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FACETS OF SOVEREIGNTY

Institutions that Spur and Institutions that Retard Tribal Development

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Abstract

That so many of their assets continue to be held in governmental trusts under outdated policy rationales creates great difficulty for indigenous peoples. But restoring control of those assets to their rightful owners will impose daunting responsibilities on judiciaries. Exchanging assets for a residual share of returns from a joint venture exposes one to shirking by co-investors. Judiciaries known reliably to penalize those who renege on commitments help investors persuade others to sink complementary assets in promising projects. But a court is an arm of the sovereign. Across history and geography justifiable rulings adverse to sovereigns have so often been honored in the breach that private parties are especially leery of sovereigns as co-investors. To attract assets into its realm a sovereign may thus invest in a reputation for abiding by waivers of sovereign immunity, or rely on a still stronger sovereign to bond its waivers. Reputations arise from observed court successes by aggrieved co-investors when their suits against the sovereign are meritorious. But many tribal reservations are small and poor, have offered few investment opportunities, and hence possess thin legal histories. At the same time, investors are skeptical that courts of more powerful sovereigns such as Canada and the United States dependably bond tribal waivers. Thus tribes often must pay investors high risk-premiums, resort to costly tribal ownership, or even forego promising opportunities altogether. The Sovereign's Paradox refers to the difficulty that an entity with power to compel involuntary outcomes has in negotiating voluntary ones. This chapter explores ways to ameliorate that Paradox and thus improve returns from reservation assets.

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FACETS OF SOVEREIGNTY

Institutions that Spur and Institutions that Retard Tribal Development

An unanticipated landmass thwarted Columbus's search for a westward route to the Orient. Instead of Hindi—Indians as Columbus understood the term—he encountered an unrelated people but mistook them for the same. From surviving and reconstructed evidence the American Indians seem an energetic people bearing one of the world's lowest parasite loads (McNeill 1976). At first contact explorers noted that the salmon fishing tribes of the Pacific Northwest were well nourished and remarkably robust in comparison with Europeans of the day (Johnsen 1986). Adult height correlates positively with health, and no later than the nineteenth century the bison-hunting equestrian plains Indians numbered among the world's tallest people (Steckel and Prince 2001; 2003).

What demon's road led from there to today's withered tribal reservations? That Indians now occupy a tiny fraction of their ancestral land was a predictable manifestation of disequilibria in population densities that are still adjusting. Though some land was undeniably seized from tribes without compensation, at other times impressive financial and real resources were placed into accounts held for them—unusual in the history of military displacement of a weaker population.[1] Even those tribes languish. Why?

Those third-world islands could converge economically with their surroundings but for stubborn institutional inertia—the governments of both the United States and Canada treat Indians as less capable than others of properly utilizing their property, even now holding many assets in trust as a failed safeguard. When no relevant external effect ensues, the economist's concept of consumer sovereignty—the title's first facet—forbids challenging individual preferences. An informed Indian who actually preferred unmarketable thorns and succeeded in growing them would not have mismanaged the family plot, no matter the neighbors' opinions. A trustee inattentively permitting that plot to go to thorns is a different matter entirely. Indeed mismanagement of Indian resources is appalling, but bureaucrats rather than individual Indians are implicated.

Taking as given their portfolio of treaty entitlements, marked efficiencies would flow from giving Indians the same rights as their fellow citizens to plan and conduct

[1] Contrast the practice in North America with the so-called ethnic cleansing recently practiced in the Balkans, or the massive compelled population movements during the Soviet Union's early history.

their own lives. By the plain meaning of many treaties, that would require restoring substantial sovereignty to those people both as tribes and as individuals.

But this paper also contains a cautionary note—sovereignty comes in varieties, and some varieties threaten those who might be of the most aid to Indians, potential investors. An offer to limit one's own discretion (i.e., to weaken one's sovereign power) may be necessary to achieve consensual, mutually beneficial undertakings. But making the limitation credible requires a judiciary as sensitive to future opportunities to be gained and lost as to past equities. Correctly or incorrectly, investors are skeptical that courts fully perceive the value of such voluntary limitations when Indian sovereignty is at issue.

I. FALLING BEHIND

In 1492 less than ten percent of the human race occupied the more than thirty percent of the world's habitable land that lies in the Americas. Contrast that with the Eastern Hemisphere. Europe, the sector experiencing the most protracted interaction with America, held more than half again that population on a quarter the area, an unadjusted population density more than six times the American.[2]

As Columbus landed the Indians bore one of the world's lowest parasite loads because sparse populations concentrate too few victims to long maintain epidemics, or unfortunately to induce much immunity. Virulent pathogenic mutations may utterly depopulate originating sites before the nascent disease becomes endemic across a larger region. Indian nutrition was predicated on land-intensive production techniques. Certainly by the time Lewis and Clark passed through, the United States was supporting a robust indigenous population in many locales (Johnsen 1986; Ambrose 1996; Steckel and Prince 2001), a characteristic evading much of Europe until recent decades.

