

Tribal Jurisdiction—A Historical Bargain

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TRIBAL JURISDICTION—A HISTORICAL BARGAIN

MATTHEW L.M. FLETCHER* & LEAH K. JURSS**

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** Clerk to the Honorable Roberto A. Lange, United States District Court for the District of South Dakota. The views expressed in this Article are the author’s alone, and do not in any way reflect or reveal the views of the author’s employer or the United States government.

INTRODUCTION

An enduring and controversial question is the extent of American Indian tribal civil jurisdiction over nonmembers.¹ Twenty-first-century nonmembers² often object to being haled into tribal court where the judge and jury may be primarily Indians and where the laws, procedures, and court buildings bring the veneer of state courts but not the same perceived gravitas.³ This is nothing new. Nineteenth century non-Indians likely shared the same discomfort when subjected to tribal laws and regulations.⁴

And yet, in recent decades, more and more nonmembers routinely consent to tribal laws, and they do so to enjoy the benefit of modern tribal governance, services, protection, and business opportunities. Modern Indian nations are serious economic players in many parts of the United States and are often the largest and most stable employers in large swaths of regional territories. As this Article will show, the 567 federally recognized Indian nations⁵ employ hundreds of thousands of American citizens who are not members of an Indian nation. Indian nations and nonmember business partners do billions of dollars of business every year. Thousands of nonmembers lease housing, grazing lands, mineral rights, and other properties from Indian nations. And many thousands enjoy the benefits of tribal government services,

1. Leading Supreme Court cases include *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 135 S. Ct. 2833 (2015), *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001), *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), *South Dakota v. Bourland*, 508 U.S. 679 (1993), *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Montana v. United States*, 450 U.S. 544 (1981).

2. This Article will primarily use the term “nonmembers” to denote those persons who are not members of a federally recognized Indian nation. However, in recognition of certain historical contexts, the Article will also use “white man” or a derivative, “non-Indian,” or “noncitizen” interchangeably with “nonmembers.”

3. See generally Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010) (surveying cases).

4. E.g., *Hamilton v. United States*, 42 Ct. Cl. 282 (1907) (affirming tribal authority to confiscate Indian trader’s assets for failure to comply with Chickasaw permitting laws).

5. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942 (Jan. 14, 2015) (listing 566 federally recognized Indian nations). The government recognized one additional tribe since the promulgation of this list. Final Determination for Federal Acknowledgement of the Pamunkey Indian Tribe, 80 Fed. Reg. 39,144 (July 8, 2015).

from health care to social services to public safety protections. Indian gaming alone is nearly a \$30 billion industry.⁶ Federal expenditures for tribal government services was about \$4.4 billion in 1999.⁷

This, too, is nothing new. Though the scale of Indian tribal economic activity in the nineteenth century pales in comparison to twenty-first century tribal economies, many nineteenth century American citizens flocked to Indian country to exploit economic opportunities. These nonmembers and noncitizens applied for and received tribal permits to work for Indian landowners. They procured licenses from tribal governments to do business on reservation lands. They became Indian traders licensed by the United States in exchange for the right to do business in Indian country. They married Indian women, often after receiving formal tribal permission, to gain access to trading markets and property rights. Some even acquired tribal membership through intermarriage, with all of the benefits and obligations that citizenship entailed, including limited treaty rights. They paid tribal taxes.

This Article intends to compare the modern practices and understandings of nonmembers doing business with Indian nations and inside of Indian country with the analogous practices and understandings of non-Indians engaged in similar activities in the period before the modern Indian self-determination era. Though non-Indians and nonmembers occasionally object to tribal jurisdiction, the long history of tribal governance and economic regulation demonstrates that nonmembers have received and continue to receive the benefit of a bargain that places them under considerable tribal regulation in exchange for access to tribal markets. For nonmembers to argue that they have not consented to tribal jurisdiction, at any stage of American history, is to ignore the very real economic benefits the nonmembers have received from their Indian country business activities. It is to claim something for nothing.

I. HISTORICAL BARGAINS

The pre-contact American Indian commercial markets and trading fairs were extraordinary affairs covering the whole of what is now American territory. These networks and markets continued for centuries after the arrival of European outsiders from overseas.⁸ Lakes and rivers were the commercial superhighways of North American Indian markets, allowing Indian people to

6. Randall K. Q. Akee, Katherine A. Spilde & Jonathan B. Taylor, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSP., no. 3, 2015, at 185, 194.

7. *Id.* at 189.

8. ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 21–22 (2012).

transport goods over a thousand miles.⁹ Regularly held Indian trading fairs were enormous and may have included thousands of Indian peoples representing dozens of Indian nations.¹⁰ For example, in 1805, Lewis and Clark were amazed to find enormous trading fairs drawing Indians from dozens of tribes.¹¹ Nonmembers, even enemies, would be adopted into the tribal community to allow for more effective and inclusive trading.¹² A limited form of tribal citizenship, then, could be a formal prerequisite to Indian trade, a kind of permission to access the Indian market.

The French and Spanish, then the Dutch and the British, and finally the Americans, bargained to access the Indian commercial market. Tribal commercial practices adapted to meet the new trading partners' particular notions of property rights and trade.¹³ The newcomers also adapted to the Indian practices, as the historical survey in Part I of this Article shows, with non-Indians, nonmembers, and noncitizens making significant concessions to Indian nations and Indian people in order to access the Indian market.

After the conclusion of the American Revolution, western Indian lands and resources quickly became a target of American economic interests. While there was much disruption among the Indian nations, many lands, such as that in the Ohio River Valley, remained under the control and ownership of Indian nations. In the early decades of the American Republic, federally licensed traders entered Indian country en masse, bargaining to enter the Indian markets as had been the norm for centuries. Americans began trying to acquire Indian land and their resources, however, through the vast land cession treaties of the early nineteenth century that also established Indian reservations, as will be shown in this part of the Article.

9. *Id.* at 22; ATLAS OF GREAT LAKES INDIAN HISTORY 6 (Helen Hornbeck Tanner ed., 1987) (“A complete geographic description of the Great Lakes Region[] . . . draws attention first to the Straits of Mackinac connecting Lake Huron and Lake Michigan, and to the St. Marys River flowing from Lake Superior to Lake Huron. This vital crossroads was the center of a trade and communications network permeating the Great Lakes Region and by extensions reaching the Great Plains of the Canadian and American West, Hudson Bay, the Atlantic Ocean and the Gulf of Mexico.”). *See generally* Henry F. Dobyns, *Trade Centers: The Concept and a Rancherian Culture Area Example*, 8 AM. INDIAN CULTURE & RES. J., no. 1, 1984, at 23, 23 (“Native Americans developed during prehistoric times a continent-wide system of trade between ethnic groups.”).

10. MILLER, *supra* note 8, at 22.

11. *Id.* at 22, 23.

12. *Id.* at 23 (“Trade was so important and integral to these communities and their economies that enemies would be temporarily and ceremonially adopted into the tribe to engage in trade.”).

13. *Id.* at 23 (“Tribes and Indians were also readily adaptable to the new economic activities and trading partners that arrived from Europe. . . . Various tribal practices and principles of property ownership were influenced by and adapted to this new commercial activity.”); Susan Sleeper-Smith, *Cultures of Exchange in a North Atlantic World*, in RETHINKING THE FUR TRADE: CULTURES OF EXCHANGE IN AN ATLANTIC WORLD, xxxvii, xxxvii–xlvi (Susan Sleeper-Smith ed., 2009) (describing the tribal transformation into “Indians as Consumers”).

But Americans would not stop at reservation borders. Demand for Indian resources in traditional Indian homelands almost always morphed into demand for reservation resources. The demand for reservation resources brought many American citizens to Indian country seeking access to reservation assets. Here, too, non-Indians had several options and strategies for accessing Indian markets and usually accepted some form of tribal regulation in bargaining for access.

A. *Federally Licensed Indian Traders*

The end of the American Revolution saw the United States quickly move towards establishing commercial relationships with Indian nations and Indian people as a means of governing Indian affairs. The federal government was very interested in acquiring Indian lands and resources but was hampered by a lack of political capital to do so. The United States had limited capacity to militarily engage Indian nations and was concerned that unscrupulous traders could be a continual source of violent conflict between Indians and whites. And so, the United States sought to continue earlier colonial efforts by the Dutch, French, and English to license and regulate traders. The first treaties with southern Indian nations in the 1780s included provisions for the regulation of Indian traders.¹⁴ The confederate Congress enacted ordinances attempting to govern Indian commercial relationships beyond those established by treaties, but these laws failed due to lack of enforcement.¹⁵

The Framers of the Constitution vested Congress with a general power over Indian affairs through the exclusive, plenary power to regulate commerce with Indian tribes.¹⁶ As it did with interstate commerce, congressional control over Indian commerce grew expansively and quickly, guided by recommendations from Henry Knox, who proposed a focus on the purchase of Indian lands instead of acquisition by conquest.¹⁷ The First Congress quickly asserted control over Indian commerce in 1790.¹⁸ That year, the United States enacted the first Trade and Intercourse Act.¹⁹ Congress repeatedly reauthorized that and other trade and intercourse laws until 1834, when it

14. Mario Gonzalez, *Regulation of Indian Traders: A Historical Perspective*, 5 AM. INDIAN L. REV. 313, 321 & 337 n.90 (1977) (citing Treaty with the Cherokee, Nov. 28, 1785, 7 Stat. 18; Treaty with the Choctaw, Jan. 3, 1786, 7 Stat. 21; Treaty with the Chickasaw, Jan. 10, 1786, 7 Stat. 24).

15. *Id.* at 321–22.

16. U.S. CONST. art. I, § 8, cl. 3. See generally Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014).

17. Gonzalez, *supra* note 14, at 322.

18. *Id.* at 323 (citing Act of July 22, 1790, ch. 33, 1 Stat. 137).

19. Act of July 22, 1790, ch. 33, 1 Stat. 137.

enacted a permanent series of statutes that included the Indian Trader statutes.²⁰ Indian trader statutes are still extant,²¹ though it is not clear if the United States continues to license traders in the twenty-first century. The Indian trader regulations are completely out of date; they refer to federal offices that no longer exist, such as the Commissioner of Indian Affairs,²² and assume Indians will only pay in cash.²³

Federal policy, however, was only one part of the equation. Indian trader laws regulated American citizens who would become traders with the Indians, but federal licenses did not automatically mandate or provide entrance into Indian country markets. Merely providing American traders access to Indian country was only step one. Trade within Indian country was the domain of Indian nations and tribal governments, and Indian trade on the ground was heavily dependent on reciprocal relationships.²⁴ For example, Potawatomi leaders rose to power based in part on their ability to “broker deals” with Indian traders.²⁵ Intratribal political disputes in the southeast arose between the Creek and Choctaw nations in the early eighteenth century because of disputed control over trade with the British.²⁶

20. Act of June 30, 1834, ch. 161, 4 Stat. 729 (partially codified as amended at 25 U.S.C. §§ 261–65 (2012)).

21. *See, e.g.*, 25 U.S.C. §§ 261–64 (2012).

22. 25 C.F.R. § 140.9 (2016).

23. 25 C.F.R. § 140.24 (2016).

24. W. Ben Secunda, *To Cede or Seed? Risk and Identity Among the Woodland Potawatomi During the Removal Period*, 31 MIDCONTINENTAL J. ARCHEOLOGY 57, 80 (2006) (noting successful efforts to enhance “traditional value[s] of reciprocity” between Potawatomi villages and American traders and missionaries in the nineteenth century); *cf.* Marty O’Shea, *Springfield’s Puritans and Indians: 1636–1655*, HIST. J. MASS., Winter 1998, at 46, 52 (1998) (noting that seventeenth-century colonists agreed to compensate Massachusetts Indians if colonial livestock damaged Indian lands).

25. Secunda, *supra* note 24, at 60 (explaining that in Potawatomi villages, tribal members “formed around a leader who demonstrated a capacity to broker deals, secure goods, and otherwise provide for the well being of his followers”); *see also id.* at 76 (“[Potawatomi leaders] were inviting their own missionaries as well as conducting their own business with selected laborers and traders. The exchange was being managed by the Potawatomi village leaders themselves.”).

