DE-FEDERALIZING AMERICAN INDIAN COMMERCE: TOWARD A NEW POLITICAL ECONOMY FOR INDIAN COUNTRY

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[S]anza speme viveme in desio.
Dante, Inferno

Commercial relations between businesses and federally recognized American Indian[1] tribes have long been regulated by a complex web of specific substantive and jurisdictional legal principles. These principles act as federally imposed "transaction rules" that exclude traditional principles of private commercial law from transactions involving American Indians.[2] Early in this nation's history, Congress began restricting commercial exchanges of lands, goods, and services between third parties and Indian tribes from private negotiation and bargaining.[3] Even before the enactment of any comprehensive federal legislation regulating Indian commerce, the United States Supreme Court decided that private land transactions with Indian tribes, absent federal consent, would have no legal effect.[4]

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1. This article primarily focuses on the law governing federally recognized American Indian tribes. Although its conclusions may also be important for other Native American peoples such as Alaskan Natives and Pacific Islanders, these groups are generally not governed under the same legal framework. There also exist numerous American Indian tribes that are not recognized by the federal government; those tribes are not subject to the degree of regulation that this article addresses.

2. Commercial law, as conceived by some economists and lawyers, should operate to reduce the transaction costs between private parties by reflecting those parties' presumed intent through adoption of statutory "default rules," which the parties presumably would have adopted had it been worthwhile for them to bargain the contract to full and complete terms. *See* Clayton P. Gillette, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, 19 J. LEGAL STUD. 535, 541-46 (1990).

3. Congress enacted, between 1790 and 1834, various Trade and Intercourse Acts aimed at comprehensively regulating contact, including trade, between non-Indians and Indian tribes. *See* Act of July 22, 1790, ch. 33, 1 Stat. 137 (1790); Act of March 30, 1802, ch. 13, 2 Stat. 139 (1802); Act of June 30, 1834, ch. 161, 4 Stat. 729 (1834), *codified at* 25 U.S.C. § 177 (1988). One goal of these statutes was to reduce the potential for conflict by requiring federal consent for commercial transactions between non-Indians and Indian tribes. FRANCIS P. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 5-25 (1962).

4. Chief Justice Marshall, writing for the Court in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), held that land transactions that occurred in 1773 and 1775 be-

Public law principles—including the doctrine of congressional plenary authority over tribal lands and resources[5]—came to dominate and shape the future of commercial relations between Indian tribes and businesses within Indian Country.[6] A proliferation of categories and distinctions that govern commercial disputes within Indian Country has severely limited and constrained tribal governmental authority within Indian Country. As a result, the coherent governance of Indian Country is now a virtual impossibility.

A wide variety of racial, cultural, political, and economic distinctions may be implicated in the resolution of a given dispute arising within Indian Country: Indian versus non-Indian; trust patent land status versus fee patent land status; "open" versus "closed" reservations; tribal wardship versus federal guardianship; tribal membership versus federal citizenship; tribal collective property ownership versus individual property rights; tribal sovereignty versus individual rights; tribal cultural and political autonomy versus cultural and political assimilation; and tribal self-determination versus federal plenary authority over Indian affairs. Tribal strategies for the economic and social development of reservations are many times blocked or frustrated by the limits on tribal authority these categories impose.[7]

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tween an Indian tribe and a non-Indian purchaser were nonetheless invalid because, under the doctrine of discovery, the United States had the sole and exclusive right to acquire the Indians' title to land that they had occupied since time immemorial. The United States, as the newly emerged sovereign, had assumed the rights of its predecessor states—Britain, France, and Spain—over the various lands that comprised the territory of the newly formed United States.

5. All tribal lands were transformed by the doctrine of discovery from the Indian tribes' private property into a species of quasi-public property owned by the United States. By virtue of this doctrine, the United States became the title owner of all Indian lands that came under its sovereign authority. The Indian tribes were the mere occupants of their lands.

This tribal right of occupancy, known legally as "Indian title," was not a constitutionally protected property interest that created enforceable rights in the Indian tribes as against the United States. Rather, Congress had the plenary authority to make any and all ownership decisions regarding the future disposal of the Indian tribes' lands. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 209-10 (1982).

6. Indian Country, while it has been accorded widely varying meanings over the course of the federal relationship with Indian tribes, has been defined by statute as including treaty or statutory reservations, Indian allotments, and dependent Indian communities. *See* 18 U.S.C. § 1151 (1988).

7. *See* COHEN, *supra* note 5, at 47-204 (chronicling the evolution of federal Indian policy from the beginning of the treatymaking period by the United States at the end of the Eighteenth Century through the Congressional assertion of plenary authority over Indian affairs and, finally, through the modern period of federal policy support for tribal self-determination).

This proliferation of categories and distinctions exposes the deep uncertainty and ambivalence that lie at the core of today's federal Indian law. Federal Indian law was originally characterized by a relatively small number of "bright line" jurisdictional and legal principles that each sought to accommodate the rights and interests of two potentially competing sovereigns: the Indian tribes and the federal government. These few, clear principles grew from largely innocuous and obscure doctrinal sources that reflected the concerns of Sixteenth-Century Spanish jurists and theologians about the rights and legal status of the indigenous tribal peoples resident in the New World.[8] From these sources, in the early Nineteenth Century the Supreme Court crafted foundational principles to guide the resolution of disputes over the rights and titles to Indian lands.[9] It was only through the "Americanization" of these natural law-based principles that the Supreme Court was later able to rationalize the existence of an exclusive, and plenary, federal authority over Indian lands, resources, and commerce.[10]

The Supreme Court's early confirmation of the inherent sovereign rights of tribes within Indian Country had contemplated a meaningful accommodation of the competing interests of the early United States and those of the Indian tribes. Several Indian tribes in the eastern United States—most notably, the Cherokees of the Five Civilized Tribes—sought to adapt their

8. The land rights of the indigenous tribal peoples raised nettlesome legal, as well as ethical, questions for the European discoverer. Various writers and thinkers competed to develop a basis for European legal, as well as ethical, title to the lands of the Indians. Some argued that a society of "cultivators" had inherently better claim to the lands than a society of "hunters." For example, Emmerich de Vattel, an Eighteenth-Century Swiss jurist, echoed well-worn natural rights sentiments when he maintained that the Indians were morally in the wrong if they sought to control more land than they could use. *See* FRANCIS P. PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 14-15 (1984).

9. The early United States faced stiff competition from a variety of internal "entrepreneurs"—aggressive individuals and state governments—that sought to create their own spheres of influence through the control of Indian lands and trade. The Supreme Court, given the weakness of the federal government, became the key institution that formulated the foundational principles that brokered these conflicting interests and that came to govern the political economy of Indian Country. *See* RUSSEL L. BARSH & JAMES Y. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 31-49 (1980).

10. The Supreme Court had to provide a legal rationale for federal supremacy over Indian affairs that respected state rights. By conceiving of the Indian tribes as analogous both to foreign nations (thereby subject to the federal executive's constitutional treatymaking) and to wards (thereby subject to the exclusive guardianship of the federal government) the Supreme Court was able to temporarily assuage the resentment of the state governments over their loss of control of Indian lands and affairs within their borders. *See id.* at 50-61.

political and social institutions so as to accommodate their new relationships with the contentious state and local governments. But this early opportunity for meaningful "tribal integration" into the broader political economy—offered through the creative force and application of the original principles of federal Indian law—was soon abandoned by the federal government in favor of the removal of the Eastern Indian tribes to distant lands that later became known as Indian Country.

"Tribal separatism" became the goal and touchstone of federal Indian policy. This policy choice necessitated the continuous creation of categories and distinctions that helped reinforce and rationalize the increasing physical, legal, and cultural separation of Indians from the American mainstream. Today's Indian law is simply heir to the accumulated generations of these principles.

Today, however, the creative force of these early doctrinal distinctions is largely spent. Many distinctions have degenerated into stereotyped, rigid categories that now operate to constrain, rather than inform, the legal and political imagination. This is unfortunate, because today's "Indian problem"—the continuing economic, social, and political isolation of Indian tribes from the benefits enjoyed by mainstream America—cries out for creative and innovative judicial and political approaches.[11]

The new task for Indian law is to establish a unified and coherent basis for the "group autonomy" of Indian tribes that

11. Recent Congressional efforts to redress the "fractionated heirship lands" problem—a direct result of the Indian allotment policies of the Nineteenth Century—starkly evidence this failure of imagination. *See* H.R. REP. No. 908, 97th Cong., 2d Sess. 12-15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4415, 4422-23 (containing letter of Kenneth L. Smith, Assistant Secretary for Indian Affairs). Tribal testimony at Congressional hearings emphasized the need for concerted and innovative land reform programs to help make the reservations—especially the heavily-allotted reservations on the Great Plains—more productive as agricultural units. *See Devils Lake Sioux Tribe Land Transactions: Hearings on S. 503 Before the Subcomm. on Indian Affairs*, 97th Cong., 1st Sess. 28 (1981) (statement of Carl R. McKay, Chairman, Devils Lake Sioux Tribe).

In response, Congress enacted the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2211 (1988). This act called for the escheat to the respective tribal governments of interests in individual allotted lands when they became fractionated below the level of two percent of the total acreage represented by the original allotment and yielded less than $100 a year in annual revenue. The Supreme Court, however, invalidated that statute as violative of the Takings Clause of the Fifth Amendment because it took away the right of a tribal decedent to convey his lands by devise or descent. Hodel v. Irving, 481 U.S. 704, 718-19 (1987). The Court's decision in *Irving* is representative of modern Indian law cases in which the Court is increasingly unwilling to defer to Congress's assertion of its plenary authority over Indian lands and resources.

will allow them to participate effectively in the governance of Indian Country. Therefore, only those categories and distinctions that can contribute to the realization of this task should be retained. The current legal principles in this area must be refurbished so that they will be sufficiently resistant to future decay, yet will still withstand democratic and constitutional scrutiny. These principles will serve as the future basis for a workable political economy in Indian Country.

This article focuses on the subset of legal principles that contemplates the restoration of tribal authority and control over commercial relations between Indians and outside interests that seek to "do business" within Indian Country. Past federal dominion over these commercial relations has had deeply disruptive consequences. First, it has squelched the development of private law principles that would have served as the basis for governance of commercial relations between businesses and Indian tribes. Second, it has prevented Indian tribes from establishing and developing the institutions and capabilities necessary to manage tribal resources. Consider how a private, tribally-controlled governance structure might have developed to regulate these commercial relationships. Businesses and tribes, through the exercise of their acknowledged contractual and corporate powers, would have cooperatively developed private agreements to govern their commercial relations. Disputes regarding the interpretation or enforcement of these agreements would have been resolved according to a tribally developed, evolving body of private law principles that could recognize the unique characteristics of the tribes, as well as the needs of outside businesses.[12]

Instead, the growth of public law principles—through the evolution of judicial decisions, treaties, and Congressional statutes—progressively restricted the sovereign and contractual powers of Indian tribes over their own lands and resources. Ultimately, Congress vested decisionmaking authority in this area

12. Indian tribes, through trading and other commercial relationships with non-Indian firms, had selectively incorporated various goods and commodities into their pre-existing cultural patterns and lifestyles. Indian tribal cultures and governments, absent federal intervention, may have evolved in an organic fashion through these private exchanges with trading representatives from the non-Indian cultures. Indian tribes may have voluntarily and incrementally adapted their political and legal institutions in response to non-Indian economic and social influences. *Cf.* Duane Champagne, *Economic Culture, Institutional Order, and Sustained Market Enterprise, in* PROPERTY RIGHTS AND INDIAN ECONOMIES 195, 197-202 (Terry L. Anderson ed., 1992)[hereinafter Anderson].

in administrative officials, pursuant to the legal fiction of a federal trusteeship over tribal assets. These officials, known as "Indian agents," knew little, and oftentimes cared less, about the economic and social needs of the tribes they represented.[13] Moreover, it did the Indian tribes little good to complain in federal court about the unfair or adverse effects of land transactions or business deals that were concluded on their behalf by the federal representatives. The tribes were told that because of the doctrine of congressional plenary authority over Indian affairs, the courts had no power to adjudicate their claims against the federal government.[14]

Today, federal dominion over commercial relations involving Indians continues to suppress the entrepreneurial effort that is necessary to develop what remains of the tribal estate—tribal lands, waters, mineral resources, and human resources.[15]

13. The first section of the Act of July 22, 1790, *supra* note 3, limited trade or intercourse with Indian tribes to persons licensed by the federal government. The broader regulatory goals of Congress have been identified as:

1. the protection of Indian rights to their land by setting definite boundaries for Indian Country, restricting non-Indians from entering the area except under certain controls, and removing illegal intruders;

2. control of the disposition of Indian lands by denying the right of private individuals or local governments to acquire land from the Indians by purchase or by any other means;

3. regulation of Indian trade by determining the conditions under which the individuals might engage in trade, prohibiting certain classes of traders, and actually entering into the trade itself;

4. control of liquor traffic by regulating the flow of intoxicating liquor into Indian Country and then prohibiting it altogether;

5. provision for the punishment of crimes committed by members of one race against another and compensation for damages suffered by one group at the hands of another, in order to remove the occasion for private retaliation that led to frontier hostilities; and

6. promotion of civilization and education among the Indians in the hope that they might be absorbed into the general stream of American society. *See* COHEN, *supra* note 5, at 110.