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[2] Beyond excluding Antarctica, no adjustment was made for soil fertility, climate, terrain, infrastructure, or the like. Such adjustments would be meaningless without accounting for contemporaneous economic conditions—rising fiber prices convert desert into high-yield (albeit high cost) irrigated cotton fields, rising grain prices convert open access prairie into demarcated (albeit low-yield) dry-land wheat fields. Falling prices reverse those processes. Even the direction a quality adjustment would move the ratio is unclear, but clearly it did not negate a 6 to 1 unadjusted ratio—population densities have continued to converge to this day. Europe, still on a quarter as much land, now has about eighty-five percent of the population of the Americas, so the intercontinental density ratio, 3.4 to 1, has fallen nearly to half its pre-Columbian level.

The land-intensity:nutrition nexus is empirical—a lower land-to-labor ratio hardly compels lower per capita consumption in a world with capital. A growing human population occupies the world's unchanging area, yet contrary to the dire predictions of the Club of Rome consumption per capita has increased dramatically in nearly every locale over the past several millennia because capital investments have more than compensated for the falling land-to-labor ratio.

It is useful to distinguish physical capital from human capital, and to subdivide human capital into investments such as education that unavoidably die with the possessor versus technology, which often survives. In theory each American might have made the more substantial investment in physical and educational capital as that economy responded to its dearth of labor, or alternatively Europeans could have proven the more avid investors as that economy reacted to a dearth of land. Empirically the latter appears to have been true, but European physical and educational capital, though greater per capita, were inadequate fully to compensate for her land deficiency.

Both as theory and empirics however, the Eastern Hemisphere held a pronounced advantage over America for technological capital, which has public good attributes when it can cheaply be retained through education. Assuming it spreads thoroughly, resources need be expended but once to create a given technology. So a more populous economy innovates at less initial cost per capita and all else equal would predictably be more innovative. It is unsurprising that European technology—crucially European military technology—led the American. One of Columbus's earliest reports to Ferdinand and Isabella foreshadowed impending events through its astonishment at how unskilled at arms the indigenous people were.[3] Given a modern epidemiological

[3] It is remarkable that European technology was not further ahead (Gunderson 1976, 30-32). Many tribes made surprising progress given their limited population and physical capital, and the large intercontinental gap in formal education, archives, and other measurable indices of human capital. "There were some obvious differences … . The Indians did not develop the technology Europeans did with metals and that, more than anything else, accounted for the subjection of the New World to the Old" (Gunderson 1976, 31). Indian "tactics—concealment and surprise, moving fire, envelopment and, when the enemy's ranks were broken, hand-to-hand combat—remained the cardinal features of Native American warfare" and served them well during mobile encounters, especially in forests. But though Indians "were able to maintain and repair firearms … they could not manufacture them, nor could they produce gunpowder. … [T]hey could not withstand onslaughts by European troops equipped with cannon. Instead, they tended to abandon their towns and food supplies rather than to fight for them. On the other hand, the lack of artillery rendered any well designed and garrisoned fort invulnerable to Indian attack if its defenders were not surprised. … [A] prolonged war required a European ally who could provide economic and technical assistance, and sanctuary for families driven from their homes" (Starkey 1998, 167-68).

understanding Columbus would have been even more astonished at how unprepared American immunities were to withstand imported diseases (McNeill 1976).

Contrast that with today's North American tribal reservations.[4] Most American-born progeny of the Eastern Hemisphere are well nourished, even over-nourished, and by definition of modern stature. Reservation residents are notably less well nourished. To a remarkable degree modern medicine has controlled disease within each group, though reservation health lags (Putney, 1980). Substance abuse, often associated with despondence, is more severe among Indians than the general population.[5] In the U.S., reservations cover about one-percent of the nation's geography and those living there account for about one-percent of the population. But most reservation land is located where land values are below the national average. A simple upper-bound estimate indicates that quality-adjusted reservation land per capita is at least one-quarter below the average value for all land in the U.S.[6] Only for capital have tribes maintained their forbearers' relative position—they still bring up the rear.

Replicating the off-reservation setting on-reservation requires understanding why the tribes lost those leads they once enjoyed but failed to close gaps when they started behind. That in turn requires reasoning beyond land the tribes lost—nearly all the world's people (including Indians) are materially wealthier today than were their ancestors though land per capita has grown vastly less with human population increase.

Even with no military discrepancy it was inevitable that a lot of land would change hands after 1492. American land had relatively low marginal productivity because there was little indigenous labor and capital to complement it. The Indians

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[4] The situation in much of South and Central America is even grimmer.

[5] "The alcohol abuse problem among American Indians/Alaska Natives appears to be concentrated in the young and the so-called 'heavy drinkers' over 26. Binge drinking rates (drinking five or more drinks on one occasion at least once a month) for youth 12 to 17 are highest for Native Americans (12.8 percent do it, versus 11.9 percent for Whites and 11 percent for Blacks). For Native youth who practice 'heavy alcohol use' (defined as binge drinking five times a month or more), the rate 1999 to 2000 has declined significantly, from 4.6 percent to 2.9 percent (rates were at least twice as high a decade ago). But after 26, the 7.4 percent rate of heavy alcohol users is highest among Native Americans, and is increasing, while most other groups' severe use rates are stable or declining. … For the age group 25 to 34, American Indian males die almost three times more frequently than their non- Indian counterparts from motor vehicle crashes; they are twice as likely to commit suicide; they are seven times more likely to suffer from alcohol-related problems, such as cirrhosis of the liver" (U.S. Department of Health and Human Services 2002, 1). "American Indians and Alaska natives are more likely to smoke than any other group in the United States, with 40 percent of adults defined as smokers, the Centers for Disease Control and Prevention said … Among adults, 25 percent of blacks said they were smokers, compared with nearly 26 percent of whites and 26.5 percent of the population overall" (New York Times 2004)

