Race and Class on the Plains*, in THE POLITICAL ECONOMY OF NORTH AMERICAN INDIANS 133, 141–42 (John H. Moore ed., 1993).

75. LLEWELLYN & HOEBEL, *supra* note 67, at 223, 233; WHITE, *supra* note 32, at 187; Benson, *supra* note 52, at 34; Carlson, *supra* note 29, at 71; Klein, *supra* note 74, at 141.

subsistence and economic activity for Plains Indians and other tribal peoples for centuries. These private endeavors also made some individuals wealthy. The wealth created by successful buffalo hunting and whaling, for example, was demonstrated by having large families, amassing ample surpluses of material items, and increasing community influence.⁷⁶ Individuals worked hard to acquire the skills and assets to succeed in these dangerous endeavors.

Indians from many nations also engaged in specific occupations other than farming or hunting in which they sold their personal services and expertise. These individuals gained private rights and profits from their efforts. For example, the Makah Tribe had specific careers and occupations that people aspired to because there was a "degree of specialization, into whale hunters, seal hunters, doctors, gamblers, warriors and fishermen."⁷⁷ And as one federal court noted, "the Makah enjoyed a high standard of living [from] their marine resources and extensive marine trade."⁷⁸ In other tribal cultures, people specialized in professions such as healers, shamans, manufacturers, singers, and songwriters and were paid fees for their services.⁷⁹ These private and voluntary economic endeavors provided income and support for individuals and their families. Without dispute, a wide variety of tribal cultures, across what is now the United States, promoted and protected institutions of private property rights in personal property. Indians worked diligently and intelligently to acquire these rights and the profits needed to support themselves and their families.

C. Trade

All American Indian peoples engaged in trade, barter, and the buying and selling of goods. Indians produced, traded, and sold their surplus foods and manufactured items to other peoples near and far. Indian communities organized large fairs and markets that

76. ANDERSON, *supra* note 37, at 41, 62; 11 SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS 315 (William C. Sturtevant ed., 1986).

77. COLSON, *supra* note 63, at 4; *see also id.* at 249-50.

78. *United States v. Washington*, 384 F. Supp. 312, 364 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. (1976).

79. HERSKOVITS, *supra* note 40, at 123-24; OBERG, *supra* note 64, at 94-95; 10 SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS 714-15 (William C. Sturtevant ed., 1983); 11 SMITHSONIAN INST., *supra* note 76, at 315-16.

were held at regularly scheduled locations and times across North America. In fact, trade networks crisscrossed North America and goods were often traded hundreds or even a thousand miles from their original source.⁸⁰ For example, seashells from the Gulf of Mexico, Southeast Atlantic, Gulf of California, and Pacific Ocean have been found a thousand miles from where they originated.⁸¹ These trading activities were controlled and motivated by private property rights and individual initiative. The well-established principles of trade and the trade networks that developed demonstrate the recognition and protection Indian cultures and institutions gave to private property rights and entrepreneurial activities.⁸²

Thousands of years before Europeans arrived in North America, long-distance trade networks were developed to serve indigenous peoples' interests in acquiring necessary and luxury items.⁸³ Trade developed in all kinds of products including food, manufactured items, stones, flint, copper, shells, and minerals.⁸⁴ Indians began using copper to make tools and beads for their own use and for the trade market.⁸⁵ Other minerals including

80. JACOBS, *supra* note 34, at 42; MANCALL, *supra* note 29, at 24; OBERG, *supra* note 64, at 105, 111–12; GEORGE QUIMBY, INDIAN CULTURE AND EUROPEAN TRADE GOODS 29 (1966); 10 SMITHSONIAN INST., *supra* note 79, at 8, 712–13; 9 SMITHSONIAN INST., *supra* note 33, at 79, 201; 7 SMITHSONIAN INST., *supra* note 35, at 150, 208–09, 560, 580; THE ENCYCLOPEDIA OF NATIVE AMERICAN ECONOMIC HISTORY 247 (Bruce E. Johansen ed., 1999) [hereinafter ECONOMIC ENCYCLOPEDIA]; James G. Swan, *The Indians of Cape Flattery*, in XVI SMITHSONIAN CONTRIBUTIONS TO KNOWLEDGE 30–32, 36 (1870) (The Makah were well-located as a market for southern to northern exchange, and they traded 5000 to 16,000 gallons of whale oil annually.); Bruce G. Trigger & William R. Swagerty, *Entertaining Strangers: North America in the Sixteenth Century*, in 1 THE CAMBRIDGE HISTORY OF THE NATIVE AMERICAN PEOPLES OF NORTH AMERICA 329 (1996) (Eastern North America was crisscrossed with Indian trade routes.).

81. JOHN C. EWERS, PLAINS INDIAN HISTORY AND CULTURE 24–25 (1997); OBERG, *supra* note 64, at 105, 111–12; LYNDA NORENE SHAFFER, NATIVE AMERICANS BEFORE 1492: THE MOUND BUILDING CENTERS OF THE EASTERN WOODLANDS 25 (1992); 15 SMITHSONIAN INST., *supra* note 29, at 45; 10 SMITHSONIAN INST., *supra* note 79, at 712–13; 9 SMITHSONIAN INST., *supra* note 33, at 79, 201; 7 SMITHSONIAN INST., *supra* note 35, at 150, 208–09, 560, 580.

82. MANCALL, *supra* note 29, at 47–48; OBERG, *supra* note 64, at 105; 15 SMITHSONIAN INST., *supra* note 29, at 83; 9 SMITHSONIAN INST., *supra* note 33, at 25–26, 71–72, 127–28, 149; 7 SMITHSONIAN INST., *supra* note 35, at 418; Patricia C. Albers, *Symbiosis, Merger, and War: Contrasting Forms of Intertribal Relationship Among Historic Plains Indians*, in THE POLITICAL ECONOMY OF NORTH AMERICAN INDIANS 94, 99, 101 (John H. Moore ed., 1993); Salisbury, *supra* note 29, at 447.

83. SHAFFER, *supra* note 81, at 21, 44–45; Salisbury, *supra* note 29, at 440, 444.

84. SHAFFER, *supra* note 81, at 21–22, 35–37; Salisbury, *supra* note 29, at 440, 444.

85. Salisbury, *supra* note 29, at 440.

chalcedony, quartz, galena, and hematite were traded in significant amounts all along the Mississippi River.⁸⁶ Jewelry and luxury items were manufactured and traded. Silver from Ontario, chert, ceramic figurines, carved soapstone pipes, mica, shell beads, animal teeth, and turtle shells were also traded.⁸⁷

Indian nations from the American Southwest manufactured and traded food, turquoise, jewelry, and masks, which they produced from materials they had grown and mined, to indigenous peoples in Mexico for birds, feathers, and copper bells, and to others in the Gulf of California for shells.⁸⁸ In addition, the extensive and well-established Indian trading networks spread new Euro-American goods to many Indians long before they actually encountered Euro-Americans. In fact, war axes that the Lewis and Clark expedition made and very successfully traded for food supplies at the Mandan and Hidatsa villages in modern-day North Dakota ended up very quickly far to the west in Nez Perce country via the native trade networks.⁸⁹ Indians had no problems incorporating Euro-American goods into their trade systems. Indian peoples and tribes willingly engaged in trade and extended their activities to new trading partners, new goods, and the fur trade, as both sides became customers and traders in common.⁹⁰

Native governments even adopted organized trading activities. The indigenous Mississippian culture that created the city of Cahokia was a society based on agriculture, manufacture, and trade. Cahokia existed from 700 to 1300 A.D.⁹¹ By 1250, Cahokia had a population of 20,000–50,000, larger than London's at that time.⁹² The citizens of Cahokia used long-distance trade to import raw

86. SHAFFER, *supra* note 81, at 22–23, 35–37, 75–80; Salisbury, *supra* note 29, at 440.

87. SHAFFER, *supra* note 81, at 22–23, 35–37, 75–80.

88. 10 SMITHSONIAN INST., *supra* note 79, at 691–707, 711–22; 9 SMITHSONIAN INST., *supra* note 33, at 201–05, 305, 559–61; Salisbury, *supra* note 29, at 442–44.

89. JAMES P. RONDA, LEWIS & CLARK AMONG THE INDIANS 102–04 (1998 ed.).

90. EWERS, *supra* note 81, at 24–25; 15 SMITHSONIAN INST., *supra* note 29, at 83, 85, 202–06, 344–47, 763–64; 10 SMITHSONIAN INST., *supra* note 79, at 711–22; 7 SMITHSONIAN INST., *supra* note 35, at 120–21; SPICER, *supra* note 29, at 9, 147, 543; Salisbury, *supra* note 29, at 440, 444.

91. SHAFFER, *supra* note 81, at 51; MICHELE STRUTIN, CHACO: A CULTURAL LEGACY 50–51 (1994).

92. SHAFFER, *supra* note 81, at 53–54.

materials from all over North America to manufacture products.⁹³ Cahokian citizens worked in specialized labor and manufactured pottery, baskets, leather clothing, stone tools, and ornamental objects, and they began producing and trading salt around 900 A.D.⁹⁴

Furthermore, Indian communities regularly hosted annual and semiannual regional trade fairs and markets across North America.⁹⁵ Markets were held at regularly scheduled times and places, and large numbers of Indians from a wide variety of nations would attend. These markets were so important that Indian nations, and later the Spanish, would even call truces to not disrupt the markets.⁹⁶ In the 1740s, for instance, a German count was very impressed by the Indian market in eastern Pennsylvania and by the amount and diversity of goods for sale. He stated that it was “like the Hague in Holland.”⁹⁷ In 1803–06, the Lewis and Clark expedition marveled at the Indian trading fairs they encountered. Lewis and Clark also observed the importance of trade in the winter of 1804–05 in the Mandan and Hidatsa towns. They observed that enemies of the Mandan and Hidatsa came to trade various buffalo products for corn and other crops.⁹⁸ Trade was so important and integral to these communities, their economies, and lives that they did not allow longstanding animosities to get in the way of business. Later in 1805, Lewis and Clark witnessed the great Indian market near present-day The Dalles, Oregon. They were amazed at

93. OTHER SIDE OF THE FRONTIER, *supra* note 29, at 5, 86; SHAFFER, *supra* note 81, at 56–58, 62–67; STRUTIN, *supra* note 91, at 50–51; Stephen H. Lekson et al., *The Chaco Canyon Community*, 259 SCI. AM., July 1988, at 100, 108; Salisbury, *supra* note 29, at 441–42.

94. OTHER SIDE OF THE FRONTIER, *supra* note 29, at 5, 86; 7 SMITHSONIAN INST., *supra* note 35, at 125, 208–09; STRUTIN, *supra* note 91, at 50–51; Lekson et al., *supra* note 93, at 108.

95. MANCALL, *supra* note 29, at 24, 47–48 (proposing that evidence exists of trade among Indian tribes in eastern Pennsylvania since 500 B.C.); 15 SMITHSONIAN INST., *supra* note 29, at 45, 83 (claiming that long-distance trade of pottery, shell beads, and native copper is evident during 300 B.C.–1000 A.D.; more perishable goods were exchanged as well); 9 SMITHSONIAN INST., *supra* note 33, at 25–26, 71–72, 127–28, 149; 5 SMITHSONIAN INST., HANDBOOK OF NORTH AMERICAN INDIANS 374 (William C. Sturtevant ed., 1984) (stating that lamps and pots carved from soapstone from the central Canadian Arctic were traded to the North Alaska Coast after 1200 A.D.); Salisbury, *supra* note 29, at 439, 447–48 (noting that in the thirteenth to sixteenth centuries, Plains tribes, Apaches, and Navajos traded at semiannual trade fairs at Taos, Pecos, and Picuris Pueblos for maize, cotton blankets, obsidian, turquoise, ceramics, and shells).

96. 9 SMITHSONIAN INST., *supra* note 33, at 189; *see* Salisbury, *supra* note 29, at 447.

97. MANCALL, *supra* note 29, at 47–48.

98. RONDA, *supra* note 89, at 75–76, 88–89.

the fish storage techniques, the tons of dried fish the Indians sold, and the amount of trade and goods for sale.⁹⁹ In 1806, William Clark called The Dalles, “the great Mart of all this country.”¹⁰⁰ In addition, Lewis and Clark reported that an active Indian trade network existed across the entire Pacific Northwest region.¹⁰¹

American Indians obviously understood the importance and benefits of trade and profits and participated fully in the individual business activities of manufacture, trade, and entrepreneurship.

D. Native Business Skills

The historical record demonstrates that Indians were sophisticated businesspeople. Indian peoples were proficient at operating economic endeavors, supporting themselves and their families, trading, and manipulating economic factors to their advantage over many centuries. Euro-Americans quickly learned that Indians were astute and experienced at business.¹⁰² For example, Indians were very aware of the value and prices of Euro-American trade goods and negotiated vigorously to purchase them.¹⁰³

Native societies also developed business and trading practices long before Euro-Americans arrived. Some Indian businesspeople and the regional trade fairs used standardized measurements and had well-established rules.¹⁰⁴ Some Indians even gave guarantees

99. HERSKOVITS, *supra* note 40, at 223–24; see RICK RUBIN, *NAKED AGAINST THE RAIN: THE PEOPLE OF THE LOWER COLUMBIA RIVER 1770–1830*, at 69 (1999); Lekson et al., *supra* note 93, at 108.

100. 12 SMITHSONIAN INST., *supra* note 9, at 403 (explaining that dentalia, salmon, slaves, and other products were exchanged for horses, dried roots, Buffalo robes, and plains clothing at The Dalles); Clark, *supra* note 10, at 129.

101. ANDERSON, *supra* note 37, at 63–64 (claiming that as described to Lewis and Clark, tribes engaged in lots of trade across complex and extensive networks and traveled great distances to trade fairs); RUBIN, *supra* note 99, at 69 (citing the journals of Lewis and Clark for the proposition that Chinook people, up and down the Columbia and Willamette Rivers, operated extensive and economically sophisticated markets).

102. CHARLES E. CLELAND, *RITES OF CONQUEST: THE HISTORY AND CULTURE OF MICHIGAN’S NATIVE AMERICANS 108–09* (4th ed. 1992); HART, *supra* note 33, at 11; OBERG, *supra* note 64, at 105; 7 SMITHSONIAN INST., *supra* note 35, at 119 (“Meriwether Lewis described the Chinooks as ‘great hagglers in trade’ . . .”).

103. HERSKOVITS, *supra* note 40, at 86, 93–94; LLEWELLYN & HOEBEL, *supra* note 67, at 228–29; OBERG, *supra* note 64, at 36, 55, 105, 110; 7 SMITHSONIAN INST., *supra* note 35, at 119–20, 123–24, 131; Trosper, *supra* note 59, at 205, 209.

104. RUBIN, *supra* note 99, at 69–71; 10 SMITHSONIAN INST., *supra* note 79, at 721.

on goods. Some native peoples extended credit, engaged in lending currencies and goods, and charged interest on these loans.¹⁰⁵

Many Indians and tribal governments also understood the economic value of gaining monopolies, controlling trade routes, and becoming the middlemen in commercial transactions.¹⁰⁶ Indians were adaptable and eager to take on new economic activities, products, and trading partners from Europe. The fur trade and European goods brought new activities and trade items to North America. Many tribes and Indians voluntarily participated in the entrepreneurial fur trade and the trade in European goods. Some tribal trading principles of property ownership were influenced by this new commercial activity.¹⁰⁷ Private and entrepreneurial business activities were not new to native peoples; in fact, they had long been part of the economic institutions that were promoted, supported, and pursued by Indian peoples in historical times.

E. Indian Currencies

Many Indian peoples and tribal nations utilized currencies as a medium of exchange and an efficient substitute for a barter system where one type of good is directly traded for another. Indians used wampum (seashells and manufactured shell belts), beads, Hudson Bay Company blankets, turquoise, dentalia shells, deerskins, and other items as money to transact business with Indians and Europeans.¹⁰⁸ Wampum was even used to pay tuition at Harvard

105. ARTHUR J. RAY, *INDIANS IN THE FUR TRADE: THEIR ROLE AS TRAPPERS, HUNTERS, AND MIDDLEMEN IN THE LANDS SOUTHWEST OF HUDSON BAY 1660-1870*, at 51-71, 125, 131-34, 138 (1974); RUBIN, *supra* note 99, at 69-71 (citing Lewis and Clark journals and George Gibbs, *Tribes of Western Washington and Northwestern Oregon*, in 1 CONTRIBUTION TO NORTH AMERICAN ETHNOLOGY 187 (1887)); 7 SMITHSONIAN INST., *supra* note 35, at 369, 585.