14. The federal government has the legal power to dispose of tribal lands regardless of a treaty provision requiring prior tribal consent to any future disposition of tribal assets. *See* Lonewolf v. Hitchcock, 187 U.S. 553 (1903). Requiring the federal government to obtain tribal consent, the U.S. Supreme Court reasoned, was inconsistent with the wardship status of the tribes and, as a practical matter, would hinder the efficiency and timeliness of future decisionmaking by the federal government regarding the best interests of its Indian wards. There was, given the political nature of the relationship between the federal government and the Indian tribes, no judicial role for the federal courts in determining the wisdom of policy decisions regarding Indian affairs. *Id.*

15. One commentator has identified a wide variety of barriers to the development of a self-sufficient economy on the Sioux reservations in South Dakota. He has singled out federal "government[al] overprotection and control" of tribal resources and decisionmaking as a major obstacle to the future economic development of the reservations. The Bureau of Indian Affairs's (BIA) present low evaluation of the managerial capabilities of the tribal governments' leaders, or tribal entrepreneurs, biases them toward non-Indian development of tribal resources and assets. For example, the BIA asset

The sheer volume and complexity of the governing federal transactional rules, which include statutes, case law, and administrative regulations, overcomplicate otherwise simple commercial agreements within Indian Country.[16] These rules also operate to "crowd out" any meaningful role for tribal governments in managing or allocating their own resources.

This overregulation frustrates the development efforts of both Indian and non-Indian entrepreneurs within Indian Country. More importantly, these transaction rules, rather than facilitating agreement or cooperation between tribal governments and business, create perverse incentives for the parties to engage in opportunistic or strategic behavior.[17] The parties direct their energy and attention toward minimizing the business risks created by the relevant rules, rather than working cooperatively to maximize the joint expected benefit from the proposed shared enterprise.[18]

My thesis is that private law[19] principles developed by tribal

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management programs, such as the leasing of Indian agricultural lands, encourage non-Indian development through leases in order to achieve a greater potential return to the Indian lessors. This strategy has led the BIA to adopt "income-focused" policies that fail to incorporate or build tribal managerial or financial capacities as the basis for comprehensive tribally directed managerial programs. *See* Dennis Ickes, *Tribal Economic Independence: The Means to Achieving True Tribal Self-Determination*, 26 S. DAK. L. REV. 494, 516-27 (1981).

16. President Reagan's Task Force on Indian Economies identified the continued bureaucratic control of tribal economic and resource decisionmaking as one significant barrier to tribal self-determination. *See* PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES, REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES, Part I (1984) [hereinafter PRESIDENTIAL COMMISSION].

17. Federal laws and statutes, intended for the benefit and protection of Indian tribes, may have a perverse, even pathological, tendency to harm the very class they are intended to protect. Economists routinely identify various government strategies, such as rent-control laws and minimum wage laws, as actually disadvantaging the very classes they were intended to protect. It often has been observed, for example, that rent-control laws result not only in the chronic undersupply of affordable housing, but in the "less needy" recipients acquiring—because of their better political connections—the available stock of rent-controlled housing. Similarly, minimum wage laws have a tendency to advantage older, better-skilled workers, while disadvantaging less-skilled minority teenagers, who are now closed out of the job market.

18. Voluntary exchanges of goods and services maximize a conceptual value known as "consumer surplus" by allowing the parties to structure their exchanges based on their preferences, knowledge, and available information regarding the expended benefits and risks arising from a proposed transaction. Governmental regulations or legal rules that predetermine the allocation of risks, or limit the scope of negotiation by the parties, have been criticized as resulting in ethically and economically inferior resource allocation decisions. *See* Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990).

19. Private law in this context means the creation by the tribal governments—as the owners of the their remaining tribal resources—of the legal and procedural rules governing non-Indian access to those resources through consensual agreements with the relevant tribal governments.

governments and courts—not public law principles developed as an aspect of federal administrative law—provide the preferred governance structure for commercial relations within Indian Country. If tribal or private entrepreneurship is to succeed as an agent of change in Indian Country, then a fundamental revision of the existing transaction rules is necessary to encourage and guide that effort.[20]

To support my thesis, I will present a proposal for the deregulation[21] of most commercial relations between business and Indian tribes. I will argue that deregulation would benefit those who seek to "do business" in Indian Country by (1) reducing the delay and uncertainty many transactions face as a result of the current federal approval requirement; (2) ensuring greater recognition and protection of "bargained for" contract rights; and (3) providing the basis for long-term stable relationships with existing and future tribal governments.

Deregulation[22] would also benefit Indian tribes by (1) increasing the volume of commercial and investment activity within Indian Country and thereby enhancing tribal economic development opportunities; (2) promoting the avowed federal policy goal of encouraging greater tribal self-determination in the management of resources and commercial transactions; and (3) promoting tribal sovereignty by strengthening tribal court jurisdiction over business transactions.

I. The Origin of the Existing Transaction Rules

The political genesis of the public law categories and distinctions regulating Indian commerce helps reveal why they are of

20. Federal dominion over tribal property rights has been recognized as the common denominator responsible for frustrating the Indian tribes' efforts to utilize effectively their remaining assets to further both economic and social goals of the tribes. *See* Steven P. Cornell & Joseph P. Kalt, *Culture and Institutions as Public Goods: American Indian Economic Development as a Problem of Collective Action*, *in* Anderson, *supra* note 12, at 216.

21. Deregulation refers, in this context, to the resumption by the Indian tribes of primary decisionmaking authority over the control and disposition of their lands and resources, which are presently held in trust for them by the federal government.

22. Deregulation, in the tribal context, can be either de jure or de facto restoration of tribal authority over economic and resource decisionmaking on a given tribal reservation. Some tribes have succeeded, in a de facto sense, in wresting much of the real control over their lands and resources from the local representatives of the BIA. For example, relatively successful Indian reservations, such as the Flathead, White Mountain, and Mescalero, are deemed successful because they have succeeded in imposing a pattern of tribal control over the strategic and day-to-day decisionmaking process, while subjugating the local BIA representatives to tribal control. *See* Cornell & Kalt, *supra* note 20, at 224-25.

limited value in resolving the real dilemmas that confront Indian tribes today. These categories and distinctions emerged from the troubled legal and moral relationships that existed between European nations and the indigenous peoples resident in the New World at the time of European discovery. The traditional analysis of these rules focuses on their paternalistic intent—that is, the desire to protect Indian tribes and their members from fraudulent or deceptive transactions perpetrated by unscrupulous third parties. On deeper examination, however, these rules clearly had a political, non-paternal, purpose and intent.

The British Crown recognized early on that there were political and military risks inherent in allowing unregulated commerce between the colonies, or colonists, and the various Indian tribes that resided along the eastern seaboard of the new American continent. These transactions—whether land transactions, liquor sales, or weapons sales—shared one thing in common: they all threatened the fragile security and stability that the British Crown struggled to guarantee to both its Indian allies and its fractious subjects in the American colonies. The unhappy experience of numerous colonial Indian wars convinced the British Parliament that only the sovereign, through its carefully chosen representatives, should be entrusted with commerce with the Indian tribes.[23]

The embryonic United States, governed by the Articles of Confederation, had similar experiences with Indian wars that were ostensibly the result of unregulated Indian commerce. These bitter conflicts likewise convinced the Framers of the Constitution that unregulated commercial relationships between private parties and Indian tribes were unduly risky. The Framers wanted the new Constitution expressly to assign control of Indian affairs to the federal Executive and Congress.[24]

Chief Justice Marshall, in a trilogy of foundational Indian law cases, laid the groundwork for the public law principles that would later govern the evolution of federal Indian law. In three

23. The British government, at the outbreak of the French and Indian War in 1754, tried to assume direct control over colonial dealings with the Indian tribes. The British Crown sought to accomplish this goal by appointing two superintendents whose responsibilities were to negotiate treaties, to report events to the home government, and generally to keep peace between the Indian tribes and encroaching settlers. *See* COHEN, *supra* note 5, at 57.

24. *Id.*

deeply pragmatic decisions, Marshall helped determine the political economy of modern-day Indian Country. In doing so, he made an effort to accommodate two competing, if not fundamentally incompatible principles: the overriding principle of federal self-determination and sovereignty over its claimed territories, and the reaffirmation of the Indian tribes' continued right of sovereignty over their internal affairs and the "right of occupancy" in their lands.

Sixteenth-Century rationalist doctrines regarding the natural rights of indigenous peoples resident in the New World served as Marshall's pragmatist basis for the resolution of Nineteenth-Century land and jurisdictional disputes involving Indian tribes. The public law categories and distinctions developed by the United States' first activist Supreme Court in these cases would ultimately have long-term consequences for the political economy of Indian Country. Nevertheless, Marshall was able to claim that he was creating no "new law"; he was simply according to the Indian tribes that amount of legal respect due them as required by the settled law of nations. Marshall also secured the exclusive and virtually unfettered sovereignty of the early United States over the lands and resources of powerful tribal adversaries without the troublesome resort to a costly "just war."

In the first major decision in this trilogy, *Johnson v. McIntosh*,[25] the Supreme Court considered whether an Indian tribe

25. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). Marshall's pragmatic resort to the doctrine of discovery as the basis for decision in *Johnson v. McIntosh* reveals two things about federal Indian law: first, how the doctrinal development of federal Indian law was shaped, early on, by an activist Supreme Court that effectively legislated the foundational principles of Indian law; and second, how profoundly pragmatic the Court was in its practical adaption of specious public international law principles as the basis for the domestic law regulating the federal government's powers over the Indian tribes and their lands.

Marshall was confronted by the fact that the land transactions in question occurred in 1773 and 1775. He was therefore precluded from using Congressional authority and power deriving from the Indian Commerce Clause, or related statutes and regulations regarding Indian trade, as the basis for decision. He thus found himself thrown back onto the earlier legal, political, and moral rationales offered by European nations as forming the basis for their sovereignty over, as well as title to, the Indian lands in the New World.

Marshall's goal was to place the federal government's authority over the Indian tribes on an unassailable legal position. The European-derived doctrine of discovery provided the best available rationale for such exclusive federal authority over Indians. The European nations, according to this doctrine, were answerable only to a divine tribunal—not an earthly court—for how they discharged their duties of good faith towards the Indian tribes of the New World. Marshall, while not endorsing the legal soundness or ethical stature of this doctrine, relied on its long-standing recognition

could sell some of its lands or rights to a private party without federal consent. The Court held that a private party could not acquire any right or interest from an Indian tribe without federal approval. Writing for the Court, Marshall declared that only the federal government, by right of discovery, had the authority to acquire title to Indian lands. This decision effectively excluded private parties from future direct land transactions in Indian Country.[26]

In the second case, *Cherokee Nation v. Georgia*,[27] Chief Justice Marshall rejected the Cherokee Tribe's claim that it was a "foreign nation" within the meaning of the constitutional provision conferring original jurisdiction on the Supreme Court over suits brought by foreign nations against American states or citizens. Instead, Indian tribes since the time of the creation of the United States were to be regarded as "domestic dependent nations"[28] that had tacitly relinquished their pre-existing sovereign right to deal with any other nation but the United States.[29]

The third case in the trilogy, *Worcester v. Georgia*,[30] represented Chief Justice Marshall's effort to resolve the respective sovereign statuses and powers of the Indian tribes, the individual states, and the United States in a federal system of government. In *Worcester*, the state of Georgia sought to prohibit any non-Indian from entering Cherokee lands without state consent. Samuel Worcester, a federally approved missionary to the Cherokees, defied the state prohibition and entered Cherokee country to continue his missionary work. Worcester was then arrested and thrown into a Georgia jail.

The Supreme Court, on a writ of habeas corpus brought by Worcester, held that Georgia lacked any authority to regulate activities within Cherokee lands. This was because the United States, as a matter of constitutional law and the nation's inherent sovereignty, was the sole and exclusive political authority

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and acceptance by those nations from whom the United States derived title to its lands—Britain, France and Spain—as the basis for an unfettered sovereignty of the United States over all the lands it claimed.

26. *Id.*

27. 30 U.S. (5 Pet.) 1 (1831).

28. *Id.* at 17.

29. The United States had impliedly assumed the "external sovereign powers" of the Indian tribes and established itself as their protector, acknowledging and guaranteeing their security as "distinct political communities" in exchange for their recognition of the United States' superior sovereign status. *See* COHEN, *supra* note 5, at 233-35.