[6] See Appendix.

were neither ignorant nor even unlucky in having land of such low marginal productivity—high marginal productivity of land is correlated with low marginal productivity of another factor (Haddock and Kiesling 2002; Haddock 2003a, 178-80; 192). European land, more productive per acre but less productive per capita, witnessed peasant poverty, even famine. What geographically differing marginal productivities implied were gains from trade. When shared, both the indigenous and immigrant populations benefited (Anderson and McChesney 1994).

First hunting-and-gathering and then agriculture, both land-intensive, have provided humankind's predominant employments through most of history. That has changed radically in recent decades. As with the rest of the U.S. population, most Indians today would be better employed in pharmacy or engineering or teaching or another line that is much less land intensive. Thus to insist that tribes strive to regain pre-Columbian land-intensities would consign them permanently to an economic backwater. It is capital rather than land that connects growing population with growing wealth. But simply augmenting pecuniary tribal accounts is a stopgap policy at best. Income elasticity for leisure is positive, so exogenous inflows may induce simultaneous consumption increases, production decreases, and eccentric forms of investment—the so-called Spanish Curse.[7] Financial capital is the obverse of physical and (to an extent) technological capital, but along with human and institutional forms it is the physical and technological capital, not merely claims to them, that enhance the opportunities for site-specific resources.

So land loss *per se* does not account for poverty on reservations. Tribal impoverishment arose from two other sources. The one discussed through the remainder of this section is absence of an impartial enforcer of property rights to prevent military capabilities from affecting land negotiations, deleteriously for the Indians. From the early-seventeenth through the late-nineteenth centuries the wealth of first one tribe and then another suffered a dramatic downward shock as immigrant traders and then settlers approached its frontier. The typical first impact was disruption of tribal economies by eastern hemisphere diseases against which the indigenous

[7] The term arises from the long-run deleterious impact on its economy of massive Spanish confiscation of America's precious metals. Spain seemed the wealthiest economy on earth while paying stolen Aztec and Inca gold for imports, but once that lode played out Spain found itself with a depleted domestic productive base. Similar impacts are seen in some Middle Eastern oil exporting countries—consumption of imported goods runs high while imported labor disproportionately supplies local services (Pamuk 2002).

population had no immunity. As a result of transmission from neighboring tribes nearer the coast, such epidemics often preceded a tribe's first contact with the immigrant population. The perception of the immigrants was consequently that the interior was even more sparsely populated than it recently had been. The already low marginal product of Indian land was further reduced by the devastation of the complementary labor resource, increasing the readiness of the survivors to part with it and decreasing their willingness to defend it.[8]

Contrary to casual perception, the Crown, colonies, and even private land dealers often paid compensation to tribes that were directly displaced as settlers moved in (see *Johnson v. McIntosh*), a policy that continued after formation of the United States (see *County of Oneida v. Oneida Indian Nation; Oneida Indian Nation v. New York*).[9] But compensation was rarely paid to inland tribes when one from nearer the coast was induced or forced to crowd in on them, a collateral displacement that, like the preliminary impact of epidemics among the Indians, often went completely unrecognized by policy makers. By revealed preference the compensation paid even to the initial movers must have been inadequate judging from frequent resistance. As a result many of today's Indians begin life shadowed by a history of puny shares of the gains from the land trade. Kuwaitis make few non-financial investments because their permanent income was shocked upward so dramatically by oil; Indians make few investments of any sort because their permanent income was shocked sharply downward by displacement.

The oft-told story of the Cherokee forced along the Trail of Tears illustrates. In the middle of the eighteenth century the Cherokee occupied most of western Virginia Colony, which included today's Kentucky and West Virginia, most of the western parts

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[8] See Haddock and Kiesling (2002) for a detailed discussion of the relevant economic theory, albeit in the context of the Black Death that afflicted the eastern hemisphere beginning in 1347.

[9] [E]ndeavor to impress the Indians with an idea of the generosity of our disposition to accommodate them, and with the necessity we are under, of providing for our Warriors, our Young People who are growing up, and strangers who are coming from other countries to live among us … [P]oint very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape.

George Washington to James Duane
7 September 1783
(Purcha 1990, 2)

of both Carolinas, including Tennessee, and north Georgia as far as Alabama (Martin 2001).[10] During the Revolutionary War the Cherokee allied with the established government against the ultimately victorious rebels, and peace negotiations between the belligerents in 1785 resulted in the Cherokee relinquishing substantial territory and agreeing to become a protectorate.[11] In exchange the U.S categorically recognized the new border separating the two nations (Prucha 1990, 6-8).

But in 1803 President Jefferson first raised the possibility of removing all eastern tribes, including the Cherokee, to land beyond the Mississippi River where French territorial claims had recently been transferred to the United States as a result of the Louisiana Purchase. That land, of course, was already occupied by a number of other tribes such as the Kiowa, Osage, Kansa, Cheyenne, and Dakota. Across more than two decades the Cherokee resisted removal from a shrinking redoubt centered in the north Georgia mountains, yielding most of their Hopewell territory via subsequent treaties signed under duress. Now whites were illegally mining gold even there.