26. Kevin T. Harrell, *The Terrain of Factionalism: How Upper Creek Communities Negotiated the Recourse of Gulf Coast Trade, 1763–1780*, 68 ALA. REV. 74, 90 (2015). As Professor Harrell explains:

Many Upper Creek headmen expressed concerns about the southern trade. The entrepreneurial spirit emerging from companies like John McGillivray’s along the Gulf coast invited a flourish of commercialism. Traders might no longer need to travel through Creek lands to access the Choctaws, nor were the Chickasaws as distant. The commercial and military advantages for the Choctaws were also glaringly apparent. The Choctaws could easily control a southern trade corridor from Mobile, denying the Upper Creeks a role in regulating the western flow of goods that passed through their towns. Additionally, as Joshua Piker argues, competition between southern and northern Upper Creek factions and town leaders arose in response to this trade and the new settlements. Northern Upper Creek towns like Okfuskee and Okchai benefited diplomatically and commercially from the generations-old overland paths and the interpersonal and inter-communal

Tribes barred traders from accessing the market without permission. Permission could mean that Indian traders must somehow acquire tribal citizenship or familial ties with the tribe to earn that permission. Kinship ties created between Indian traders and tribal members bound together the groups both politically and socially. Indian traders married into the tribe, worked for the tribe as interpreters, and otherwise took on the rights and responsibilities that tribal rules and norms required of relatives.²⁷ The “real source of power” in the trading relationship during this time was not the federal government and its Indian trader statutes, but a “[n]ative political imaginary” delineating the boundaries of the trading spaces.²⁸

Even Congress, at times, seemed to understand that tribal regulations were of greater import than federal Indian trader statutes, which proved to be an ineffective means to govern Indian trade.²⁹ In 1834, a critical year in federal Indian policy,³⁰ Congress expressed hope that Indian nations would address the problem of unscrupulous trading by federally licensed Indian traders. During the discussion of the Western Territory bill,³¹ a bill that would have recognized the Indian Territory as the State of Sequoyah, the House of Representatives hoped that Indian nations would assert greater regulatory enforcement over Indian traders, relieving the Interior Department of the obligation.³²

relationships linking their towns with Augusta, Savannah, and Charlestown. Conversely, southern Upper Creek towns were more geographically situated to benefit from southerly-river courses and land routes just as they had been under the French regime. This, perhaps, best explains why some Upper Creek headmen favored trade from the Gulf coast, while others were vehemently opposed.

Id. (footnotes omitted) (first citing GEORGIA AND FLORIDA TREATIES, 1763–1776, 12 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789, at 217–19 (John T. Juricek ed., 2002); and then citing Joshua A. Piker, “White & Clean” & Contested: Creek Towns and Trading Paths in the Aftermath of the Seven Years’ War, 50 ETHNOHISTORY 315, 315–47 (2003)).

27. MICHAEL WITGEN, AN INFINITY OF NATIONS: HOW THE NATIVE NEW WORLD SHAPED EARLY NORTH AMERICA 33 (2012).

28. *Id.* at 138.

29. *E.g.*, Izumi Ishii, *Alcohol and Politics in the Cherokee Nation Before Removal*, 50:4 ETHNOHISTORY 671, 674 (2003) (noting that “[t]he Trade and Intercourse Act did not regulate the actions of Indians who were conducting business with other Indians within their own nations”). See generally Gonzalez, *supra* note 14, at 324–25 (noting abuses of Indian traders, justifying additional federal regulation in 1834).

30. That year saw the passage of the Indian Intercourse Act of 1834. Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730 (codified as amended at 25 U.S.C. § 177 (2012)).

31. The legislative history of this bill, which was never enacted, was cited favorably by the Supreme Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201–02, 201 n.12, 202 n.13 (1978).

32. H. EVERETT, REGULATING THE INDIAN DEPARTMENT, H.R. REP. NO. 23-474, at 19 (1834). Congressman Everett stated:

The regulations of trade and intercourse among the tribes should be liberal and uniform; such regulations must be made either by the United States, or by the tribes. They

By that time, it was well established that federal government efforts to regulate Indian traders had failed. Indian traders in many tribal communities were exploitative and abusive.³³ They sold liquor illegally to Indian people and engaged in other illegal trade activities, such as the slave trade and smuggling.³⁴ Indian nations from around the country complained about these traders.³⁵ A few tribes were hamstrung by treaty provisions that precluded tribal regulatory jurisdiction over federally licensed Indian traders.³⁶ Other tribes entered into treaties with the United States, which provided that the federal government would enforce Indian trader laws and regulations.³⁷ As Congress noted in 1834, no legal bar existed to prevent tribal regulation of federally licensed Indian traders.³⁸ Possession of a federal trading license did not equate to immunity from state or tribal regulation. States could and did tax Indian trader stocks, as Indian traders were private business entities, not federal agents.³⁹ However, relatively few tribal governments acted formally, perhaps deferring to individual tribal members' dependence on trade goods.

Tribal kinship networks were expanded not only by advantageous traders, but also through marriages between Indians and non-Indians based in love.⁴⁰ There are numerous instances where non-Indian men and women married into tribal families and became tribal members socially, politically,

will be more satisfactory if made by them, than if made by us, and it must be our desire to do nothing for them which they can do for themselves.

Id.

33. *E.g.*, ALFRED A. CAVE, *LETHAL ENCOUNTERS: ENGLISHMEN AND INDIANS IN COLONIAL VIRGINIA* 144 (2011) (detailing how the confluence of suspicion and fear of Native Americans was used as a justification in the exploitation and abuse of tribal members); LEWIS O. SAUM, *THE FUR TRADER AND THE INDIAN* (1965).

34. *See generally* DAVID M. DELO, *PEDDLERS AND POST TRADERS: THE ARMY SUTLER ON THE FRONTIER* (1998); WILLIAM E. UNRAU, *WHITE MAN'S WICKED WATER: THE ALCOHOL TRADE AND PROHIBITION IN INDIAN COUNTRY, 1802-1892* (1996).

35. JOINT SPECIAL COMMITTEE APPOINTED UNDER JOINT RESOLUTION OF MAR. 3, 1865, *CONDITION OF THE INDIAN TRIBES* app. 365 (1867) ("I met and conferred with a large number of the chiefs of the different bands of the Sioux. Nearly all complained of the violation of their treaties, and the bad faith, dishonesty, and misconduct of the agents and traders. They say the goods designed for them under their treaties with the government do not reach them; that they are taken by their agents, traders, &c.") (statement of Hon. A.W. Hubbard, commissioner).

36. *E.g.*, Treaty with the Sacs and Foxes art. 8, Nov. 3, 1804, 7 Stat. 84 (providing that "the said tribes do promise and agree that they will not suffer any trader to reside amongst them without [a federal] license").

37. *E.g.*, Treaty with the Teton, Yancton, and Yancionies Bands of the Sioux Tribe of Indians art. V, June 22, 1825, 7 Stat. 250-51 (providing "that for injuries done by individuals, no private revenge or retaliation shall take place, but instead thereof, complaints shall be made, by the party injured, to the superintendent or agent of Indian affairs, or other person appointed by the President").

38. EVERETT, *supra* note 32.

39. *E.g.*, *Truscott v. Hurlbut Land & Cattle Co.*, 73 F. 60, 65 (9th Cir. 1896); *Moore v. Beeson*, 51 P. 875, 877 (Wyo. 1898).

40. FRANCIS E. LEUPP, *THE INDIAN AND HIS PROBLEM* 344-45 (1918) (describing "the squaw-man").

and most importantly, legally. Instructive is the case of *Janis v. United States*.⁴¹ This is the classic “squaw man” case, holding that a man who had married into a Lakota tribal community is no longer entitled to bring a claim for Indian depredations in the court of claims after Indians stole his cattle because the court considered the man to be an Indian.⁴² Other courts have mentioned white men that married into tribal communities, acquired tribal membership, and may have even acquired a property interest in land as a result of their tribal relations. In *United States v. Rowell*,⁴³ for example, the Supreme Court rejected a property claim by a white man that had acquired tribal membership through marriage.⁴⁴ The Court specifically acknowledged that the United States had the power to award an allotment to Rowell, an adopted member of the tribe.⁴⁵ Courts also held that intermarriage, captivity, or other acts of immersion into Indian communities, such as adoption, could put an American citizen beyond the reach and protections of American law.⁴⁶

In the southwest, French and Spanish traders followed the Caddo tribe’s lead in trading protocols from the beginning to the end of the exchange, “making clear the Caddos’ power over their European visitors.”⁴⁷ These new traders “learned and obeyed the rules governing visits” to Caddo communities.⁴⁸ One requirement was that Spanish men bring their own wives with them. This was a way for the Caddo to regulate and limit intermarriage, which protected Caddo women from abuse, and showed that “they expected those who settled among them and became part of Caddo societies to be

41. 32 Ct. Cl. 407 (1897).

42. *Id.* at 411 (“The principle which governs it is that when a citizen of the United States carries his property voluntarily into the Indian country, makes the home of the Indians his home, casts in his lot as a resident with them, he becomes subject, so far as his property is involved, to the risks of a natural-born Indian, and to that extent must be considered as one of the tribe.”).

43. 243 U.S. 464 (1917).

44. *Id.* at 466–67 (“James F. Rowell is a white man who went to the large reservation as an Indian trader in 1899 and has since lived with these Indians. He is a physician and has practiced among them. In 1903 he married a Kiowa woman and in 1909 was adopted as a member of the tribe.”).

45. *Id.* at 468 (“In view of the scope of this power, as reflected by over a century of practice and by the decisions of this court, we think it was quite admissible for Congress to give effect to Rowell’s status as an adopted member of the tribe, to recognize his claim to an allotment out of the tribal lands, to designate the land which he should receive and to direct that it be conveyed to him by a patent in fee without awaiting the expiration of the usual trust period of twenty-five years.”).

46. *See, e.g., Ruffner v. McLenan*, 16 Ohio 639, 643 (1847) (“It may be assumed as a fact, that within the territory now constituting the State of Ohio, there was not a white man at the date of the ordinance, subject to the jurisdiction of the United States. There might have been some few Indian traders, and were undoubtedly some whites who had been made captives by the Indians, and who had been adopted into, and had become members of their different tribes.”).

47. JULIANA BARR, *PEACE CAME IN THE FORM OF A WOMAN: INDIANS AND SPANIARDS IN THE TEXAS BORDERLANDS* 27 (2007).

48. *Id.* at 52.

properly equipped to contribute to those societies.”⁴⁹ The trading relationship between the Spanish and the Caddo broke down, however, when the Spanish failed to bring their own wives and children with them to the small settlement communities, thus failing to show the reciprocal respect for Caddo women within the community hierarchy.⁵⁰ In contrast, French traders who engaged in “family-based settlement[s]” were allowed to intermarry with Caddo women and engage and rise in the hierarchy of Caddo society, thus providing economic benefits and obtaining the loyalty of the Caddo as allies.⁵¹ Indigenous nations in the southwest retained their power over European and American traders for more than a century after their northeastern counterparts, because settler survival was only assured by reciprocal relationships with the more powerful Indian nations.⁵²

This tribal regulation of nonmember business activities and intermarriage in the southwest has survived well into the modern era. Some pueblo nations, for example, continue to bar or severely restrict nonmember business activities.⁵³ Other pueblos continue to restrict intermarriage.⁵⁴ The Jicarilla Apache Nation allows nonmembers to marry into the tribe without permission, but those nonmembers must receive permission from the tribal council to do business with the tribe.⁵⁵

49. *Id.* at 70.

50. *Id.* at 61–63.

51. *Id.* at 71.

52. *Id.* at 288–89. For more scholarship on situations where Native tribes exercised the majority of authority in their relationships with Europeans, see generally NED BLACKHAWK, *VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST* (2006) (Great Basin), KATHLEEN DUVAL, *THE NATIVE GROUND: INDIANS AND COLONISTS IN THE HEART OF THE CONTINENT* (2007) (Arkansas River Valley), and PEKKA HÄMÄLÄINEN, *THE COMANCHE EMPIRE* (2008) (New Mexico and Texas).

53. Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509, 525 (1998). Professors Cooter and Fikentscher discuss the diverse regulations that pueblo nations impose on nonmember businesses seeking to enter pueblo markets:

Usually the tribal council must decide whether to permit a business to acquire land and begin operating on a reservation. Business on the reservation, especially if run by outsiders, can have difficulty obtaining land or permits. Some tribes do not permit business by outsiders on the reservation (e.g., Sandia Pueblo, which is near Albuquerque). In San Felipe Pueblo, everything depends on what the kind of business it is. Under certain conditions, in Santo Domingo Pueblo an outsider may get a permission from the tribal council.