30. 31 U.S. (6 Pet.) 515 (1832).

responsible for the regulation of Indian affairs. Although Worcester himself remained in a Georgia prison, this decision established the federal government's supremacy as the regulator of Indian affairs to the exclusion of state power and authority.

The United States emerged, as a result of these three cases and later federal decisions, as a "super-monopsonist":[31] the sole and sovereign buyer of Indian lands, who could either negotiate with the Indian tribes and buy the titles to their lands, or simply extinguish the Indian tribes' "original titles" in cases in which the Indians did not voluntarily cede their lands to the federal government.

II. How Do These Rules Operate Today?

In 1871, Congress ended the era of treaty-making with Indian tribes. The House of Representatives, while it had appropriated the monies necessary for the implementation of Indian treaties formulated by the President and the Senate, effectively had no voice in Indian affairs. This perceived institutional inequity lead to a political revolt by many House members who wanted a greater role in the formulation of Indian policy.[32] Previously, the President, acting through his cadre of treaty commissioners, had conducted Indian policy as part of the executive foreign affairs powers under the Constitution. While some commentators have questioned the constitutionality of the 1871 statute curtailing the President's authority to negoti-

31. The federal government's "market power" position, as the sole and exclusive buyer of Indian lands, meant little if the Indian tribes had minimal or no interest in participating in this market. As a pragmatic matter, the federal government needed judicial sanction of its "rent-seeking" behavior, which would allow it to appropriate and dispose of tribal lands for national purposes without being answerable to the courts under the Due Process Clause of the Constitution. The Supreme Court, in its decision in Lonewolf v. Hitchcock, 187 U.S. 553 (1903), freed the federal government to dispose of tribal lands as the Indians' trustee without constitutional limit or constraint.

32. *See* Appropriations Act of March 3, 1871, 24 U.S.C. § 71 (1988). Critics of Indian treatymaking increasingly advocated that Indian tribes should be dealt with by general Congressional legislation rather than through treaties that acknowledged Indian tribes as semi-autonomous governmental bodies. Instead, the tribes should be considered as "wards of the nation" and not quasi-independent nations. The end to the process of treatymaking, however, was more a product of traditional political jealousies than of rigorous policy. Members of the House of Representatives resented the Senatorial power to ratify Indian treaties without any role by the House in treaty formulation. The House therefore demanded, and received in 1871, an end to treatymaking and a greater role for itself in the development and control of Indian affairs. *See* Cohen, *supra* note 5, at 105-07.

ate treaties with Indian tribes,[33] it nonetheless effectively ended the treaty-making process. This shift in the governance of Indian affairs was defended as an effort to unify Indian policy and to reduce the transaction costs of administering Indian affairs by eliminating bilateral treaty negotiations.[34] Congressional control of Indian affairs spurred the growth of the dense bureaucratic process that now regulates tribal life, resources, and lands.

A. *Contract Formation*

Pursuant to its authority over Indian commerce, Congress has enacted various statutes that either directly regulate commercial relations between tribes and non-Indians or direct federal officials to adopt the appropriate regulations for that purpose.[35] These statutes have severely limited the governmental and contractual capacity of Indian tribes. For example, in 1871 Congress, motivated by evidence of potentially fraudulent business transactions between non-Indians and Indian tribes, passed a law prohibiting any contracts affecting Indian lands or monies that did not comply with an elaborate system of judicial and federal administrative review and approval. Title 25, Section 81 of the United States Code requires federal approval of contracts with individual Indians and any federally recognized Indian tribe for money, services relative to lands, or claims under laws and treaties of the United States.[36]

The only subsequent modification to this system was the elimination in 1958 of the requirement that parties execute such contracts before a judge or a court of record.[37] Notwithstanding this modification, failure by businesses to comply with the formalist requirements of this statute and its regulations renders a given contract void. While this statute, by its express

33. *See, e.g.*, WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 17 (2d ed. 1987).

34. According to some observers, by 1869, treatymaking with Indian tribes had degenerated into a "cruel farce." For example, in 1869 Caleb H. Smith, the Commissioner of Indian Affairs, recommended that the Indian tribes be recognized expressly in the law as "dependents and wards." It was believed that the end of treatymaking with the tribes and the beginning of Congressional direct rule by statute would be the departure point for a rational and more effective, if not more humane, Indian policy. *See* COHEN, *supra* note 4, at 106.

35. See discussion regarding Trade and Intercourse Act, *supra* note 2.

36. Act of Aug. 27, 1958, Pub. L. No. 85-770, 72 Stat. 927 (codified as amended at 25 U.S.C. § 81 (1988)); *see* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 280 (1971).

37. *See* Act of Aug. 27, 1958, Pub. L. 85-770, 72 Stat. 927 (1958).

terms, applies only to contracts with Indians "relative to their lands, or to any claims regarding Indian monies,"[38] courts have broadly construed the protective intent of the statute to include a wide variety of contracts.

For example, in *Barona Group of Capitan Grande Band of Mission Indians v. American Management, Inc.*,[39] a federally recognized Indian band sued to have a 1983 bingo management agreement declared void for failing to meet the federal approval requirements of 25 U.S.C. § 81. The non-Indian management firm counterclaimed, alleging that it was entitled either to damages for breach of contract or to compensation for the band's taking of its property, which consisted of the bingo facility the firm had financed and constructed on tribal lands. The facts showed that in 1981, the parties had submitted an earlier proposed contract between the band and the defendant firm to the superintendent of the local office of the Bureau of Indian Affairs (BIA) for his approval. He informed the parties that there was no need for formal government approval of the contract under 25 U.S.C. § 81 because the contract was not related to Indian lands or monies, as required by the statute.[40]

The 1981 agreement called for the firm to "finance, construct, and operate" a bingo facility on the reservation. The firm constructed the facility and operated it on behalf of the band for several years. But in 1986 the band, because of a dispute with the firm, shut down the bingo facility and commenced this suit. The federal district court granted the band's motion for summary judgment and declared the agreement invalid because it had not been approved by the BIA as required by the relevant statute.[41]

American Management appealed that decision on the ground that the BIA's 1981 ruling had obviated the need for any federal approval of the later agreement. American Management also claimed that, even if the agreement was invalid, it was entitled to fair compensation for the bingo facility that the band

38. 25 U.S.C. § 81 (1988).

39. 840 F.2d 1394 (9th Cir.), *cert. dismissed*, 487 U.S. 1247 (1988). The Indian tribes' entry into the potentially lucrative "gaming" industry has placed new pressure on the federal government to take an active role in managing economic development activities on reservations through the contract approval requirements of 25 U.S.C. § 81. Several recent cases have involved bingo management agreements between non-Indian firms and Indian tribes.

40. *Id.* at 1397-98.

41. *Id.* at 1398.

had seized. The federal appeals court affirmed the district court's decision and refused to give the BIA's administrative interpretation of 25 U.S.C. § 81 any weight because it was a clearly erroneous interpretation of the law. Because the management agreement required American Management to "build, construct, and operate" the bingo facility on tribal lands, this was sufficient to make the contract "relative" to Indian lands as required by the statute.[42] Furthermore, the court held that American Management was not entitled to just compensation for the band's alleged taking of its bingo facility because the band, as a sovereign entity, is not bound by the "Just Compensation Clause" of the United States Constitution.[43] The federal appeals court, citing the Supreme Court's 1974 decision in *Morton v. Mancari*,[44] also summarily rejected American Management's contention that 25 U.S.C. § 81 created a constitutionally invalid racial preference in favor of Indians.[45]

Contract law cases like *A.K. Management Co. v. San Manuel Band of Indians*[46]—some only tangentially related to Indian lands or monies—also demonstrate the federal courts' willingness to use statutory canons of construction to carry out a perceived Congressional intent to protect Indian tribes from the adverse consequences of improvident contracts. In *A.K. Management*, a non-Indian bingo management firm sought to enforce its management agreement against a federally recognized Indian band. In 1984, the management firm had agreed to finance, construct, and operate a bingo facility on behalf of a small band of Indians on a reservation in San Bernadino County, California. Three days after the execution of the agreement, however, the band notified the firm that it was repudiating the agreement. The federal district court granted the band's motion to dismiss the complaint based on the band's sovereign immunity from suit.[47] The firm appealed that decision to the Ninth Circuit Court of Appeals arguing, among

42. *Id.* at 1403-04.

43. *Id.* at 1405 (construing U.S. CONST. amend. V).

44. 417 U.S. 535 (1974). The Court in *Morton* upheld an Indian employment preference within the BIA against a due process challenge brought by non-Indian employees. The Court held that such a preference for Indian employees within the BIA was based on a political, not a racial, classification, and was designed to further Indian self-government. *Id.* at 554 (construing U.S. CONST. amend. V).

45. 840 F.2d at 1407 (construing U.S. CONST. amend. XIV).

46. 789 F.2d 785 (9th Cir. 1986).

47. *Id.* at 786.

other things, that the agreement need not be approved by the BIA to be valid. The management company further contended that the band had breached other independent aspects of the contract and had waived its sovereign immunity from suit with respect to those breaches.[48]

The Ninth Circuit rejected the firm's contention that the contract was outside the scope of 25 U.S.C. § 81. The court found that the contract, although not purporting to convey an interest in Indian lands or monies, was nonetheless "relative to Indian lands and monies" and therefore fell within the statute's requirement of federal approval.[49] The firm's additional contention that Section 81 creates undue uncertainty in business dealings, thereby disadvantaging both Indian tribes and non-Indian businesses, was rejected by the court as not relevant to the legal issue involved in the case. The court asserted that non-Indian businesses that choose to deal with Indian tribes are put on notice by Section 81 that the prudent course of action is to seek initial BIA approval of the contract.[50] The court also rejected the firm's contention that standard contract rules of construction should be applied to "save" the contract. Indian contracts are rendered *sui generis* by operation of the protective statute involved. Therefore, standard principles of contract law do not necessarily apply to their formation or interpretation.[51] The ultimate result of the statute and its court interpretation is that the requirement for BIA approval for a valid contract to be formed between an Indian tribe and a business is absolute.

B. *Contract Enforcement*

Businesses must also be aware that Indian tribes enjoy a sovereign's common law immunity from suit.[52] This immunity extends to governmental agencies of the tribes as well.[53]

48. *Id.* at 786-87.
49. *Id.* at 787-88.
50. *Id.* at 788.
51. *Id.* at 788-89.
52. The United States Supreme Court has repeatedly reaffirmed its commitment to preserving the Indian tribes' immunity to suit absent a clear and unequivocal waiver of such immunity that has been authorized by Congressional action. Both federal and state courts are required to respect this rule of law. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).
53. *See* Weeks Construction Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668 (8th Cir. 1986). In that case, a non-Indian construction firm brought a breach of contract action against a tribal housing authority and federal housing agency. The firm

Congress has the power to waive the sovereign immunity of Indian tribes, but such a waiver must be express and unequivocal.[54] Without express Congressional authority, federal officials have no capacity to waive tribal sovereign immunity.[55]

Therefore, even if businesses comply with the formalities of the relevant statute, their contracts will be unenforceable against tribal governments unless there is also an effective waiver of sovereign immunity. However, it remains an open question whether Indian tribes without Congressional authorization can effectively waive their own immunity to suit.[56] Although some lower federal courts have held that Indian tribes may waive their immunity to suit without Congressional authority,[57] such authority is questionable in light of the fact that Congress must expressly authorize tribal waivers of sovereign immunity when tribal corporations are created.[58]

Some tribes have managed to avoid the Congressional authorization requirement by forming tribal corporations under the authority of the Indian Reorganization Act ("IRA").[59] The IRA authorizes the Secretary of the Interior to issue federal corporate charters to eligible tribal governments that have elected to create economic or business development arms of

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alleged that it had been hired to construct housing units on a South Dakota Indian reservation, Pine Ridge, and that the local tribal housing authority had breached its contract with the firm by causing construction delays, providing improper information about subsoil conditions, and wrongfully declaring the firm in default on the contract. The district court declined to exercise diversity jurisdiction over the action and dismissed it because the tribal housing authority shared in the acknowledged sovereign immunity of the tribe. The Eighth Circuit affirmed the district court's dismissal of the action.

54. *See, e.g.*, COHEN, *supra* note 5, at 324-25.

55. *See* Santa Clara Pueblo v. Martinez, 436 U.S. at 58.

56. For example, Indian tribes cannot waive their immunity by contract in matters affecting trust property without adequate Secretarial or Congressional consent. *See* COHEN, *supra* note 5, at 325 (citing 25 U.S.C. § 81 (1988)). It has not been decided whether Indian tribes can waive their immunity without Congressional authorization in contracts not related to trust property.

57. *See, e.g.*, Weeks Construction Inc. v. Oglala Sioux Housing Auth., 797 F.2d at 670-71.