After a major strike near Dahlonega in 1827 Georgia's legislature declared the Cherokee Nation dissolved.[12] Georgia's militia prevented the Cherokee Council from even convening at New Echota, their capital—they defiantly met across the Tennessee border instead. The state apportioned the reservation among several counties and granted the land to white Land Lottery and Gold Lottery winners (Wishart and Hanson 2003).

Rather than going to war, the tribe went to the U.S. Supreme Court, demanding treaty enforcement. Writing for the Court, Chief Justice Marshall ruled that

> If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. … [But the] third article of the constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" "between a state or the citizens thereof, and foreign states, citizens, or subjects." … Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution? … [Tribes] may, more

[10] Georgia Colony also included most of today's Mississippi, but Chickasaw warriors kept Mississippi and south Alabama beyond the Cherokee range.

[11] Two years older than the Constitution of the United States, the Treaty of Hopewell was negotiated under the Articles of Confederation. It might seem that protectorate is euphemistic—*inter alia* the tribe was "protected from" potential voluntary dealings with nations other than the U.S.—unless one understands that it was not the tribe but a U.S. monopoly of intercourse with the tribe that was to be protected.

[12] The Dahlonega gold rush was the nation's largest prior to the California strike at Sutter's Mill twenty-one years later. History is silent regarding the Atlanta football club's failure to be named the Twenty-Seveners.

> correctly, perhaps, be denominated domestic dependent nations. … [T]he framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state … and foreign states. … If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.
>
> *Cherokee Nation v. Georgia*

The courts would enforce no Indian treaty rights—even today a tribe must throw itself on the mercy of Congress for that.

Congress had other things in mind for the Cherokee—removal to their sector of an Indian reserve originally envisioned as the entire column of land between the Missouri River in what became South Dakota and the U.S.-Mexican border at the Red River along the southern edge of today's Oklahoma—after 1836 the U.S. border with the Republic of Texas. The Cherokee lost the voice of their vocal champion—Tennessee Congressman Davy Crockett headed west toward immortality at the Alamo after his political career was scuttled by his unpopular protest against treatment of the tribe—and in 1838 the U.S. Army began to force the Cherokee west. Several thousand perished during removal.

Despite the Treaty of Hopewell the U.S. recognized the Cherokee Nation within its ever-shrinking homeland for barely a half-century.[13] Following the Civil War Congress dissolved the geographical borders even of the Cherokee Nation's Indian Territory reservation. Thus, that most civilized of the Five Civilized Tribes, a tribe with a written language, a newspaper, courts and a constitution modeled on that of the U.S., was coerced into a very unfavorable land exchange, a massive diminution of tribal wealth.

The Cherokee experience was part of an accelerating continent-wide process. At the conclusion of the War of 1812 Britain retrenched into Canada leaving the U.S. with no serious competitors for alliance with interior tribes, with a predictable impact on subsequent treaty terms (Starkey 1998, 167-68; Wilkinson and Volkman 1975, 609). Thereafter the U.S. often allied with a band from one tribe against another tribe—even

[13] A minority of the tribe evaded the Army's sweep. Eventually a tiny reservation was formed for them on ancestral land at the verge of the Smoky Mountains where their progeny remain today in and around the appropriately named town of Cherokee, North Carolina.

against another band from the same tribe[14] (Roberts 1993)—but no European nation was prepared to enter a serious alliance with a tribe against the United States. A half-century later the massive human capital and infrastructure that had been specialized to contesting the Civil War proved difficult to reintegrate into the post-war U.S. economy. For the first time the U.S. was left with a large standing army in peacetime (Anderson and McChesney 1994). By decreasing the United States' cost of fighting Indians, that otherwise idle force increased the plight of the tribes. In 1871 Congress decreed that

> Hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.
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> 16 Stat. 544, 566

Treaty making with Indians was at an end (Getches, Wilkinson, and Williams 1993, 179), and on Sept. 3, 1886 the last free Indians were summarily herded into confinement.

But being dragged behind does not require staying behind. Regression-to-the-mean is a common social process—those pushed behind (or ahead) tend to converge toward the mean over time, while non-systematic shocks jolt new individuals away. For comparison, though African-Americans remain less wealthy than average the gap has continued to close since abolition. The failure of reservation Indians to converge as rapidly—the second source of their impoverishment—is manmade, legal constraints on Indians' management of their residual assets. We now discuss that chronic, festering problem, point to subtle pitfalls that sabotage well-meaning but naïve efforts by the U.S. courts to rectify it, then suggest a self-help initiative that tribes could adopt that would make involvement of the national court system unnecessary.

II. STAYING BEHIND

Early U.S. policy sometimes benefited Indians, as by buffering reciprocal threats distinct populations posed for each other, but that was incidental to an intended benefit for U.S. citizens.[15] Many reservations, especially in the western U.S., began as prisoner

[14] Debo (1970, 278) claims that, except for officers, the force that inflicted the final defeat on Geronimo's band consisted entirely of Apache scouts. Though other sources contend that U.S. troopers were involved, mention of the significant role played by Apache scouts is ubiquitous. For instance, see Sharp (2002).