106. COLSON, *supra* note 63, at 5; EWERS, *supra* note 81, at 17, 28; JACOBS, *supra* note 34, at 9; MANCALL, *supra* note 29, at 50-51, 83, 91-94; OBERG, *supra* note 63, at 106; RAY, *supra* note 105, at 51-71, 125, 131-34, 138; 15 SMITHSONIAN INST., *supra* note 29, at 199, 204-06, 344-47, 430; 12 SMITHSONIAN INST., *supra* note 9, at 403 (stating the Wishram and Wasco tribes served as middlemen at The Dalles trading market); 9 SMITHSONIAN INST., *supra* note 33, at 305; 7 SMITHSONIAN INST., *supra* note 35, at 123-25, 130, 153, 208, 282, 319-20, 407-08, 471; Wessel, *supra* note 28, at 11-13.

107. JACOBS, *supra* note 34, at 9-10, 32-33; OBERG, *supra* note 64, at 35, 56, 60-61, 132; RAY, *supra* note 105, at 51-71, 125, 131-34, 138; 15 SMITHSONIAN INST., *supra* note 29, at 84; 7 SMITHSONIAN INST., *supra* note 35, at 119, 130; Klein, *supra* note 74, at 143.

108. 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 20 (1995 ed.) (stating that in 1744 the governor of Pennsylvania

and as cash in the Dutch colonies of Pennsylvania and New York.¹⁰⁹ Furthermore, some Indians loaned these currencies out at interest.¹¹⁰ Tribal communities used the wealth they accumulated in currencies to buy goods, give to the poor, settle disputes, and compensate for criminal acts.¹¹¹ Some tribal nations made manufacturing wampum a tribal business, and wampum could suffer from inflationary valuations as currencies often do.¹¹²

In the Pacific Northwest, dentalia shells harvested from Vancouver Island were used as currency. Indians of some tribes even tattooed their arms or legs to more easily measure strings of dentalia to determine their value.¹¹³ Many Indians and non-Indians used dentalia and other tribal currencies exactly as we use money today.¹¹⁴

said for Indians “wampum . . . is their [m]oney”); DAVID MURRAY, *INDIAN GIVING: ECONOMIES OF POWER IN INDIAN-WHITE EXCHANGES* 119–20 (2000); OBERG, *supra* note 64, at 50–51, 112, 132; RUBIN, *supra* note 99, at 71; MARSHALL SAHLINS, *STONE AGE ECONOMICS* 219 (1972); 15 SMITHSONIAN INST., *supra* note 29, at 384; 10 SMITHSONIAN INST., *supra* note 79, at 720–21; 9 SMITHSONIAN INST., *supra* note 33, at 149; 7 SMITHSONIAN INST., *supra* note 35, at 122, 369, 505, 537, 565, 591 (dentalia shells obtained by trade from Vancouver Island were the “economic standard for Chinookans and their neighbors”; they were strung in fathom-length units, and the value depended on the number of shells per fathom; wealth would be used to pay compensation for injuries and killings); STRUTIN, *supra* note 91, at 50–51; Vayda, *supra* note 54, at 495–96.

109. ECONOMIC ENCYCLOPEDIA, *supra* note 80, at 261; OBERG, *supra* note 64, at 96 (Dutch used wampum as money as early as 1622); 15 SMITHSONIAN INST., *supra* note 29, at 166, 202–03 (commenting that the Dutch used “wampum as currency in their trade with the Indians as well as among themselves”; wampum was produced by Indians of Connecticut and Rhode Island; Dutch and English traders took wampum in trade and traded it with inland and northern Indians for furs; “[w]ampum became a true medium for exchange”).

110. HELEN CODERE, *FIGHTING WITH PROPERTY: A STUDY OF KWAKIUTL POTLATCHING AND WARFARE 1792–1930*, at 69–75 (1950) (maintaining that the Kwakiutls charged interest on loans of goods for potlatches and other loans); 7 SMITHSONIAN INST., *supra* note 35, at 369 (Hudson Bay blankets were loaned out at interest); Philip Drucker, *The Potlatch*, in *TRIBAL AND PEASANT ECONOMIES* 481, 487–88 (George Dalton ed., 1967) (explaining that Pacific Coast tribes made “loans at interest[, which] were strictly commercial transactions” of money, and traded blankets with very high interest rates).

111. ECONOMIC ENCYCLOPEDIA, *supra* note 80, at 167, 260–61; OBERG, *supra* note 64, at 50–51, 132; SAHLINS, *supra* note 108, at 219; 15 SMITHSONIAN INST., *supra* note 29, at 384; 7 SMITHSONIAN INST., *supra* note 35, at 565, 591.

112. JACOBS, *supra* note 34, at 41, 48; MURRAY, *supra* note 108, at 119–20; OBERG, *supra* note 64, at 96, 152; 15 SMITHSONIAN INST., *supra* note 29, at 166, 202–03; 7 SMITHSONIAN INST., *supra* note 35, at 536 (explaining that the exchange of value of dentalia shells was subject to market fluctuations; blue and white china beads became another form of currency).

113. RUBIN, *supra* note 99, at 27, 69, 71.

114. HERSKOVITS, *supra* note 40, at 209, 251–53; JACOBS, *supra* note 34, at 490, 609 n.61; 7 SMITHSONIAN INST., *supra* note 35, at 29, 417, 493, 505, 537, 562, 573, 585.

F. Accumulating Wealth

Another aspect of indigenous economic and private rights is that many Indians and tribal cultures engaged in wealth accumulation and honored and protected these activities. These kinds of private pursuits were important to Indian peoples in historic times for the same reasons we pursue wealth today. Amassing wealth and a surplus of goods led to ample leisure time: time to manufacture art and handicrafts, and time to practice elaborate social and religious ceremonies. Indian peoples even amassed wealth for public display.¹¹⁵

Indians and their families worked hard and sometimes performed dangerous activities to acquire the material goods they needed and wanted.¹¹⁶ Buffalo hunters, traders, farmers, fishermen, and whalers could become very prosperous, and they often accumulated considerable amounts of privately owned assets and wealth.¹¹⁷ Tribal communities understood the value of amassing surpluses. Many Indians and communities were so successful in their work and ingenuity in gathering and preserving life's necessities that their "economic year," the time it took to produce their annual subsistence needs, was only about four to five months.¹¹⁸

115. HERSKOVITS, *supra* note 40, at 251, 478; 7 SMITHSONIAN INST., *supra* note 35, at 346, 493; Duane Champagne, *Economic Culture, Institutional Order, and Sustained Market Enterprise: Comparisons of Historical and Contemporary American Indian Cases*, in PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 29, at 195, 196-97.

116. OBERG, *supra* note 64, at 35, 56, 60-61, 132; 15 SMITHSONIAN INST., *supra* note 29, at 384; 9 SMITHSONIAN INST., *supra* note 33, at 979; Lekson et al., *supra* note 93, at 105.

117. CODERE, *supra* note 110, at 4, 13-14; DENSMORE, *supra* note 63, at 3 (stating that Makah men and families owned many different types of property and passed them on by rules of inheritance); FRANK GILBERT ROE, THE INDIAN AND THE HORSE 90 (1955); 9 SMITHSONIAN INST., *supra* note 33, at 82 (explaining that for the Hohokam, successful irrigation techniques permitted food surpluses and population increases, leading to increasing interaction with cultures to the south and increased trade).

118. CODERE, *supra* note 110, at 4 (claiming that due to the surpluses they produced, the Kwakiutls stopped almost all economic activities in winter and were preoccupied with ceremonies); ECONOMIC ENCYCLOPEDIA, *supra* note 80, at 180, 208 (noting that potlatch societies produced goods far in excess of their daily needs and "paid intense attention to private property"); 7 SMITHSONIAN INST., *supra* note 35, at 564 (opining the Tillamook year was divided between the economic summer activities and the winter religious ones); Swan, *supra* note 80, at 20-30 (suggesting that the Makah Tribe became rich in resources, leisure and aesthetic sensibilities; that the Makah had an easy economic life; "they can procure, in a few hours, provisions enough to last them for several days").

These short economic years left ample time for individuals and communities to engage in leisure, culture, and ceremony.

Moreover, in some cultures, individuals did not keep wealth a secret. The Pacific Northwest Coast Indians “had cultures that valued status and wealth.”¹¹⁹ These peoples would publicly demonstrate their wealth by pouring valuable whale oil in the fire at gatherings, destroying valuable copper objects, or freeing slaves.¹²⁰ Other Indians accumulated valuable dentalia shells, and women would wear great strands of dentalia to demonstrate a family’s wealth.¹²¹ This is similar to how we wear gold and silver jewelry today. Some Indians even hoarded and buried their dentalia and would dig it up occasionally to admire it.¹²²

An intriguing demonstration of one reason why natives accumulated and used wealth is the potlatch ceremony. Potlatching is the economic, social, and competitive gifting of enormous amounts of goods at feasts. Chiefs and rich families would distribute gifts to other families, clans, or tribes. The purpose was to gain fame and standing, as “a person was known not so much for his private wealth as the wealth he distributed.”¹²³ Potlatching obviously required enormous efforts to create and gather the wealth needed to then give it away.¹²⁴ The accumulation of wealth, or an excess of goods, was an absolute necessity. Potlatches demonstrate that Indians understood wealth, its use, and its value to their communities and cultures. According to these peoples, potlatches were a social, economic, cultural, and valuable way to use their wealth.

119. KENNETH R. PHILP, *JOHN COLLIER’S CRUSADE FOR INDIAN REFORM, 1920-1954*, at 239 (1977).

120. Beth Laura O’Leary, *Aboriginal Whaling from the Aleutian Islands to Washington State*, in *THE GRAY WHALE: ESCHRICHTIUS ROBUSTUS* 95 (Mary Lou Jones et al. eds., 1984) (claiming that whale oil possession was an indicator of wealth); see also *ECONOMIC ENCYCLOPEDIA*, *supra* note 80, at 180, 208, 210 (Potlatches in Northwest cultures were displays of wealth and for other purposes; the ruling families of Powhatan Indian villages in Virginia flaunted their status with lavish entertainments.).

121. RUBIN, *supra* note 99, at 27, 69, 71; 7 SMITHSONIAN INST., *supra* note 35, at 493, 505, 540, 548, 551, 580, 591 (noting that dentalia were used as ornaments and esteemed as symbols of wealth); JAMES G. SWAN, *THE NORTHWEST COAST, OR, THREE YEARS RESIDENCE IN WASHINGTON TERRITORY* 159 (1857) (stating that dentalia were objects of wealth and that women would wear them like jewelry).

122. RUBIN, *supra* note 99, at 71 (citing MELVILLE JACOBS, *CLACKAMAS CHINOOK TEXTS* 490, 609 n.61 (1958)).

123. ROBERT SULLIVAN, *A WHALE HUNT* 67 (2000).

124. OBERG, *supra* note 64, at 132-33; Champagne, *supra* note 115, at 196-98.

This is no different than how modern-day Americans spend money on the activities they choose, including giving to charitable organizations for tax deductions and recognition. The Pacific Northwest native cultures did the same through potlatching.

In sum, this brief overview demonstrates that Indian nations, cultures, and individuals conceptualized, established, and protected private property institutions, legal regimes, and private ownership rights. Indians and tribal governments understood and protected the ownership of private rights in lands, river and ocean fishing sites, hunting sites, nut and fruit trees, and in personal property such as horses, manufactured items, and professional services. Indian peoples worked hard to create and acquire these individual property rights by investing their human capital of labor, expertise, and time, and physical capital of tools and assets, to manufacture foods and other items for their own benefit or “profit.” They developed and used lands and resources by cultivating and protecting them, by protecting and using hunting and fishing sites, and by making various products for trade. European colonists and early Americans saw these property rights regimes at work and benefited from them by trading with tribes and Indians and by using tribal products. Almost all Indian nations and peoples were well acquainted throughout history with both private property rights and engaging in private entrepreneurial economic activities to support their families and societies. As reported to a U.S. congressional committee in 1934, “in the vast majority of cases Indian economic pursuits were carried on directly with individual rewards in view.”¹²⁵ Consequently, private-sector economic activities, the principle of individuals and families working to accumulate private property and profits to support themselves, are not new ideas to Indian peoples and cultures.

IV. REVIVING INDIGENOUS INSTITUTIONS FOR PRIVATE-SECTOR ECONOMIC DEVELOPMENT IN INDIAN COUNTRY

How can Indian nations revive the historical institutions described in Part III that promoted and supported their private

125. *History of the Allotment Policy: Hearing on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 431 (1934) [hereinafter *Statement of Delos Sacket Otis*] (statement of Delos Sacket Otis, Professor, Columbia University).

economic activities? How does a nation or reservation community go about creating a private-sector economy when it currently lacks one? Every Indian reservation has an informal, underground private sector, of course, composed of part-time workers and entrepreneurs whom residents can employ. But how can a tribal government and reservation community consciously and purposely start anew to build a functioning and formal private-sector economy?

Surprisingly, there appears to be little to no scholarly commentary or economic analysis directly on this exact issue.¹²⁶ Thus, this Part sets out my analysis of steps Indian nations and individuals could undertake to recreate their private-sector economies. This effort entails rebuilding and reviving the institutions that Indian nations and communities have successfully used for centuries to govern their economic lives. Then this Part looks for additional guidance by examining the scholarly research on how tribal governments have developed their public-sector economies and how former Soviet-bloc countries and China have attempted to transform their publicly operated socialist economies into private-sector free-market economies.

A. Strategies for Private-Sector Development in Indian Country

1. Financial literacy

American Indians and especially reservation communities have long suffered from extreme poverty and an absence of privately operated businesses.¹²⁷ It is no surprise that the levels of financial literacy and skills necessary to start and successfully operate privately owned businesses might be lacking. Consequently, one of the basic needs for Indians and Indian nations is to increase their overall financial literacy.¹²⁸ Indian nations should mandate the

126. There is, however, an extensive body of literature on the subject of the former Soviet-bloc countries and China's efforts to transition from communist/socialist, public-sector economies to free-market, private-sector economies. *See infra* Section IV.C.

127. U.S. DEP'T OF COMMERCE & U.S. CENSUS BUREAU, *supra* note 16; U.S. CENSUS BUREAU, *supra* note 26.

128. *See, e.g.*, WILLIAM ANDERSON ET AL., FIRST NATIONS OWEESTA CORP., BARRIERS AND POSSIBILITIES FOR FINANCIAL EDUCATION IN HIGH NATIVE ENROLLMENT SCHOOLS: THE CASE OF SOUTH DAKOTA (2010), https://firstnations.org/knowledge_center/download/financial_education_south_dakota_s_high_native_enrollment_schools_barriers; SARAH DEWEES &

teaching of financial, business, and accounting topics from kindergarten through college in tribally operated schools and colleges. Tribes should also advocate for the teaching of these topics in Bureau of Indian Affairs- and Bureau of Indian Education-operated schools and in state-operated schools located on or near reservations. Tribal governments should also offer adult financial literacy classes through their economic development or education departments or by using nongovernmental organizations. Sample materials are available for these endeavors.¹²⁹ Beneficial and long-lasting results could occur from such efforts.

2. *Develop human capital*

The long history of poverty and the lack of economic activities on most reservations have left many reservation inhabitants with poor credit scores and limited job experience and business skills. American Indians and tribal governments need to improve these aspects of their “human capital” and develop reservation-based workforces.¹³⁰ The first two questions a business or entrepreneur who considers locating on a reservation will ask are (1) what the

GARY MOTTOLA, FINRA INV’R EDUC. FOUND., RACE AND FINANCIAL CAPABILITY IN AMERICA: UNDERSTANDING THE NATIVE AMERICAN EXPERIENCE (Apr. 2017), <http://www.usfinancialcapability.org/downloads/Native-American-Experience-Fin-Cap.pdf>; John L. Murphy, Alicia Gourd & Faith Begay, *Financial Literacy Among American Indians and Alaska Natives*, SOC. SECURITY ADMIN. (Research & Statistics Note No. 2014-04, Aug. 2014), <https://www.ssa.gov/policy/docs/rsnotes/rsn2014-04.html>.