58. Tribes may elect to form "Section 17" business corporations pursuant to a BIA-issued corporate charter that can allow the tribally chartered corporation to "sue and be sued" in a court of competent jurisdiction. *See* COHEN, *supra* note 5, at 327; *cf.* 25 U.S.C. § 476 (1988).

59. Indian Reorganization Act, ch. 576, 48 Stat. 987 (codified at 25 U.S.C. § 476 (1988)). The IRA was an effort to improve the economic status of Indian tribes. Tribes were encouraged to organize tribal business corporations and a modest amount of financial capital was to be made available to the tribes to support their fledgling economic endeavors. *See* COHEN, *supra* note 5, at 247.

the tribe.[60] These corporate charters generally recognize the existence of standard corporate powers in the eligible tribes and also authorize the future tribal corporations to "sue or be sued" in a court of competent jurisdiction.

Some lower courts have interpreted these "sue or be sued" clauses as constituting general waivers of tribal sovereign immunity for tribes that have adopted charters pursuant to 25 U.S.C. § 477.[61] The weight of authority, however, holds that these clauses, without more, are insufficient to operate as waivers of sovereign immunity, and, at best, only waive the tribal corporations' immunity with regard to the specific scope of their authorized economic or business activities.[62]

Recognizing this limitation, one would expect that businesses would insist on contracting with federally chartered tribal corporations, rather than the tribes themselves, to avoid the bar of tribal sovereign immunity from suit.[63] This tactical suggestion, however, fails to grasp the complexity of doing business in Indian Country. For example, if a court finds that the tribal corporation is acting as the alter ego of the tribal government and not purely in a business capacity, then the corporation is likely to be held to share in the tribe's general immunity from suit.

In *S. Unique Ltd. v. Gila River Pima-Maricopa Indian Community*,[64] for example, a non-Indian business firm sought to "pierce the veil" of tribal sovereign immunity in a breach of contract action against a tribal business enterprise in Arizona state court. The firm sought to characterize the defendant enterprise as a separate and distinct entity that should not be enti-

60. Some lower courts have viewed the "sue and be sued clauses" as evidencing a general Congressional intent that tribally chartered corporations, like federally chartered corporations, should be amenable to suits unless Congress indicates a contrary intent. *See* Namekagon Development Co. v. Bois Forte Reservation Housing Auth., 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975).

61. *See* Maryland Casualty Co. v. Citizens Nat'l Bank, 361 F.2d 517 (5th Cir. 1966), *cert. denied*, 385 U.S. 918 (1966); Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127 (D. Alaska 1978); Martinez v. Southern Ute Tribe, 374 P.2d 691 (Colo. 1962).

62. This waiver is clearly limited to the action of the business corporation, and any action against the tribe acting in a governmental capacity is clearly beyond the scope of the waiver and is barred. *See* COHEN, *supra* note 5, at 326; *see also id.* at n.378 (collecting and criticizing cases); Boe v. Fort Belknap Indian Community, 455 F. Supp. 462 (D. Montana 1968); Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977).

63. Richard M. Grimsrud, *Doing Business on an Indian Reservation: Can the Non-Indian Enforce His Contract with the Tribe?*, 1981 B.Y.U. L. REV. 319, 324-25.

64. 674 P.2d 1376 (Ariz. Ct. App. 1983).

tled to invoke the defense of tribal sovereign immunity.[65] The firm alleged that the defendant enterprise had purchased several thousand gallons of herbicide in an off-reservation transaction, accepted delivery of the herbicide on the reservation, and later refused to pay the bill of $177,000. The trial court, on the motion of the tribal government, dismissed the firm's complaint with prejudice.[66]

The appellate court agreed with the trial court's decision. The facts showed that the Indian tribe had consciously created the tribal enterprise as a subordinate economic enterprise to carry out governmental objectives of the tribe.[67] The appellate court distinguished a tribally chartered business enterprise, which would be subject to a "sue and be sued" clause in its governing charter, from a governmental enterprise that was merely exercising the economic powers of the tribe as its "alter ego."[68] Furthermore, the plan of operation for the tribal enterprise reflected the tribal government's intent to have continuing and direct control over all facets of decision-making by the tribal enterprise.[69] The appellate court held that, under these facts, the tribal business enterprise was entitled to share in the tribe's sovereign immunity from suit as a "subordinate economic enterprise" as defined by Arizona case law.[70]

Even if a business is successful in contracting with a truly independent tribal corporation it faces other difficult substantive hurdles. For example, federal law requires that the tribal corporation must pledge its own non-exempt assets, not tribal lands or monies, as the security out of which a non-Indian judgment creditor can satisfy its claim.[71]

C. *Appropriate Forum for Enforcement*

Devising an appropriate dispute resolution mechanism for

65. *Id.* at 1377.
66. *Id.*
67. *Id.* at 1378-79.
68. *Id.* at 1380-81.
69. *Id.* at 1379.
70. *Id.* at 1382.
71. For example, all "sue and be sued" clauses included in tribal corporate charters pursuant to Section 17 are accompanied by clauses limiting the execution of judgments against such corporations to "assets specifically pledged or assigned"; these limitations have been upheld by the courts. *See* COHEN, *supra* note 5, at 327; *see also id.* at n.383 (collecting and criticizing cases). This means that the contracting party must seek a pledge in advance of whatever security may be required, since the general assets of the corporation cannot be reached.

the resolution of any conflicts emerging from agreements between tribes and non-Indian businesses presents numerous difficulties. Civil jurisdiction over the many potential disputes arising in Indian Country is divided among tribal, state, and federal courts.[72] Complex factual, legal, and policy analyses are needed to determine which court system *actually* has jurisdiction over a particular case.[73] The business, for example, may prefer state court as the forum for possible future dispute resolution between itself and the tribal government. Even if the tribe agrees to this forum, however, it may prove difficult or impossible for the parties to achieve this goal.

Businesses face four potential barriers when they seek to have disputes with Indian tribes adjudicated in particular state or federal judicial forums. First, state courts are generally barred from exercising subject matter jurisdiction over claims arising within Indian Country when such an exercise of jurisdiction would interfere with important tribal or federal interests. Since the Supreme Court's 1959 decision in *Williams v. Lee*,[74] tribal courts have presumptively possessed civil jurisdiction over lawsuits arising on reservations and involving Indians. In *Williams*, a federally licensed non-Indian trader who operated a general store on the Navajo Reservation sued in state court to collect a debt from a Navajo Indian who resided on the reservation.[75] The defendant tribal member moved to dismiss the action from state court because the debt arose on the Navajo Reservation and therefore, he contended, the tribal court had exclusive jurisdiction over the claim.[76] The trial court, however, denied that motion and entered judgment for the non-Indian plaintiff. The state supreme court affirmed the trial court's decision because there was no specific Congressional act prohibiting the state's exercise of judicial jurisdiction over the action.[77]

On certiorari, however, the U.S. Supreme Court reversed the state court's judgment. Even assuming the absence of a federal statute preempting state jurisdiction in this case, the Court rea-

72. Frank Pommersheim, *Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329 (1989).
73. *Id.* at 345-47.
74. 358 U.S. 217 (1959).
75. *Id.* at 217-18.
76. *Id.* at 218.
77. *Id.*

soned, the state's exercise of jurisdiction over claims involving reservation Indians was nonetheless prohibited because it infringed on the inherent right of tribes to make their own laws and to be governed by them.[78] The Court emphasized the federal government's continuing support for tribal jurisdiction over claims arising on reservations and involving tribal members. The federal government historically had respected the Navajo tradition of judicial jurisdiction over reservation-based claims involving Indians.[79]

The Supreme Court decided that the appropriate forum for the resolution of this dispute was in tribal court. In so doing, the Court established the rule that state judicial jurisdiction over reservation-based claims is permitted only when essential tribal relations are not involved and when the rights of Indians will not be jeopardized.[80] The only exception to this rule seems to be the unusual case where state courts have exercised jurisdiction over claims in which the Indian tribe, and not the non-Indian, is the *plaintiff*.[81]

Furthermore, any *tribal* governmental action that purports to confer subject matter jurisdiction on a state court otherwise without such jurisdiction also may be judicially suspect. In *Kennerly v. District Court*,[82] a non-Indian business firm sought to rely on a tribal resolution as the basis for state court subject matter jurisdiction over its debt claim against a tribal member. The resolution purported to confer concurrent jurisdiction on Montana courts over actions arising on the Blackfoot Indian Reservation. An owner of a reservation-based store brought the action in state court to recover on a debt against tribal members of the Blackfoot Tribe for food purchased at his store.[83] The defendant tribal members moved to dismiss the claim for lack of subject matter jurisdiction. The state trial court denied defendants' motion and the state supreme court affirmed that ruling. The Montana Supreme Court then held that the state

78. *Id.* at 220.

79. *Id.* at 221-22.

80. The rule declared in *Williams v. Lee* reflects the modern federal support for tribal self-government and self-determination in economic and social matters that is crucial to the continued existence of the Indian tribe. *See* COHEN, *supra* note 5, at 266-70.

81. Three Affiliated Tribes v. Wold Engineering, 476 U.S. 872 (1986). This case may be explained by the fact that the North Dakota state courts historically had been open to Indians and Indian tribes seeking to enforce damage claims against non-Indians.

82. 400 U.S. 423 (1971).

83. *Id.* at 424.

courts' exercise of jurisdiction in this case did not infringe on any significant tribal interests under the *Williams v. Lee* test.[84] In addition, the court determined that the Blackfoot Tribal Council had by tribal ordinance effectively vested the state courts with concurrent jurisdiction over cases involving tribal members.[85]

Reversing the state court's decision, the United States Supreme Court held that a governing federal civil jurisdictional statute, known popularly as Public Law 280, effectively precluded the state court's exercise of subject matter jurisdiction in that case.[86] Montana had not complied with the requirements of the statute necessary to assume jurisdiction over the category of actions in question. Public Law 280 was construed by the Court to require so-called "optional states," such as Montana, to take "affirmative legislative" action in compliance with Section 7 of the statute before they could assume any measure of civil jurisdiction over disputes that were otherwise within the exclusive jurisdiction of the Indian tribes.[87] Montana had never undertaken this affirmative legislative action.

The Supreme Court also decided that the Blackfoot Tribal Council was not authorized by any governing federal law to confer on state courts subject matter jurisdiction over reservation- based claims that involve Indians. Indeed, the majority in *Kennerly* held that Congress had actually *limited* tribal governmental authority in this regard, through a 1968 amendment to Public Law 280. That amendment required a majority vote of eligible tribal members in favor of the extension of state civil jurisdiction over their reservation *before* any state could assume civil jurisdiction over the reservation.[88]

Another barrier that businesses seeking to have disputes resolved in state fora face is that there may be doubt whether state service of process reaches within Indian Country. In *Francisco v. State*,[89] an Arizona state court's exercise of *in personam* jurisdiction over a tribal member, based on service of process

84. *Id.* at 426-27.

85. *Id.* at 426.

86. *Id.* at 427 (construing Act of Aug. 15, 1953, Pub. L. No. 280, ch. 505, 67 Stat. 588, (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360 (1988))).

87. *Id.*

88. *Id.* at 428-30 (construing the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, Tit. IV, 82 Stat. 78, amending 25 U.S.C. §§ 1321-26 (1988)).

89. 556 P.2d 1 (Ariz. 1976).

on the reservation by a deputy sheriff, was held invalid. In deciding this case, the Arizona Supreme Court reasoned that state judicial rules regarding service of process are subject to federal preemption just like any other attempts to exercise state jurisdiction over Indian lands.[90] The court concluded, therefore, that because the Papago Indian reservation was created by a federal executive order guaranteeing the tribe exclusive sovereignty over its lands, the state lacked any jurisdictional authority to interfere with the tribe's right of self government.[91] The court further held that because of Arizona's failure to assume civil jurisdiction over Indian reservations within the state through compliance with Public Law 280, it was compelled to dismiss the paternity action against the defendant tribal member.[92]

A third obstacle to business litigation is that even if the business creditor secures a judgment in state court against an Indian tribe, there remains the difficult task of enforcing the judgment within Indian Country. The weight of authority holds that direct enforcement of a state court judgment against even non-exempt Indian assets is not possible within Indian Country.

In *Joe v. Marcum*,[93] the Tenth Circuit Court of Appeals held that a state court has no power to order the garnishment of a tribal member's on-reservation wages to satisfy an otherwise valid state court judgment in favor of a non-Indian creditor. The plaintiff, a Navajo tribal member, brought a declaratory judgment action seeking injunctive relief against a state court judge who had ordered the garnishment.[94] The plaintiff had borrowed money from a New Mexico finance company and had defaulted on the debt. The finance company sued on a debt action in state court and obtained a default judgment against the tribal member.[95] The tribal member was employed on the reservation; notwithstanding this fact, the company obtained a state court order garnishing his wages and served that order on the tribal member's employer.[96]

90. *Id.* at 4-5.
91. *Id.* at 5.
92. *Id.*
93. 621 F.2d 358 (10th Cir. 1980).
94. *Id.* at 360.
95. *Id.*
96. *Id.* at 360.