[15] Few Indians held U.S. citizenship before passage of the Citizenship Act of 1924.

of war camps confining entire populations, young and old, male and female. Before firing a single shot the Nez Perce tragically discovered that refusing to vacate ones homeland for some unfamiliar locale, then, resistance having failed, trying to emigrate peaceably to an allied tribe's reservation or to Canada as preferred alternatives would make an enemy of the U.S. A few Nez Perce children who saw their people lend crucial aid to Lewis and Clark during the fall of 1805 and again in the spring of 1806 were poorly repaid as elders in 1877, forced to abandon their homeland to gold miners and settlers (Debo 1970, 101-02, 261-64; Ambrose 1996, 292-301, 353-70; Greene 2000). Eventually bureaucratic drive for uniformity led even those tribes who have never fought against the U.S. to be treated in much the same way (*United States v. Sandoval*).

From there popular perception of tribal reservations gradually eroded from a slanderous, nightmarish vision of concentration camps for dangerous and cunning foes capable of almost anything to an even less complimentary one of wasted ghettos for the lethargic and apathetic underemployed capable of almost nothing. Both visions have motivated policy that has been injurious to Indians, the former through actions that closely confined Indians geographically, the latter through policies that continue even now to limit Indians' economic decisionmaking as though they are mental incompetents. Anachronistic constraints on resource utilization translate into poor incentives for investment in physical, human, technological, or institutional capital, as reflected by abrupt differences between encumbered and adjacent unencumbered land (Anderson and Lueck 1992). A proud and energetic people have been brought low.

Careful observers distinguish top-down policies from bottom-up institutions. Bottom-up institutions arise organically when people learn to deal with whatever problems and incentives they themselves face on a day-to-day basis. Though unlikely to be perfect, such institutions have a close association with the matters addressed and thus with common life.[16] Top-down policies originate in the mind of authorities who use the policies to govern the lives of others. Sometimes that seems the only way to attack some problem. But policy makers may be remote, have private interests that are largely or totally unaffected by their policies, and be shielded from or indifferent to reverse information flows regarding policy impacts. Then there is little reason to expect the policies to improve common life, though they may interfere with initiatives that

[16] Perfect (albeit hypothetical) institutions are called Nirvana efficient, while optimal institutions merely beat realistic alternatives (Demsetz 1969).

would. Indeed policy makers sometimes have private interests that run counter to what would appear to the public to be their obligations, and then there is good reason to expect policies that degrade common life (McChesney 1990; 1997).

Much like our present Iraq policy, U.S. Indian policies are top-down manifests issuing from geographically remote bureaucrats whose private interests lie elsewhere, and who often seem quite insulated from information regarding policy failures at ground zero. On-going litigation hints that many bureaucrats employed by the main trustee of Indian resources, the Interior Department's Bureau of Indian Affairs (BIA), hardly care.[17]

One need not even reach the question of whether Indian forbearers deserved to be treated as POWs or were incapable of coping with a modern world into which they had unceremoniously been thrust. That happened generations ago, a period that has proven easily adequate for Norway (as just one example) to transform itself from an impoverished land of semi-literate peasants into one of the most modern of nations. Though they have little desire to lose their tribal identity, Indians who continue to reside on reservations despite the manifest economic hardships would like to be placed on a comparable legal footing with their fellow citizens.

How might a transition be made that preserves distinct Indian cultures and treaty entitlements? One of the most promising routes would unfetter individual Indians where purely personal affairs are concerned by removing the BIA as trustee over individual entitlements, a transfer accompanied by limited constraints on asset

[17] "U.S. District Judge Royce C. Lamberth … is presiding over a lawsuit filed five years ago [now nearly eight] by [Blackfeet] Indians who contend they are owed up to $10 billion because of chronic accounting failures [by the BIA]. He ordered the Interior Department to repair the system in a December 1999 ruling that detailed a history of incompetence and neglect. … At a hearing [two years later], Lamberth said it wasn't clear to him who was even in charge of trust reform efforts. … [The then Secretary of the Interior] Babbitt launched his own reorganization in 1999 … . Despite those efforts, the Interior Department still can't provide an accurate accounting of trust assets for account-holders. … [The subsequent Secretary of the Interior] Norton's plan, which came after a management consultant's study, takes the BIA out of trust fund management and shifts those duties to [a] new office. But many of the BIA employees now involved … will move to the new office, Norton said. … [A] lawyer for the Indians, likened the planned changes to 'rearranging the deck chairs on the Titanic'" (Miller 2001). See *Cobell v. Norton*. Unfortunately, Indian asset mismanagement is not the great aberration that has been exposed by this case—that the media have only recently become intently interested in what has since the 1800s been gross mismanagement is the greater aberration. The Soviet Union could well and truly have been characterized as a new and improved model of the U.S. bureaucracy that has handled Indian affairs since the nineteenth century.

alienability if the tribe decided by vote that such a policy would protect their culture.[18] Unfortunately that route has barely been exploited. A mutually compatible route would devolve governance over local matters to tribes, though care must be taken that the tribal government is truly representative of individual Indians. Some movement has occurred along that line as Congress and the courts gradually strengthen the sovereignty of tribal governments.[19]

III. Sovereignty

Sovereignty is an ambiguous term, two incisive definitions being "supreme in power; superior in position to all others" and less grandly "independent of, and unlimited by, any other; possessing … original and independent authority" (Webster 1960). Analogously, a sovereign can mean "chief of state" or "[s]elf-governing, independent" (American Heritage 1976). Supreme in power and chief of state clearly imply a government-subject relationship. But while self-governing, independent of, and unlimited by any other precludes any higher authority, it is silent regarding subordinate ones, and might apply to an individual living in anarchy. Thus the one meaning implies a sovereign who can demand allegiance from somebody, but the alternative requires only that nobody can demand subservience from a sovereign.