Id.

54. *Id.* at 545–47.

55. *Id.* at 545.

B. Great Lakes Trade

Intermarriage as a form of entry into Indian trade markets was very strong in the western Great Lakes region well into the American era. American citizens, sometimes armed with a federal Indian trader license and sometimes not, often used intermarriage to form the kinship ties necessary to access the fur trade. It was an old tactic, if not a ritual, going back to the sixteenth and seventeenth centuries when the French began marrying Anishinaabe women.⁵⁶

The American fur trade started with French and Dutch in the late sixteenth century.⁵⁷ With the arrival of European colonists in the seventeenth century came the introduction of government regulation of the fur trade; absent the regulation, colonial governments feared unscrupulous traders would swindle Indian traders or encroach on Indian hunting territories, creating often-violent conflict.⁵⁸ However, the regulations were simply not effective, forcing non-Indian traders to adapt by immersing themselves deeper into Indian communities to forge profitable and efficient trade activities.⁵⁹

Anishinaabe trade prior to the twentieth century was a highly propertied affair. Families and clans formed complex property rights structures to control fishing, farming, ricing, hunting, trapping, sugaring, and other productive activities.⁶⁰ Distribution of Anishinaabe-produced goods were also subject to complex property systems. As the French before them—but less so the British—Americans married into Anishinaabe families. They typically served as middle-men between Indian producers and non-Indian purchasers of Great Lakes trade goods. They lived in large houses on Mackinac Island

56. SUSAN SLEEPER-SMITH, INDIAN WOMEN AND FRENCH MEN: RETHINKING CULTURAL ENCOUNTER IN THE WESTERN GREAT LAKES 16–17, 19 (2001).

57. Gonzalez, *supra* note 14, at 313.

58. *Id.* at 314–16.

59. These unlicensed traders were often called *coureurs de bois*, or “runners of the woods.” Despite the dangers of being unlicensed, the potential profits from the early fur trade were so high that it encouraged traders to enter the woods unlicensed and form kinship relations with tribes to make engage in trade instead of brandishing licenses. See generally GEORGES-HÉBERT GERMAIN, ADVENTURERS IN THE NEW WORLD: THE SAGA OF THE COUREURS DES BOIS (2003).

60. See generally Frank G. Speck, *The Family Hunting Band as the Basis of Algonkian Social Organization*, 17 AM. ANTHROPOLOGIST 289 (1915); Dean R. Snow, *Wabanaki “Family Hunting Territories”*, 70 AM. ANTHROPOLOGIST (NEW SERIES) 1143 (1968).

and often prospered.⁶¹ But they also acquired obligations to the Anishinaabe families and clans into which they married.⁶²

As a general matter, non-Indians not part of the Anishinaabe production and distribution could be nothing more than mere passive participants in trade. The western Great Lakes were not empty places where non-Indians could walk in and set up camp. Trade secrets such as locations of good fishing and trapping, or wintertime lodges, or good routes to reach what is now called the St. Lawrence Seaway, would not be given away to the first white men who walked into the area. Many early French traders realized that access to trade secrets was closely guarded by familial and clan relationships. If non-Indians were to access and exploit Anishinaabe production and distribution markets, then they would have to form familial and clan relationships. Many did.⁶³

As the British replaced the French after the French and Indian Wars, the Anishinaabeg expected the British to make concessions to access the Indian market.⁶⁴ Professor McDonnell explains, “[i]f the British wished to occupy

61. See generally John E. McDowell, *Therese Schindler of Mackinac: Upward Mobility in the Great Lakes Fur Trade*, 61 WIS. MAG. OF HIST. 125 (1978); Lucy Eldersveld Murphy, *Public Mothers: Native American and Métis Women as Creole Mediators in the Nineteenth-Century Midwest*, 14 J. WOMEN’S HIST. 142, 155-56 (2003); Elizabeth A. Scott, *A Feminist Approach to Historical Archaeology: Eighteenth-Century Fur Trade Society at Michilimackinac*, 25 HIST. ARCHEOLOGY 42 (1991).

62. Cf. Michael A. McDonnell, *Maintaining a Balance of Power: Michilimackinac, the Anishinaabe Odawas, and the Anglo-Indian War of 1763*, 13 EARLY AM. STUD. 38, 49 (2015). According to Professor McDonnell:

French officials constantly complained that métis traders confounded efforts to impose imperial policies at places like Michilimackinac—because they acted too much in the interests of their Indian kin. Historians have tended to view men such as Langlade as go-betweens, or mediators, and as métis, but his Indian kin were just as likely to see him as Anishinaabe. As one French official complained as early as 1709, the children born of mixed marriages “try to create as many difficulties as possible for the French.”

Id. (footnote omitted) (quoting 33 MICHIGAN HISTORICAL COLLECTIONS 454 (Michigan Pioneer & Historical Society ed., 1904)).

63. *E.g., id.* at 49 (“A Nassauekueton Odawa (nation de la Fourche) woman named Domitilde, for example, married one in 1712, and, after his death, she married Augustin Langlade in the 1720s. Their son, Charles Langlade, became one of the most influential and well-known figures from Michilimackinac.”); Murphy, *supra* note 61, at 144 (“People who had been born in the Great Lakes region, residents of towns such as Green Bay, Prairie du Chien, St. Louis, Vincennes, Detroit, and Mackinac, included French and Anglo-American fur traders and related workers, Indian wives, and some of their kin, and a wide variety of young and old Métis people, with a few African Americans.”).

Nineteenth-century court decisions involve many fact patterns relating to intermarriage. For example, see the Michigan Supreme Court case of *Stockton v. Williams*, 1 Doug. 546 (Mich. 1845), a case of alleged identity theft. In that case, an Anishinaabe woman, Mokitchenoqua (aka Nancy Smith), the child of Jacob Smith, an Indian trader, alleging that another Anishinaabe woman, Mokitchenoqua (aka Elizabeth Lyons), the child of yet another Indian trader, Archibald Lyons, stole her lands.

64. *E.g., McDonnell, supra* note 62, at 40.

the French posts and establish a trade with the western nations, they would have to do so on Indian terms. . . . [N]ewcomers would have to follow long-established customs in return for their occupation of the posts and their trade with the Indians.”⁶⁵ After some uncertainty, and after the 1763 Anishinaabe uprising against the British, British traders and other interests became dependent on the Odawa Indians of northern lower Michigan.⁶⁶ Like the French before them, the British bargained for entrance into the Indian market, relying on the same method of intermarriage and compliance with Indian traditions and norms.⁶⁷

By 1820, the time the United States formally asserted control over what is now Michigan, Anishinaabe culture had changed along with the economic changes brought by the influx of French, then British, then American interests and individuals. The famed Michigan Indian agent Henry Schoolcraft’s career is instructive. Though he was a government agent and not strictly an economic player, Schoolcraft married into a prominent mixed Ojibwe family with control over much of the Upper Peninsula’s fur trade. He married Bamewawagezhikaquay, or Jane Johnston, daughter of John Johnston and Ozhaguscodaywayquay/O-shaw-gus-co-day-way-quah.⁶⁸ O-shaw-gus-co-day-way-quah’s father was Waubojeeb, an important Lake Superior Ojibwe ogema.⁶⁹ John Johnston’s marriage “transformed him into a successful Lake Superior trader, and his wife became one of the most powerful women in the region.”⁷⁰ Schoolcraft benefitted from these familial relationships during his long tenure as Indian agent in the western Great Lakes. It could be said that a critical key to his success as a government official was his decision to enter into a familial relationship with an important and wealthy Michigan Ojibwe

65. *Id.*

66. *Id.* at 79. Professor McDonnell contends:

With a flourishing population, a strategic location, and a dense and widespread kinship and alliance network, the Odawas at Waganakising especially reclaimed and commanded a privileged place in both Indian and British councils. From 1763 the British—unlike many historians of colonial America—would never again fail to take note of Michilimackinac. Nor would they mistake Detroit as the decision-making center of the “western nations.” The Odawas and their Green Bay allies had provided an early demonstration of the importance of the straits and the different strategic alliances at play in the *pays d’en haut*. As later British agents had to concede, good relations with the Odawas were essential since they were “a Nation much respected by all the others.”

Id.

67. *Id.* at 40 (“The Anishinaabeg at Michilimackinac saw no reason for this position and relationship to end with the coming of the British.”).

68. SLEEPER-SMITH, *supra* note 56, at 19; *see also* ROBERT DALE PARKER, *THE SOUND THE STARS MAKE RUSHING THROUGH THE SKY: THE WRITINGS OF JANE JOHNSTON SCHOOLCRAFT* 4 (2008).

69. WILLIAM W. WARREN, *HISTORY OF THE OJIBWAY PEOPLE* 173 (1984).

70. SLEEPER-SMITH, *supra* note 56, at 19.

family. Of course, it was his downfall as well, as he was later forced to resign after allegations of nepotism in government appointments came to light.⁷¹

It may appear crass to modern sensibilities that white men who entered into kinship relationships with Anishinaabe families often did so in order to acquire access to markets and trade routes. That sensibility dates back centuries; the Jesuits that accompanied the French in the early years of the fur trade were “horrified” by these practices.⁷² But given that Anishinaabe traditional governance was—and continues to be—heavily based in kinship and clan relationships, it made a great deal of sense for outsiders seeking access to the Indian market to marry into the market. In fact, many Indian nations believed formal treaties with European and American governments established familial relationships between nations.⁷³

Although non-Indians gained many benefits from establishing relationships with tribes, they acquired duties and responsibilities to their newfound kin that were concomitant to their entrance into the family business. Family responsibilities extended beyond merely providing sustenance to close relatives. Obligations would include defending the larger family from attacks, providing resources to a large group of relatives and others who had need, enforcing local rules, and helping to hold others accountable for their responsibilities. These duties parallel modern governmental obligations. There was little tolerance for failure to meet these obligations, and self-dealing or double-dealing could be met with swift retribution.⁷⁴

Intermarriage was only one way that the Great Lakes Anishinaabeg governed their hunting and trading territories—Indian people expected compensation for trespass and property damages. In one notable instance, missionaries in what is now the Upper Peninsula of Michigan, invited by fur traders in the nineteenth century, faced demands that they enter into agreements to compensate local Indians for expanding the facilities at the trading posts or face attacks on their own property in retaliation.⁷⁵ Natives in Waukesha,

71. THEODORE J. KARAMANSKI, *BLACKBIRD’S SONG: ANDREW J. BLACKBIRD AND THE ODAWA PEOPLE* 102 (2012).

72. *Id.* at 16–17.

73. *See generally* ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800*, at 62–82 (1997).

74. CARY MILLER, *OGIMAAG: ANISHINAABEG LEADERSHIP, 1760–1845*, at 124–25 (2010); *see also, e.g.*, ANTON TREUER, *THE ASSASSINATION OF HOLE IN THE DAY* (2011) (detailing the life of Hole in the Day the Younger, who asserted more power than his tribal community recognized in him, and was assassinated).

75. Miller, *supra* note 74, at 101. Professor Miller elaborates:

When fur traders and missionaries in the nineteenth and even early twentieth centuries used Anishinaabeg resources without proper compensation, communities reminded them of their obligations. In the 1830s, [at L’Anse,] . . . missionaries, who understood themselves as invited into the field by the fur traders, asked only their missionary supervisors, the regional Indian agent, and the local fur traders for permission when wishing to add

Wisconsin, for example, demanded damages after white settlers allowed their cattle to roam free and destroy Indian corn crops; the “Indians being legally in possession of the land” required and received compensation in the form of a large ox in one instance.⁷⁶

In short, non-Indians expecting to reside within Anishinaabeg territories and do business with Indian people and Indian nations understood that the tribe expected them to comply with tribal customary and traditional law in exchange for permission to reside and trade.

C. *Five Civilized Tribes’ Permitting and Intermarriage Laws*

The so-called Five Civilized Tribes established and codified the most detailed and comprehensive tribal regulatory schemes to govern noncitizens in nineteenth-century American history. Other Indian nations located near these tribes also adopted similar laws.