The employee brought an action in federal court to bar the garnishment. The federal district court granted the plaintiff's motion for summary judgment.[97] Both the state court judge and the finance company appealed the federal district court's decision. The Tenth Circuit affirmed the district court's granting of the summary judgment in favor of the tribal member. In so doing, the court recognized that the state court had subject matter jurisdiction over the claim against the tribal member because it involved an off-reservation transaction.[98]

Nevertheless, the Tenth Circuit primarily focused on whether the state court's garnishment order intruded on tribal sovereign rights reserved to the Navajo Tribe under federal law. The Court found that the Navajo Tribe had its own tribal court structure and that while the tribal code allowed some post-judgment enforcement remedies, it expressly did not allow garnishment as a remedial device.[99] Additionally, the court noted that garnishment is a statutory remedy that some states allow and some do not. Therefore, even if the defendants were accurate in characterizing the garnishment proceeding as merely ancillary to the default judgment, it was, in practice, an independent statutory proceeding against a judgment debtor's employer who was located on the Navajo Reservation.[100]

The fourth difficulty for businesses seeking to deal with Indian tribes is that principles of comity and federal policies favoring tribal court civil jurisdiction over non-Indians constrain a business litigant's resort to federal court. Potential litigants cannot by agreement confer subject matter jurisdiction upon the federal courts.[101] Common-law claims such as breach of contract or tortious injuries—even if they arise on an Indian reservation or involve tribal members—typically are not within federal court jurisdiction.[102] Therefore, agreements between Indian tribes and businesses to resolve future business disputes in the local federal district court, absent an adequate jurisdictional basis, will be ineffective in conferring subject matter ju-

97. *Id.*

98. *Id.* at 361.

99. *Id.*

100. *Id.* at 362-63.

101. *See* Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974).

102. Causes of action founded on state law, even if state law incorporates federal law, do not meet the "arising under" standard of 28 U.S.C. § 1331. *See* KENT SINCLAIR, FEDERAL CIVIL PRACTICE § 2.12 (2d ed. 1986).

risdiction on that court.[103]

Furthermore, out of respect for tribal sovereignty and federal policy interests, the United States Supreme Court recently adopted prudential rules requiring federal courts to defer to tribal court jurisdiction. In *Iowa Mutual Insurance Co. v. LaPlante*,[104] the Court held that even when non-Indian plaintiffs persuasively make a prima facia case for federal jurisdiction, district courts should defer to tribal courts' jurisdictional decisions.

In *LaPlante*, an insurance company brought a federal diversity action in federal district court seeking a declaration that the company was under no duty to defend or indemnify its insured, a member of the Blackfoot Tribe who owned and operated a ranch on the Blackfoot Indian Reservation in Montana. This case arose out of an accident that occurred on the insured's ranch when an employee, another tribal member, was injured as a result of his cattle truck overturning. The employee brought a personal injury suit against the ranch and the insurance carrier in tribal court. The tribal court ruled that the Blackfoot Tribe had jurisdiction over commercial relations between non-Indians and tribal members.[105] Meanwhile, the insurance company brought an action in federal district court seeking declarative and injunctive relief. The district court dismissed the suit for lack of subject matter jurisdiction. The Ninth Circuit affirmed that dismissal and the insurance company then appealed to the United States Supreme Court.[106]

The issue before the Court was whether a federal court may exercise diversity jurisdiction over a civil claim arising on a reservation and involving tribal members, before the relevant tribal court has had the opportunity to determine the scope of its own jurisdiction.[107] The majority opinion in *LaPlante* decisively rejected the insurance company's contention that Congress, in granting diversity jurisdiction to the federal courts, had intended to override the competing federal policy of deference to tribal courts. In fact, the Court found substantial evidence of specific federal policies in support of tribal sovereignty and tri-

103. *See* Schantz v. White Lightning, 502 F.2d at 69.
104. 480 U.S. 9 (1987).
105. *Id.* at 12.
106. *Id.* at 12-13.
107. *Id.* at 11.

bal court development.[108] Justice Marshall, writing the Court's opinion, cautioned that a federal court's exercise of jurisdiction in this instance would significantly impair tribal sovereignty.[109] In addition, the Court rejected the insurance company's claim that tribal courts were incompetent to adjudicate complex cases. The Court responded to this argument by observing that any injury to the rights of litigants in tribal court is ultimately reviewable in federal court. Therefore, the Court required, as a matter of comity, that non-Indian civil litigants exhaust their remedies in tribal court before they can seek relief in federal court.[110]

The lesson of *LaPlante* is that regardless of the basis of federal court jurisdiction, federal courts must respect the principle of tribal self-government. The principle of comity, as applied in *LaPlante*, requires that federal courts exercise restraint so that tribal courts, in cases involving non-Indians, may first examine the relevant facts, laws, and treaties to determine the scope of their own jurisdiction.[111]

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108. *Id.* at 17-18.

109. *Id.* at 15.

110. *Id.* at 16. The Supreme Court first developed the exhaustion of tribal court remedies requirement in National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 485 (1985). In that case, another insurance company contended that tribal courts lack civil jurisdiction over non-Indian defendants. The case arose on the Crow Indian Reservation and involved a personal injury action by a tribal member against a school district for injuries suffered in a motorcycle collision at the local elementary school. The tribal member sued in tribal court and obtained a default judgment for $153,000. Neither the insurance company nor the school district appeared at the tribal court proceeding. *Id.* at 847-48. After the default judgment, the defendants sought to have the federal district court enjoin the tribal court from any further proceedings. The federal district court granted the requested injunctive relief, finding that the tribal court had no civil jurisdiction over non-Indian defendants. The Ninth Circuit, however, dissolved that injunction. *Id.* at 848-49. The non-Indian defendants then appealed to the Supreme Court.

The issue before the Court was whether the federal court had federal question jurisdiction over the petitioners' claim that the tribal court had been divested of civil jurisdiction over non-Indians by the operation of federal law. *Id.* at 850-51. The Court reviewed the evolution of the federal question jurisdictional statute, 28 U.S.C. § 1331, and found that it provided a jurisdictional basis upon which to hear federal common law, as well as statutory, claims. *Id.* at 852-53. Therefore, the non-Indian petitioners' claim that the tribal court unlawfully exercised its jurisdiction had its source in federal law. The Supreme Court held that, because federal law defines the outer boundary of tribal governmental power over non-Indians, a federal court may decide whether a tribal government or court has exceeded the lawful extent of its jurisdiction. *Id.* at 852. However, because there is no federal statute granting federal courts power to adjudicate civil disputes between Indians and non-Indians, tribal courts should, in the first instance, determine the existence and extent of tribal court jurisdiction. *Id.* at 854. This exhaustion of tribal remedies requirement, the Court reasoned, would promote tribal self-government. *Id.* at 856-57.

111. *LaPlante*, 480 U.S. at 15.

The public law principles and distinctions governing Indian commerce disrupt the standard private law principles governing contracts, torts, and property law in the context of commercial dealings between Indian tribes and non-Indian businesses. The legal and social rationales for this distinctive treatment of Indian commerce have varied over time. The rules were justified in earlier years as a conflict management tool needed to avoid antagonizing powerful tribal allies or enemies.[112] Later, during the reservation period, they were justified as an "anti-fraud" device to prevent unscrupulous whites from taking advantage of the now powerless and vulnerable Indian tribes.[113] Today, they are justified as assisting Indian tribes in their efforts to achieve self-determination.[114]

These same public law principles and distinctions, however, are now being subjected to renewed scrutiny from a wide variety of vantage points—legal, economic, political, and ethical.[115] Can these principles and distinctions—which reflect a strong bias towards the isolation and separation of Indian tribes and reservations from mainstream American influences—be adapted so that they contribute to the strengthening and development of the tribal economies and societies?[116]

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112. *See* Nathan R. Margold, *Introduction* to FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at xxi, xxii (1971).

113. *See id.* at xxii, xxv.

114. *See id.* at xxiii.

115. Congress, during the 1930s, sought to use its plenary power over Indian affairs as a means to leverage democratic change and adaptation within the Indian tribes. Influential congressmen, as well as reformers within the BIA, viewed the past federal Indian policies as creating a "wall" of legal and economic tribal separatism that was inconsistent with democratic values and damaging to the future of the tribal peoples. An ambitious reform program, known as the Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq.* (1988), was intended to extend to Indian tribes the opportunity for political and economic "home rule" demonstrated by a federal charter. *See also supra* note 58 and accompanying text. But the IRA, ambitiously conceived, lacked the coherence—as well as the needed economic and financial support—to serve as the basis for a new political economy for Indian Country. Indeed, many of the more influential, traditional tribes rejected the IRA both as being inconsistent with their traditions and as exposing the tribes to institutions that they could not adapt to their needs. *See* BARSH & HENDERSON, *supra* note 9, at 96-111.

116. Inherent, and perhaps unresolvable, tensions are present in the competing legal and political conceptions of Indian tribes. Indian tribes, in the standard conception, are viewed as comprising ethnically and culturally distinct peoples that, due to a "historic bargain" between them and the federal government, are entitled to govern their members by their own internal laws free of unreasonable federal or state interference. But as Indian tribes reassert their governmental powers—especially regulatory authority over non-Indian economic activities within Indian Country—they impose unanticipated externalities on both non-Indians and state governments. The federal courts have struggled to accommodate the emerging tribal interests in providing for economic and social development on the reservations while at the same time protecting

III. What Is the Nature of Business Risk That These Rules Create?

The failure of the public law model of governance within Indian Country has derived, in part, from the public decisionmakers' unwillingness, or inability, to protect tribal interests when those interests conflict with, or hinder the realization of, national interests. Some political economists, for example, argue that the federal government consciously chose to regulate Indian title to lands and resources so that Congress, in responding to the demands of various interest groups, could engage in self-interested "rent seeking" behavior.[117] By virtue of its plenary authority over Indian lands and resources, Congress has been able to grant rights in tribal property as incentives to favored non-Indian interests that promised to develop the western United States. Examples of this strategy include railroad land grants, lands for homestead entry, and patents for mineral development. Indeed, the development of the American West would have been inconceivable absent the existence—and the exercise—of the federal government's virtually absolute disposal power over Indian lands.[118]

Nonetheless, the real challenge is to retrieve, from this increasingly discredited model, those few core principles of federal Indian law that can be revitalized to serve as the basis for a new political economy for Indian Country.[119] I will therefore identify and discuss those relatively few public law categories

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the rights of non-Indians from regulatory overreaching. This effort to develop new judicial concepts as the background for a new political economy within Indian Country has proven to be chaotic and confusing to both Indian tribes and non-Indians. *See id.* at 241-56.

117. Political economists sometimes view politics in the vulgar sense of "who gets what and when?" Congress, according to this view, chose to regulate Indian lands and resources under an "incomplete" assignment of property rights to the Indian tribes so that the relevant Congressional committees were later free to "complete" those rights by assigning those interests to powerful non-Indian interest groups who would help further the federal interest. *See* Lee J. Alston & Pablo T. Spiller, *A Congressional Theory of Indian Property Rights: The Cherokee Outlet*, *in* Anderson, *supra* note 12, at 85, 106.

118. *See* Fred S. McChesney, *Government as Definer of Property Rights: Indian Lands, Ethnic Externalities and Bureaucratic Budgets*, *in* Anderson, *supra* note 12, at 109.

119. I advocate a return to foundational principles as the starting point for constructing a new political economy for Indian Country. This effort also is consistent with, I believe, a deeply shared desire by the courts and policymakers to conserve the essence of the "historic bargain" between the tribes and the federal government while making it possible for the tribes to adapt to new economic and political demands. These basic principles, with my proposed adaptation, serve to further the best aspects of the tribal governments' and the federal government's programs for an Indian policy that works. *See* Cohen, *supra* note 36, at 122-26.

and distinctions that effectively assist tribal governments. My approach is to use a market-based analysis that will reveal which basic principles promote tribal self-governance in a manner consistent with broader democratic principles and values.