Sovereigns of the former type certainly existed in some pre-contact locales. As in the Eastern Hemisphere at the same time, Mayan princes boastfully recorded wars they won as well as the frequently dreadful aftermath. At first contact the Aztec and Inca ruled states of a sort very familiar to Europeans. Indeed, Inca is not the name of a

[18] Removing the BIA as trustee for individual entitlements could hardly fail to improve asset management. That being accomplished, the tribe might then vote, for instance, to permit alienation of each member's land only to another member of the tribe (McChesney 1990). If excluding some potential purchasers decreased land value, a tribal majority and not the BIA would have decided that the subjective benefit exceeded the objective cost. But if tribal culture is a valuable amenity attaching to the land, the restriction would increase the value to members of any given plot. It is an empirical question which of those influences would dominate and thus whether reservation land would sell for more or for less. On Canadian reserves Indian residents who hold Certificates of Possession are indeed permitted to alienate their rights only to other members of the tribe (Flanagan and Alcantara 20xx). The restriction of alienation on those reserves, however, seems to be required by Canadian law rather than being an option that a willing tribe may select if it chooses. On efficient treatment of an amenity that affects site value see Haddock (2003b).

[19] Some consider the Indian Reorganization Act of 1934 to be a major benchmark in the growth of tribal sovereignty, though others point to the resulting stubborn increase in BIA intrusion into tribal affairs (McChesney 1990). One might instead date the process from 1959 when *Williams v. Lee* was handed down, or even from the Indian Self-Determination and Education Act of 1975 (88 Stat. 2203).

tribe or language as is commonly supposed—a proper Quechuan translation is king or emperor.[20] As Conquistadors arrived in South America one Inca governed a northern empire from a capital at Quito while another governed the southern part from Cuzco. In the more densely populated parts of what became the United States pre-contact hierarchical structures with governmental authority over subjects also had evolved, perhaps the most widely-remembered being the Haudenosaunee (or Iroquois) Confederacy.[21]

But tribe implies a group of people sharing a language and culture, with or without a government (Anderson 1995), and sometimes the latter definition of sovereignty—independent, self-governing individuals unlimited by any other—would have been appropriate. The Europeans often focused entreaties on some persuasive Indian capable frequently of convincing a number of fellows to cooperate in various undertakings, but in many tribes no person or assembly was considered by members to wield institutionalized coercive authority over dissenters.

The Chiricahua for instance "had no formal leader such as a tribal chief, or council, nor a decision making process. The core of the band was … predominantly, but not necessarily, kinsmen" (Crystal 2003). Cochise led a band of at-will volunteers, not a troop of conscripts. Formerly allied Apaches sometimes made war on each other while erstwhile enemies might ally against a common foe (Roberts1993). The Lewis and Clark Expedition inadvertently sparked antagonism when they inferred that the apparent leader of one small Nez Perce band was a paramount chief with sway over another small band (Ambrose 1996, 361-62). That is reminiscent of saga era Iceland (Njal's Saga 2001; Friedman 1979) and Norway (Egil's Saga 1975) or today's Kung (Marshall 1959), not of government. As with the individual sovereignty of consumers, those people were individual political sovereigns, but hardly governments.

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[20] Analogous usage would have one calling all Russians Czars, or all the Zulu Impi. Both the Aztec and the Inca (and the Czars and Impi for that matter) ruled states rather than tribes in that in each instance peoples of several languages and cultures had been incorporated under central authority.

[21] The Confederacy formed either in 1142 or 1451, either date pre-Columbian. The three century plus margin of error arises from oral tradition that the Seneca, the last of the pre-contact members to join, became persuaded to adopt the Great Law of Peace when a solar eclipse interrupted a tense afternoon of negotiation at a known site. A total eclipse would have occurred there on August 31, 1142 and a substantial but partial eclipse on June 28, 1451. It is clear from European records that a Haudenosaunee government functioned in the early 1500s at first contact. The Confederacy still spans the New York-Ontario border, consisting of the pre-contact member tribes—Cayuga, Mohawk, Oneida, Onondaga, and Seneca—as well as the Tuscarora who joined circa 1700 (Mann & Fields 1997; Johansen 1995).