129. E.g., *Achieving Native Financial Empowerment*, FIRST NATIONS DEV. INST., <https://www.firstnations.org/our-programs/achieving-native-financial-empowerment> (last visited Jan. 22, 2019); *Empowering Women Through Online Education*, DREAMBUILDER: WOMEN’S BUS. CREATOR, <https://dreambuilder.org> (last visited Jan. 22, 2019); FIRST NATIONS DEV. INST., BUILDING NATIVE COMMUNITIES: FINANCIAL SKILLS FOR FAMILIES (5th ed. 2016), <https://www.firstnations.org/publications/financial-skills-for-families-workbook-5th-edition>; *My Green: Take Charge of Your Money*, MY BIG MONEY, <http://mybigmoney.org> (last visited Jan. 22, 2019); see also Larry Jacob, *We Can Build the STEM Workforce Our Future Economy Needs*, KAUFFMAN FOUND. CURRENTS (June 21, 2018), https://www.kauffman.org/blogs/currents/2018/06/we-can-build-the-stem-workforce-our-future-economy-needs?utm_source=newsletter&utm_medium=email&utm_campaign=iaw_6_21_2018 (describing how state workforces need to be upgraded educationally also to prepare for the jobs and industries of the future).

130. MILLER, RESERVATION “CAPITALISM,” *supra* note 5, at 118 (“Human capital is the physical and mental tools and abilities needed to operate a business [and] includes an entrepreneur’s own labor, education, experience, and abilities as a fundraiser, manager, operator, et cetera.”); see also NCAI P’SHP FOR TRIBAL DEV., TRIBAL WORKFORCE DEVELOPMENT: A DECISION-FRAMING TOOLKIT (2018), http://www.ncai.org/ptg/WDEV_TOOLKIT.pdf.

available workforce is and (2) whether it is experienced and motivated.

Tribal governments have the capacity to have the greatest impact on developing reservation human capital.¹³¹ Hiring tribal citizens to work in and manage tribal departments and programs will increase the experience and abilities of Indians. Consequently, the preference most Indian nations already provide to hire their own citizens and Indians in general is a valuable tool to develop indigenous human capital. As more and more Indian nations operate more and more social welfare and economic activities, they are improving their human capital to the extent they are hiring Indians and reservation inhabitants.¹³² One would expect the future pool of successful Indian country entrepreneurs to come from people who have gained experience and skills working for tribal nations.

In addition to improving the financial literacy of reservation communities as mentioned above, there are now thirty-six tribal colleges located on various reservations, and Indian peoples are graduating with college degrees in ever increasing numbers from on- and off-reservation institutions.¹³³ This is another important aspect of improving human capital and also expanding the pool of possible reservation-based entrepreneurs for the future. When Indian nations provide higher education and create business and employment opportunities on their reservations, they help to alleviate the brain drain—the loss of young, motivated, and

131. The Mississippi Choctaw Tribe has engaged in a nearly sixty-year systematic approach to improve the educational and health levels of its citizens and has now benefitted from greatly improved life expectancy rates, lower infant mortality rates, much better housing conditions, an increasing reservation population, higher educational rates, and a 2% unemployment rate. Rhonda G. Phillips, *The Choctaw Tribe of Mississippi: Managing Skills for Workforce Transformation*, OECD iLIBRARY, 155, 158–63, 169–72 (2009), <https://www.oecd-ilibrary.org/docserver/9789264066649-6-en.pdf?expires=1540588356&id=id&accname=ocid194919a&checksum=64CEACBB4B404EFA1F2CEEFB12F0F94E>.

132. See, e.g., HARVARD U. CSR INITIATIVE ECON. OPPORTUNITY PROGRAM, THE ROLE OF THE PRIVATE SECTOR IN EXPANDING ECONOMIC OPPORTUNITY THROUGH COLLABORATIVE ACTION: A LEADERSHIP DIALOGUE 3–5, 9 (Oct. 2007), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cr/ri/files/report_29_Harvard%2BEO%2BDIALOGUE%2BSUMMARY%2B20071018.pdf.

133. *Tribal Colleges and Universities*, WHITE HOUSE INITIATIVE ON AM. INDIAN & ALASKA NATIVE EDUC., U.S. DEPT EDUC., <https://sites.ed.gov/whiaiane/tribes-tcus/tribal-colleges-and-universities> (last visited Jan. 22, 2019).

talented people from their reservations – by employing and housing them at home.

3. Create entrepreneurs

Indian governments, political leaders, and reservation communities need to concentrate on developing more native and non-native entrepreneurs in Indian country.¹³⁴ Again, with the decades of poverty and the absence of privately owned businesses on reservations, there are few role models, mentors, and examples to inspire native peoples and youth to dream of owning their own businesses. Tribal governments can start to overcome the dearth of private business owners by establishing economic development departments and programs that focus on developing the private sector, teaching business and entrepreneurial classes, sponsoring business plan development competitions, publicizing private business owners in tribal newspapers, and giving community awards to entrepreneurs. Successful tribal models already exist for these kinds of endeavors.¹³⁵

There are at least three nationally known nongovernmental Indian-related organizations that are well recognized for offering training programs, counseling services, and assistance to potential native entrepreneurs. First, the Lakota Funds has operated on the Pine Ridge Indian Reservation in South Dakota since 1986. It was the first native Community Development Financial Institution (CDFI) in the nation. In 1986, there were only two Indian-owned businesses on the reservation, 85% of the Oglala Lakota people had never had a bank account, 75% had never had a loan, and 95% had no business experience.¹³⁶ Lakota Funds started as a microlender of \$500 loans.¹³⁷ To date, it has helped create over 1600 permanent jobs

134. See Steven Cornell et al., *Citizen Entrepreneurship: An Underutilized Development Resource*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT (Miriam Jorgensen ed., 2007); Robert J. Miller, *American Indian Entrepreneurs: Unique Challenges, Unlimited Potential*, 40 ARIZ. ST. L.J. 1297 (2008).

135. E.g., Navajo Nation Dep't of Econ. Dev., *4th Annual Navajo Nation Economic Summit 2019, Business Plan Competition*, NAVAJO NAT. ECON. SUMMIT, <http://www.nneconomic.summit.com> (last visited Jan. 22, 2019). Professor Mark Maletz of the Harvard Business School has suggested a process in which the winning business plan is fully funded and not just awarded some minimal prize for winning.

136. LAKOTA FUNDS, <https://lakotafunds.org> (last visited Jan. 22, 2019).

137. *Id.*

on the reservation, made over 1000 loans totaling more than \$10 million, helped establish 600 businesses, and assisted thousands of artists and entrepreneurs.¹³⁸ Its loan portfolio now exceeds \$2 million, and it can award loans up to \$300,000.¹³⁹

Moreover, the Oregon Native American Business and Entrepreneurial Network (Onaben) was created in 1991 by four Oregon tribes as a nonprofit organization designed to develop and train Indian entrepreneurs who would hopefully open businesses on reservations.¹⁴⁰ For more than twenty-five years, Onaben has helped hundreds of Indian people in the Pacific Northwest start their own businesses through its twelve-week training classes that assist people in drafting business plans and then starting and operating privately owned business.¹⁴¹ Onaben continues to serve native entrepreneurs and community-based economic development organizations with its culturally relevant business curriculum, programs, and assistance to access financing and business-to-business relationships.

Onaben has hosted its annual conference, "Trading at the River," for more than a decade to help native entrepreneurs gather to share information, business contacts, and marketing opportunities. It also puts on native youth entrepreneurship camps and focuses on financial literacy for youth.¹⁴² But Onaben is best known for creating the widely used culturally specific training materials entitled *Indianpreneurship*[®].¹⁴³ Onaben and others have used these materials to train thousands of native peoples to consider their suitability for business, draft functional business plans, and launch their enterprises. Onaben also hosts "train the trainers" sessions across the country to enable others to teach entrepreneurship classes using these materials.¹⁴⁴

138. *Id.*

139. *Id.*

140. *Our History*, ONABEN, <http://onaben.org/about-us/our-history> (last visited Jan. 22, 2019).

141. Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 839–40 (2001).

142. ONABEN, ONABEN 2015 ANNUAL REPORT, <http://www.onaben.org/userfiles/Documents/2015%20ONABEN%20Annual%20Report.pdf> (last visited Jan. 22, 2019).

143. *Indianpreneurship*, ONABEN, <http://www.onaben.org/indianpreneurship> (last visited Jan. 22, 2018).

144. *Our History*, ONABEN, *supra* note 140.

Third, the Cheyenne River Sioux Tribe created the Four Bands Community Fund (Four Bands) in 2000 as a CDFI to provide entrepreneurial training services. At that time, less than 1% of the businesses on the reservation were Indian owned, although the population was 75% American Indian. Four Bands has had a major impact in transforming the economic landscape at Cheyenne River and assisting native peoples on that reservation and throughout South Dakota to improve their financial literacy and human capital, expand their funding options, and enter the private business world.¹⁴⁵ At its creation, Four Bands could only make \$500 loans. However, in the first fifteen years of its existence, Four Bands has provided technical assistance to over 6600 customers; made over 1000 loans totaling nearly \$10 million; approved 671 “credit builder loans” to help people improve their credit scores; created or retained on the reservation nearly 600 jobs; graduated 445 people from its business training courses; increased the financial literacy of 810 people through training courses; placed nearly 200 native youth in internship positions; invested nearly half a million dollars in a matched savings program that raises money for education, business, or home ownership; and assisted people in filing tax returns who then received more than \$5 million in refunds.¹⁴⁶ Those are spectacular results.

All of these entities teach various educational classes and provide services designed to create and assist new entrepreneurs.¹⁴⁷ These organizations and programs are excellent templates for any Indian nation attempting to build its private sector. In fact, every Indian nation should consider creating similar entities and programs or utilizing these existing programs to assist in creating and training entrepreneurs and helping to establish private-sector economies.

4. Funding private businesses

The poverty in Indian country has left most Indians and families unable to finance start-up businesses. In fact, individual

145. *A Strategy for Economic Parity*, FOURBANDS, <http://fourbands.org/about> (last visited Jan. 22, 2018).

146. *Id.*

147. *A Strategy*, FOURBANDS, *supra* note 145; *Our History*, ONABEN, *supra* note 140.

Indians almost universally lack access to the three primary avenues that the average American uses to start a private business; first, accumulated family wealth; second, loans backed by home mortgages; or third, regular bank loans.¹⁴⁸ Indian entrepreneurs have to overcome generational poverty, spotty credit and job histories, and a lack of financial resources that many reservation-based people suffer from. Hence, Indian nations and private organizations must assist individual Indians to obtain the seed funding necessary to start businesses.

A few Indian nations have the resources to loan or grant fairly significant amounts of money to tribal citizens to open businesses.¹⁴⁹ That is a perfectly acceptable way to expend tribal funds and to assist tribal citizens to create privately owned businesses on reservations. Furthermore, tribal governments could pressure the banks they do business with, to the tune of millions of dollars every year, to open bank branches on reservations and be more amenable to granting tribal citizens business loans. My own tribe, the Eastern Shawnee Tribe of Oklahoma, for a time used our bank, Peoples Bank of Seneca, in which the Tribe owns the controlling interest, to issue Tribe-guaranteed loans to tribal citizens.¹⁵⁰

Successful models of microlending already exist internationally and for Indian peoples in the United States as demonstrated by the Lakota Funds and Four Bands.¹⁵¹ In fact, the Lakota Funds was patterned after a microloan organization from Bangladesh called the Circle Banking Project.¹⁵² Lakota Funds and Four Bands were each initially limited to issuing only \$500 loans. As both those entities have proven, such loan funds and entrepreneurial assistance can make dramatic improvements in

148. MILLER, RESERVATION "CAPITALISM," *supra* note 5, at 118 (listing the three primary avenues as (1) accumulated family wealth, (2) loans backed by home mortgages, and (3) regular bank loans).

149. Miller, *Economic Development in Indian Country*, *supra* note 141, at 842 n.316.

150. SHOOTING STAR, June 1999, at 6 (hard copy on file with author).

151. *E.g.*, *History*, GRAMEEN FOUND., <https://grameenfoundation.org/about/history> (last visited Jan. 22, 2019); *What We Do*, GRAMEEN FOUND., <https://grameenfoundation.org/what-we-do> (last visited Jan. 22, 2019) (showing that beginning in 1997, the Grameen Foundation has made microloans and provided financial services to 10.9 million people worldwide); *Kiva by the Numbers*, KIVA, <https://www.kiva.org/about> (last visited Jan. 22, 2019) (showing that since 2005, Kiva has made loans to 2.9 million borrowers around the world).

152. *About*, LAKOTA FUNDS, <https://lakotafunds.org/about> (last visited Jan. 22, 2019).

reservation economic conditions and are worth the time and efforts of tribal governments.

5. Tribal and federal Buy Indian acts

The federal and tribal governments must become the clients of reservation-based privately owned businesses. This will not only help businesses start and succeed but also help reservation communities benefit from what economists call the “multiplier effect.”¹⁵³

The United States enacted the federal Buy Indian Act in 1908 and amended it slightly in 1910, 1988, and 1994.¹⁵⁴ This act encourages the Secretary of Interior to employ “Indian labor” and “products . . . of Indian industry” in carrying out his/her duties in federal Indian affairs.¹⁵⁵ The problem with this good idea is that the provision is totally discretionary and has not produced much effect in Indian country.

In my opinion, Indian nations should lobby Congress to strengthen this act and put some teeth into it by, for example, requiring the federal government to spend some set percentage of the total federal budget, the total General Services Administration budget, or at least the Bureau of Indian Affairs (BIA) and Indian Health Services (IHS) budgets on purchasing Indian labor and products. Since Congress appropriates the BIA and IHS budgets for the direct benefit of Indian nations and peoples, it should be relatively straightforward to convince Congress to earmark that a certain percentage of these funds must be spent more directly to benefit Indians and tribal nations by purchasing Indian labor and products. The BIA and Department of Interior could also locate more field offices on reservations. If BIA and Department of Interior employees lived on reservations, they would likely spend more money there and assist reservation economies. Government employees would also be motivated to support better schools, businesses, etc., on the reservations where they lived.

153. The multiplier effect is the idea that it is extremely beneficial to the economic health of a region to keep dollars circulating in their area, being spent between consumers, businesses, employees (who then become consumers themselves), and other businesses. Obviously, this requires that an area possess multiple businesses where consumers can buy goods and services.

154. 25 U.S.C. § 47 (2012).

155. *Id.*

In addition, tribal governments must also step up to the plate and take more direct action to become the customers of reservation-based privately owned businesses. Many Indian nations have very large annual budgets, and they possess the legal right to give preferences to tribal citizens and other Indians. Tribes should absolutely enact their own Buy Indian acts and order tribal departments to spend as much money, or a set percentage of their annual budgets, by buying goods and services from tribal citizens and Indian-owned private businesses.

This kind of tribal policy would have at least two major and immediate impacts. First, there is a “chicken and egg” problem in Indian country. Tribal leaders and department heads often say, correctly, that there are few or no Indian-owned businesses they can contract with. But this just raises the issue that tribal governments must actively work to increase the number of native privately owned businesses so that tribal governments can then engage in business with them. This entire subsection is addressing that very topic. Think of the major incentive to creating new Indian-owned businesses on reservations that would result if Indian nations made public and binding commitments through tribal ordinances that they would spend, say, 3% or 5% of their annual budgets, on Indian-owned businesses. Tribal departments would then have to actively seek out and promote Indian-owned businesses to do business with the nation, and every person with an ounce of entrepreneurial spirit could not help but notice this new opportunity to engage in business with their own tribal government on their own reservation. I think this would go a long way to solving the “chicken and egg” issue because new businesses would be formed and/or Indians might locate their existing businesses or branches thereof on reservations to benefit from tribal Buy Indian acts.

Second, reservations would benefit from well-accepted economic principles if tribal governments made directed purchases such as the ones I am suggesting. Even if goods and services purchased from new, Indian-owned businesses might cost a tribal government a bit more than buying from major chain stores and producers, reservations will receive a guaranteed benefit by slowing the “leakage” of money from reservation economies to border towns. Reservations would instead benefit from the proven results of the multiplier effect by keeping money in the local

reservation economy to circulate a couple of times. Economists unanimously agree that towns, cities, counties, and states are injured when money “leaks” away from the local economy sooner than is optimal.¹⁵⁶ Indian country understands this principle well because most reservations are surrounded by “border towns” where reservation inhabitants are forced to go and spend their money on necessary and luxury goods and services because they are unavailable on the reservation. But if tribes could increase the number of businesses operating on reservations and begin to build functioning, private-sector economies, they would begin to capture the multiplier effect and see increased economic activities, businesses, and jobs created on the reservation.