The law governing Indian commerce holds the key for the Indian tribes' future development. Unfortunately, the pathological effects and perverse incentives generated by the existing law have impeded commercial relations between Indian tribes and non-Indian businesses. Reputable businesses are deterred from entering Indian Country, while disreputable "quick-buck" artists seem to flourish within it.[120]

Past analysis has reduced the complex commercial relations between Indian tribes and non-Indians to a simple binary choice between public and private law. If one is for tribal sovereignty, he will argue that clearly delineated principles of public law should continue to govern commercial relations.[121] Conversely, if one is against government paternalism, then he will claim that these business dealings should be governed by private law principles that encourage and protect private investment within Indian Country.[122]

Those who advocate the former choice praise the rules as necessary to protect the remaining tribal estate—lands, waters, and natural resources—from risk of loss. They assume that tribal governments are not equal, politically or economically, to the task of bargaining directly with businesses. The existing rules, advocates assert, insulate vulnerable, unsophisticated tri-

120. *See supra* text accompanying notes 13-18. The federal government's failure to develop, through the BIA or other federal agencies, appropriate institutional capabilities and strategies for the "intermediation" of commercial relations between emerging tribal governments and non-Indian commercial interests has been a key factor contributing to the impoverishment of the tribal reservations. The ad hoc, ill-fated, and ill-conceived nature of economic development efforts on the Indian reservations are routinely cited by critics as leading examples of government planning gone awry. *See* Ickes, *supra* note 15, at 494-528.

121. *See* United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 513 (1940).

122. The Congressional "termination" movement of the early 1950s reflects some of these assumptions as the basis for ending the federal wardship over Indian tribes. House Concurrent Resolution Number 108, adopted on Aug. 1, 1953, represented Congress's commitment to the rapid termination of Indian tribes. The professed goal of that legislation was to "make Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end the status as wards of the United States and to grant all of the rights and prerogatives pertaining to American Citizenship." PRUCHA, *supra* note 8, at 1044 (quoting H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953); *see id.* ch. 41 (entitled "Termination in Action").

bal governments from the catastrophic risk of liability resulting from their improvident business deals.[123]

Those who advocate the latter choice condemn the existing rules as a bar to tribal economic development, an affront to the doctrine of tribal self-determination, and a trap for unwary businesses that may be exploited by federal officials or tribal governments. These rules, critics assert, should be abolished and Indian tribes, through a process of natural selection, should be required to participate in the rigors of a market economy.[124]

The binary choice model itself is a reflection of the pathology underlying the existing governance model. That model imposes substantive and jurisdictional legal rules that homogenize the diverse interests, preferences, and aspirations that exist among Indian tribes in Indian Country today. In fact, today's Indian tribes vary dramatically in terms of their cultural, political, and economic orientations.[125] A desirable alternative model would focus on tribal self-governance. It would allow Indian tribes to decide for themselves whether to pursue an evolutionary, or even a revolutionary, path in developing their tribal economies and societies.

Nonetheless, the successful development of an alternative model for Indian commerce is possible only through understanding the defects in the existing public law model.[126] Analytically, the present public law categories and distinctions governing Indian commerce can be considered as a set of federally-imposed commercial transaction rules. These rules shape, channel, and distribute both tribal and business risk in a manner that tends to impede development.[127] This result is not necessary, however. Other commercial governance systems—

123. *See supra* text accompanying note 117.

124. *See supra* text accompanying note 118.

125. *See* Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S. DAK. L. REV. 246 (1989). In this article, Professor Pommerscheim emphasizes the continuing process of tribal self-scrutiny as the appropriate departure point for the formulation of any "answers" to the modern dilemmas that confront tribal governments.

126. *See id.* at 248-51. Professor Pommersheim invites the federal and state governments to engage in a new dialogue with Indian tribes in order to transform the horrendous economic and social conditions under which many tribes still live.

127. As viewed by law and economics scholars, private commercial law (including contract, corporation, and partnership legal principles) creates a set of governmentally imposed "default rules" that govern commercial transactions in the absence of the parties' indication of a contrary intent through bargaining. *See, e.g.*, Gillette, *supra* note 2, at 543.

contract law and partnership law, for example—can likewise be analyzed as imposing default rules that govern and shape business risk and behavior.[128] Why can the governance system for Indian commerce be singled out as encouraging perverse or pathological behavior by tribes and businesses, while these other systems appear to be valued and welcomed by the parties?[129] The distinctions between the two systems of commercial governance are revealed in response to two questions.

The first question asks whether the governmentally imposed default rules actually help the relevant parties to maximize their joint expected benefit from a particular bargain or transaction.[130] Can Indian tribes and their business partners, with minimal cost or effort, "bargain out" of the present federally imposed system of default rules? Are they free to bargain into a customized agreement that would better meet their joint needs in light of the present information they have about the risks and benefits of a particular transaction?[131] Recent expert opinion supports the conclusion that the transaction costs imposed on Indian tribes and businesses of bargaining out of the present governance structure are prohibitively high.[132]

The second question asks whether the present governance rules encourage "egoistic" or "cooperativist" behavior. Egoistic players in commercial transactions, whether businesses or tribes, will attempt to defect from an agreement if the legal environment rewards their efforts to shift or avoid unanticipated risk.[133] The rigidity of the governing categories and distinctions in Indian commerce encourage egoistic, or risk-focused,

128. *See id.* at 546-52.

129. *See* Ickes, *supra* note 15, at 502-04 (arguing that federal overprotection and control of tribal resources—primarily through the BIA—no longer serves its original goal of protecting Indian tribes, but has instead crippled developmental efforts on the various Indian reservations).

130. *See* Scott, *supra* note 15, at 602-03 (arguing that parties contract in order to maximize the joint, expected value of the contract for both parties, and, therefore, the governing commercial default rules should reflect that presumed rational intent of the parties).

131. Commercial law default rules should be neutral; that is, the government should acknowledge that parties may well have better information about how to structure and allocate foreseeable risks in a specific transaction. *See id.* at 608-09.

132. *See* PRESIDENTIAL COMMISSION, *supra* note 16.

133. *See* Gillette, *supra* note 2, at 546-52. Gillette distinguishes "egoistic" commercial actors—archetypes of pure self-interest who believe they have no obligation to assist any one else, absent explicit agreement—from "cooperativist" actors—an equally fictional type who believe that contract relationships presumptively create obligations to assist the other party if unforeseen complications arise during the course of contract performance.

behavior. Much of the litigation between businesses and Indian tribes focuses on tribal immunity from unconsented suit. This doctrine has been vigorously challenged by businesses as conferring an unfair advantage on Indian tribes in the commercial context. Yet businesses, as well Indian tribes, have sought to exploit various features of the transaction rules to obtain strategic advantage over opposing parties.

For example, in *Three Affiliated Tribes v. Wold Engineering*,[134] an engineering firm—the defendant in this breach of contract and negligence action—moved the state court to dismiss an Indian tribe's damages claim. The engineering firm contended that the Indian tribe had to waive its sovereign immunity to suit, as required by state statute, before it could have access to state court.[135] The North Dakota Supreme Court agreed with the firm and dismissed the tribe's damages action. The tribe petitioned the United States Supreme Court for review of the state court's decision, arguing that such a state-imposed waiver condition was either unconstitutional or preempted by governing federal law.[136]

The Supreme Court eventually decided that the state statute in question did conflict with recognized tribal and federal interests, especially the important federal interest of preserving free access to courts. Therefore, the Court held that the state statute was preempted by federal law.[137] Yet, by raising issues unique to Indian law, *Wold Engineering* transformed a garden-variety negligence case into a major Indian law case. Only after four full briefings and hearings before both the North Dakota Supreme Court and the United States Supreme Court was it determined that the immunity issue would not insulate the business from liability.

Businesses have pursued a wide variety of strategies to dilute or nullify the perceived advantages that Indian tribes enjoy under the existing commercial transaction rules. For example, a non-Indian litigant, in *Dixon v. Picopa Construction Company*,[138] sought to nullify a tribal corporation's claim of sovereign immunity to suit by establishing off-reservation "minimum contacts" that would sustain state court jurisdiction over its

134. 476 U.S. 872 (1986).
135. *Id.* at 878.
136. *Id.*
137. *Id.* at 884-86.
138. 772 P.2d 1104 (Ariz. 1989).

damage claim. In that case the Supreme Court of Arizona decided that the non-Indian plaintiff could bring a personal injury action in state court against a tribal corporation for injuries arising from an off-reservation accident in Tempe, Arizona.[139]

The court first focused on the commercial nature of the activities of Picopa, the tribally owned construction company. Because it was a for-profit corporation, rather than a subordinate economic organization of the tribal government, the defense of tribal sovereign immunity was unavailable to Picopa.[140] The court also emphasized Picopa's independence from tribal governmental control or direction. Picopa, for example, was governed by an independent board of directors and had liability insurance to protect its assets.[141]

The court therefore found that no important tribal or federal interest was at stake in the case and no overriding social interest would be furthered by immunizing the defendant tribal corporation from suit.[142] Indeed, the court suggested that the federal policy of encouraging tribal economic development would be furthered by withholding immunity from tribal corporations in similar circumstances.[143]

In its decision the Arizona Supreme Court also reversed long-standing precedent by sustaining *in personam* jurisdiction over a reservation-based tribal defendant even though such jurisdiction was obtained by mail service under a long-arm statute.[144] If the state courts have subject matter jurisdiction over a case, the court reasoned, then they must have power to effect service of process on the Indian reservations within the state. Treating Indian reservations as "out of state" for service of process adequately respects tribal sovereignty, according to the court's rationale, because Indian tribes are thereby accorded the same level of sovereign respect as sister states.[145]

The Supreme Court of New Mexico further developed the judicial reasoning displayed in *Picopa* by fully equating the sovereign status of sister states with that of Indian tribes. In *Padilla*

139. *Id.* at 1116.
140. *Id.* at 1109-11.
141. *Id.*
142. *Id.* at 1111-12.
143. *Id.*
144. *Id.* at 1112-13.
145. *Id.* at 1113-15.

v. Pueblo of Acoma,[146] the court sanctioned a breach of contract suit brought by a non-Indian business directly against a federally-recognized tribe. In that case, a roofing contractor brought a breach of contract action against an Indian pueblo doing business off-reservation as a construction firm. The pueblo refused to consent to the suit against the nominal defendant, Sky City, Inc.[147] Sky City was clearly a subordinate economic organization of the tribe and therefore, under existing law, entitled to claim the sovereign immunity of the tribe.[148]

The New Mexico Supreme Court, however, reasoned that a state court has subject matter jurisdiction over an Indian tribe's off-reservation business conduct.[149] Consequently, it would be purely a function of comity for a state court to recognize tribal sovereign immunity to a suit arising from the tribe's off-reservation conduct. But the New Mexico state legislature, the court reasoned, had already barred such a comity-based recognition of tribal sovereign immunity by declaring that breach of contract actions should be allowed against tribal governments.[150] Thus, the scope and nature of tribal sovereignty has been increasingly defined by reference to state interests and laws, without regard to the impact of those rules on the Indian tribes' economic or social well being.

Business litigants have also borrowed offensive strategies from analogous public law contexts in an effort to avoid the defense of tribal sovereign immunity to suit. In *Tenneco Oil Co. v. Sac and Fox Tribe*,[151] an oil company successfully argued that the defense of tribal sovereign immunity does not shield tribal governmental officials from liability when they act outside the scope of their authority. An Indian tribe had sought to cancel an oil company's leases on tribal lands. The company sued in federal district court for declaratory and injunctive relief, not against the Indian tribe directly, but against tribal officials to prevent them from taking action.[152] The tribe appealed the trial court's denial of immunity. On appeal, the Tenth Circuit held that there is an exception to tribal sovereign immunity,

146. 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989).
147. *Id.* at 847.
148. *Id.* at 849.
149. *Id.* at 850.
150. *Id.* at 850-51 (construing N.M. STAT. ANN. § 37-1-23 (Michie 1978)).
151. 725 F.2d 572 (10th Cir. 1984).
152. *Id.* at 574.

just as there is an exception to federal sovereign immunity, that allows injunctive relief against a tribal official who acts outside the scope of his official authority.[153]

There are two main reasons why the current federally imposed rules governing Indian commerce have failed. First, the doctrine of Congressional plenary control of Indian affairs requires federal and state courts to defer to both the Congress and the President. Second, the courts—especially state courts—are cognizant of those instances in which tribal governmental activities give rise to externalities that burden non-Indian, state citizens.

Through the use of tools such as jurisdictional rules, courts often seek to balance the competing interests in Indian Country. This judicial effort at intermediation of competing federal, tribal, and state interests has caused the Supreme Court to reject its original bright-line rule of virtually complete tribal sovereignty within Indian Country, subject only to explicit federal limitation on those federal powers.[154]

Today, acceptance of that rule would mean that state interests—governmental and economic—could not be counted in the resolution of judicial disputes involving tribal governments. The Supreme Court, rather than countenancing that outcome, rejected the bright line of tribal sovereignty in favor of preemption analysis. The preemption approach, however, by its very nature, requires a complex, ad hoc balancing of competing federal, state, tribal, and private interests in a given dispute. Both state and federal courts are required to weigh the competing benefits and costs imposed on the respective parties by any proposed tribal governmental action. Given the relatively small size of the tribal economies and the tribal populations, it is not surprising that the courts may be overly impressed by the costs imposed on the relatively larger non-Indian economic and social interests in these disputes.[155]

Moreover, the real costs of this governance structure to the Indian tribes and their potential business partners are hidden and perhaps unmeasurable; these costs can only be understood

153. *Id.*

154. *See, e.g.*, Karl J. Kramer, Comment, *The Most Dangerous Branch: An Institutional Approach To Understanding the Role of the Judiciary in American Indian Jurisdictional Determinations*, 1986 WIS. L. REV. 989 (1986).