After the removal of the Five Civilized Tribes to Oklahoma, the tribes established strict permitting requirements governing noncitizens who wished to reside upon, work within, and lease Indian lands, or marry into Indian families. In Oklahoma Indian country, American citizens wishing to access the Indian markets had to acquire a federal Indian trader permit and a tribal permit, and often married into the tribe and acquired tribal citizenship.⁷⁷ In many instances, it appears, white men married Indian women merely to acquire property in Indian country.⁷⁸

In the mid-nineteenth century, several Indian nations in and around Indian Territory, in what is now the state of Oklahoma, enacted legislation purporting to govern non-Indian activity.⁷⁹ These Indian nations regulated entrance, residence, contracting, and employment by non-Indians with the

on to their facilities at the posts. This behavior aroused the animosity of the local villages, who insisted that the missionaries desist or enter into an agreement with the community. When the missionaries ignored repeated warnings to engage in proper reciprocal and compensatory behavior, they often jeopardized their own property, especially livestock.

Id.

76. Alexander F. Pratt, *Reminiscences of Wisconsin*, in 1 WISC. HIST. COLLECTIONS 127, 135 (Lyman Copeland Draper ed., State Historical Society of Wisconsin 1903) (1855).

77. *E.g.*, Oliver Knight, *An Oklahoma Indian Trader as a Frontiersman of Commerce*, 23 J. SOUTHERN HIST. 203 (1957) (detailing the life of James J. McAlester, an American citizen who traded inside of Choctaw Indian country under a federal license and a tribal permit and acquired tribal citizenship by marrying a Choctaw woman).

78. LEUPP, *supra* note 40, at 345–46.

79. In at least one instance, the Choctaw Nation, the tribe’s removal treaty expressly provided that noncitizens must procure a written permit from the tribe or the federal government before conducting business on Choctaw land:

No person shall expose goods or other article for sale as a trader, without a written permit from the constituted authorities of the Nation, or authority of the laws of the Congress of the U.S. under penalty of forfeiting the Articles, and the constituted authorities of the

tribes. In 1880 and 1890, Interior Department reports on Indian affairs acknowledged these types of permitting statutes.⁸⁰ Additionally, a 1912 report to Congress on the Five Civilized Tribes noted that the tribes had long been issuing employment permits to noncitizens.⁸¹ The same report noted that tribal courts adjudicated the rights of noncitizens employed in accordance with a permit.⁸²

The Cherokee Nation of Oklahoma is a good example of a tribe restricting non-Indian activity within its borders.⁸³ Immediately after removal, the Cherokee Nation took legislative action in 1839 to strictly regulate noncitizen activity on the reservation by initially barring citizens from leasing land to noncitizens in 1839.⁸⁴ From then until the 1880s, the Cherokee Nation continually enacted laws regulating noncitizen activities, usually restricting noncitizen rights to own land.⁸⁵ In 1843, the Cherokee Nation enacted a permit system similar to that enacted by other Oklahoma tribes in the same period.⁸⁶ The Civil War interrupted enforcement of the intermarriage permit system, but the Cherokee Nation moved to reinstate the system in the 1870s.⁸⁷ In addition to laws restricting use and ownership of tribal land, the Cherokees enacted many stringent regulations on noncitizens wishing to marry tribal

Nation shall grant no license except to such persons as reside in the Nation and are answerable to the laws of the Nation.

A Treaty of Perpetual Friendship, Cession and Limits, Choctaw-U.S. art. X, Sept. 27, 1830, 7 Stat. 333.

80. DEP'T OF INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 91 (1890), <http://digicoll.library.wisc.edu/cgi-bin/History/History-idx?type=article&did=History.AnnRep90.i0003&id=History.AnnRep90&isize=M> ("Each of the five nations has its distinct permit system."); DEP'T OF INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 217 (1880) ("These nations have a permit system, by which citizens of the nations can employ citizens of the United States to labor for them one year by paying a small tax to the national treasurer. If these laborers attend to their own business, and carry out their contract in good faith, they remain here for years.").

81. DEP'T OF THE INTERIOR, FIVE CIVILIZED TRIBES IN OKLAHOMA, S. DOC. NO. 1139, at 110 (3d Sess. 1912) ("The people who thus removed to the Choctaw-Chickasaw country west of the Mississippi entered upon the land and made homes thereon, acquired farms, and otherwise improved the country. To some of them, as the records of the department show, permits were issued by the tribal authorities to employ noncitizens. Thus, the persons receiving such permits were, in one way, recognized as citizens.").

82. *Id.* at 121 (referencing "people who were accorded school privileges in the Indian nations who were granted permits to employ noncitizens and whose rights were adjudicated in the tribal courts").

83. *See generally* NANCY HOPE SOBER, THE INTRUDERS: THE ILLEGAL RESIDENTS OF THE CHEROKEE NATION, 1866–1907 (1991).

84. *Id.* at 27.

85. *Id.* at 27–28.

86. *Id.* at 28; *see also supra* notes 77–79 and accompanying text.

87. *Id.* at 28–29.

citizens.⁸⁸ However, by the late decades of the nineteenth century, the Cherokee Nation was overrun by intruders as neither the tribe nor the federal government could or would enforce the tribe's permit laws.⁸⁹

The United States Attorney General also addressed the legal consequences of tribal permit systems and acknowledged tribal authority to govern nonmembers. In an 1855 opinion, Attorney General Caleb Cushing reviewed the permitting and intermarriage systems established by the Choctaw Nation.⁹⁰ Around ten years prior, the Supreme Court had decided *United States v. Rogers*,⁹¹ which held that a white man who had acquired tribal citizenship was not released from federal criminal jurisdiction.⁹² Cushing disagreed with this holding, however, and stated that he would have held that non-Indians who acquired tribal citizenship remained subject to tribal civil authority.⁹³

In the opinion, the Attorney General concluded that the Choctaw tribal court (which then had jurisdiction over Chickasaw tribal members) could have civil jurisdiction over a white man who had acquired tribal citizenship through the permit system. The opinion's syllabus concludes:

[I]n matters of civil jurisdiction, arising within the nation, its courts have jurisdiction over a white man who has voluntarily made himself a Chicasaw by intermarriage and exercise of all the rights of a Chicasaw, and where the question concerns property the proceeds of a head-right granted to him as a Chicasaw.⁹⁴

The syllabus suggests that tribal jurisdiction over white men is dependent on the white man's adoption by marriage into the Chickasaw Nation, and property acquired by white men through a treaty provision.

The particular white man in question in Cushing's opinion, Thomas F. Cheadle, married a Chickasaw woman before the federal government removed the majority of the Chickasaw and Choctaw people from the southeast United States to what is now Oklahoma.⁹⁵ He acquired property—a Chickasaw head-right—in an 1834 treaty, drew a treaty annuity as a Chickasaw

88. *Id.* at 30.

89. *Id.* at 126–34.

90. Jurisdiction of the Courts of the Choctaw Nation, 7 Op. Att'y Gen. 174 (1855).

91. 45 U.S. 567 (1846).

92. *Id.* at 573.

93. 7 Op. Att'y Gen. at 185 (“Congress has seen fit to withhold from the Choctaw nation all criminal jurisdiction over white men within their territory, but not to withhold from them civil jurisdiction over such white men as of their own free will and accord choose to become members of the nation.”).

94. *Id.* at 174–75.

95. *Id.* at 175 (“Thomas F. Cheadle, represented to be a ‘white man,’—which, if it have any pertinent meaning in the case, must mean that he is a man of European race, and a *possible* citizen of the United States, by right of birth or naturalization according to law,—married a Chicasaw woman, by whom he had children, previous to the emigration of the Chicasaws from the State of Mississippi . . .”).

tribal member, and enjoyed Chickasaw political rights.⁹⁶ Cheadle and his wife eventually sold the property he acquired by virtue of the treaty terms, and their children claimed the proceeds.⁹⁷

The Choctaw Nation argued that the dispute should be resolved in tribal court, but the United States Indian agent opposed that position, arguing that he should have exclusive authority to resolve the dispute.⁹⁸ The Attorney General rejected the view of the Indian agent out of hand, labeling the position “suicidal,” deeply unsatisfied with the proposition that the President should be forced into a position to decide every simple property rights matter arising in Indian country.⁹⁹ That left the tribal court as the proper forum. The critical portion of the opinion of the Attorney General was that no federal or state court would have jurisdiction over this uniquely internal question:

But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this, a question of property strictly internal to the Choctaw nation; nor is there any written law which confers jurisdiction of such a case on any court of the United States. The Agent admits that if the courts of the Choctaws have not jurisdiction, the case must depend for its decision on the executive authorities of the United States.¹⁰⁰

96. *Id.* (“[Cheadle] became entitled to a Chickasaw head-right of three sections of land under the treaty between the United States and the Chickasaws, of July 1st, 1834;—emigrated with the Chickasaws to their present residence in the country of the Choctaws,—draws annuity as a Chickasaw, has sued as plaintiff in the Choctaw courts, votes for officers to the General Council, and exercises all the other rights of a Chickasaw member of the Choctaw and Chickasaw Union.”).

97. *Id.* at 176.

98. *Id.* (“The Choctaw nation think it belongs to their courts: the United States Agent, residing with the Choctaws, (Mr. Cooper,) thinks there is no court which has jurisdiction of the matter, and that the determination of it belongs in the first instance to him, subject, of course, to the authority of his executive chiefs, the Commissioner of Indian Affairs, the Secretary of the Interior, and the President.”).

99. *Id.* at 179. Attorney General Cushing declared that the agent, an extension of the executive branch, would be constitutionally incapable of adjudicating such a claim:

Such a conclusion is suicidal. How shall the President of the United States adjudicate upon a mere question of *meum* and *tuum*, a right of property, possession, inheritance, succession, usufruct, or whatever it may be, in controversy between private individuals in the United States? How shall any subordinate executive agent of his do this? A judgment or decree of any such executive agent, disposing of any such question, and giving title to the successful party, would be a new and strange thing in the jurisprudence of the United States.

Id.

100. *Id.* at 179.

Immediately following this decision, the Attorney General's views had support in a smattering of lower court cases addressing similar issues.¹⁰¹ Attorney General Cushing effectively validated the permit system as a mechanism by which tribes could assert jurisdiction over nonmembers.

Often, the Oklahoma Indian nations codified their permit system codes, and used the permit system to impose tribal taxes on the commercial activities of noncitizens and other non-Indians.¹⁰² At the height of tribal self-governance in mid-nineteenth-century Oklahoma, however, tribal enforcement of permitting systems faced federal court challenges to tribal authority. At least one federal court indirectly affirmed the authority of Oklahoma Indian nations to enact permitting systems and to enforce them by confiscating and selling noncompliant, noncitizen property. In *Hamilton v. United States*,¹⁰³ the court rejected the claims under an Indian depredation act for dwellings seized and sold by the Chickasaw Nation under the tribe's permitting system. The court concluded that the noncitizen had consented to tribal jurisdiction by acquiring a permit under tribal law:

The claimant by applying for and accepting a license to trade with the Chickasaw Indians, and subsequently acquiring property within the limits of their reservation, subjected the same to the jurisdiction of their laws. Redress for any infringement of their property rights, by national authority, in pursuance of legislative enactment can not be granted in this kind of a proceeding, and the petition is dismissed.¹⁰⁴

A second federal court rejected the authority of the Interior Department to enforce tribal permitting laws, at least where a treaty expressly excluded federally licensed Indian traders from tribal authority over permitting laws, as in the 1866 treaty respecting the Choctaws and Chickasaws.¹⁰⁵

101. *See, e.g., Tuten's Lessee v. Byrd and Welcker*, 1 Tenn. 108, 108 (1851) ("For many years preceding the treaty of 1817 said Wyly Tuten resided with the Cherokee tribe of Indians, and was recognized by them as one of their nation, and as entitled to all the rights and privileges of a native Indian. Under the treaties of 1817 and 1819 he registered his name in the office of the Cherokee agent for a life-estate reservation in the section of land sued for in this action."); *United States v. Ragsdale*, 27 F. Cas. 684, 686 (C.C.D. Ark. 1847) (No. 16,113) ("After adoption [by the Cherokee Nation, white men] became members of the community, subject to all the burdens, and entitled to all the immunities of native born citizens or subjects; and it is reasonable, in my judgment, to suppose that they were intended to be included in the general amnesty."). Though beyond the scope of this Article, Cushing's Opinion has been revived in recent decades by the Supreme Court. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985).

102. A representative survey of these laws is included in an Appendix following this Article. *See App'x*.

103. 42 Ct. Cl. 282 (1907).

104. *Id.* at 287.