Once rare, governments had engulfed Europe by 1492, so throughout our colonial and national history the Crown, Congress, and the courts have analogized tribes to those institutions with which they were familiar. With the Apache as with the Iroquois, some sort of governmental tribal council has been assumed and tribal members have been taken to be bound by council decisions and to shoulder whatever burdens result. Such a government's power can be enhanced via distinct routes that are different in important ways—at the expense of the national government, at the expense of the government of the state or states that overlap the tribe geographically, or at the expense of private parties—whether Indian or non-Indian—who have or might form interests on the reservation. Increasing any sovereign power may well afford benefits but will surely impose costs, and thus may either appreciate or depreciate the circumstances that face citizens (Barzel 1992; Haddock and Hall 1983; Haddock 1998). When permitted by courts, a wise and benevolent government would seek to exploit its sovereign power if and when benefits exceed costs, and to control the costs of all forms.

The several facets of sovereignty remain blurred unless one distinguishes non-consensual constraints that were imposed on sovereigns by more powerful ones from constraints that a sovereign or subject assumes willingly in order to draw corresponding commitments (i.e., constraints on the sovereignty of the other). Every tribe could point to past inequities to rationalize policies that disappoint particular individuals. But that is hazardous with consensual interactions, where cooperation will be rare if unprincipled tribal sovereignty is feared. An investor who simply forgoes on-reservation opportunities avoids tribal policy easily and at low cost though substantial opportunity costs are thus imposed on residents holding site-specific complementary resources. Emerging tribes endeavoring to form good reputations can more easily calm investor fear if courts, both tribal and federal, will help insure the *ex post* veracity of *ex ante* tribal proclamations, as courts do for other citizens. Profligate use of a first mover's power more easily injures other tribes than investors. If courts neglect that danger they could trap some tribes in a prisoner's dilemma where the best choice becomes prompt over-exploitation of tribal power (Haddock 1994). Just a few bad examples might easily convince many potential investors that all tribes are untrustworthy.

Yielding sovereignty implies increasing constraints in one of several distinct ways. (1) For instance, when William the Conqueror seized power from King Harold dominion was gained by the one and *ipso facto* lost by the other. Harold would have been displeased by the expectation and (had he survived) by its realization, wishing that

someone could halt William's incursion at Hastings. (2) William, hoping to retain the loyalty of his Norman lieutenants, granted them limited sovereignty over parts of his new realm by disenfranchising Saxon lords. The newly created Norman lords were sovereign over their serfs and the lesser nobles below them in the feudal estate, but at the same time subjects of William. William expected both he and his lieutenants would be advantaged. But the displaced Saxons must surely have rued the day both *ex ante* and *ex post*, wishing that some still higher authority had forbidden William's expropriations. (3) Saxon peasants limited their future options in exchange for Norman or Saxon merchants limiting their present options, as by obtaining food during famine with an offer to repay with interest once yields recovered. Survivors would be advantaged *ex post* by avoiding repayment, but in sharp distinction to the two earlier examples disadvantaged *ex ante* were that anticipated, for then merchants would predictably provision only those who could pay spot prices. Merchant injury would be reduced if provisions could be sold where no similar threat existed. Every famished peasant would ardently vow to repay, but after the famine had passed an unscrupulous peasant's incentive would be to disavow the promise. The peasants' loss of sovereignty would be beneficial *ex ante*—their problem would be making it credible so as to avoid starvation.

With respect to tribal governments, analogues are (1) unilateral extension of authority over Indians by the United States government, (2) delegation of a part of that authority to state governments, and (3) tribal members or governments dealings with investors, whether Indian or not. There is reason to think that tribes were disadvantaged by involuntarily yielding sovereignty to the U.S. and might benefit by recapturing it. State governments typically exchange little if anything, at least directly, for the limited sovereignty over the tribes that is granted them by the national government. Tribes might benefit by recapturing that. But non-fraudulent voluntary agreements between a tribe and either a private party or a state are mutually beneficial *ex ante*. If the long-run injury could be confined to untrustworthy tribes and those foolish enough to contract with them, opportunistic interference would be of minor importance. But federal Indian law is a unified whole, investors have difficulty distinguishing among tribes, and thus un-textured deference to Indian sovereignty diminishes credible tribes' reputations as well.

A. Sovereignty Recaptured From the U.S.

If sovereignty is taken to mean independent of and unlimited by any other, no Indians inside U.S. borders have been completely sovereign since Geronimo's dwindling band surrendered in 1886. Like that of William's lieutenants, tribal sovereignty is conditional, whatever the U.S. is prepared to recognize at the moment. In 1831 the Supreme Court characterized tribes not as sovereign nations but as "domestic dependent nations" (*Cherokee Nation v. Georgia*). As governments they were and are able to deal directly with the national government, but certainly not as equals. And they can deal directly and bindingly with any other individual or government—state or foreign—only if and when authorized to do so by the national government.

From *Cherokee Nation v. Georgia* the tribes' plight actually increased.

> The contention [that Congress could not divest tribal lands in violation of treaty terms] in effect ignores the status of the contracting Indians and the relation of dependency that they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress … and to deprive Congress … of all power to act, if the assent of the Indians could not be obtained.
>
> *Lone Wolf v. Hitchcock*

Popular perception is that treaties do indeed "materially limit and qualify the controlling authority of" the signatories. Inter-sovereign dealings often lack an impartial third-party enforcer and as a result ultimately rely on credible threats (Umbeck 1981; Haddock 2003a, 180), but such bald-faced acknowledgment never facilitates treaty negotiations.