155. *See id.*

in terms of the opportunity costs associated with the limiting and discouraging of entrepreneurial activity by tribal governments and private businesses within Indian Country.[156] Indeed, federal task forces have identified the present governance structure as discouraging many businesses from even considering commercial or investment opportunities with Indian tribes.[157]

The prospect for a new political economy for Indian Country will require a revised set of governance rules that creates new categories and new distinctions that allow Indian tribes the option of participating more fully in the administration of their own economic and political affairs.

IV. Deregulation of Indian Country: The Movement From Public Choice to Social Choice

Indian tribes that choose to develop their remaining tribal estate in order to provide greater economic and social opportunities for their tribal members face daunting obstacles.[158] It is clear, however, that at least some tribes have succeeded in developing the basic institutions and political processes necessary to achieve these goals. When a tribe chooses to pursue a program of economic and social development, no one recipe will guarantee a successful outcome; too many variables impact the likely success of any given venture.[159] It does, however, make sense to analyze tribal opportunities, if not outcomes, for success in these endeavors. By focusing on the background political and social institutions that create the environment for successful development and execution of economic and social strategies, one can discern common elements among successful tribes that can become the basis for revitalization of the core concepts of Indian law.[160]

156. *See* Presidential Commission, *supra* note 16, at 45-55.

157. *See id.*

158. *See* Pommersheim, *supra* note 124, at 247-49.

159. *See id.* at 264-69 (emphasizing the need for a broader, more inclusive ethic that will allow both Indians and non-Indians in a given shared region to realize their common interests so that jointly they can develop that region).

160. Restoring to tribes authority over their own lands and resources has an important symbolic, even spiritual, dimension that is not captured by my emphasis on the legal or institutional aspects of this restoration. Professor Pommersheim appropriately notes that tribal people, as a result of the federal control of tribal land and resources, have become estranged from their own traditional relationship with the land and that this element deserves recognition in any policy formulation. *See id.*

Ironically, the same core principles of federal Indian law that contributed to the impoverishment of the Indian tribes when employed to support the "rent-seeking" behavior of the federal government can now be redeployed to help strengthen tribal governments and support development efforts by tribal entrepreneurs.[161] The refurbishing and revitalization of these core principles focus on the development of a new political economy for Indian Country based on the foundational elements of voice, exit, and loyalty.[162]

A. *Voice*

The restoration of tribal governmental authority over the remaining tribal estate is one means for achieving long-term social and economic growth within Indian Country. This restoration of tribal authority would seem to be a logical extension of the federal government's relatively new policies in support of tribal self-determination and the strengthening of tribal governments. Yet the "dead hand" of the old categories and distinctions often conspire to defeat this process.[163] For example, Congress has recently acted to regulate tribal gaming enterprises, heavily patronized by non-Indians, within Indian Country.[164] These tribally sponsored gaming enterprises represent a major source of income for many of the smaller Indian tribes and bands.

The major advocates for such regulation were not tribes or their members, but states and local governments that objected to tribal competition for limited tourist dollars.[165] These inter-

161. Congressional plenary authority over Indian affairs has always had the potential to be a powerful tool to assist Indian tribes in the development of their own resources. Increased public scrutiny by the courts, as well as by tribal groups and organizations themselves, regarding the permissible scope and purpose of Congressional action gives hope that this power will be used in the future to help, not hurt, the Indian wards.

162. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

163. Federal courts have become increasingly active policy makers in Indian law and are called on to broker regulatory and jurisdictional disputes between tribal governments and non-Indian interests. The Supreme Court's rejection of the foundational Indian law doctrines embodied in Worcester v. Georgia, 31 U.S. (5 Pet.) 515 (1832), in favor of a "new Indian law" based on principles of federal preemption has injected uncertainty and risk into tribal efforts in economic and social development. *See* Kramer, *supra* note 154.

164. Indian Gaming Regulatory Act, 25 U.S.C.S. §§ 2701-21 (1988).

165. According to Senate Report Number 100-446, states are authorized to consider the "negative impacts" of tribal gaming competition on existing state gaming activities in deciding whether they will consent to what the Act describes as "Class III gaming" (for example, bank card games such as blackjack, chemin-de-fer, and bacca-

est groups, having been rebuffed by the Supreme Court in their effort to directly regulate this economic activity within Indian Country,[166] turned to Congress to exercise its plenary power over Indian affairs and to overrule the tribal victory in the Supreme Court. Congress, under pressure from these powerful interest groups, responded as public-choice economists predicted it would: Congress sought to concentrate benefits on powerful supplicants, while diffusing the costs broadly over the comparatively powerless tribal governments and their membership.[167]

If this destructive "rent-seeking" behavior is so deeply ingrained in the fabric of federal Indian law and politics, why should Congress, or the BIA, be willing to restore "tribal voice" over tribal land and resources? The answer is that Congressional recognition of this tribal voice in the governance of Indian Country is in the long-term economic and political interest of not just the tribal governments, but the American taxpayer, as well.[168] The belief that a "beggar-thy-neighbor" policy should govern Indian affairs has now been repudiated. The failure of the early federal policies that subjected tribal governments and economies to rigid bureaucratic control is now painfully evident: the federal government presently pays, through a variety of federal programs, nearly $1.9 billion annually to the BIA to support tribal governments and their members on the many reservations in the United States.[169] Simple economic rationality has persuaded diverse policy-makers ranging from the General Accounting Office (GAO) to the

rat). *See* S. REP. No. 446, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084-85.

166. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

167. The Department of Justice (DOJ) has advocated the legislation of a "bright line" rule that clearly declares the scope of state regulatory and prohibitory authority over Indian gaming in Indian Country. Such a rule, according to DOJ, should balance state "law enforcement concerns with the understandable desire of the tribes to obtain revenue from this activity . . . ." *See* S. REP. No. 446, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3092-93.

168. The FY 1993 budget for the BIA alone provides $1.7 billion dollars in direct federal assistance to recognized Indian tribes throughout the United States. Both friends and critics of the BIA acknowledge that greater tribal participation in determining the tribal priorities for the use of the funds, as well as greater tribal control over the actual delivery of the programs, would result in greater social and economic development on the reservations.

169. *Department of the Interior and Related Agencies Appropriations for 1993: Hearings before a Subcomm. of the House Comm. on Appropriations*, 102d Cong., 2d Sess. 884 (1992) (listing estimated appropriations, including permanent and trust funds, to the BIA for fiscal 1993).

White House staff to support greater tribal autonomy to foster the growth of self-sufficient tribal economies as an alternative to the present environment of tribal dependency on federal programs and transfer payments.[170]

Many Indian reservations have valuable natural resources—including timber, coal, uranium, water, oil, and gas—that have been underutilized and undervalued within the prevailing management system used by the BIA and related federal agencies.[171] Congress, by recognizing "tribal voice" in the development and disposition of these resources, can help provide the appropriate incentives to encourage and support the indigenous tribal entrepreneurship that will result in superior management and greater return on investment of tribal resources.[172]

Tribal governments that do seek innovation in both government and business enterprises face challenges that are common to other emerging governments: how to establish a political economy that avoids or channels the destructive "rent-seeking" behavior of ambitious, powerful individuals or groups who seek to appropriate public power to private ends.[173] Growing evidence from the emergence of strong, tribal political institutions and increasingly effective tribal business enterprises supports the notion that "tribal voice" is an effective tool of leadership and social integration on many reservations.[174] The

170. *See* COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, REPORT TO THE SUBCOMM. ON THE DEPARTMENT OF INTERIOR AND RELATED AGENCIES OF THE SENATE COMM. ON APPROPRIATIONS: TRIBAL PARTICIPATION IN THE BUREAU OF INDIAN AFFAIRS BUDGET SYSTEM SHOULD BE INCREASED ii-iii, 16-17, 25 (1978).

171. The federal government, despite its acknowledged plenary authority over Indian affairs and trust power over Indian resources, is crippled by conflicting and competing interests that make it unable to discern and respond to the best interests of the Indian tribes. However, recent federal policy changes emphasizing tribal self-determination hold out the hope for greater tribal participation in the development of and decision processes within the reservations. *See* Cornell & Kalt, *supra* note 20, at 222-23.

172. A few modest tribal "success stories" have resulted from the early period of the federal policy of tribal self- determination. The White Mountain Apache Tribe in Arizona has succeeded in exploiting its comparative advantage—primarily recreational and natural resources—and has built a lucrative tribal ski lodge and operates tribal sawmills that bring in millions of dollars in revenues each year and provide employment for many of the tribal members. *See id.* at 223-24.

173. Indian tribes must confront the challenges of governance and create effective political, economic, and developmental strategies and programs that can help leverage their reservations out of a present state of underdevelopment. The lack of strong and widely supported tribal political institutions means, however, that regulating and channeling individual behavior in the "tribal interest" can be a major barrier to development. *See id.* at 233-40.

174. Tribal success in business enterprises apparently depends not only on strong,

successful tribal leaders have gathered together the scattered and underutilized human, political, and natural resources on those reservations to provide organizational nuclei for new political economies oriented toward tribal, not federal, decisionmaking. Recent studies show that most Indian people have a widespread preference for remaining on their home reservations, but they must be convinced that a genuine opportunity for achieving a better life for themselves and their families exists within the tribal context.[175] These studies show that on many reservations the basic "social glue" of a supportive core membership remains intact and provides the basis for tribal self governance.

Despite this promise, some federal governmental officials and tribal leaders are anxious about the long-term consequences of increased tribal voice in Indian affairs. Some tribal leaders fear that the federal government may seek to use this increased voice as a pretext for abolishing the unique relationship that exists between Indian tribes and the federal government.[176] Federal officials, especially those within the BIA, may also fear that greater tribal voice will mean a direct reduction in their agency's power over Indian affairs and a personal loss of career, prestige, or influence. These fears must be acknowledged and managed in the context of federal policies that reward, rather than penalize, tribal leaders and federal officials for working cooperatively to advance the development of tribal voice.[177] The BIA has already shown that it is capable of moving towards a service-oriented agency, under the impetus of the Indian Self-Determination Act, that supports, rather than dictates, tribal programs and policies.[178] New personal and insti-

decisive leadership from the tribal government, but also on the existence of strong social and normative influences that constrain the managers and tribal leaders from profiting personally from the operation of these enterprises at the expense of the tribal people. For example, tribal enterprises have failed on the Pine Ridge Reservation in South Dakota, where there are competing subgroups that vie for control of programs and enterprises rather than subordinating their personal interests to the common tribal interest. *See id.* at 238-39.

175. *See* Pommersheim, *supra* note 124, at 250-52.

176. Some tribal leaders expressed the fear that tribal contracting of federal services for Indians is simply a prelude to the Congressional termination of the unique federal relationship that exists between Indian tribes and the federal government. *See* PRUCHA, *supra* note 8, at 1161-62.

177. By 1980, over 370 Indian tribes had contracted for the operation of over $200 million worth of federal programs under the Indian Self Determination Act, 25 U.S.C. § 450 *et seq.* (1988). *See* PRUCHA, *supra* note 8, at 1162.

178. *See* PRUCHA, *supra* note 8, at 1197-1200.

tutional incentives will be needed to counteract the inherent inertia and resistance to change exhibited by any large federal agency.[179]

B. *Exit*

Successful tribal governments that have created the appropriate social and political institutions capable of directing and managing the "rent-seeking" behavior of competing tribal groups should be given the option of managing their own resources and property within a statutory framework that helps reveal and manage the risks inherent in major investment and resource decisionmaking.[180] Tribal governments that choose to "exit" the governing public law model of Indian law should be restored as the definers of their own property rights, meaning that they, not the federal government, will be the primary managers of their collective assets and resources. The BIA, under this model, would perform a substantially different role. It would no longer serve as the property manager of tribal resources and property. Instead, it would become a true service bureau that would assist the Indian tribes in effectively managing a balanced "portfolio" of investments and assets at varying levels of risk. This assistance would help the tribes maintain an income stream that would support each participating tribe's chosen level of economic and social development.[181]

Tribal governments that opted into this alternative governance model would be freed of many of the distinctions and disabilities presently imposed by the public law model of Indian law. Participating tribal governments would be able to recast reified legal concepts, such as tribal sovereign immunity and regulatory jurisdiction over non-Indian economic activity, into risk management tools that help define, support, and encourage policy and business entrepreneurship in a given tribal

179. *See id.* at 1120-26.

180. *See id.* at 1202-06.