105. *See Zevely v. Weimer*, 82 S.W. 941 (Indian Terr. 1904). In *Zevely v. Weimer*, the Court of Appeals of Indian Territory stated:

The Oklahoma Indian nations also levied business and commercial taxes on noncitizens, enforcing and collecting those taxes throughout the nineteenth century. The lack of tribal capacity to collect taxes from an overwhelming number of noncitizens, coupled with some interference from the federal government, eventually undermined practical tribal power to assert jurisdiction.

As tribal governance capacity was overwhelmed by noncitizen activity in the latter decades of the nineteenth century, the Department of Interior did begin to assist several tribes in collecting tribal taxes. In 1900, the report from the Commissioner on Indian Affairs to the Interior Secretary noted that the Choctaw Nation required noncitizens to pay a tax on “the value of goods introduced by them for sale in that nation,” and the Chickasaw Nation required noncitizens “engaged in business” to pay a tax on “the amount of their

It thus clearly appears by the treaty of 1855 that the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction—where? “Within their respective limits.” They are not to have jurisdiction over noncitizens and their property “found within their limits,” and such shall be considered intruders and be removed, but an exception to those to be removed are those “trading” therein under license from the United States; and by the treaty of 1866, art. 39, “No person shall expose goods for sale as a trader without a permit of the legislative authorities of the nation he proposes to trade in;” the treaty of 1855 being thus modified by the later treaty of 1866 so that the license shall be granted by the legislative authorities of the nation, instead of by the government of the United States. By the express terms of the treaties, the only persons to be removed are the noncitizens “found within their limits,” but “traders” are not to expose goods for sale without a permit from the legislative authorities, and are expressly excepted from those to be removed. The appellees, by their own complaint, admit that they are traders “without license from the legislative authorities of the nation they propose to trade in.” By article 45 of the treaty of 1866 it is provided: “Art. 45. All the rights, privileges and immunities heretofore possessed by said nations or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty.” It seems, therefore, quite unnecessary to enter the field of speculation or explore the realms of imagination to discover by what authority the tribal governments of the Choctaws and Chickasaws fix a license fee for traders, or to investigate for precedents for such action, when by express terms it is under and by virtue of the power conferred by the aforesaid treaties with the government of the United States.

Id. at 945–46.

capital stock invested.”¹⁰⁶ The tribes collected their own taxes from noncitizens.¹⁰⁷

The Commissioner also reported that the Creek Nation attempted to impose a tax on national banks within the reservation: “Section 246 of the Laws of the Creek Nation provides for a tax on each banking establishment of ‘one-half of 1 percent of capital stock invested—assessment to be made on the bank on account of the shares thereof.’”¹⁰⁸ The Indian agent asked for an opinion on whether federal bank regulations precluded the tax on the bank, and the Comptroller of the Currency answered that the tax likely was preempted but could still be imposed on the stock of the bank.¹⁰⁹

In the late 1890s and early 1900s, as the United States terminated the tribal justice systems of the Five Civilized Tribes and took significant control over those tribal governments, the Interior Department began to assist the tribes in enforcing tribal permit laws and taxation ordinances. In significant cases such as *Morris v. Hitchcock*,¹¹⁰ where the Supreme Court affirmed Choctaw and Interior Department regulations providing for enforcement of the tribal taxes on licensed Indian traders, and *Buster v. Wright*,¹¹¹ holding the same in relation to Creek laws, courts affirmed the practice of allowing the Interior Department to enforce tribal laws in the absence of tribal courts.

D. Intruders

Numerous Indian treaties anticipated and dealt with the problem of non-Indian or nonmember Indian intruders on reservation lands. There was no uniformity in the treaties regarding enforcement mechanisms. Some treaties

106. DEP’T OF INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 137–38 (1900), <http://digicoll.library.wisc.edu/cgi-bin/History/History-idx?id=History.AnnRep1900p1>. The report provided:

The laws of the Choctaw Nation provide that noncitizens shall pay a tax of 1 1/2 per cent on the value of goods introduced by them for sale in that nation, and the Chickasaw laws require that noncitizens engaged in business in the Chickasaw Nation shall pay a tax of 1 per cent on the amount of their capital stock invested. . . . [T]he Government has never collected any of the rents, royalties, or taxes in the Choctaw and Chickasaw nations accruing by reason of noncitizens being engaged in business within the limits of said nations, except the royalty on coal and asphalt. All other taxes, royalties, and rents have been collected by the national collectors of those nations.

Id.

107. *Id.* at 138.

108. *Id.* at 140 (quoting CREEK LAWS (1893 ed.)).

109. *Id.* at 141 (“While . . . it would seem that the Chickasaw Nation would be precluded, under the statutes of the United States, from imposing a permit tax on national banks within that nation, the said nation may impose a tax upon the stock of the bank held by individuals and require the bank to pay the same, unless there be banks established under the authority of the laws of the nation which are taxed upon their capital stock.”).

110. 194 U.S. 384 (1904).

111. 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

required the United States to enforce the reservation boundaries and expel intruders.¹¹² Some presumed tribal assistance with intruder expulsion. Other treaties provided that intruders had given up their American legal protections and left their fate to tribal law.

Typical treaty provisions dealing with intruders, however, left incomplete the enforcement provisions and simply barred nonmembers from entrance absent tribal consent, such as Article 7 of the Treaty with the Sacs and Foxes.¹¹³ The several “Stevens treaties,” named after the American treaty negotiator Isaac Stevens, contained similar provisions. One example is the Article 2, paragraph 2, of the Treaty with the Nez Percés.¹¹⁴ Other treaty

112. See, e.g., Treaty with the Choctaws and Chickasaws art. 7, June 22, 1855, 11 Stat. 611. The intruder provision stipulates:

So far as may be compatible with the constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; excepting, however, all persons with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe, and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders, and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military

Id. Relatedly, two Presidential Proclamations gave authority to the military to remove early settlers within the Indian Territory. Proclamation No. 243, 21 Stat. 797 (April 26, 1879) (Settling in the Indian Territory); Proclamation No. 246, 21 Stat. 798 (Feb. 12, 1880) (Settling in the Indian Territory). Later, Congress would appropriate \$15,000–\$20,000 each year “[f]or the purpose of removing intruders and placing allottees in unrestricted possession of their allotments.” See Act of Mar. 1, 1907, Pub. L. No. 59-154, 34 Stat. 1015, 1025; see also Act of June 21, 1906, Pub. L. No. 59-258, 34 Stat. 325, 325; Act of Mar. 1, 1907, Pub. L. No. 59-154, 34 Stat. 1015, 1015; Act of Apr. 30, 1908, Pub. L. No. 60-104, 35 Stat. 70, 70.

113. Treaty with the Sacs, Foxes, Iowas art. VII, Mar. 6, 1861, 12 Stat. 1171. The Article provides:

No person not a member of either of the tribes, parties to this convention, shall go upon the reservations or sojourn among the Indians without a license or written permit from the agent or superintendent of Indian affairs, except Government employees or persons connected with the public service. And no mixed-blood Indians, except those employed at some mission, or such as may be sent there to be educated, or other members of the aforesaid tribes, shall participate in the beneficial provisions of this agreement or former treaties, unless they return to and unite permanently with said tribes, and reside upon the respective reservations within six months from the date of this convention.

Id. This provision can also be found, slightly altered, in an earlier treaty with the Sacs and Foxes: “If any citizen of the United States or other white person should form a settlement upon lands which are the property of the Sac and Fox tribes, upon complaint being made thereof to the superintendent or other person having charge of the affairs of the Indians, such intruder shall forthwith be removed.” Treaty with the Sacs and Foxes art. 6, Nov. 3, 1804, 7 Stat. 84).

114. Treaty with the Nez Percés art. II, June 11, 1855, 12 Stat. 957, 958. That paragraph provides:

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent

provisions failed to specify both the requirement of tribal consent and the enforcement mechanism, only broadly and in passive voice referring to the required removal of intruders from Indian territory.¹¹⁵

Treaty provisions dealing with the problem of intruders highlight the status of Indian tribes as both sovereigns and property owners, and that tribes retained a kind of plenary authority over tribal lands. A property owner retaining sovereignty, like an Indian tribe, inherently possesses the power to regulate all persons within its jurisdiction. Persons entering tribal lands would need to bargain for permission to enter and, usually as a result of that bargain, accept tribal control. Tribes likely intended the intruder provisions to require the federal government to assist tribes in enforcing that regime.

II. IMPLICATIONS FOR MODERN TRIBAL JURISDICTION

The twenty-first-century experience of Indian nations and the nonmembers that permeate their lands is not radically different than the nineteenth and early twentieth-century experience. Indian nations still jealously guard their economic assets and nonmembers still must bargain for entrance into the tribal economic markets. The substance of tribal economies, however, has changed dramatically as on-reservation economic activity has shifted from a more subsistence-type economic culture to economies based on government, service, tourism, entertainment, and natural resource extraction. Nonmembers must still bargain for and make concessions to access these tribal markets.

The sheer number of nonmembers that have already consented, expressly or impliedly, to tribal jurisdiction is also unprecedented in American Indian history. It is now routine for nonmembers to pay tribal taxes,¹¹⁶ be

and agent. And the said confederated tribe agrees to remove to and settle upon the same within one year after the ratification of this treaty.

Id.; see also Treaty with the Flatheads art. II, July 16, 1855, 12 Stat. 975, 976 (“Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent.”); Treaty with the Qui-nai-elts art. II, July 1, 1855 & Jan. 25, 1856, 12 Stat. 971, 971 (providing that “no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent”); Treaty with the Makah Tribe, Makah-U.S. art. II, Jan. 31, 1855, 12 Stat. 939 (same); Treaty with the S’Klallams, Sklallams-U.S. art. II, Jan. 26, 1855, 12 Stat. 933, 934 (same); Treaty with the Nisquallys art. II, Dec. 26, 1854, 10 Stat. 1132, 1133 (same).

115. See A Treaty of Perpetual Friendship, Cession and Limits, Choctaw-U.S. art. X, Sept. 27, 1830, 7 Stat. 333. (“All intruders shall be removed from the Choctaw Nation and kept without it.”).

116. Cf. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 139–41 (1982); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

haled into tribal court in civil cases,¹¹⁷ to sue in tribal court,¹¹⁸ and even serve on tribal court juries.¹¹⁹ Tribal governance over Indian lands has expanded dramatically as the federal government has grown to support and encourage

117. *See, e.g.*, *One Thousand Four Hundred Sixty Three Dollars v. Muscogee (Creek) Nation*, 9 Okla. Trib. 83 (Muscogee (Creek) 2005) (holding tribal court was the correct forum for civil forfeiture proceedings involving non-Indians' illegal drug use and distribution in casino parking lot); *Wolf Point Org. v. Investment Centers of America, Inc.*, 3 Am. Tribal Law 290 (Fort Peck Ct. App. 2001) (holding tribal court was the correct forum for a dispute involving a non-Indian investment company operating on the reservation).

118. Due to their perceived deep pockets, tribes with casinos often attract slip-and-fall cases to their tribal courts. *See, e.g.*, *Lefevre v. Mashantucket Pequot Tribe*, 23 Ind. L. Rep. 6018 (Mash. Peq. Tr. Ct. 1992) (deciding a slip and fall case at the Tribe's bingo hall as the first case heard by the Tribal Court). Non-Indians bring numerous other types of claims, as well. *See* *Neptune Leasing, Inc. v. Mountain States Petroleum Corp.*, 11 Am. Tribal Law 162 (Navajo 2013) (breach of payment plan); *Marathon Oil Co. v. Johnston*, 33 Ind. L. Rep. 6095 (Shoshone & Arapaho Ct. App. 2006) (negligence suit against employer for injuries suffered in the scope of employment); *Mustang Fuel Corp. v. Cheyenne-Arapaho Tax Com'n*, 4 Okla. Trib. 1 (Cheyenne-Arapaho 1994) (challenge to Tribe's ability to tax entities on allotted lands); Matthew L.M. Fletcher, *Supreme Court Case Could Expose Indian Tribes to New Legal Risks*, THE CONVERSATION (Nov. 13, 2016, 8:40 PM), <https://theconversation.com/supreme-court-case-could-expose-indian-tribes-to-new-legal-risks-66728> (noting there are many suits brought by nonmembers in tribal courts to reach tribal coffers).