I know of only two Indian nations that have enacted laws with this idea in mind: the Navajo Nation and the Salt River Pima-Maricopa Indian Community. There are, no doubt, a few other tribes who have done the same, but both of these tribal ordinances suffer from the same deficiency as the federal Buy Indian Act.¹⁵⁷ They are not mandatory, and they do not allocate a set percentage of tribal expenditures to be spent on Indian privately owned businesses.

The Navajo Nation enacted its Business Opportunity Act because its studies showed that, while 90% of the reservation population was Navajo, “approximately 76% of the contracts by the Navajo Nation between the years 1994 and 2003 were awarded to non-Navajos . . .”¹⁵⁸ The Nation recognized that Indian preferences could assist in developing privately owned businesses on its reservation, which would “promote economic development and the growth of Navajo-owned businesses within the Navajo Nation.”¹⁵⁹ But the Act is discretionary in the sense that it only allows a “‘first opportunity’ and/or preference in contracting to Navajo and/or Indian owned and operated businesses” with the Nation.¹⁶⁰

156. See *infra* note 280 and accompanying text.

157. 25 U.S.C. § 47.

158. 5 NAVAJO NATION CODE § 201(B)(6) (2005).

159. *Id.* § 201(F).

160. *Id.* § 201(C)(1), (E).

The Salt River Pima-Maricopa Indian Community enacted its Administrative Policies Procurement Policy in 2014, if not earlier.¹⁶¹ One of the purposes of this policy is to “[p]romote the success and growth of Community-owned and Community Member-owned businesses and individual Community Members through the application of preference as set forth in this policy[.]”¹⁶² This policy comes close to requiring tribal departments to contract with a qualified tribal citizen or tribal-citizen-owned business, but it does not provide a guarantee that a tribal citizen will receive a tribal contract.¹⁶³

The federal government and Indian nations need to impose requirements upon themselves that will help increase the number of Indian-owned businesses in Indian country and that will assist in developing private-sector economies.

6. Legal infrastructure

Legal commentators and economists have long counseled Indian nations to improve their legal infrastructure to attract investors and help develop their economies.¹⁶⁴ There is no question that sophisticated investors analyze the courts, laws, bureaucracies, and governing bodies of the states, counties, cities, and reservations where they are considering investing.

Many Indian nations, however, lack some of the basic laws that business needs to function smoothly and profitably. For example, tribal governments have particularly been encouraged for decades to enact the Uniform Commercial Code of which there are several models available.¹⁶⁵ Tribes should also consider adopting other

161. Salt River Pima-Maricopa Indian Cmty., Admin. Policies, ch. 3 Fin., 3-5 Procurement Policy (2014).

162. *Id.* § I(A)(3).

163. *Id.* § IV(D)(2)(d).

164. DEAN HOWARD SMITH, MODERN TRIBAL DEVELOPMENT: PATHS TO SELF-SUFFICIENCY AND CULTURAL INTEGRITY IN INDIAN COUNTRY 131 (2000); JORGENSEN, *supra* note 16, at 73–87; Miller, *Economic Development in Indian Country*, *supra* note 141, at 842–48; Susan Woodrow & Fred Miller, *Lending in Indian Country: The Story Behind the Model Tribal Secured Transaction Law*, 15 ABA BUS. L. SEC. (2005), <https://www.americanbar.org/content/dam/aba/publications/blt/2005/11/lending-indian-country-200511.authcheckdam.pdf>.

165. *E.g.*, MODEL TRIBAL SECURED TRANSACTIONS ACT, REVISED (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017), <https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=1f31aa7f-74be-457e-904b-ba3b6d7d3646&tab>

commercial,¹⁶⁶ consumer protection,¹⁶⁷ and probate codes.¹⁶⁸ Some Indian nations have enacted very extensive commercial codes.¹⁶⁹ The value of publicly available codes is that businesses need certainty and knowledge of the laws of a region before they can decide to invest or start a business in the area. By adopting and publicizing such laws, Indian nations demonstrate they are taking steps to encourage and protect economic activities in their jurisdictions.

Two examples will suffice to demonstrate the kinds of laws that Indian nations could consider enacting to make their reservations more business friendly. First, very few tribal nations (only two apparently) have constitutional provisions that prevent the tribal government from impairing the obligation of contracts, similar to the provision in the U.S. Constitution.¹⁷⁰ Enacting such provisions in tribal constitutions or statutes could prevent a new tribal council from altering contractual rights that had been approved by a prior council. There are some well-known examples of this issue, and this undoubtedly has stopped or stalled many investors' interest in Indian country.¹⁷¹ If tribes were to enact provisions such as a no

=librarydocuments (last visited Jan. 22, 2019); *see also* SUSAN WOODROW, UNIFORM COMMERCIAL CODES: BRINGING BUSINESS TO INDIAN COUNTRY, <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/ieed/pdf/idc1-024558.pdf> (last visited Jan. 22, 2019) (report presented at "Tribal Secured Transactions Laws: A Working Forum").

166. *E.g.*, WINNEBAGO TRIBE OF NEBRASKA TRIBAL CODE, titles 10–11B (2015); HOOPA VALLEY TRIBAL CODE, titles 26, 28, 36, 39, 45–46, 50–57, 59–61, 66, 69–70 (2016).

167. MODEL TRIBAL CONSUMER PROTECTION CODE (FIRST NATIONS DEV. INST. 2018), https://firstnations.org/programs/financial-empowerment?qt-financial_investor_education=1&_ga=2.201222694.986020145.1529018345-2032112543.1529018345#qt-financial_investor_education (last visited Jan. 22, 2019).

168. TRIBAL PROBATE CODE (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS) <https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=8a2f2343-6723-41e9-a4cf-d824ef951ed9&tab=librarydocuments> (last visited Jan. 22, 2019).

169. *E.g.*, WINNEBAGO TRIBAL CODE, *supra* note 166; HOOPA TRIBAL CODE, *supra* note 166.

170. CONST. OF THE SNOQUALMIE TRIBE OF INDIANS art. XI, § 1(9) (2006); Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 289 (1990) (Salt River Pima-Maricopa Indian Community); *see also* Robert J. Miller, *Inter-tribal and International Treaties for American Indian Economic Development*, 12 LEWIS & CLARK L. REV. 1103, 1110–15 (2008) (explaining that in 2007–09, a tribal organization, Affiliated Tribes of Northwest Indians, drafted a treaty that would require Indian nations signing the treaty to adopt statutes limiting their ability to impair contractual obligations).

171. *E.g.*, MILLER, RESERVATION "CAPITALISM," *supra* note 5, at 101–05.

impairment of contracts law, this would help assure investors that their contractual rights would be enforced in tribal courts.

Second, many tribal governments have not enacted separation of powers clauses to make their court systems fully independent from the legislative branch—the tribal council. Thus, investors might fear that tribal courts would favor tribal councils. Creating true separation between courts and councils should reassure financial investors and entrepreneurs considering investing in Indian country.

According to many commentators, tribal court systems need to be analyzed and perhaps modified to help attract investment and build economies in Indian country.¹⁷² Tribes could consider creating specialized business courts and should at least ensure that their court systems are independent and non-politicized. Tribal judges need some form of guaranteed tenure and independence from political bodies. The importance of these safeguards to economic development are proven by multi-decade studies conducted by the Harvard Project on American Indian Economic Development. These studies demonstrate that tribal governments with truly independent court systems have 5% better employment rates on their reservations than Indian nations without such a court, and tribes that couple independent court systems with separation of powers provisions enjoy 15% better employment rates than tribal nations that have not enacted those two institutions.¹⁷³ The higher employment rate for Indian nations with independent courts and separation of powers provisions demonstrates that businesses and investors recognize well-governed areas and gravitate to localities where contractual and property interests are protected, and courts are free from political influence and control.¹⁷⁴

172. Stephen Cornell & Joseph P. Kalt, *Culture and Institutions as Public Goods: American Indian Economic Development as a Problem of Collective Action*, in PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 29, at 215, 227, 235, 237.

173. Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 28 tbl.3 (Stephen Cornell & Joseph P. Kalt eds., 1992).

174. Russia provides a warning of what happens when investors come to question a government and the enforcement of its laws and its courts. After 2002, foreign investment in Russia dropped dramatically due to questions about the fairness of the courts. *Vlad the*

Tribal courts are a particular concern for investors and businesses that enter contracts with tribal governments, tribal entities, and reservation-based Indians, and/or work on tribally and Indian-owned lands on reservations. Such investors will probably litigate disputes from these relationships in tribal courts. While the available evidence proves that in the vast majority of cases non-Indian litigants are treated as fairly as Indian litigants, non-Indians probably feel at a disadvantage in tribal courts.¹⁷⁵

Entrepreneurs and investors considering Indian Country are well aware of the tribal court question. Sometimes Indian nations have had to waive their sovereign immunity to be sued in federal or state courts, or they have had to accept arbitration agreements when a potential business partner has so demanded and the deal is too important for the tribe to pass up. Tribal governments that want to attract entrepreneurs, businesses, and investors need to critically examine their courts to see if they are established and operated to create legitimate and fair legal systems where the rule of law applies.¹⁷⁶

Indian nations also need to develop efficient bureaucracies and reasonable regulations to govern their operations.¹⁷⁷ It is a truism that business detests red tape and the time that it wastes. Consequently, the Harvard Project has also proven that tribal institutions of efficient bureaucracies and administrative agencies play important roles in helping tribal governments attract economic development.¹⁷⁸ An efficient and knowledgeable bureaucracy

Impaler, ECONOMIST, Nov. 1, 2003, at 13, 45, 69; Sabrina Tavernise, *Glimmers of an Investor-Friendly Russia*, N.Y. TIMES, Feb. 15, 2003, at C1.

175. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Non-members in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2006) (empirical research demonstrated fairness was afforded nonmembers by Navajo courts); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 285-87, 351-52 (1998) (analyzing eighty-five cases in tribal courts and concluding that they demonstrated fairness to non-Indian litigants).

176. Miller, *Economic Development in Indian Country*, *supra* note 141, at 847-48 & n.338; U.S. DEP'T OF THE TREASURY CMY. DEV. FIN. INSTS. FUND, *supra* note 12, at 54.

177. Cf. COMM. FOR ECON. DEV., REGULATION & THE ECONOMY: THE RELATIONSHIP & HOW TO IMPROVE IT (2017), <http://www.ced.org/report/regulation-and-the-economy>.

178. Stephen Cornell, *Sovereignty, Prosperity, and Policy in Indian Country Today*, 5 CMY. REINVESTMENT 5, 5-7, 9-13 (1997); Matthew B. Krepps, *Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry*, in WHAT CAN TRIBES DO?, *supra* note 173, at 182-83, 199.

that assists investors, entrepreneurs, and businesses to locate on reservations is a major boon for attracting investments.

In conclusion, tribal governments and reservation communities should evaluate and decide whether and how to make the legal, institutional, and systemic changes they think will help develop their economies. Indian nations need to be aware of these factors and the concerns of the investment community that might prevent them from locating in Indian country. Ultimately, however, the economic and legal policies that an Indian nation and its citizens might choose will probably not satisfy all commentators or all investors. But the decision on how business friendly a tribal nation and community wants to become is up to that government and its citizens. Indian country does need to be aware, however, that there is no question that building successful economies requires building legal institutions that respect the rule of law, ensure the performance of contractual agreements and the repayment of loans, and assist as much as possible in the success of business ventures.

7. *Physical infrastructure*

Indian reservations lack the physical infrastructure that the vast majority of the United States benefits from and that private businesses need to operate and survive: paved roads, highways, railroad lines, potable water, electricity, high-speed internet, and cell phone connectivity.¹⁷⁹ Some of these items are so costly that tribal governments are usually forced to rely on the federal or state governments to finance such projects. Some tribes, however, have used bond financing to construct items such as hospitals, roads, and sewer projects themselves.¹⁸⁰

Indian country also suffers from an absence of another form of physical infrastructure that the rest of America enjoys: banking. Few banking institutions and credit unions are located on

179. U.S. DEP'T OF THE TREASURY CMTY. DEV. FIN. INSTS. FUND, *supra* note 12, at 11, 14, 39-40; Timothy Egan, *As Others Abandon Plains, Indians and Bison Come Back*, N.Y. TIMES, May 27, 2001, at A1.

180. *See, e.g.*, *Wells Fargo Bank v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684 (7th Cir. 2011); Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009 (2007); Adam Morgan, *California Tribe Issuing Bonds to Finance Envisioned Casino Resort*, STAND UP FOR CAL.! (July 2, 2018).

reservations.¹⁸¹ It is a truism that money burns a hole in one's pocket, and people will spend their money where they can cash their checks. Without banks on reservations, where can Indians open accounts and learn some of the fundamentals of financial management? Where can they cash checks and then spend money?¹⁸² Tribal governments must explore whatever options they have to open financial institutions on their reservations. Indian nations could use their financial muscle and try to coerce the banks they deal with to open branches on reservations. Tribes could also buy or create banks under federal or state banking laws, open federal credit unions,¹⁸³ or at least create Community Development Financial Institutions. Reservation communities absolutely have to find solutions for this particular lack of physical infrastructure.

In contrast, Indian country seems to have a surplus of one infrastructure need: available land. Yet even here, Indian entrepreneurs often encounter serious problems in acquiring the infrastructure of sites to lease to operate businesses. Many reservations have lots of seemingly empty space, but preexisting grazing rights, for example, and other issues actually limit where businesses and storefront establishments can be established or built. In addition to the land issues, the lack of utilities, internet, and telephones already mentioned limits where businesses can locate and be profitable. There are also reports of it taking extraordinary lengths of time and numerous steps to obtain a land lease on some reservations.¹⁸⁴

Indian nations could facilitate commercial land leases by designating in advance, and clearing any preexisting claims on,

181. Miriam Jorgensen & Randall K.Q. Akee, *Access to Capital and Credit in Native Communities: A Data Review*, at iii-iv, 4-10 (2017) (stating that there are only eighteen native-owned banks in the United States); MILLER, RESERVATION "CAPITALISM," *supra* note 5, at 2, 148-49.

182. Perhaps technological advances will partially solve the problem of the lack of brick-and-mortar banks in Indian country, just as cell phone technology solved the lack of telephone hard-wire infrastructure in some countries. *See, e.g., Growing Inclusive Markets*, UNITED NATIONS DEV. PROGRAMME, http://www.undp.org/content/undp/en/home/partners/private_sector/GIM.html (last visited Jan. 22, 2019) (explaining that in 2005 Kenya had 32 million people but only 2 million bank accounts so Safaricom Kenya developed a cell phone electronic money transfer system for cash withdrawals and deposits).

183. *E.g.,* NORTHERN EAGLE FED. CREDIT UNION, <https://northerneaglefcu.org> (last visited Jan. 22, 2019).

184. MILLER, RESERVATION "CAPITALISM," *supra* note 5, at 121; SMITH, *supra* note 164, at 63, 68, 96; Fonseca, *supra* note 26, at 13.

reservation locations where land is immediately available to lease and where efficient tribal bureaucracies are ready to facilitate leases within very short time periods.¹⁸⁵ Perhaps federal and tribal governments could even install utilities at these designated locations in advance and/or build incubator spaces—a currently very popular idea where new business start-ups share space and perhaps even obtain space rent free.¹⁸⁶ Moreover, tribes could build business parks and strip malls with small office spaces for lease where businesses could open very quickly and cheaply. This idea, however, will remind people of U.S. Economic Development Agency and Bureau of Indian Affairs projects and grants from the 1960s and 1970s, which allowed federal and tribal governments to build buildings and industrial parks on speculation. Many of these projects sat empty for years.¹⁸⁷ But, hopefully, Indian country is more available for business today than fifty-plus years ago so that this suggestion can now succeed where the projects built on speculation in the 1960s and 1970s mostly did not.¹⁸⁸

Building incubators and/or buildings or strip malls where multiple small businesses can locate offers another big benefit to small business. Research on how clusters of entrepreneurs succeed more often and are more profitable than solo entrepreneurs further demonstrates the value of this idea. The research shows that clusters of entrepreneurs innovate new ideas, services, and products off of each other, and they support each other by being both suppliers and customers of the other entrepreneurs.¹⁸⁹ So the more

185. Miller, *Inter-tribal and International Treaties*, *supra* note 170, at 1112.

186. See, e.g., *Incubators & Accelerators*, BUS. OR., <http://www.oregon4biz.com/Innovate-&-Create/R&D-Business/Incubators> (last visited Jan. 22, 2019).