181. Many tribes are dependent on their income from natural resources such as oil and gas. During the energy crisis of the 1970s, some Indian tribes, such as the Shoshone and Arapahoe on the Wind River Reservation in Wyoming, received substantial oil income. Those same tribes have seen disastrous downturns in their oil and gas revenues during the 1980s. Only by diversifying their income and resource bases will even the relatively "rich" tribes be able to deal with the vagaries of an increasingly volatile and unpredictable political and economic environment. *See* Daniel Cohen, *Tribal Enterprise*, THE ATLANTIC, Oct. 1991, at 32-43.

context.[182] Whether some tribes will actually choose to "opt out" of the prevailing public law model of governance and into this private law model will likely depend on each tribal government's assessment of its own comparative advantage. If a tribal government believes it has the requisite natural, political, and social resources that will allow it to face its future in a manner superior to its expected future under the prevailing governance structure, then it may choose to opt into this new governance model.[183]

C. *Loyalty*

Tribal governments that choose this route of political and social development confront the task of gaining and maintaining the respect and support of pre-existing, and potentially hostile, informal groups such as clans and tribal societies that may or may not support broader collective efforts. The underlying normative structure of any society helps define what activities and endeavors are deemed valuable in that society.[184]

Many critical studies of reservation life have focused on what those studies describe as social pathologies—for example, the comparatively high rates of alcoholism, unemployment, suicide, accidental deaths, and infant morbidity and mortality—that seem to characterize life on many reservations.[185] Successful tribal governments will be those that effectively confront these harsh facts of life by seeking to honor and mobilize the

182. Those tribes that have acted either to create a new or to restore an old workable political economy deserve to be given greater de jure authority over their tribal lands and resouces. *See* Cornell & Kalt, *supra* note 20, at 228-31.

183. Some tribes, perhaps many, will choose to remain subject to federal control over their resources and commercial affairs. Such a tribal choice may well be rational in light of a tribe's limited resource base and alternative opportunities. For example, the Hualapai, a relatively small tribe, is doing comparatively well relying solely on federal projects and monies to employ a large percentage of their people. *See id.* at 238.

184. Indian tribes will reclaim their sovereign rights that have been held in abeyance under the precept of federal plenary authority over Indian affairs. This reclamation is consistent with the position of those political economists who argue that meaningful political and economic incentives can only arise from the particular formal and informal environments that constitute a given society. If that is true, then it is only the respective tribal peoples, not the remote federal trustee, who could ever effectively conceive and administer programs of social and economic development within Indian Country. *See id.* at 242-43.

185. The "culture of poverty" on many Indian reservations is accompanied by other disturbing social and health problems. Some political economists see a clear link between past federal Indian policies and the impoverishment of the tribal communities on the reservations throughout Indian Country. For that reason they propose fundamental changes in Indian policy in the direction of greater tribal self-determination and control over the tribes' resources and commercial relations. *See id.* at 225-31.

underlying traditional values that are essential to a healthy culture.[186] Only by working through, and with, these traditional and normative communities can a future tribal government avoid the mistakes that doomed federal Indian policies that sought to eradicate the communities. Successful tribal governments will therefore have to present programs of job creation and resource development that are compatible with existing cultural values and preferences. The significance of this "fit" between tribal governmental efforts and the background preferences and values of the specific tribal community is reflected in recent analysis that has sought to explain the environments in which tribal governmental efforts are successful.[187]

Thus, tribal governments face the task of instilling a reciprocal sense of loyalty between themselves and their tribal peoples if they hope to be successful in long-term developmental programs. At the same time, Congress must also act to instill a similar reciprocal sense of loyalty between itself and tribal governments that seek to pursue the path of self-determination. This sense of Congressional loyalty can be realized, in part, by the creation of new institutional mechanisms that encourage and support tribal government in policy and business innovations.[188] These institutions must be powerful enough to buffer the Indian tribes and their interests against the past impulse in Congressional politics to engage in "rent seeking" behavior at the expense of the Indian tribes. These institutions would be required to say "no" to competing interest groups and federal agencies that in the past sought to direct federal power over Indian affairs to serve their own narrow interests rather than the interest of the Indian tribes.[189]

Fortunately, the rhetoric of tribal self-determination has been matched by a start on important institutional reforms within Congress and the BIA that suggest some prospect for

186. The "cultural paradigm" of a given tribe can help it identify those development efforts the tribal people will support. This paradigm helps establish the range of responses that tribal members may exhibit to given social and economic development projects initiated by the tribal government. Depending on the "risk-reward" trade-off for a specific project, tribal governments may be well-advised to stay within that acceptable range of tribal preferences regarding the future development alternatives for their reservation. *See id.* at 232-33.

187. *See id.* at 241-44.

188. The concept of an Indian Trust Council Authority is one proposed mechanism that would buffer tribal interests against competing interests of federal agencies and private parties. *See* PRUCHA, *supra* note 8, at 1113-14.

189. *See id.* at 1139-70.

the future success of a new loyalty between the federal government and the Indian tribes.[190] The future interaction among these three elements—voice, exit, and loyalty—at both the micro-level of future tribal governance and the macro-level of federal Indian policy will determine whether tribal self-governance of Indian Country will be realized in fact.

V. A Proposed Model For the Deregulation of Business Transactions

A statutory "restatement" is needed to prevent the further decay of the core categories and distinctions governing federal Indian law.[191] Absent the incentives provided by such a clear set of governance rules for Indian Country, Indian tribes will also be unable to reclaim their role as the primary economic and social decision-makers on their respective reservations. The primary intent of such a restatement would be to provide a new ethic for the relationship between the federal government and the Indian tribes; that is, the restatement would provide a legal and political basis for the federal trusteeship over Indian lands and resources that is consistent both with constitutional values and the economic realities of Indian Country. The secondary intent of such a restatement should be more pragmatic in nature: to provide Indian tribes with the statutory confirmation of an appropriate mix of regulatory and jurisdictional authority within Indian Country that will allow the tribes to compete better with local and state governments.

My focus is on a small element of this much larger project—the establishment of a new set of commercial transaction rules for Indian Country. These new rules, which Indian tribes and their business partners could opt into, are intended to:

1. eliminate the requirement, at the election of the tribal government, of prior federal administrative review and approval of most of those commercial transactions presently subject to federal regulation under 25 U.S.C. § 81;

2. authorize Indian tribes to waive, subject to certain limitations, their sovereign immunity to suit for liability arising from commercial transactions within Indian Country; and

190. *See* Cornell & Kalt, *supra* note 20, at 223.

191. *See* Steve E. Dietrich, Comment, *Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 Wash. L. Rev. 113, 114-16 (1992) (proposing the adoption of a comprehensive statute delineating tribal immunity).

3. establish an Inter-Tribal Court of Commercial Appeals with statutorily defined powers, including exclusive appellate jurisdiction over any appeals from the various tribal courts regarding the interpretation or enforcement of those commercial agreements that were entered into pursuant to this proposed statutory authority.

A. *Reform of 25 U.S.C. § 81*

The Congressionally avowed purpose and intent behind the enactment of 25 U.S.C. § 81 was the protection of Indians by subjecting their contracts with third persons to prior examination and scrutiny by appropriate federal officials.[192] Experience has shown, however, that in many cases this statute harms, rather than helps, Indian tribes. Its rigid formalism and overinclusiveness chill business dealings between tribes and third parties without providing substantial offsetting benefits. For example, there is little evidence that the responsible federal officials have either the relevant business skills or incentive to help craft effective commercial agreements between tribes and businesses.[193] Furthermore, the courts have refused to impose any fiduciary duty on federal officials that would require them to adequately assess, and help the parties manage, the business risk created by the proposed agreement.[194]

Indian tribes and businesses need the opportunity to exercise entrepreneurial energy and vision where rigid and uninformed federal control has failed. For that reason, Congress should amend 25 U.S.C. § 81 to authorize Indian tribes and their business partners to "opt out" of that statute and "opt into" this alternative set of commercial transaction rules. This tribal election may be evidenced by a tribal referendum that allows the tribal members to decide whether they believe the tribe should take such a dramatic step towards tribal independence.

B. *Statutory Confirmation and Definition of Tribal Sovereign Immunity*

The contemplated statutory "restatement" of the governing principles and categories of Indian law would include a con-

192. *See* COHEN, *supra* note 36, at 68-88.
193. *See* Ickes, *supra* note 15, at 516-27.
194. *See* United States v. Mitchell, 445 U.S. 535 (1980).

gressionally declared standard for tribal sovereign immunity to suit in connection with tribal governmental or commercial activities, on or off reservation.[195] The purpose of this declaration is to provide clear statutory guidance to federal and state courts in the adjudication of claims against Indian tribes, or businesses closely affiliated with the tribal government, in order to avoid or minimize judicial error in balancing the respective interests in such cases.[196]

This statute would also allow Indian tribes and businesses to use the waiver of tribal sovereign immunity as a bargaining tool in a given transaction. The purpose of this provision is to allow the tribes and their business partners to assess explicitly the expected benefits or risks of a proposed transaction and to allocate those risks and benefits according the preferences of the parties. Indian tribes would thus be authorized to waive their immunity to suit and thereby share in the inherent risks and benefits of a business deal. The tribes, however, would only be authorized to waive their immunity to suit without further federal action if the expected exposure to liability fell below a statutorily defined "trigger amount." A new independent regulatory board known as the Indian Trust Council Authority would determine this "trigger amount," which would be established for varying categories of Indian tribes and types of asset transactions.[197]

The Indian Trust Council Authority would have as its mandate the effective "intermediation" of the inherent risks in large business ventures undertaken jointly by Indian tribes and their business partners within Indian Country (for example, large capital-intensive irrigated agriculture projects, oil and gas development projects, tourism and recreation projects). This board, which would be comprised of appropriate tribal representatives, risk management experts, and experienced businessmen familiar with Indian Country, would provide "risk-management" analysis and guidance prior to tribal participation in any relatively large commercial transaction or development project. The goal would be to establish for each participating tribe an appropriately diversified portfolio of projects consistent with the development goals and asset capa-

195. *See* Dietrich, *supra* note 191.
196. *See id.*
197. *See* PRUCHA, *supra* note 8, at 1113-14.

bility of a particular tribe. The board would also serve as a clearinghouse that would promote relationships and information exchange between the participating Indian tribes and interested private sector participants.

An Indian tribe and its business partner would be required to submit to the board any proposed commercial transaction that requires the tribe to share in the business risks by a waiver of immunity to suit above a defined "trigger level." The board would have up to 180 days in which to investigate and analyze the underlying financial risks and benefits to the particular tribe from the proposed transaction. The board would be required to make confidential findings and recommendations regarding the proposed transaction and to consult with the tribe and its business partner whether to accept, reject, or recommend changes to the proposed transaction.

If the board does ultimately approve the proposed commercial agreement, then it would issue a certificate of tribal liability limiting the future financial risk to the tribe to a specific dollar amount in any future litigation. Such a certificate would be binding as a matter of statute in any federal or state court. This approach would provide businesses with the necessary legal certainty regarding the protection of its commercial investment and expectations that arise from agreements with the tribes. It would also protect Indian tribes from the risk of catastrophic liability that could devastate the remaining tribal estate.

C. *Providing an Acknowledged Adequate Forum*

The contemplated statute would also provide for the establishment of an Inter-Tribal Court of Commercial Appeals that would have exclusive jurisdiction over all commercial disputes entered into under this statutory authority. This court would be staffed by experienced, commercial law-trained judges who would have adequate support personnel and funding to hear all of the disputes that arise regarding agreements entered into under this statutory authority.

The judges on this court would be nominated by a panel of recognized, experienced commercial lawyers, tribal judges, and acknowledged scholars in the areas of Indian and commercial law. The court would adjudicate disputes according to a specially adapted commercial code that would borrow from statutory and commercial law principles, as well as tribal customs

and practices, in forming the basis for its organic "rules of decision" charter. Both Indian tribes and the businesses that have agreed to these transactions would be bound by decisions of this court as long as the decisions were consistent with fundamental fairness, applicable constitutional provisions, and the federal charter of the court.

VI. Conclusion

Deregulation of commercial transactions between Indian tribes and non-Indian businesses will begin the realization of meaningful political and economic tribal self-determination. This envisioned restoration of tribal authority and control over resources and legal relationships is a necessary step toward making tribal self-sufficiency and autonomy a working reality within Indian Country. Beyond the institutional revision and reform of the governing public law concepts of federal Indian law lies the real challenge: the establishment of an adequate statutory framework for the new interdependent relationship between Congress and the emerging tribal governments.

Congress will be required to commit the necessary support and resources that will allow those tribes who desire greater independence from federal control to achieve that goal within a statutory framework that preserves their governmental powers from future erosion by federal or state action. Tribal governments that seek greater independence will have to become fully accountable and responsive political and economic institutions that are designed to serve the underlying needs of their peoples. Trust and patience will be required as the tribal governments "test" the opportunities, and assess the risks, inherent in this new structure for the governance of Indian Country.