119. Tribal courts have altered their tribal codes to include non-Indians within jury pools in order to fulfil the requirement under the Violence Against Women Reauthorization Act of 2013 that juries must represent a "fair cross section of the community," tribal courts have altered their tribal codes to include non-Indians within jury pools. Pub. L. No. 113-4, § 204(d)(3)(A), 127 Stat. 54, 122 (2013) (codified in part at 42 U.S.C. §§ 13701-14040); *see also* FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE, tit. 6, ch. 5 § 507(b)(1), (c)-(d) (2015) (requiring the juror list for special domestic violence criminal jurisdiction to include twenty-one tribal members and twenty-one nontribal members, randomly summoning twelve individuals and choosing six); PASCUA YAQUI TRIBAL CODE, tit. 3, ch. 2-1 § 160 (2016) (pulling potential jurors from tribal members, individuals living in tribal housing, and anyone working for the tribe); TULALIP TRIBAL CODES, ch. 2.05, § 110 (2017) (creating a potential juror list from tribal members and employees of the tribe or "any of its enterprises, agencies, subdivisions or instrumentalities"); CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, CRIMINAL CODE AND PROCEDURES, ch. 3, § 3.19 (2014) (using county voter registration lists to find and summon potential jurors from any resident of the Umatilla Indian Reservation, regardless of tribal membership).

tribal self-determination,¹²⁰ replacing the remaining whispers of federal and state government authority over Indian lands.¹²¹

There has been a similar dramatic shift in Indian country land ownership patterns, originating from the allotment era of federal Indian affairs.¹²² Although many tribes were affected by allotment practices decades earlier,¹²³ allotment policies occurred in full force from 1887 to 1934.¹²⁴ During this period, the United States opened up dozens of communally owned Indian

120. The executive and legislative branches' movements towards accepting and furthering tribal self-determination are credited as beginning with President Lyndon B. Johnson. Lyndon B. Johnson, President, *The Forgotten American: The President's Message to the Congress on Goals and Programs for the American Indian* (Mar. 6, 1968), in 4 WEEKLY COMP. PRES. DOC. 438, 448 ("We must affirm the right of the first Americans to remain Indians while exercising their rights as Americans. We must affirm their right to freedom of choice and self-determination."). In the ensuing fifty decades, tribal self-determination has increased exponentially through the passage of acts such as the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended in scattered sections of 25 U.S.C.), the Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as 25 U.S.C. § 1901-63 (2016)), the American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as 42 U.S.C. § 1996, 1996a (2016)), and the HEARTH Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150 (amending 25 U.S.C. § 415 (2016)), among many others.

121. The federal and state governments have often extended their jurisdiction into Indian country under the guise of concurrent jurisdiction. But because of a lack of funding or political will by states, no one exercises adequate governance over Indian country. *Cf.* *United States v. Bryant*, 136 S. Ct. 1954, 1960 (2016) ("Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country."); *see also*, e.g., Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 JUDICATURE 147, 148-49 (1995) (offering an early overview of the lack of funds appropriated for tribal courts and Indian country justice systems). In the 1953 hearings on Public Law 83-280, Congress debated appropriating more funding for the additional police and court work required by states but chose to follow the Department of the Interior's recommendation not to. *Bryan v. Itasca Cty.*, 426 U.S. 373, 381-83 (1976) (citing Unpublished Transcript of Hearings on H.R. 1063 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (1953)).

122. The changes in land ownership because of allotment were contemplated by the Supreme Court as early as 1896. *Draper v. United States*, 164 U.S. 240, 246 (1896). *See generally* KRISTIN T. RUPPEL, *UNEARTHING INDIAN LAND: LIVING WITH THE LEGACIES OF ALLOTMENT* (2008); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

123. Earlier approaches to allotment occurred through piecemeal treaties and special acts but encompassed a broad number of parcels. In the one year prior to the beginning of the formal allotment era, 7,673 separate allotments were made. DEP'T OF INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 411 (1886), <http://digioll.library.wisc.edu/cgi-bin/History/History-idx?id=History.AnnRep86>. In 1885, at minimum 6,537 allotments were made. DEP'T OF INTERIOR, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 355 (1885), <http://digioll.library.wisc.edu/cgi-bin/History/History-idx?type=header&id=History.AnnRep85&isize=M>.

124. These dates are bounded by the 1887 passage of the Dawes Act, also known as the General Allotment Act, Pub. L. No. 49-119, 24 Stat. 388, and the passage of the Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984. During the middle of this period, Congress passed the Burke Act of 1906, which allowed the Secretary to take allotments out of trust status prior to the required twenty-five years proscribed by the Dawes Act, opening the land up to unscrupulous non-Indian land collectors. Pub. L. No. 5-149, 34 Stat. 182 (1906).

reservations to non-Indian ownership.¹²⁵ Indian country on those reservations is now heavily checkerboarded with Indian nations, tribal members, nonmembers, and non-tribal governments owning and controlling large swaths of former Indian reservation lands.¹²⁶ Somewhat similarly, landless tribes have benefitted from the Interior Secretary's acquisition of land in trust for Indian nations and individual Indians,¹²⁷ but almost by definition those trust lands created more checkerboarding, as the trust lands are islands of tribal and federal jurisdiction surrounded by state and local jurisdiction. For purposes of this Section of the Article, we will use the term "Indian lands" to mean lands that remain in reservation or trust status, and other lands over which Indian nations retain the power to exclude.

A. *Modern Bargains*

Nonmembers in the late twentieth and early twenty-first centuries have integrated themselves into tribal communities in ways that are largely analogous to the ways nonmembers entered tribal communities in the pre-modern era.¹²⁸ For the most part, what has changed is not how nonmembers enter tribal economic, political, and legal arenas, but instead how tribal governments have changed and adapted to the modern world.

The United States formally supported the development of tribal governance for much of the twentieth century after the enactment of the Indian Reorganization Act in 1934,¹²⁹ excepting the so-called Termination Era of the 1950s where Congress eliminated the federal relationship with hundreds of

125. The Dawes Act included a provision allowing surplus land, land existing after all tribal members had received allotments, to be sold to non-Indians. Dawes Act, § 5, 24 Stat. at 389–90.

126. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (2012 ed.).

127. 25 U.S.C. § 2201 (2012); 25 C.F.R. § 151.1–.3 (2011).

128. We are not referring here to nonmembers that enter Indian lands passing signs stating that they expressly consent to tribal jurisdiction by doing so, say at reservation boundaries or tribal casino entrances, though surely an argument can be made that a tribe may exercise some form of jurisdiction over these nominal non-consenters.

129. Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. § 5123 (2016)). The Indian Reorganization Act outlined procedures whereby tribes could formally enact constitutions, bylaws, and business charters. While this indicated support by the United States for independent tribal governments, the questionable adoption voting practices, the necessity of Secretary approval of any constitution, and model constitutions all emphasize the culture of paternalism directed toward Indian peoples at that time. *See id.*

tribes.¹³⁰ Federal support for tribal governance began in earnest with the formal beginning of the tribal self-determination era in the 1970s,¹³¹ with the federal government authorizing tribal governments to administer most federal programs benefitting tribal interests. In the 1980s and 1990s, many Indian nations' economic activities expanded dramatically with federal support,¹³² allowing tribal governments more resources to provide services to Indian country residents, including members and nonmembers, and to govern Indian lands.

The following subsections describe nonmember activities on modern Indian reservations and how tribal jurisdiction over those nonmembers is triggered.

1. Employment of Nonmembers on Indian Lands

The rise of tribal government bureaucracies beginning in the 1970s and continuing to today means that tribal governments have created thousands of jobs, and have needed to hire thousands and thousands of members and nonmembers. There are 567 federally recognized Indian nations, each employing anywhere from a few dozen to several thousand tribal employees.¹³³ As

130. See H.R. Con. Res. 108, 83d. Cong., 67 Stat. B132 (1953) ("That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potawatamie Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe who are on the Turtle Mountain Reservation, North Dakota.")

131. See *supra* note 120.

132. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 217–18 (1987); *Oversight Hearing on Economic Development: Hearing Before the S. Comm. on Indian Affairs*, 105th Cong. (1998) (containing the statements of numerous tribal leaders detailing the economic growth in their communities in the prior two decades often resulting from federal financial and political encouragement). The Mississippi Band of Choctaw Indians, for example, estimated a growth in their economy from \$1 million to \$300 million between 1979 and 1998, including the creation of 6,000 new jobs during that time. *Id.* at 5, 7 (statement of Phillip Martin, Chief, Mississippi Band of Choctaw Indians, Philadelphia, MS).

133. The Navajo Nation employs over 8,000 employees within the tribal government alone. NAVAJO NATION, 2009–2010 COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY 121 tbl.22 (2010), http://www.navajobusiness.com/pdf/CEDS/CED_NN_Final_09_10.pdf. Conversely, several tribal governments employ only a handful of individuals to run their tribal government. LAURA E. EVANS, *POWER FROM POWERLESSNESS: TRIBAL GOVERNMENTS, INSTITUTIONAL NICHES, AND AMERICAN FEDERALISM* (2011) (offering a detailed review of twelve tribal governments, varying in population, geographic, and economic sizes). For more information on how the makeup of tribal governments can influence tribal economic activities, see Stephen Cornell & Joseph P. Kalt, *Re-loading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in *WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* (Stephen Cornell & Joseph P. Kalt eds., 1992), and Stephen Cornell & Joseph P. Kalt, *Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development*, 29 J. SOCIO-ECON. 443 (2000).

in any municipal-type government, the skill and education level of the employees range from maintenance workers to doctors and lawyers. Large numbers of tribal government employees are nonmembers.¹³⁴

The rise of Indian gaming beginning in the 1980s¹³⁵ coupled with greater tribal control over natural resource extraction industries and the overall rise in tribal business activity, tribal enterprises also employ thousands upon thousands of employees.¹³⁶ Some tribal enterprises are very small and employ mostly tribal members. The larger the tribal enterprise, however, the larger the number of nonmembers that are employed.¹³⁷ As with tribal government employment, large numbers of tribal enterprise employees are nonmembers. In many large tribal gaming and natural resource enterprises, non-member employees significantly outnumber tribal member employees.¹³⁸

Tribal employment is always located on Indian lands, reservation or trust lands owned or controlled by the tribal government. Management-level employees usually have executed an employment contract with the tribal government or enterprise. Other employment is governed by employee manuals and handbooks that provide for dispute resolution and employment separation procedures.¹³⁹ Several tribes, and the number is growing, have entered into collective bargaining agreements with employees under tribal labor ordinances.¹⁴⁰

134. One estimate is that 450,000 nonmembers work for Indian gaming operations alone. 161 CONG. REC. H8,261 (Nov. 17, 2015) (“It should be noted that some 600,000 workers are employed in tribal casinos, but fully 75 percent are not members of tribes.”).

135. Tribal gaming revenue now exceeds \$28 billion dollars annually. *NIGC Tribal Gaming Revenues by Gaming Operation Revenue Range*, NAT’L INDIAN GAMING COMM. (2014), <http://www.nigc.gov/images/uploads/reports/2014GGRbyGamingOperationRevenueRange.pdf>.

136. *See supra* note 134.

137. In 1998, California Indian casinos alone employed nearly 15,000 individuals, ninety percent of whom were non-Indian. NAT’L GAMBLING IMPACT STUDY COMM., NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT 7–9 (1999).

138. *See supra* note 134.

139. *See, e.g.*, COLORADO RIVER INDIAN TRIBES, EMPLOYEE’S HANDBOOK 25–29 (2010); SITKA TRIBE OF ALASKA, EMPLOYEE HANDBOOK 27–30 (2013); STOCKBRIDGE-MUNSEE COMM., EMPLOYEE MANUAL 45–49, <http://mohican-nsn.gov/mt-content/uploads/2015/11/stock-bridge-munsee-employee-manual.pdf> (last visited Apr. 2, 2017).

140. For examples of tribal labor ordinances, see PORT GAMBLE S’KLALLAM TRIBAL CODE § 27.03.06 (2011); MASHANTUCKET PEQUOT TRIBAL LAWS tit. 32 (2014); COQUILLE INDIAN TRIBAL CODE ch. 240 (2008). At least two circuit courts have applied the National Labor Relations Act to Indian-owned businesses. *See San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007); *NLRB v. Little River Band of Ottawa Indians Tribal Gov’t*, 788 F.3d 537 (6th Cir. 2015). Tribal businesses have become increasingly hostile toward to courts’ application of the National Labor Relations Act—so much so that lawmakers have introduced the Tribal Labor Sovereignty Act, which was passed by the House of Representatives in November 2015. H.R. 511, 114th Cong. (2015). The Senate Committee on Indian Affairs has repeatedly recommended that the bill be passed, see S. REP. NO. 114-140 (2015) and S. REP. 115-3 (2017), but it has yet to be voted on by the full Senate. S. 63, 115th Cong. (2017).