187. KLAUS FRANTZ, INDIAN RESERVATIONS IN THE UNITED STATES: TERRITORY, SOVEREIGNTY, AND SOCIOECONOMIC CHANGE 290 (1999); MILLER, RESERVATION “CAPITALISM,” *supra* note 5, at 64. In contrast, the Mississippi Choctaw Tribe built an industrial park in the 1970s and convinced Packard Electric to open an automotive wiring harness manufacturing plant there in 1979. *Economic Development History*, MISS. BAND CHOCTAW INDIANS (2016), <http://www.choctaw.org/government/development/economicDevHistory.html>.

188. Over the past fifty years, American Indian governments and Indian individuals have made great strides and gained valuable experience operating governmental departments and businesses, and many tribal governments have developed very successful and lucrative businesses. These experiences and expertise make Indian country more ready for future development.

189. Vincent J. Pascal & Daniel Stewart, *The Effects of Location and Economic Cluster Development on Native American Entrepreneurship*, 9 INT’L J. ENTREPRENEURSHIP & INNOVATION

entrepreneurs and businesses attracted to a reservation, the more businesses and new entities that will result. Establishing incubators or strip malls will encourage the formation of these entrepreneurial clusters.

It is clear that Indian country must find solutions for its infrastructure issues if significant progress is to be made toward developing private-sector economies. Proactively working on these ideas could even produce a multiplier-effect benefit of its own because many tribal governments now operate utility departments¹⁹⁰ and even construction companies or departments, and these entities could be the developers and builders of much of the infrastructure discussed above. This would create a win-win situation because the funding to build such projects would be used to employ tribally and Indian-owned companies that hopefully employ many Indian people, and this would help keep that money circulating in tribal communities to further benefit reservations from the multiplier effect.¹⁹¹

8. Attracting human and financial capital investments

Indian nations can greatly increase their chances of successfully creating private-sector economies by undertaking targeted strategies designed to attract human capital and financial investments to their reservations. We have already discussed several strategies above: developing human capital, creating and funding entrepreneurs, patronizing on-reservation businesses, and improving the legal and physical infrastructure in Indian country. This section addresses how Indian nations could also use tribal partnerships and tax and regulatory incentives to attract private businesses and investments.

121 (2008) (arguing that economic cluster formations are a new strategy for regional competitive advantage and entrepreneurial growth; clusters facilitate entrepreneurship and business performance; Native American entrepreneurs in economic clusters enjoy the same competitive advantages); *Early State Entrepreneurial Support Programs*, KAUFFMAN FOUND., <https://www.kauffman.org/microsites/state-of-the-field/topics/entrepreneurial-support-programs> (last visited Jan. 22, 2019).

190. See, e.g., LEONARD S. GOLD, *ESTABLISHING A TRIBAL UTILITY AUTHORITY HANDBOOK* (2012 ed.); *Inter-tribal Utility Forum and Gathering*, U.S. DEP'T ENERGY (Mar. 30, 2016), <https://www.energy.gov/indianenergy/events/inter-tribal-utility-forum-and-gathering>.

191. Both the Obama and Trump administrations touted infrastructure improvements as important steps to improve the U.S. economy.

Several tribal governments have already implemented the idea of entering joint-venture situations with private industry to develop major economic resources.¹⁹² Indian nations could also consider partnerships or joint ventures on a smaller scale with private-sector businesses and non-Indian companies to operate economic concerns or franchises on reservations.¹⁹³ These efforts will bring private-sector employment to reservations.

The Navajo Nation provided an illuminating example when it worked with the Bashas food company in Arizona to build privately owned medium-sized grocery stores on the reservation. The economic and human benefits have been enormous. As of 2014, thirteen Bashas stores were located on the reservation with 355 employees, and Navajo women were the managers of all of these stores.¹⁹⁴ The stores also provide quality fruits and vegetables that are mostly absent from remote reservations. This has clearly been a valuable partnership and points the way to further partnerships between tribal governments and private businesses that can also create economic, employment, and social benefits.

Tribes should also consider the impact that tax and regulatory issues play in attracting or repelling business and investment. It is, of course, a political decision for tribal governments to make whether they will aggressively wield their taxation and regulatory

192. See, e.g., R. LANCE BOLDREY & COURTNEY F. KISSEL, MICH. ECON. DEV. CORP, INCENTIVES FOR JOINT VENTURES BETWEEN MICHIGAN'S TRIBES AND NON-INDIAN BUSINESSES (Sept. 14, 2011), https://www.michiganbusiness.org/49de06/contentassets/207519e5bc664dac9c08dc89ddb5da0/guide_on_incentives_for_joint_ventures_with_tribes.pdf. Some Alaska Native corporations partnered with Wackenhut company and used federal minority contracting provisions to provide security services on American military bases around the world. Jay Price & Joseph Neff, *US: Indian Tribes Outsource Defense Contracts After Winning Them with Preferential Rules*, CORPWATCH (Nov. 28, 2004), <https://corpwatch.org/article/us-indian-tribes-outsource-defense-contracts-after-winning-them-preferential-rules>; Leslie Wayne, *Security for the Homeland, Made in Alaska*, N.Y. TIMES (Aug. 12, 2004), <https://www.nytimes.com/2004/08/12/business/security-for-the-homeland-made-in-alaska.html>. The Mississippi Choctaw Tribe worked to attract companies to its reservation, and in 1981 the American Greetings Corporation opened a plant that provided 250 jobs. MISS. BAND CHOCTAW INDIANS, *supra* note 187.

193. In 1985, the Mississippi Choctaw Tribe entered its first joint venture with the Oxford Speaker Company of Chicago, which was seeking a minority partner to make car speakers. The partners opened their plant on the reservation in 1985 as the Tribe's first joint venture. MISS. BAND CHOCTAW INDIANS, *supra* note 187.

194. Susan F. Calder, *Bashas' Diné Markets and the Navajo Nation: A Study of Cross-Cultural Trade*, 39 AM. INDIAN CULTURE & RES. J. 47, 58 (2015).

powers or consider reducing them and using them instead as incentives to entice businesses and investors. In 2001, the Navajo Nation provided an example of these incentives when it approved a 25% business activity tax break for reservation-based coal companies.¹⁹⁵ Similarly, tribal governments could induce reservation investments of financial and human capital via tax incentives. Contractual and statutory promises of reduced tax rates for a set number of years, or even offers of financial assistance as inducements for businesses to locate in a particular jurisdiction, are well-known strategies used by non-Indian governments to attract business and industry. Tribes could even assist investors with loans, grant monies, or federal investments. These tactics are similar to what states and counties do to attract businesses to locate in their areas. Indian nations are plainly in competition with non-Indian cities, counties, and states to attract business development. These political entities often offer big companies enormous tax breaks to locate in their jurisdictions. Tribal governments need to consider similar strategies to attract investments.

Tribal governments need to consider making their reservations welcoming places that are “open for business” and that will entice entrepreneurs to invest their financial capital and their time, efforts, and expertise operating businesses. These efforts obviously include attracting both tribal citizens, other Indians, and non-Indians to invest their human capital and businesses in Indian country.

As already suggested, tribes will also benefit by attracting more than just some minimal number of entrepreneurs to their reservations. Studies show that entrepreneurs flourish and their numbers increase best when they operate in clusters.¹⁹⁶ This seems an obvious statement because larger groups of business people can advocate in local chambers of commerce and the political arena, engage in business with each other, and innovate new ideas and businesses from other entrepreneurs’ ideas and actions.

It is even more crucial for Indian nations to make reservations business friendly when attempting to attract financial investments. Investors go wherever they wish and invest in what they wish, and they do so in locations and in financial instruments that promise

195. 4 NAVAJO NATION CODE § 409 (2005).

196. Pascal & Stewart, *supra* note 189, at 128-29.

the highest and safest returns. By necessity, Indian nations must make Indian country as secure and profitable a place to invest as possible. Utilizing the points discussed in this section will contribute to a more profitable and stable economic environment in Indian country.

Tribes cannot rely on the mere fact that most reservations are poor and that businesses should naturally be drawn to them. It might be counterintuitive, but a region's extreme poverty is actually a negative aspect for attracting financial and human capital. Investors can invest in many places, and locations that are already prosperous, that have large populations and lots of money, often appear more promising places to invest than do poverty-stricken areas.¹⁹⁷

9. Nonprofit and nongovernmental social welfare organizations

Nonprofit organizations, nongovernmental organizations, and social welfare programs and organizations create enormous ancillary economic benefits that assist the regions they work in while they are serving their often laudatory objectives.¹⁹⁸ They are an important part of the non-Indian American economy. Such organizations and activities can also help attract financial and human capital, and more employment and economic activities to reservations. Indian country could benefit greatly from emphasizing and assisting the creation of such entities and adopting policies to attract these kinds of programs and organizations.

One example demonstrates graphically the ancillary economic impacts a tribal social policy can create. In 2003, the Tohono O'otham Nation completed a sixty-bed skilled nursing facility on its reservation. The facility was built to serve the social and cultural goals of helping elders stay on the reservation and be closer to their

197. Hunter R. Clark & Amanda Velazquez, *Foreign Direct Investment in Latin America: Nicaragua – A Case Study*, 16 AM. U. INT'L L. REV. 743, 759 (2001).

198. E.g., *Economic Impact*, NAT'L COUNCIL NONPROFITS, <https://www.councilofnonprofits.org/economic-impact> (last visited Jan. 22, 2019) (posting reports on states such as Alaska, New York, Vermont, New Hampshire, and Maine, and cities such as Portland, Oregon, where nonprofits are extremely valuable contributors to the economic health of the region); *Independent Sector Releases Economic Impact Data on Nonprofits in Greater Detroit*, INDEP. SECTOR (Oct. 26, 2017), <https://independentsector.org/news-post/independent-sector-releases-economic-impact-data-on-nonprofits-in-greater-detroit> (this organization's study showed that the 3500 501(c)(3) nonprofits operating in the Detroit area generated over 240,000 jobs and contributed nearly \$18 billion in economic activity).

families. Apparently, no one was thinking of any economic potential from this project, but it ended up creating one hundred permanent jobs on the reservation, the majority of which are filled by Tohono O'otham citizens. The facility later added employee housing and a ten-bed assisted living annex.¹⁹⁹ This project ended up serving both community welfare interests and economic interests on the reservation.

There are many nonprofit entities working on American Indian issues, but I am aware of very few such organizations that are actually located on reservations and thus are contributing to Indian country economies.²⁰⁰ Tribal governments and Indian country economic development advocates should work to attract such organizations to operate in Indian country. Certainly, being located on reservations should assist these organizations to better carry out their missions and would assist Indian country economic development.

In sum, Indian nations must make reservations attractive to investors and businesses by continuing to enforce the rule of law, drafting and enforcing sound business codes and regulations, creating effective and efficient bureaucracies, and establishing courts that are independent from political whims. In essence, they must develop conditions that attract new and existing entrepreneurs, businesses, and investments. The ideas discussed in section IV.A set out some important steps for Indian nations and reservation communities to consider using if they choose to develop private-sector economies.

B. Lessons from Indian Nations' Economic Development

Every government in the world is intimately involved in the creation, regulation, control, and influence of their economies whether they be capitalist, free-market, socialist, or communist

199. Email from Judith Dworkin, Managing Partner, Sacks Tierney, to Robert J. Miller (June 8, 2018, 3:07 PM) (on file with author). Additionally, the Mississippi Choctaw Tribe was actively seeking to help diversify its reservation economy when it opened a 120-bed nursing home that employed 125 people. MISS. BAND CHOCTAW INDIANS, *supra* note 187.

200. *E.g.*, *Top Native American Organizations to Know*, DIVERSITY BEST PRACTICES (Aug. 28, 2016), <https://www.diversitybestpractices.com/news-articles/top-native-american-organizations-to-know>.

countries.²⁰¹ It is the same in Indian country. Tribal governments are the political entities that help create, regulate, and control the legal and economic systems in Indian country and are at least partially responsible for the success of their private-sector economies.

The Harvard Project on American Indian Economic Development has engaged in extremely important research and advocacy work since 1987, investigating the elements that create successful Indian nations' economic development.²⁰² In my opinion, the key factors the Harvard Project has identified for tribal governments to succeed are directly relevant to the development of successful private-sector economies in Indian country. This section briefly sets out the key factors identified by the Harvard Project for successful public-sector (tribal) development and then shows how the same factors can also be utilized to help develop private-sector economies.

According to the Harvard Project, the first element in successful tribal economic development is that tribal institutions matter.²⁰³ The Harvard Project defines "institutions" to include both the formal and informal ingredients that make economic development possible in a particular jurisdiction such as court systems, commercial codes, administrative law, property and tax law, and the social and cultural institutions that impact incentives to invest in one community over another.²⁰⁴

The Harvard Project also identifies three subparts of this first key factor that are required for Indian nation economic success. First, a society and government must follow the rule of law so that business contract disputes and employment decisions, for example, are handled in ways that comply with the core concepts of the

201. E.g., IRMA ADELMAN, *THE ROLE OF GOVERNMENT IN ECONOMIC DEVELOPMENT* (1999); DEREK BOK, *THE STATE OF THE NATION: GOVERNMENT AND THE QUEST FOR A BETTER SOCIETY* (1996) ("All governments try to use these powers to increase economic growth, keep prices stable, and lower unemployment. But countries go about this task in markedly different ways."); David Smallbone & Friederike Welter, *The Role of Government in SME Development in Transition Economies*, 19 INT'L SMALL BUS. J. 63, 66 (2001).

202. *About Us*, HARV. PROJECT ON AM. INDIAN ECON. DEV., <https://hpaied.org/about> (last visited Jan. 22, 2019).

203. HARVARD PROJECT, *STATE OF THE NATIVE NATIONS*, *supra* note 24, at 122 (2008).

204. *Id.*

society's and culture's traditions and definitions of legitimacy.²⁰⁵ The second subpart needed to succeed in economic endeavors is that Indian governments have to separate politics from the day-to-day operation of tribally owned businesses.²⁰⁶ It seems obvious that politicians are not the best operators and managers of businesses when their decisions could no doubt be driven by their political agendas and interests. The Harvard Project recommends that tribal governments appoint experienced and independent boards of directors and business managers to operate tribally owned enterprises. In fact, its research shows that Indian nations who follow that advice have a 400% better chance for their businesses to be profitable and sustainable.²⁰⁷ The third subpart the Harvard Project recommends for Indian nations is efficient governmental bureaucracies.²⁰⁸ Obviously, businesses and entrepreneurs are attracted to locations where the branches of government are competent and can assist businesses to locate, operate, and profit.

The second key element or factor according to the Harvard Project is that tribal cultures matter.²⁰⁹ They are not saying that Indian cultures are anti-business or anti-economic activities. But as with any country or culture, various Indian peoples and their cultures and beliefs will not support certain businesses or activities on their reservations if they might violate a nation's traditions, culture, or religion for instance. As an example, I often point out that starting a hog farm in Israel or in a Muslim country would no doubt be a poor business decision since the religions of those countries do not allow the eating or use of pork. It would be the same in Indian country regarding a particular business that might violate some cultural or religious taboo. Such a business would surely be doomed to failure.²¹⁰

205. *Id.* at 122–23.

206. *Id.* at 123.

207. *Id.*

208. *Id.* at 123–25.

209. *Id.* at 125–26.

210. See, e.g., David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 203–04 (2004) (discussing *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1035 (8th Cir. 2002) and *Sangre de Cristo Dev. Co., Inc. v. United States*, 932 F.2d 891 (10th Cir. 1991), where tribal governments and reservation communities rejected a massive hog farm operation and

The third key factor identified by the Harvard Project is that tribal sovereignty matters in the success of tribally owned businesses.²¹¹ The point is that Indian governments and reservation communities have to make the decisions regarding their own futures and the economic strategies they will pursue. The Harvard Project has found that self-determination and self-rule over the decisions of which institutions and businesses to create and operate is the only strategy that has proven successful for economic development in Indian country.²¹²

In my opinion, each of these elements that are necessary for tribal public-sector economic success are equally applicable to private-sector economic success on a reservation. As discussed in section IV.A above, Indian nations are intimately involved in the development and success of their private sectors and in attracting entrepreneurs, businesses, and human and financial capital to their locations. First, entrepreneurs, businesses, and human and financial capital will never relocate on to reservations that lack the rule of law, or where tribal governments do not stay appropriately out of the “business” of private businesses. Nor will the private sector relocate to reservations that lack efficient governmental institutions, courts, and bureaucracies.²¹³ There are too many other locations where businesses can operate profitably to consider risky locations.

Second, hopefully most business owners and entrepreneurs are astute enough to not establish a business where they would violate the basic cultural and religious norms of the people. That would seem to be a ridiculous business decision and destined for bankruptcy.

The third element, that sovereignty matters in tribal economic development issues, also applies to the private sector by analogy. A tribal government that exercises its sovereignty and carries out the will of the people by serving their desires, needs, and preferences, should also be able to provide clear directions to the

a housing development that would have brought 16,000 non-Indians onto a reservation of 300 Indians); *Navajos Ban Uranium Mining on Reservation*, NBC (Apr. 22, 2005).

211. HARVARD PROJECT, STATE OF THE NATIVE NATIONS, *supra* note 24, at 126–28.

212. *Id.* at 126.

213. *Cf.* Clark & Velazquez, *supra* note 197, at 759 (explaining that while much of Latin America has become a major recipient of direct foreign investment, investors have avoided Nicaragua in part due to weak government).

business world and entrepreneurs on how governmental and economic issues are handled on that particular reservation and consequently should help create a climate where private-sector businesses can succeed.

The conclusions of the Harvard Project in regard to successful tribal economic development also provide guidance on the elements necessary for Indian nations and reservation communities to successfully develop private-sector economies.

C. Lessons from Eastern Europe and China

In searching for analogous situations that might provide lessons for Indian nations in developing private-sector economies, it appears helpful to examine the recent efforts of the ex-Soviet-bloc countries and China. These countries have attempted in recent decades to transform communist and socialist economies to free-market private-sector entities. I only briefly mention the topic here because a fuller investigation of the subject is beyond the scope of this Article.

After the fall of the Soviet Union, many Soviet-bloc countries attempted to transform their economies to capitalist free-market systems. The primary debate in Eastern Europe, it seems, was over how quickly to attempt these transformations and how to pass the public ownership of the means of production, distribution, and exchange to private ownership and control.²¹⁴ China has also been undergoing this process and addressing these same debates for the past several decades.²¹⁵

214. See generally 1 & 2 THE TRANSITION IN EASTERN EUROPE (Olivier Jean Blanchard, Kenneth A. Froot & Jeffrey D. Sachs eds., Univ. Chi. Press 1994); John Bennett, Saul Estrin & Giovanni Urga, *Methods of Privatization and Economic Growth in Transition Economies*, 15 ECON. TRANSITION 661 (2007); Simeon Djankov & Peter Murrell, *Enterprise Restructuring in Transition: A Quantitative Survey*, 40 J. ECON. LIT. 739 (2002); Saul Estrin et al., *The Effects of Privatization and Ownership in Transition Economies*, 47 J. ECON. LIT. 699 (2009); Jeffrey Sachs, *The Economic Transformation of Eastern Europe: The Case of Poland*, 25 ECON. PLAN. 5 (1992); Barbara Blaszczyk et al., *Corporate Governance and Ownership Structure in the Transition: The Current State of Knowledge and Where to Go from Here* (CASE Studies & Analyses No. 264, 2003), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443806#.

215. See generally Andrew Feltenstein & Saleh M. Nsouli, "Big Bang" Versus Gradualism in Economic Reforms: An Intertemporal Analysis with an Application to China, 50 IMF STAFF PAPERS 458 (2003); Nicholas Calcina Howson, *China's "Corporatization Without Privatization" and the Late Nineteenth Century Roots of a Stubborn Path Dependency*, 50 VAND. J. TRANSNAT'L L. 961 (2017); Sumon Bhaumik & Saul Estrin, *How Transition Paths Differ: Enterprise*

After preliminary consideration, however, I am uncertain whether Indian country has much to learn from these efforts because those countries are attempting to transform their public-sector economies into free-market capitalist economies. In contrast, I am not arguing for Indian nations to alter their current public economies one iota but am instead discussing how tribal governments and reservation communities can develop and add the private sector to their existing economies. But the comments of economists David Smallbone and Friederike Welter hint at the beneficial lessons Indian country might learn and demonstrate that this topic deserves further in-depth research. They argue that the primary role of governments and politicians in transitioning economies is to influence the values their societies place on private enterprise and entrepreneurship and to encourage individuals to start businesses. They then state:

[T]his is the most fundamental and important role for government, which is largely underdeveloped in many of the former Soviet republics in particular. For example, in the Russian Federation, the absence of a recent tradition of private business ownership, combined with a lack of self-governing (business) organisations and a poor public perception of the contribution of small business to social and economic change, means that the state must take a lead in modifying the institutional conditions and the ground rules in which business is conducted, if entrepreneurship is to flourish and fulfil its potential contribution to social and economic development.²¹⁶

There is a lot to unpack from that quote that is relevant to Indian country economic development.

I agree with their comments and see some direct analogies to Indian country. First, I have advocated in this Article that Indian nations have a crucial role in influencing and directing reservation economies and in starting, emphasizing, and encouraging the development of private-sector economies. Second, I have argued that tribal communities need to reinvigorate their historical institutions that supported and promoted private economic activities and legally protected the earned benefits or “profits.” Third, Indian

Performance in Russia and China (William Davidson Inst., Working Paper No. 744, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=664537#.

216. Smallbone & Welter, *supra* note 201, at 66.

country has lacked a recent tradition of private business ownership, and tribal governments need to help restore that community benefit and the common understanding of the value to the whole from privately owned economic enterprise. Finally, I have argued that tribal governments must adopt the institutional conditions and rules that help business flourish and contribute to the social and economic development of Indian country. These factors, which Smallbone and Welter say are crucial for private-sector development in Eastern Europe, are equally important to the development of fully functioning economies in Indian country and are absolutely crucial to the sustainability of reservations as the homelands of Indian nations, peoples, and cultures.

It is obvious that to successfully develop private-sector economies in Indian country, tribal nations and reservation communities have many possible tactics available to revive their traditional institutions to reach that end goal. This section has detailed nine potential short-term and long-range strategies to begin that process. Moreover, research on successful tribal governmental economic development and the attempts of Eastern Europe and China to develop private-sector economies can also provide some interesting analogies.

V. THE PRIVATE PROPERTY RIGHTS PANACEA?

This Part quickly reviews what some commentators suggest would improve economic conditions in Indian country: private property rights. This is not a new argument for tribal governments, Indians, reservation communities, and historians and lawyers involved in Indian affairs, but is instead a painful reminder of the most disastrous idea in U.S. Indian policy called the Allotment and Assimilation era.²¹⁷ Then, this Part briefly examines the Allotment era and its alleged attempt to apply a private property rights solution to economic deficiencies in Indian country. The Part concludes by exploring an intriguing, and to date very successful, movement in Scotland that is developing a land ownership and

217. MILLER, RESERVATION "CAPITALISM," *supra* note 5, at 42-44; 2 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 895-96 (arguing that allotment did not make Indians self-sufficient); *accord* Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. (forthcoming 2019); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 6 (1995).

management regime startlingly similar to historical and traditional forms of American Indian land ownership and economic development. Maybe the traditional and current Indian nations' communal land and use systems are not the regressive and underperforming anachronisms that some people claim.

A. Private Property Rights Approach

In the past three decades, many commentators have advocated for creating more and stronger private property rights for Indian individuals and Indian nations as a solution for reservation economic problems.²¹⁸ I support the argument to a limited degree.²¹⁹ But if these commentators are really arguing for the full application of individual private rights at the expense of tribal communal land ownership as the end-all be-all solution for reservation economic issues then, in my opinion, that would only lead Indian nations and reservation communities down a slippery slope they have encountered before. I believe these ideas are unworkable because they will be rejected out of hand by most Indian nations and Indian peoples as being counter to their experiences with American policies and especially with the Allotment era. Indian nations will also consider them as counter to the essence of their traditional economic institutions, land ownership regimes, and cultures because the ideas ignore their

218. TERRY L. ANDERSON ET AL., UNLOCKING THE WEALTH OF INDIAN NATIONS, at xvi, 109, 122, 295 (Terry L. Anderson ed., 2016); Terry Anderson & Dominic Parker, *Un-American Reservations*, DEFINING IDEAS: HOOVER INSTITUTION J. (Feb. 24, 2011), <https://www.hoover.org/research/un-american-reservations>. See generally Valerie Volcovici, *Trump Advisors Aim to Privatize Oil Rich Indian Reservations*, REUTERS (Dec. 5, 2016), <https://www.reuters.com/article/us-usa-trump-tribes-insight-idUSKBN13U1B1>; e.g., Bryan Leonard, Dominic Parker & Terry Anderson, *Poverty from Incomplete Property Rights: Evidence from American Indian Reservations 1* (Jan. 2018) (unpublished manuscript) (on file with author); John Koppisch, *Why Are Indian Reservations So Poor? A Look at the Bottom 1%*, FORBES (Dec. 13, 2011), <https://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/#29839b5c3c07>; Riley, *supra* note 14. For arguments supporting a bill proposed to the Canadian Parliament to increase private property rights for First Nations, see TOM FLANAGAN, CHRISTOPHER ALCANTARA & ANDRÉ LE DRESSAY, *BEYOND THE INDIAN ACT: RESTORING ABORIGINAL PROPERTY RIGHTS* 4-8, 53, 165-80 (2010).

219. I have long argued that the federal trusteeship and federal ownership of the legal estate over much of Indian country cause bureaucratic inefficiencies, intolerable time delays, and add costs to economic activities in Indian country. MILLER, *RESERVATION "CAPITALISM," supra* note 5, at 34, 40, 110-11, 122-23, 160; Miller, *Economic Development in Indian Country, supra* note 141, at 851-52.

history of successful communal land ownership, management, and use over many centuries.

The main argument of the private rights advocates seems straightforward: private property ownership is more efficient and profitable than the communal tribal and federal ownership of lands and resources in Indian country.²²⁰ These advocates claim that the issues of poverty, economic inefficiency, federal bureaucratic hurdles, and tribal institutional obstacles to development arise from communal land ownership²²¹: “Prosperity is built on property rights, and reservations often have neither. They’re a demonstration of what happens when property rights are weak or non-existent.”²²² “What American Indians need are real property rights.”²²³

I disagree with this premise for four reasons. First, these advocates seem to assume that there are currently no, or few, private property rights held by Indian nations and Indians in Indian country. That is incorrect. Indian nations and their citizens own “private” property rights in their reservation lands and resources.²²⁴ As pointed out by economics professor Jennifer Roback long ago, economists usually consider “the individual as the unit of analysis,” but they do “treat ‘firms’ and ‘households’ as if these were individual decision makers and as if these were natural and well-defined units of analysis.”²²⁵ She concluded that “[o]nce we acknowledge this point, it is no longer obvious whether ‘privatization’ as practiced by Europeans is superior to ‘collectivization’ as practiced by Indians.”²²⁶ I agree with her statement that “tribal lands are privately owned by tribes.”²²⁷ In a sense, Indian nations own their lands similar to corporate owners or the United

220. E.g., Jennifer Roback, *Exchange, Sovereignty, and Indian-Anglo Relations*, in PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 29, at 5, 6.

221. E.g., Leonard, Parker & Anderson, *supra* note 218, at 1 (“[I]ncomplete property rights have stunted income growth for Native Americans, relative to local control, whether communal or private.”).

222. Koppisch, *supra* note 218.

223. Riley, *supra* note 14.

224. See *supra* Sections III.A & B; see also Leonard A. Carlson, *Learning to Farm: Indian Land Tenure and Farming Before the Dawes Act*, in PROPERTY RIGHTS AND INDIAN ECONOMIES, *supra* note 29, at 67, 69-71, 73-75, 81 (commenting that Indian cultures had private property and farming rights systems before the Allotment Act policy).

225. Roback, *supra* note 220, at 6.

226. *Id.*

227. *Id.*

States: tribal nations manage their lands and assets by administrative and democratic decision-making somewhat akin to the United States' decisions regarding federal lands, and akin to corporate governance methods and structures. Corporations are treated as the owners of private property rights and can be efficient managers of their assets. In a similar fashion, Indian nations and their citizens make the management and ownership decisions to exercise their private rights in their lands and assets in ways that they think will benefit themselves.

Second, the central premise of the private rights advocates is not universally accepted, i.e., that individually owned rights are always more valuable or more efficiently managed than other forms of property rights. Many private owners of land, including individuals and corporations, have taken actions that were extremely detrimental to their own real property interests and have even injured outsiders, in the environmental arena for example.²²⁸ In addition, Professor Matthew Hoffman states that “[t]here is far from complete agreement however that the foregoing model of private property rights is the best one.”²²⁹ Private property rights systems might not be the end-all be-all solution for Indian country that some economists and commentators claim. In fact, there is another viable economic development and property rights method to seriously consider, one that tribal nations utilized for hundreds and thousands of years: a mixed system of communal ownership and private-use rights.²³⁰

228. See, e.g., Karl Puckett, *Fort Belknap Backs State in Bad Actor Case over Zortman-Landsky Pollution: Since 1999, \$77 Million Has Been Poured into Healing This Injured Landscape, Almost \$50 Million Coming in Public Money*, GREAT FALLS TRIB. (Sept. 13, 2018), <https://www.greatfallstribune.com/story/news/2018/09/13/cleanup-costs-zortman-landsky-gold-mines-continue-mount-montana-bad-actor-superfund-acid/1292506002>; EPA Seeks Dismissal of Lawsuit over Colorado Mine Spill, AP (July 27, 2018), <https://www.apnews.com/47cbd296483c418390b821a80ed65e76> (discussing the Navajo Nation, Utah, and New Mexico's suit versus EPA); 2015 Gold King Mine Waste Water Spill, WIKIPEDIA, https://en.wikipedia.org/wiki/2015_Gold_King_Mine_waste_water_spill (last visited Jan. 22, 2019).

229. Matthew Hoffman, *Why Community Ownership? Understanding Land Reform in Scotland*, 31 LAND USE POL'Y 289, 290 (2013); see also Scott J. Shackelford, *Neither Magic Bullet nor Lost Cause: Land Titling and the Wealth of Nations*, 21 N.Y.U. ENVTL. L.J. 272, 272 (2014) (arguing that formalizing property rights is not a panacea for alleviating poverty in the developing world but is just one part of a process of legal reforms required for economic development).

230. See FLANAGAN ET AL., *supra* note 218, at 19–22 (discussing some advantages of common-, community-, government-, and family-owned properties).

Third, there is a major modern-day movement of the use of communal land ownership, communal decision-making, and private rights going on in Scotland, as discussed in section V.C below. This movement demonstrates the successful use of common land ownership and community economic decision-making. And the movement demonstrates that those interests are just as important as the bottom line.

The final reason I disagree with the private rights solution is that, in this particular situation, I think historical and cultural reasons will cause Indian nations and most Indian citizens to oppose such an idea. How can an economic strategy succeed if it goes against the ingrained institutional ideas of Indian property ownership, legal regimes, cultures, and historical experiences?²³¹ In my opinion, Indians and tribal nations will not accept this solution because it is historically tone deaf. The private rights panacea sounds dangerously similar to the U.S. Indian policies that the United States pursued throughout history to acquire Indian lands; in particular, it sounds like the Allotment era of federal Indian policy in which tribes lost the ownership of two-thirds of their lands and with them the sovereignty and jurisdiction over those territories and assets.

The private rights idea also ignores historical and cultural principles because communal ownership is how all native societies and cultures in North America successfully held and managed their lands and assets for centuries. I am not one who fears that culture is hurt by economic activities and the pursuit of private initiative and profits.²³² But in this instance it does appear that the legal practices and cultural beliefs of almost all Indian nations and communities, in what is now the United States, would reject a private property rights approach that ignores their historical and traditional forms of property ownership and use. Thus, Indian country would probably never benefit from any of the possible efficiencies the private rights advocates promise.

231. ANDERSON, *supra* note 37, at 19 (“[C]ulture cannot be left out of the institutional milieu, because culture is itself a crucial part of the informal institutions.”).

232. I have long argued that private property rights are not new to American Indian cultures and legal institutions. MILLER, RESERVATION “CAPITALISM,” *supra* note 5, at 8, 160–64; Miller, *Economic Development in Indian Country*, *supra* note 141, at 853–59.