In many regions, tribal governments and enterprises are the largest employers and the key generators of regional economic activity.¹⁴¹

2. Tribal Vendors

Tribal governments and tribal enterprises depend heavily on outside vendors to supply tribal activities. Indian nations execute dozens or even hundreds of agreements each year with office suppliers, investment portfolio managers, slot machine technicians, and an incredibly wide variety of other vendors. These agreements commonly require the outside vendor to obtain a tribal business license and may require the vendor to consent to tribal laws and judicial jurisdiction.¹⁴² Tribal contractors typically must comply with tribal hiring laws as well, which are often enforced by the tribal employment rights offices established by tribes to enforce Indian preference in employment and contracting laws.¹⁴³

3. Tribal Lessees

Indian nations also execute leases with a large number of nonmember individuals and business interests. As Indian nations have been doing for over a century, they have executed leases of tribal lands for agricultural and natural resource extraction purposes. Pre-modern era lessees were usually accountable to the Department of Interior as the trustee of tribal assets.¹⁴⁴ In recent decades, tribal governments have taken greater and greater control over these nonmember lessees, requiring lessees to obtain business licenses, comply with tribal laws, and consent to tribal judicial jurisdiction.¹⁴⁵

141. See BEACON ECONOMICS, 2014 CALIFORNIA TRIBAL GAMING IMPACT STUDY: AN UPDATED ANALYSIS OF TRIBAL GAMING ECONOMIC AND SOCIAL IMPACTS, WITH EXPANDED STUDY OF RSTF AND CHARITABLE EFFECTS (2014); JONATHAN B. TAYLOR, THE ECONOMIC IMPACT OF TRIBAL GAMING IN ARIZONA (2014); JONATHAN B. TAYLOR, THE ECONOMIC AND FISCAL IMPACTS OF INDIAN TRIBES IN WASHINGTON (2012); Katherine Spilde & Jonathan B. Taylor, *Economic Evidence on the Effects of the Indian Gaming Regulatory Act on Indians and Non-Indians*, 17 UNLV GAMING RES. & REV. J. 13 (2013); William N. Evans & Julie H. Topoleski, *The Social and Economic Impact of Native American Casinos* (NBER, Working Paper No. 9198, 2002).

142. Heidi McNeil Staudenmaier & Michael Coccaro, *Negotiating with a Tribe or Tribal Entity: Practical Tips for Franchisors*, 34 FRANCHISE L.J. 34, 47 (2014).

143. See, e.g., Oglala Sioux Tribal Employment Rights Ordinance, OGLALA SIOUX TRIBE LAW AND ORDER CODE ch. 18 (2002); Seneca Nation of Indians Tribal Employment Rights Ordinance (2012), <https://sni.org/media/145335/sa-adm-prt014121615380.pdf>; Comanche Tribal Employment Rights Ordinance (1995), <http://www.comanchenation.com/forms/TERO%20Ordinance%2095.pdf>.

144. Under the terms of the Indian Long-Term Leasing Act, almost all leases of tribal trust lands need to be approved by the Secretary of the Interior before they become effective. See 25 U.S.C. § 415(a) (2016).

145. The HEARTH Act of 2012 allows tribal governments to codify tribal leasing regulations, leases executed under these new regulations do not require approval from the Secretary of the Interior. See generally Pub. L. No. 112-151, 126 Stat. 1150 (amending 25 U.S.C. § 415 (2016)). Other,

A large number of Indian nations also allow nonmembers to enter into leases for Indian housing, often when those nonmembers are caring for tribal member children or have married tribal members.¹⁴⁶ Tribal housing regulations are rigorous, beginning with the application process,¹⁴⁷ which makes it impossible for a nonmember to be unaware, or refuse to consent to tribal jurisdiction.

4. Tribal Patrons

Tribal enterprises depend heavily on nonmember customers in gaming, service, and tourism industries. Millions of nonmembers enter Indian lands to play casino games,¹⁴⁸ buy gasoline or tobacco, and stay at tribal resorts. These nonmembers pay tribal excise, sales, use, and other taxes and fees without question.¹⁴⁹ Nonmembers that stay at tribal resorts likely have signed documents in which they expressly consent to tribal jurisdiction. Numerous Indian nations have also begun to enforce civil offense ordinances against non-Indians,¹⁵⁰ often with cooperation from state and federal authorities.

5. Tribal Government Service Recipients

As tribal resources increase, more and more Indian nations are providing governmental services to nonmembers. Numerous tribes have public

non-HEARTH Act land use policies also exist. The Fort Peck Tribes, for example, have adopted a comprehensive land use policy that outlines requirements for the major types of land leases, including agricultural, business, homesites, and rights of way. FORT PECK, TRIBES LAND USE POLICY (2013).

146. Tribal housing built and managed with block grant funds received under the Native American Housing Assistance and Self-Determination Act (NAHASDA) can be restricted to Indian families under an exception to Title VI of the Civil Rights Act. 25 U.S.C. § 4101 (2012).

147. For example, while the Colville Indian Housing Authority only accepts applications from tribal members, all household members over the age of eighteen are required to sign the application. Memorandum from the Occupancy Specialist I, Colville Indian Housing Auth., to Applicant, <http://colville.whydevelop.com/media/files/RENTAL%20ASSISTANCE%20APP.pdf> (last visited Apr. 2, 2017).

148. A report from the American Gaming Association in 2000 estimated that almost 8 million adults visited casinos on Indian reservations. AM. GAMING ASS'N, STATE OF THE STATES: THE AGA SURVEY OF CASINO ENTERTAINMENT 21 (2001), https://www.americangaming.org/sites/default/files/research_files/aga-sos-2001.pdf. This number continues to increase. In 2007, the state of Minnesota alone recorded 17.22 million visits by non-Indians to tribal casinos. See BARRY RYAN, THE ECONOMIC CONTRIBUTIONS OF MINNESOTA TRIBAL GOVERNMENTS IN 2007 (2009), http://www.mnindiagamingassoc.com/wp-content/uploads/2016/06/MIGA_RYAN_REPORT_ON_EC_IMPACT_2009.pdf.

149. These tribal taxes were upheld by the Supreme Court in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

150. See, e.g., POKAGON BAND OF POTAWATOMI INDIANS CODE OF OFFENSES, CIVIL OFFENSES § 2, <http://www.pokagon.com/government/codes-and-ordinances> (follow “Code of Offenses” hyperlink) (last visited Apr. 2, 2017).

safety cooperative agreements that require tribal police, ambulance, and fire-fighting assets to respond to nonmember calls for assistance.¹⁵¹ Many tribes have also established health clinics that serve nonmembers as well as members.¹⁵² As noted above, nonmembers also live in tribal housing and, as a result, may partake in services provided to renters and lessees. Finally, tribal governments provide a panoply of government services to all persons within their jurisdictions, as any municipal government does, from animal control¹⁵³ to snow plowing¹⁵⁴ to zoning and land use regulation.¹⁵⁵

6. Tribal Investment Partners

The rise of tribal business enterprises has allowed Indian nations to partner with investors on a wide variety of commercial activity. Many Indian nations contract with gaming management companies to operate Indian gaming facilities, as provided for and governed by the Indian Gaming Regulatory Act.¹⁵⁶ Tribes have also invested in business operations all over the world.¹⁵⁷ The contracts between tribes and their business partners occasionally provide

151. See CAROLE GOLDBERG & HEATHER VALDEZ, LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 18–37, 113–73 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf> (discussing the prevalence and effectiveness of cooperative and cross-deputization agreements within Public Law 280 states); Matthew L.M. Fletcher et al., *Indian Country Law Enforcement and Cooperative Public Safety Agreements*, 89 MICH. B.J. 42 (2010) (detailing public safety cooperative and cross-deputization agreements within Michigan).

152. Tribal clinics located in small, rural communities may choose to extend care to non-tribal members. Often, this care is extended to non-Indian women pregnant with the child of a tribal member, or nonmembers living in a home where the head of the household is a tribal member, such as step children. *E.g.* SILETZ TRIBAL HEALTH DEP'T, CONTRACT HEALTH SERVICE (CHS) USERS GUIDE 2, http://www.ctsi.nsn.us/uploads/downloads/Clinic/Contract_Health_User_Guide.pdf; ALASKA NATIVE MED. CTR., ELIGIBILITY TO RECEIVE DIRECT HEALTH SERVICES AT ANMC POLICY # 703E, at 2–3, <http://anmc.org/files/703E.pdf> (last visited Apr. 2, 2017). Any tribal clinic operated under a block contract grant for IHS services may only serve tribal members or descendants. INDIAN HEALTH SERV. INDIAN HEALTH MANUAL § 2-1.2, https://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_pc_p2c1#2-1.1 (last visited Apr. 2, 2017).

153. *E.g.*, Lac du Flambeau Animal Control Ordinance, LAC DU FLAMBEAU TRIBAL ORDINANCES, ch. 50 (2007); Animal Control, PASCUA YAQUI REGULATORY CODE, pt. VI, ch. 6-1 (2016), http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/ (follow “Ch 6-1 Animal Control”); UTE INDIAN ANIMAL CONTROL CODE, tit. IX (1988).

154. NAT'L COOPERATIVE HIGHWAY RESEARCH PROGRAM, TRIBAL TRANS. PROGRAMS: A SYNTHESIS OF HIGHWAY PRACTICE 93 (2007).

155. The Supreme Court, however, has made it decidedly more difficult for tribes to control zoning within their reservations. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

156. 25 U.S.C. §§ 2701–21 (2012).

157. For example, the Seminole Tribe of Florida owns the Hard Rock brand of cafes, hotels, and casinos. *Seminole Ownership*, HARD ROCK, <http://www.hardrock.com/corporate/ownership.aspx> (last visited Apr. 2, 2017).

for tribal court jurisdiction over disputes, and almost always require tribal business partners to comply with relevant tribal laws.¹⁵⁸

Millions of nonmembers access the tribal market in some manner, from employment to gaming to contracting. In each of those arrangements, nonmembers have expressly or impliedly consented to tribal laws in some form or another. These nonmembers are on Indian lands for only two fundamental reasons—either they have family relationships with tribal members¹⁵⁹ or they have bargained in some way to access the tribal commercial market.

B. Normalizing Tribal Civil Jurisdiction

On Indian lands, where tribal governance authority is at its zenith, nonmembers have voluntarily entered tribal jurisdiction. At one time, the Supreme Court stated that tribal civil jurisdiction over nonmembers in such circumstances was “presumptive.”¹⁶⁰ Later, the Court backed away from that statement, suggesting that tribal civil jurisdiction is an “open question.”¹⁶¹ Nevertheless, the long history of tribal jurisdiction over nonmembers where nonmembers bargain for access to tribal markets, continuing with the millions of nonmembers who voluntarily enter tribal markets today, supports presumptive tribal civil jurisdiction over nonmembers.

Nonconsenting nonmembers that object to tribal court jurisdiction after accessing the tribal market are rare. Given the sheer numbers of nonmembers expressly or implicitly consenting on any given day to tribal jurisdiction, the small number of tribal and federal court challenges to tribal jurisdiction indicates the rarity of nonconsenting nonmembers. Nonconsenting nonmembers are outliers.

C. Land Ownership

Indian lands, as we have used that term in this Article, constitute the core of tribal territorial authority. Indian nations retain the power of exclusion on Indian lands.¹⁶² The power to exclude, the Supreme Court has held,

158. The dispute over tribal court jurisdiction in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, for example, involved fairly standard lease documents wherein the nonmember company agreed to comply with tribal laws. J. App. at 45, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496), 2015 WL 5139328.

159. See, e.g., Motion for Leave to File Brief Amici Curiae of the Rosebud Sioux Tribe et al. at *10 n.3, *Duro v. Reina*, 495 U.S. 676 (1990) (No. 88-6546) (noting the prevalence of intermarriage between members of different tribes, up to seventy percent in some cases).

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

161. *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001) (“We leave open the question of tribal-court jurisdiction over nonmember defendants in general.”).

162. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

also includes the concomitant power to impose conditions on those that enter Indian lands.¹⁶³ In recent tribal jurisdiction cases, the Court has also stated that land ownership is an important, if not dispositive, factor in determining whether tribes may assert jurisdiction over nonmember activities.¹⁶⁴

Indian lands are where most tribal commercial activity takes place. Tribal natural resources and other fixed assets are located on Indian lands. Tribal entertainment and tourism industries are located on Indian lands. Individual tribal members also live and work there and are a customer base for nonmember owned businesses located on Indian lands. Outside of intimate personal relationships, the only reason for nonmembers to enter and stay on Indian lands is to access tribal commercial markets.

Indian lands are also where state jurisdiction is most limited. Unless clearly expressed congressional intent to the contrary exists, states have no regulatory authority on Indian lands.¹⁶⁵ States may tax nonmember activities,¹⁶⁶ and state courts are open to on-reservation civil disputes in states governed by Public Law 280,¹⁶⁷ but that is the extent of state civil jurisdiction on Indian lands. The absence of state regulatory authority on Indian lands promotes tribal commercial activities by allowing tribal governments to be more flexible with their own regulations and to craft regulations to encourage nonmember businesses to relocate and expand onto Indian lands.

Finally, Indian lands are what remain of Indian homelands.¹⁶⁸ The bleak history of American Indian affairs has meant the dispossession of the vast

163. *Id.* at 144 (“Nonmembers who lawfully enter tribal lands remain subject to the tribe’s power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation.”).

164. *Hicks*, 533 U.S. at 360 (“The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is ‘necessary to protect tribal self-government or to control internal relations.’ It may sometimes be a dispositive factor.” (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981))).

165. *See, e.g.*, *South Dakota v. Bourland*, 508 U.S. 649 (1993); *Bryan v. Itasca Cty.*, 426 U.S. 373 (1976).

166. *See* Nathan Quigley, *Defining the Contours of the Infringement Test in Cases Involving the State Taxation of Non-Indians a Half-Century After Williams v. Lee*, 1 AM. INDIAN L.J. 147 (2012) (detailing the various permutations of a state’s ability to tax non-Indians within Indian lands).

167. Public Law 280 is the most egregious form of state control on Indian laws. In 1953, Public Law 83-280 was passed, granting states mandatory criminal jurisdiction over almost all the Indian reservations in six states: California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska (Alaska was added in 1959). *Id.* The law also left open the option for additional states to take jurisdiction. *See generally* CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997). In contrast, the transfer of civil jurisdiction in these states was more nuanced and “primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes,” and was held to necessarily exclude state power to tax tribal members. *Bryan*, 426 U.S. at 383.

168. In addition to being one of the biggest spaces for tribal commercial possibilities, Indian land often holds a deep connection to the spiritual, mental, and physical health of tribal members.

majority of Indian resources, usually with little to no compensation.¹⁶⁹ Even reservations are sometimes inundated with nonmembers as a result of allotment and similar federal initiatives,¹⁷⁰ usually imposed on Indian nations without their consent. For many Indian nations, reservation and trust land is the last remaining asset the tribe owns and controls.

IV. CONCLUSION

The modern tribal market is not the market of the nineteenth century, with multiple nations and their citizens converging on Indian country to exploit untapped natural resources of Indian lands. The modern tribal market still includes natural resource development but now with tribal control. The modern market is otherwise dominated by economic growth arising from enhanced tribal governance activities and a multi-billion dollar entertainment and tourism industry. Nonmembers still flock to Indian lands for commercial purposes, but they now do so in accordance with the laws of Indian nations.

Nonmembers that object to tribal laws and jurisdiction are true outliers that demand access to the tribal market without giving anything in return. Indian nations are willing to allow nonmembers access to the market, but nonmembers must comply with tribal laws. Tribes retain the inherent sovereignty to deny access to their commercial markets to those nonmembers unwilling to be subjected to tribal jurisdiction. Tribes that have been subject to thorough political and economic domination by outsider forces, usually advanced by the federal government, are often slow to realize and enforce the closing of tribal markets to specific individuals. The twentieth century saw a plummet in the number of tribes formally regulating nonmember activities, until recently giving nonmembers the mistaken impression that access to the tribal market is free. Like access to any market—formal, under the table, sovereign controlled, or voluntary—it is not.

169. *See, e.g.*, JEFFREY OSTLER, *THE LAKOTAS AND THE BLACK HILLS: THE STRUGGLE FOR SACRED GROUND* (2010).

170. *See supra* notes 122–127 and accompanying text.

APPENDIX: REPRESENTATIVE OKLAHOMA INDIAN NATIONS' LAWS
GOVERNING NONCITIZENS

Several Oklahoma Indian nations enacted statutes pursuant to its tribal authority to govern the entrance, residence, and activities of noncitizens on tribal land. The Table below contains representative examples of tribal statutes that constitute what was then loosely referred to as the “permit system.” In large part, the tribes themselves enforced the laws from the 1830s until the 1880s and 1890s, when the sheer number of noncitizens in violation of tribal laws overwhelmed tribal law enforcement capacity. The United States failed to adequately assist the tribes, and in 1898 the federal government stripped several tribes of their justice systems.¹⁷¹

Tribal Law	Relevant Statutory Language	Source
<p>1836 Choctaw Nation Law Governing Employment</p> <p>In 1836, the Choctaw Nation enacted a statute regulating both the residence and employment of “white citizens of the United States,” requiring them to obtain a permit from either the principal chief of the Nation or the United States Agent.</p>	<p><i>Sec. 7. Be it enacted by the General Council of the Choctaw Nation assembled, That all white citizens of the United States wishing to remain in the Nation under employ of any person, citizen of the Choctaw Nation, may do so by procuring permission in writing from the Chief or United States Agent. But should any person, citizen of this Nation, receive any white man into his employ, not having the regular permission to remain in the Nation, and should such white man commit any depredation, or run away with any property belonging to the Nation, the person so employing shall pay all damages, and make good to the person or persons for property so stolen or injury sustained. Approved, October 8, 1836.</i></p>	<p>Act of Oct. 8, 1836 § 7, <i>reprinted in</i> CONST. & LAWS OF THE CHOCTAW NATION, TOGETHER WITH THE TREATIES OF 1855, 1865 AND 1866, at 72 (1869).</p>
<p>1868 Chickasaw Nation Law Governing Employment</p> <p>In 1868, the Chickasaw Nation enacted a law requiring registration of “white men” for hiring purposes.</p>	<p><i>Be it enacted by the Legislature of the Chickasaw Nation: That section first of An Act entitled ‘An Act in relation to hiring white men,’ be and the same is hereby amended so as to substitute ‘County Clerks’ of the several counties in the Nation, instead of the National Secretary. Be it further enacted: That the clerk shall receive from the white man, registered, one dollar, for which the clerk shall give his certificate to the white man so registered, which receipt shall be good evidence to the officers that said white man has been registered according to law.</i></p>	<p>Act of Sept. 24, 1868 ch. XLIX, <i>reprinted in</i> GENERAL LAWS OF THE LEGISLATURE OF THE CHICKASAW NATION, at 28 (1867, 1868, 1869 & 1870).</p>

171. Curtis Act, Pub. L. No. 55-517, 30 Stat. 495 (1898).

<p>1885 Sac and Fox Nation Law Governing Employment and Rental</p> <p>In 1885, the Sac and Fox Nation enacted a comprehensive law governing the employment of “Non-Citizens” or rental of real property to “Non-Citizens.”</p>	<p>Sec. 15. Any Citizen of this Nation who may desire to employ, for one month, or more, or rent to a citizen of the United States, shall be required to obtain a permit for that purpose from the Sac and Fox Executive Council, and be approved by the Indian Agent, and the Indian Office at Washington. [¶] Sec. 16. Any citizen of this Nation who may desire to employ or rent to a non-citizen Indian, shall be required to obtain a permit for that purpose from the Sac and Fox Executive Council, and be approved by the Indian Agent. [¶] Sec. 17. For all such permits granted, the National Secretary shall require of the person obtaining it one dollar for every month or fraction more than a month for which it is granted. He shall report to the Treasurer at the end of each quarter, and turn over to him all of the receipts that may come into his hands for the quarter then ending. [¶] Sec. 18. After the expiration of the time of the permits, such persons shall be deemed an intruder, and it is made the duty of the Prosecuting Attorney to report the same to the Indian Agent. [¶] Sec. 19. Any citizen of this Nation who shall hire or employ any citizen of the United States, or non-citizen Indian, in any other manner than as provided in the first and second sections of this article, shall be deemed guilty of a misdemeanor, and, upon conviction, be fined in any sum not less than twenty-five nor exceeding fifty dollars, at the discretion of the court. [¶] Sec. 20. That any person fined at any time, upon the Sac and Fox reservation, not a citizen of the Nation, or a United States officer or employee, and not having a permit from the Executive Council, and paid or the same according to law, shall be ejected from the reservation as the law directs in other cases.</p>	<p>Employment of Non-Citizens, Laws of the Sac and Fox Nation ch. 2, art. V, reprinted in CONST. AND LAWS OF THE SAC AND FOX NATION (1975).</p>
<p>1867 Muscogee (Creek) Nation Law Licensing Traders</p> <p>In 1867, the Muscogee (Creek) Nation enacted a law requiring traders to pay license fees to the tribal government for each trading house operating on the reservation.</p>	<p><i>Be it further enacted,</i> That all licensed traders settling in this Nation shall pay a tax of one hundred dollars (\$100) for each and every trading house.</p>	<p>CIV. CODE OF LAWS § 10, reprinted in CONST. AND CIV. AND CRIM. CODE OF THE MUSKOGEE NATION 11 (1867).</p>

<p>1849 Choctaw Nation Law Barring “White Men” from Raising Stock</p> <p>In 1849, the Choctaw Nation enacted a law barring “white men” from raising stock within reservation boundaries unless they were married to a Choctaw woman.</p>	<p><i>Be it enacted by the General Council of the Choctaw Nation assembled,</i> That from and after the passage of this act, no white man who has not married a native of this Nation shall ever be allowed to raise any stock within the limits of this Nation.</p>	<p>Act of Oct. 10, 1849, § 6, <i>reprinted in</i> CONST. AND LAWS OF THE CHOCTAW NATION, TOGETHER WITH THE TREATIES OF 1855, 1865 AND 1866, at 103 (1869).</p>
<p>1859 Choctaw Law Removing White Men Residing Without a Permit</p> <p>In 1859, the Choctaw Nation provided for the removal of “white men” residing on the reservation without a permit.</p>	<p><i>Be it enacted by the General Council of the Choctaw Nation assembled,</i> That it shall be the special duty of the Sheriff in each county of this Nation, to give prompt and immediate notice to the Governor of this Nation, of all white men, who are residing, or who may reside within the limits of their respective counties, without a license or permit from the proper authorities of this nation. <i>Be it further enacted,</i> That the Governor of this Nation is hereby authorized, and directed to take the necessary steps to cause the removal of all such persons as may be residing here without any license, or permit.</p>	<p>Act of Oct. 17, 1859, <i>reprinted in</i> CONST. AND LAWS OF THE CHOCTAW NATION, TOGETHER WITH THE TREATIES OF 1855, 1865 AND 1866, at 206 (1869).</p>
<p>Nineteenth-Century Osage Laws Requiring Permit for Inter-marriage</p> <p>The Osage Nation constitution provided for the legalization of intermarriage with white men only after the completion of a detailed procedure for the procurement of a license.</p>	<p><i>To Legalize Inter-marriage with White Men. . .</i> Whereas the peace and prosperity of the Osage people require that, in the enforcement of the laws, jurisdiction of the civil laws should be exercised over all persons whatever, who may, from time to time, be privileged to reside within the limits of the Osage Nation: therefore, any white man or citizen of the United States, who may hereafter come into the country to marry an Osage woman, shall first be required to make known his intentions to the National Council by applying for a license, and such license may, under the authority of the National Council, be issued by the clerk thereof; any person so obtaining a license shall pay to the clerk, the sum of twenty dollars (\$20.00) for such license, and take an oath to support the Constitution and abide by the laws of the Osage Nation; which oath may be administered by the President of the National Council, or the Clerk of the body, authorized for that purpose, and it shall be the duty of the Clerk to record the same in the Journals of the National Council. But if any such white man, or citizen of the United States, shall refuse to subscribe to the oath, he shall not be entitled to the rights of citizenship, and shall forthwith be removed without the limits of the Osage Nation as an intruder.</p>	<p>CONST. OF THE OSAGE NATION, art. IX, § 1, <i>reprinted in</i> TREATIES AND LAWS OF THE OSAGE NATION, AS PASSED TO NOV. 26, 1890, at 90 (1895).</p>