Other professors in the Indian Law field have also addressed this private rights approach.²³³ Recently, Professors Kristin Carpenter and Angela Riley emphasized three points in opposition to the privatization argument. They state first that the discussion “ignores indigenous perspectives on the legal and cultural history.”²³⁴ Second, that “land tenure in Indian Country is much more varied and complex than some of the calls for privatization would suggest.”²³⁵ And they emphasize that indigenous self-determination and sustainability can be an alternative or complement to the privatization rhetoric.²³⁶ They also cite various studies of the Harvard Project on American Indian Economic Development that financial conditions in Indian communities are rapidly improving for tribal populations generally and that this occurs largely because of their communally owned lands.²³⁷ Furthermore, tribes that exercise governmental self-determination by communal decision-making and that free themselves of federal bureaucratic control, and strengthen their cultural practices, are actually doing better economically than other tribal communities.²³⁸

In my opinion, the private property rights argument will not succeed in Indian country because it will not be accepted in Indian country. The idea is not guaranteed to be a better solution than traditional Indian institutions, or even the best solution to economic development issues in Indian country. Moreover, the argument ignores historical and cultural principles.

B. Allotment and Assimilation Era

The United States’ overriding policy toward the lands and assets of Indian nations and Indian peoples has always been to acquire them as quickly and cheaply as possible. This might sound a simplistic or strident statement. But when one closely examines

233. Carpenter & Riley, *supra* note 217, at 26.

234. *Id.* at 6.

235. *Id.*

236. *Id.* at 7.

237. *Id.* at 25 (citing Stephen Cornell & Joseph P. Kalt, American Indian Self-Determination: The Political Economy of a Policy that Works 9 (Nov. 2010) (unpublished manuscript) (on file with author)).

238. Carpenter & Riley, *supra* note 217, at 23, 25–26 (citing MIRIAM JORGENSON, NATIVE NATIONS INST., ACCESS TO CAPITAL AND CREDIT IN NATIVE COMMUNITIES (2016)).

the history of European exploration and colonization of what is now the United States, and the policies pursued and the laws enacted from the establishment of the English colonies, the American states, and the United States, it appears to be correct.²³⁹ We will look at just one example, and then at the Allotment Act, to prove this statement regarding the United States' policy toward Indian lands and assets, and then argue this is one big reason why Indian country would probably not accept the private property rights approach addressed above.

In 1783, the Articles of Confederation Congress asked General George Washington for his opinion on how to deal with the Indian nations after the United States signed the 1783 treaty with England that ended the Revolutionary War. In a letter to a committee of Congress dated September 7, 1783, Washington set out his thoughts:

"[T]he Settlemt. [sic] of the Western Country and making a Peace with the Indians are so analogous that there can be no definition of the one without involving considerations of the other . . . policy and oeconomy [sic] point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause *the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape*. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expence [sic], and without that bloodshed, and those distresses . . ." ²⁴⁰

239. See generally ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY* (2006); ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE c. 1500–c. 1800* (1995); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

240. DOCUMENTS OF UNITED STATES INDIAN POLICY 2 (Francis Paul Prucha ed., 3d ed. 2000) (emphasis added).

Pursuing these same strategies, in 1887, Congress adopted a “new” Indian policy by enacting the General Allotment Act during what became known as the Allotment and Assimilation era.²⁴¹

For decades preceding 1887, liberal thinkers, “Friends of the Indians,” politicians, and Christian reformers had been examining federal Indian policies. The predominant principle on how to best deal with tribal nations and help Indians was assumed to be to “civilize” and convert individual Indians and liberate them from communal tribal life.²⁴² The policy was also designed to bring Indians into the American “melting pot” and assimilate them into American society.²⁴³ In addition, this era of official federal Indian policy had the explicit goals of breaking up tribal communal lands, ending the existence of Indian nations, and opening reservations to non-Indian settlement.²⁴⁴ It is well known that the desire of non-Indians to own reservation lands and to open Indian lands and assets to the American economy was the prime motive behind this policy.²⁴⁵

241. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–334, 339, 341, 342, 348, 349, 354, 381 (2012)); see COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 71–84 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK].

242. EWERS, *supra* note 81, at 92–93; DELOS SACKET OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 11–12 (1973 ed.) (arguing that allotment fought the cooperativeness and clannishness of tribal life); PRUCHA, *supra* note 217, at 129, 139–51, 179–208, 283–92, 412, 465, 500, 510, 609–10, 689–92, 814–22.

243. Statement of Delos Sacket Otis, *supra* note 125, at 430–34; PRUCHA, *supra* note 217, at 609–10.

244. Hagen v. Utah, 510 U.S. 399, 425 (1994) (Blackmun, J., dissenting) (“[Allotment was] intended to assimilate the Indians by transforming them into agrarians and opening their lands to non-Indians.”); Montana v. United States, 450 U.S. 544, 560 n.9 (1981) (“[A]n avowed purpose of the allotment policy was the ultimate destruction of tribal government.”); COHEN’S HANDBOOK, *supra* note 241, at 74 (explaining that land “had to be taken out of common tribal ownership, shifted to individual Indian ownership and then somehow shifted to new settlers or other non-Indian corporate or personal owners”); PRUCHA, *supra* note 217, at 140–43, 659 (noting that allotment was part of the drive to individualize Indians by nineteenth-century Christian reformers and to break up tribalism by a government educational system and by extending American law over Indians); Richard Wilson, *Land Use and Economy on Indian Reservations*, in INDIAN VOICES: THE NATIVE AMERICAN TODAY 118–19 (1974) (arguing the allotment policy was meant to destroy traditional forms of tribal governments).

245. *E.g.*, Statement of Delos Sacket Otis, *supra* note 125, at 435 (alleging that the primary motivation of allotment was pressure from “land-hungry western settlers”); PRUCHA, *supra* note 217, at 577, 580–81, 659, 661–62, 864–65 (noting that Department of Interior reports from 1880, 1881, 1882, and 1884 all emphasized the necessity to reduce the size of reservations so that “industrious” white farmers could utilize the lands); *id.* at 665

The allotment aspect of the policy was to break up the communally owned tribal lands into individual plots, called “allotments,” that were to be owned by individual Indians and operated as farms.²⁴⁶ The General Allotment Act and the tribal-specific allotment acts that followed generally allotted reservations into 160-, 80-, and 40-acre plots that were given to individual tribal citizens who would become U.S. citizens.²⁴⁷ To protect unsophisticated Indians, the United States retained legal ownership of these allotments by holding the land in trust for twenty-five years during which the land was inalienable and not taxable by states.²⁴⁸ Significantly, any reservation lands left over, that were not allotted to individual Indians, were defined as “surplus” and sold to non-Indians.²⁴⁹ Most tribal governments lacked enough citizens to allot their entire reservation to only Indians. Hence, the United States sold the surplus lands to non-Indians and today many reservations have much higher non-Indian than Indian populations.

In the 1890s, Congress also began opening reservations to the American economy. Congress began authorizing the development of minerals and timber in Indian country, and the leasing of reservation lands to non-Indians for grazing and farming.²⁵⁰ Congress also authorized other uses of reservation lands for the U.S. economy by allowing rights-of-way for railroads, telegraphs, and telephones, for example.²⁵¹

(quoting the minority report of an 1880 House committee that attacked allotting reservations because the “main purpose” was “to get at the valuable Indian lands and open them up to white settlement”).

246. ANDERSON, *supra* note 37, at 111, 117; PRUCHA, *supra* note 217, at 140 (alleging that many felt the government should “encourage the Indians to adopt individual ownership of property, [and] assist them in opening farms”).

247. PRUCHA, *supra* note 217, at 667–68.

248. 25 U.S.C. § 348 (2012) (establishing twenty-five-year trust periods); PRUCHA, *supra* note 217, at 872–73.

249. 25 U.S.C. § 348; ECONOMIC ENCYCLOPEDIA, *supra* note 80, at 15 (noting tribes lost 60 million acres to surplus land sales).

250. 25 U.S.C. § 403 (allowing the leasing of trust allotments); 25 U.S.C. §§ 406–07 (allowing timber sales on allotted and unallotted trust lands); PRUCHA, *supra* note 217, at 672 (observing that Congress made leasing of Indian allotments possible in 1891); *id.* at 884–88 (discussing the enactment of mineral leasing acts); *id.* at 888–89 (observing that Congress allowed reservation timber to be logged starting in 1889).

251. 25 U.S.C. §§ 312, 319–20, 357; PRUCHA, *supra* note 217, at 738, 740.

Subsequent events severely limited any private benefits that Indians might have received from the Allotment Act. Many Indians quickly sold or lost their allotments once they received alienable titles to their lands due to fraud, tax foreclosures, and their own dire conditions.²⁵² Thus, these lands are no longer in Indian ownership to help Indians or tribal nations today.

Another problem allotment created that remains a nightmare today is the “fractionalization” of the ownership of individual allotments that remain in Indian ownership. This occurred when the original allottees, and then their heirs, died and their lands passed intestate to ever larger numbers of heirs. Indians were not allowed under the original Allotment Act to devise their allotments by will, and even after Congress fixed that oversight in 1910, many Indians did not take advantage of the provision.²⁵³ As a result, many trust allotments on reservations today have hundreds of owners. This has led to a serious problem coordinating ownership and decision-making over allotments and a burden on record keeping and legal work to manage and use these lands. In this situation, it is often easier for Indians to passively lease their property rather than attempt to gain consensus on projects or consolidate land rights to develop a business or project involving allotments.²⁵⁴

Also applicable to economic development on reservations today is the fact that a significant number of trust allotments, more than 10 million acres, are still held in trust by individual Indians

252. *The Purposes and Operation of the Wheeler-Howard Indian Rights B.: Hearing on H.R. 7902 Before the S. and H. Comms. on Indian Affairs*, 73d Cong., 2d Sess. 15, 15-18 (1934) [hereinafter Statement of John Collier] (statement of John Collier, Comm’r, Bureau of Indian Affairs); PRUCHA, *supra* note 217, at 811, 883, 896 (explaining that “a very high percentage of patentees quickly sold or mortgaged their land”; twenty-three million acres were sold by Indians after receiving their titles).

253. COHEN’S HANDBOOK, *supra* note 241, at 73; EWERS, *supra* note 81, at 120-21, 126-27 (observing that under the original Act Indians could not use wills to devise their allotments; heirship problems grew and made owners helpless to make use of the land; by 1960, 6 million acres of allotted land were owned by six or more heirs; divided ownership hurts agricultural productivity; trust lands produce about half the value of fee simple lands); PRUCHA, *supra* note 217, at 873-74 (commenting that fractionalization made a mockery of the idea of turning Indians into landowning farmers; by 1910 there were too many heirs and no way to unify and make their pieces of allotments into economically viable parcels).

254. Statement of John Collier, *supra* note 252, at 15, 16-18; PRUCHA, *supra* note 217, at 873-74 (explaining the impossibility of creating economically sized parcels); Wilson, *supra* note 244, at 118-19 (suggesting that allotment has hampered attempts to develop what remained of the reservation land base).

with the United States as the legal owner.²⁵⁵ This occurred because the United States changed the allotment policy in 1934 and froze in place any trust allotments that had not yet passed to Indians in fee simple ownership. Hence, many individual Indians own land on reservations today as the beneficial owner with the United States being the legal owner. The fact that the United States still retains the trusteeship and legal ownership of these allotments has rendered them almost totally unavailable for mortgages and borrowing money by individuals because a person cannot mortgage, lease, or develop the land without the permission of the federal government.²⁵⁶

The Allotment Act did not help create a thriving private-sector economy in Indian country nor did it assist Indian peoples to develop or benefit from the private property rights allegedly created by the Act. In fact, it created just the opposite. Evidence shows, for example, that Indian farming was on the increase before 1887 but then declined dramatically from 1887 to 1934 under the Allotment Act.²⁵⁷ In addition, allotment resulted in tribes losing two-thirds of all tribally owned lands, with the majority of that passing to non-Indians.²⁵⁸ It is no wonder that commentators call allotment a disaster for Indian nations and reservations because it drastically diminished the tribal land base, injured individual

255. DAVID GETCHES ET AL., *FEDERAL INDIAN LAW* 20 (4th ed. 1998) (stating that as of 1996, BIA statistics record 45.2 million acres of tribal trust land and 10.1 million acres of individual trust allotments).

256. Terry L. Anderson & Dean Lueck, *Agricultural Development and Land Tenure in Indian Country*, in *PROPERTY RIGHTS AND INDIAN ECONOMIES*, *supra* note 29, at 147, 154–56, 163.

257. LEONARD A. CARLSON, *INDIANS, BUREAUCRATS, AND LAND: THE DAWES ACT AND THE DECLINE OF INDIAN FARMING* 18, 174 (1981) (arguing that allotments were an economic disaster to Indian farmers; the “heavily supervised property right that emerged from allotment led to inefficiencies, corruption, and losses for both Indians and society”); EWERS, *supra* note 81, at 113–14 (suggesting that before allotment, tribes were effectively using land for farming); PRUCHA, *supra* note 217, at 42, 686, 895–96 (observing that under allotment Indian farming actually declined); Carlson, *supra* note 29, at 75 (stating that Indian farming reached a peak in the mid-1890s; allotment discouraged and injured Indian farming); Trospser, *supra* note 59, at 209, 219.

258. Tribally owned lands dropped from 138 million acres in 1871 to about 48 million acres by 1934. COHEN’S *HANDBOOK*, *supra* note 241, at 73; *see also* Statement of John Collier, *supra* note 252. In addition, nearly 20 million acres of the remaining 48 million were desert or semi-desert. *Id.*; *see generally* Judith V. Royster, *The Legacy of Allotment*, 27 *ARIZ. ST. L.J.* 1 (1995).

Indian economic progress, and hampered the ability to efficiently coordinate the use of the remaining Indian-owned land on reservations.²⁵⁹

In my opinion, suggesting a private property rights antidote to reservation poverty and poor economic conditions ignores historical and cultural principles. It ignores historical principles because it recalls the failed Allotment era policies and the disastrous problems allotment caused that Indian country is still dealing with today. It ignores cultural principles because it proposes something that would probably not be accepted in Indian country, by going against the economic institutions, laws, and land ownership regimes that most Indian nations and cultures promoted and protected for centuries. Even if the proponents of this approach are correct that there might be some improvements in economic efficiencies and profitability, I think most American Indian nations and reservation communities would reject the premise out of hand.²⁶⁰

C. *Communally Owned Lands in Scotland*

A land ownership and property rights regime that has developed in Scotland over the past few decades is worthy of note because it appears to be similar to the land ownership principles and rights, and the cultural and legal property regimes, that have been utilized by American Indians for hundreds of years. Maybe the idea of communal land ownership and management is not the dinosaur or anachronism that some assume.

In 1999, when the Scottish Parliament was reconvened after 300 years, one of its first concerns was continuing the ongoing examination of land reform.²⁶¹ The issue was alive and controversial

259. CARLSON, INDIANS, BUREAUCRATS, AND LAND, *supra* note 257, at 18, 174; PRUCHA, *supra* note 217, at 42, 686, 895-96 (arguing that allotment did not make Indians self-sufficient); Carpenter & Riley, *supra* note 217, at 16.

260. See THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALISM 8, 11, 90, 110 (1999) (alleging that a country can try to avoid free-market globalization for cultural and social reasons, but this comes at "an increasingly steep price"; admitting though that standardized economic systems can cause "cultural homogenization").

261. John Bryden & Charles Geisler, Community Based Land Reform: Lessons from Scotland 11, 13-15 (June 6, 2004), <http://www.caledonia.org.uk/land/documents/Bryden-and-Geisler.pdf> (paper presented at the IRSA XI World Congress of Rural Sociology, Trondheim, Norway); Frank Rennie, Professor, Lews Castle Coll., Univ. of the Highlands &

partly because Scotland has one of the most concentrated land-ownership patterns in the world.²⁶² The debate primarily centered around the crofting²⁶³ areas of the Highlands and Islands of Scotland. The debate was based on “the political justification and process for enabling greater community responsibility in the ownership of land.”²⁶⁴ The debate was also based on how to fund purchases of private lands by communities and how to manage such lands for the common good.

In 2003, the Scottish Parliament enacted the Land Reform Act, and revised it in 2016.²⁶⁵ This act has fueled an enormous growth in the ownership and management of crofting estates. Over seventy communities in the Highlands and Islands have now acquired ownership of the lands where they reside.²⁶⁶ These acts allow communities meeting certain requirements to acquire a preemptive right of first refusal to buy land whenever an owner puts it up for sale, and they can even force a sale without the land being put on the market.²⁶⁷

Instead of lands being controlled and used by rich, absentee landowners for sport or collecting rents, these new community-owned estates base their land use and business plans on providing benefits and improvements for the local residents.²⁶⁸ The rights of

Islands, 2018 John F. Roatch Global Lecture on Social Policy and Practice, Celtic Lands and Identities: Global and Local Implications (Mar. 23, 2018), https://socialwork.asu.edu/sites/default/files/celtic_land_and_identities_global_and_local_implications.pdf; Hoffman, *supra* note 229, at 291; Charles Warren, *Occupying the Middle Ground: The Future of Social Landownership in Scotland*, 23 ECOS MAG., May 2002, at 1, 3–4.

262. Peter Peacock, *Land: For the Many, Not the Few? Limitations on the Scale of Land Ownership*, at iii, 1–2 (Scottish Land Comm’n Land Lines Discussion Paper, Mar. 2018), <https://landcommission.gov.scot/wp-content/uploads/2018/03/Land-Lines-Land-Ownership-Peter-Peacock-March-2018.pdf>; Frank W. Rennie, *The Dingwall Agenda* (Ross & Cromarty Dist. Council Paper, 1995), <http://www.caledonia.org.uk/land/dingwall.htm>; *see also* Bryden & Geisler, *supra* note 261, at 3, 10–11.

263. Crofting is a form of rural settlement and agricultural tenancy that mixes small land holding agriculture on extensive estates of land frequently owned in common by the crofting villages. Hoffman, *supra* note 229, at 290 n.1; Rennie, *Celtic Lands*, *supra* note 261, at 3. *See generally* JAMES HUNTER, *THE MAKING OF THE CROFTING COMMUNITY* (2010).

264. Rennie, *supra* note 261, at 7.

265. Land Reform (Scotland) Act 2016, (ASP 18); Land Reform (Scotland) Act 2003, (ASP 2).

266. Rennie, *Celtic Lands*, *supra* note 261, at 7; *see* COMMUNITY LAND SCOT., <http://www.communitylandscotland.org.uk> (last visited Jan. 22, 2019).

267. Hoffman, *supra* note 229, at 291.

268. Bryden & Geisler, *supra* note 261, at 11; Hoffman, *supra* note 229, at 292; Rennie, *Celtic Lands*, *supra* note 261, at 7.

the private owners are purchased and transferred to nonprofit companies owned by the communities, and these companies are managed by democratic elections of the members of those communities.²⁶⁹ The communities form land trusts which themselves have created a national support organization, Community Land Scotland, and these member trusts now own and manage around 500,000 acres of land.²⁷⁰ In the Outer Hebrides Islands, the communities own about 60% of the land, and about 85% of the people live on community owned land.²⁷¹ This new program is perceived as being such a success that the Scottish government has stated its goal to have one million acres of land in community ownership by 2020.²⁷²

According to some commentators, the popularity of the initiative is due to the ideas of community landownership, collective power, and managing land for the benefit of the entire community and not just for the gain of one person.²⁷³ The benefits that have been identified are long-term communal thinking, managing assets with children and grandchildren in mind, making home sites available for young families (which has already helped slow the “brain drain” and outmigration from the Islands and rural areas), and empowering communities in ways that markets do not.²⁷⁴

It will be very interesting to watch this Scottish experiment over the next few decades. American Indian nations and cultures successfully supported themselves for centuries with similar principles and legal and cultural institutions. Maybe Scotland can do the same. In fact, the Scottish argument has one very important point in common with a well-known American Indian governmental and cultural principle: plan and make decisions today for the benefit of the future generations. Societies and nations that want

269. Rennie, *Celtic Lands*, *supra* note 261, at 7.

270. JAMES HUNTER, *FROM THE LOW TIDE OF THE SEA TO THE HIGHEST MOUNTAIN TOPS: COMMUNITY OWNERSHIP OF LAND IN THE HIGHLANDS AND ISLANDS OF SCOTLAND*, at ix, 191, 193 (2012); Rennie, *Celtic Lands*, *supra* note 261, at 7; *COMMUNITY LAND SCOT.*, *supra* note 266.

271. Rennie, *Celtic Lands*, *supra* note 261, at 7.

272. *Id.*; see also LAND REFORM REVIEW GRP., *THE LAND OF SCOTLAND AND THE COMMON GOOD*, <http://www.scotland.gov.uk/Resource/0045/00451087.pdf> (last visited Jan. 22, 2019).

273. Bryden & Geisler, *supra* note 261, at 2–6, 10–11; Rennie, *Celtic Lands*, *supra* note 261, at 8.

274. Hoffman, *supra* note 229, at 293, 296; Peacock, *supra* note 262, at 9; Rennie, *Celtic Lands*, *supra* note 261, at 8.

to survive hundreds and thousands of years have to adopt this kind of thinking and not just pursue the short-term profit motives of a single individual or family.

This Scottish experiment shows that the adoption of pure private property rights and the most extreme forms of capitalism are not the only ways to operate national economies and sustainable societies. Economists and commentators do warn countries, however, that while it is their choice which property rights regimes and economic principles to pursue, these decisions might come at some cost in efficiency and ultimate profitability.²⁷⁵ If that is true, then perhaps this Scottish program and the historical practices of Indian nations and cultures might not be the absolutely most profitable or most “efficient” way of maximizing land use. But there is no question that these kinds of legal, political, social, and cultural decisions must be made by each society after weighing the pros and cons. Some peoples might well choose a little less profitability to enjoy a more sustainable and equitable society.²⁷⁶ In fact, this movement in Scotland is very analogous to traditional and modern-day American Indian thinking on this subject because the Scottish reforms are “reclaiming land as a place rather than a commodity” and “as a tie of belonging to place and a source of identity.”²⁷⁷

The private property rights advocates and the Scottish experiment in communal land ownership and governance present differing solutions to questions of economic development and land use. American Indian nations and communities face similar issues in addressing their critical issues of poverty and social conditions. Clearly, the traditional and historical institutions of Indian land ownership and economic management can help reservations succeed using their own ways and customs, and there is no question that Indian peoples and nations have the self-determination right to make the decisions of the economic strategies they will pursue.

275. E.g., FRIEDMAN, *supra* note 260, at 8, 11, 90, 110; Koppisch, *supra* note 218 (quoting economist Terry Anderson: “If you don’t want private ownership, and want to stay under trusteeship, then I say, ‘fine.’ But you’re going to stay underdeveloped; you’re not going to get rich.”).

276. See Hoffman, *supra* note 229, at 296.

277. *Id.*

VI. CONCLUSION

There is a crying need to revive the traditional American Indian institutions that supported private-sector economic activities in Indian country. Economic conditions are desperate on reservations. It is crucial for the continued existence of Indian country as the homelands of tribal governments, Indian peoples, and their cultures that Indian nations and reservation communities improve their living conditions.

A failure to address these issues will continue to create problems that work to defeat Indian country. The leakage of money from reservations to border towns and beyond, and the “brain drain” issue that tribes and rural America face of young families moving away, is a death knell for communities. If young people and families cannot find living wage jobs, adequate housing, good schools, and the necessities and luxuries of life on reservations, they will be forced to live elsewhere. This loss of human capital is a disaster for the future of tribal nations and reservations. In addition, continued abject poverty and the social pathologies caused by poverty will continue to work against Indian country as the continued homelands of Indian nations and peoples.

The goal of this Article is to stimulate analysis and action on improving economic conditions to help make Indian country and reservations sustainable homelands where Indian nations, governments, cultures, communities, and peoples can survive and thrive. American Indian nations, peoples, and cultures have existed on their homelands for thousands of years. Will they be able to preserve their existence? Many tribal citizens and families are ready to move home to their reservations if they can only find decent housing and employment.²⁷⁸ Surely, diversifying reservation economies and improving economic conditions will go a long way toward strengthening reservation communities and making reservations viable places to live and to “sustain[] and develop[] Native American cultural identities.”²⁷⁹

278. Richard Cockle, *Jobs, Jobs, Jobs, but No Homes*, SUNDAY OREGONIAN, Apr. 20, 2008, at B4; Egan, *supra* note 179, at A1.

279. SMITH, *supra* note 164, at 3, 16, 71, 80, 111; see also Jane Nelson, *Leveraging the Development Impact of Business in the Fight Against Global Poverty* 1, 6–7 (John F. Kennedy Sch. of Gov't, Harvard Univ., Working Paper No. 22, 2006), https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_22_nelson.pdf.

One of the best ways to diversify reservation economies is to revive the native institutions that supported private-sector business activities. Re-developing traditional private-sector economies and institutions is an efficient and potent method to increase economic activity and economic diversity in Indian country. The private sector is so important because it allows a community to benefit from the “multiplier effect” where the same dollar circulates within an area creating new economic activities, new businesses, and new jobs. The longer a dollar stays in a local area the greater the benefit. Rural America and Indian reservations understand the opposite of the multiplier effect; these areas suffer from “leakage” where money leaves their communities sooner than is optimal.²⁸⁰ The only way to create the multiplier effect is to have multiple locations in a community where money can be spent on goods and services. This requires the creation of private-sector economies on reservations. No matter how much economic activity tribal governments engage in, they can never replicate or operate the enormous level of diverse businesses, goods, and services that a functioning private sector can create.

Furthermore, the importance of developing privately owned businesses in Indian country is emphasized by the fact that small businesses are the primary ingredient of the U.S. economy. As of 2001, small businesses were creating 93% of the new jobs in the United States.²⁸¹ In Oregon, for example, as of 2008 small and

280. Economists define “leakage” as a situation where money leaves or leaks away from the local economy of a town, city, county, or state sooner than is optimal. Ideally, money should circulate in the local economy where it was received or earned five to seven times before it leaks out of that community. Leakage usually occurs because consumers cannot buy the goods and services they desire in their local areas. Miller, *Economic Development in Indian Country*, *supra* note 141, at 829. Rural areas, Indian reservations, and tribal governments understand this problem well. KENT GILBREATH, *RED CAPITALISM: AN ANALYSIS OF THE NAVAJO ECONOMY* 129 (1973).

281. PRESIDENTIAL COMM’N ON INDIAN RESERVATION ECONOMIES, REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES (1984); Ericka Schenck Smith, *Meeting Spotlights Reservation Economies*, BILLINGS GAZETTE, June 1, 2001; *see also* AUSIL, DEP’T OF FOREIGN AFFAIRS & TRADE, THE ROLE OF THE PRIVATE SECTOR IN SUPPORTING ECONOMIC GROWTH AND REDUCING POVERTY IN THE INDO-PACIFIC REGION 1, 6, 9–15 (May 7, 2014) (stating that 85% of employment opportunities in developing countries are created by small and medium-sized enterprises, 90% of jobs in the Indo-Pacific region are in the private sector, and that sector funds 60% of all investments and creates more than 80% of government revenues).

family-owned businesses made up 90% of the state's economy, created 78% of new jobs, and paid more than 65% of all wages.²⁸² When we compare these facts to the almost complete absence of small businesses and private-sector economies in Indian country, it is no surprise that poverty exists on reservations.

Indian peoples can only rely on themselves and their institutions to improve conditions in Indian country. No one else cares as much or will work as hard as themselves to correct these deficiencies. I agree with a statement of Sam Deloria when he was discussing Indian educational issues: "[T]he federal government can't give our young people hope and pride: we have to do that. . . . High-level people in Washington can help . . . but we can't look to them to do our jobs."²⁸³

In addition, Indian nations and peoples must address the issue of culture. In every discussion of economic development in Indian country the question of culture arises. Many people fear that American capitalism or increased attention to economic activities will injure Indian cultures. I hope that Part III of this Article helps dispel the myth that being involved in private economic activities is somehow anti-Indian or anti-native culture. In fact, the exact opposite is true. American Indians have always supported themselves through individual and family-operated economies activities and hard work. That defines Indian cultures, histories, and institutions. One Navajo Nation chairman affirmed this point: "Traditional Navajo values do not include poverty."²⁸⁴ And frankly, it is clear that allowing Indian country and Indian families to suffer from poverty is injuring our cultures and imperiling the continued existence of our reservations as our homelands. Our cultures demand we work to support ourselves. Creating private-sector economies on our reservations is a tool to ensure our continued existence.

Moreover, one point bears emphasizing and re-emphasizing: improving economic conditions on reservations will greatly help tribal cultures, reservation health and welfare, and the continued

282. Amy Hsuan, *Success, Caring Infuse the Sacks Family Tradition*, OREGONIAN, May 15, 2008, at D1.

283. Sam Deloria, *Obama Administration Indian Education Initiative*, 9 AM. INDIAN GRADUATE 6, 7 (2010) (Director, American Indian Graduate Center).

284. RICHARD H. WHITE, TRIBAL ASSETS: THE REBIRTH OF NATIVE AMERICA 277 (1990).

existence of Indian nations. Improved conditions in Indian country will encourage families to move home, increase salaries, and produce both private profits and public tax dollars that can be spent on studying and practicing native cultures, creating and supporting language preservation programs, sustaining and improving governmental services, and improving social welfare issues on reservations. We must emphasize the important fact that better economic conditions make families healthier. The same is true in Indian country.

In fact, there are concrete examples of this statement. An ongoing twenty-year study by Duke University School of Medicine demonstrates clearly that this statement is true. Since 1996, Duke has studied the mental health of children from the Eastern Band of Cherokee Indians in North Carolina. As the Band began operating a successful casino and distributing some of its profits annually to Cherokee families, the mental health of the children improved dramatically.²⁸⁵ These improvements are still evident today even as these Cherokee children are entering their thirties. Moreover, the Mississippi Choctaw Tribe has demonstrated the fantastic beneficial health and cultural results that arise from improving economic conditions on reservations. In the 1950s and 60s, the Tribe suffered from the lowest life expectancy rates and the highest infant mortality rate in the United States, and almost every family lived in poverty and on less than \$2000 in annual income.²⁸⁶ Up to 90% of their houses had no plumbing, only 7% of the people had attained high school degrees, and educated Choctaws were leaving the reservation seeking better economic opportunities.²⁸⁷ After several decades of the tribal government and community working to create sustained and diverse economic activities, Choctaw families were

285. E. Jane Costello, William Copeland & Adrian Angold, *The Great Smoky Mountains Study: Developmental Epidemiology in the Southeastern United States*, 51 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 639 (2016); Jim Shamp, *Cherokee Study: As Poverty Falls, So Do Psychiatric Problems*, HERALD SUN, Oct. 14, 2003, at A11; Moises Velasquez-Manoff, *Opinion, What Happens When the Poor Receive a Stipend?*, N.Y. TIMES (Jan. 18, 2014), <https://opinionator.blogs.nytimes.com/2014/01/18/what-happens-when-the-poor-receive-a-stipend/>; Jane Costello, *Duke University – Sharing the Wealth*, ACAD. MINUTE (June 23, 2014), <https://academicminute.org/2014/06/jane-costello-duke-university-sharing-the-wealth>.

286. PETER J. FERRARA, *THE CHOCTAW REVOLUTION* 46–47, 82–85 (1998); Phillips, *supra* note 131, at 156.

287. FERRARA, *supra* note 286, at 46–47, 82–85; Phillips, *supra* note 131, at 156.

moving home to the reservation for employment and improved incomes. Chief Phillip Martin stated in 1998: "It used to be that everyone moved away. Now they're all coming back."²⁸⁸ The Tribe also significantly improved its housing, increased educational attainment levels, and is now one of the top ten employers in the state. Choctaw people are now enjoying improving life spans and as of 1998 had the lowest infant mortality rate in the United States.²⁸⁹ It is hard to imagine more concrete and beneficial results for an Indian nation and Indian families.²⁹⁰

In conclusion, Indian nations and Indian peoples need improved economic conditions. Reservations need living-wage jobs, adequate housing and schools, and adequate health care. These kinds of services require public and private economic activities and money. Indian nations and reservation communities need to revive their traditional governmental and cultural institutions that support and promote private-sector economies and use them as one more tool to address and solve the economic issues they face.

288. UNIVERSITIES AND INDIAN COUNTRY: CASE STUDIES IN TRIBAL DRIVEN RESEARCH 15 (Dennis K. Norman & Joseph P. Kalt eds., 2015) (quoting speech by Chief Phillip Martin at Harvard University, September 29, 1998).

289. FERRARA, *supra* note 286, at 13-14, 82-85; Phillips, *supra* note 131, at 169; Barbara Powell, *Choctaws: From Poverty to Prosperity in 40 Years*, CLARION-LEDGER, June 26, 2003.

290. Richard Cockle, *Reseroation Shows No Signs of Slowing*, SUNDAY OREGONIAN, Apr. 20, 2008, at B4; Egan, *supra* note 179, at A1.