A transfer of sovereignty from the United States might well benefit tribes. But to the extent it may seem from time to time to occur it is a mere, readily-withdrawn delegation of authority—sometimes the U.S. government chooses not to intervene in tribal affairs, but it always can. In that sense the tribes are older but nonetheless lesser sovereigns than states. Though the Constitution's Supremacy Clause permits the national government to set aside a great deal of state law there remain reserved rights that protect state action in the absence of a constitutional amendment. *Lone Wolf*, in contrast, grants the national government extraordinary discretion unilaterally to frustrate tribal decisions.

B. Sovereignty Recaptured From States

State sovereignty over tribes would seem a more promising target for the tribes, given the U.S. government's availability as third-party enforcer. A few reservations are

more easily measured in acres than square miles, and it seems unlikely that their sovereignty could be completely disentangled from that of the surrounding state. But at the other extreme sixteen reservations are larger than Rhode Island, ten of them larger than the Canadian province of Prince Edward Island, eight larger than Delaware. The largest reservation, Navajo, approaches New Brunswick's area, is virtually the size of West Virginia, somewhat larger than Nova Scotia, and well over twice the size of any New England state other than Maine. Just as it has long been possible for all those states and provinces to govern themselves rather than lean on geographically larger neighbors, it seems at least plausible that large reservations could similarly stand completely apart from states if U.S. trust authority over Indians were terminated.

In fact, most reservations predate the states that were layered atop them. States attain sovereignty over tribes only to the extent the Congress transfers it to them and retain it only so long as it is not rescinded—the legal default remains that tribes are senior to states. When Congress or courts override the default, empowering both tribe and state independently to regulate or tax a reservation activity, a successive monopoly problem becomes a threat. Removing either authority of either the state or the tribe should lower burdens on individuals but actually increase aggregate regulatory benefit or tax revenue (Machlup and Taber 1960). An alternative is for the U.S. to require those two lesser sovereigns to negotiate with each other, but as tribal gaming illustrates that can lead to substantial rent-seeking dissipation (Johnson 20xx).

With a casino in San Diego County where state law prohibits most gambling, the Barona Reservation's median annual household income now exceeds $100,000, two and one-third times the national average.[22] Just off the Boston-New York City interstate in eastern Connecticut, receipts from Foxwoods, the world's largest casino, enable the Mashantucket Pequot to send all tribal children to private school, one the Pequot saved from insolvency.[23] But most reservations, frequently the most impoverished, are remote with few passers-by. Consequently less than one-third participate in gambling.

> For the majority of tribal governments that do run gambling facilities, the revenues have been modest … . The 20 largest Indian gambling facilities account for 50.5 percent of

[22] *Seminole Tribe v. Butterworth* (1981) and *California v. Cabazon Band of Mission Indians* (1987) are important early cases concerning tribal ability to operate a reservation gaming establishment with less stringent operating limits than are exercised by the surrounding state. Congress quickly acted to affirm those court initiatives, with substantial modification, through the Indian Gaming Regulatory Act of 1988 (18 U.S.C. §§ 1166 et seq.; 25 U.S.C. §§ 2107 et seq.).

[23] {{Track down NYTimes article, or obtain updated info directly from the tribe.}}

> total revenues with the next 85 accounting for [only] 41.2 percent. Additionally, not all gambling facilities are successful. Some tribes operate their casinos at a loss and a few have even been forced to close money-losing facilities.
>
> *National Gambling Impact Study Commission Report*, 2-10

Moreover, states increasingly are threatening to license competing operations in order to extract side payments from the tribe (Johnson 20xx). A once thriving tribal enterprise may find survival increasingly difficult as a result. Beyond question, gaming has proven lucrative for a few tribes, but the bounty is quixotic. Tribes that by pure luck are well situated enjoy very attractive returns while their unlucky brethren languish in poverty. Though ameliorating reservation poverty in individual locales, tribal gambling establishments comprise no panacea.

Much of the rest of the tribe-state record is similarly discouraging. A Court that typically loves competition among private enterprises is skeptical of competition among political enterprises. Thus *Washington v. Confederated Tribes* held that activities on a reservation would be subject to state taxation if a substantial part of the business was motivated by customers' intention to evade the state levy. A state cannot tax a transaction if the reservation-based enterprise can reliably (but expensively) document that the customer is a tribe member.

Thus the Court has outlined an Orwellian form of sovereignty—all sovereigns are equal but some are more equal than others. There is little question that, by bearing the cost of doing so, Indiana can tax liquor brought into the state for local consumption. But imagine the Court informing Illinois that Indiana could tax the entire Illinois retail liquor sector except for those parts that, at substantial cost, Illinois documented were not sold to Hoosiers. Imagine the Court informing North Carolina that New York could tax all its tobacco sales in an analogous way. The Court's reasoning is distinct only in viewing reservations as a part of states that were layered atop them rather than as the more usual default—holes in the states' sovereignty. The import of *Washington v. Confederated Tribes* is that both a reservation and a state can tax a lot of on-reservation sales while only the state can tax off-reservation sales. Single-taxed liquor stores and bars thrive along one side of many reservation borders while double-taxed smoke shops along the opposite side fail.[24]

[24] Belluck (2003) reports on one of a number of recent tribe-state encounters regarding a state's ability to tax sales made on reservations.

Vacillating policy means that even tribal sovereignty retrieved from the states, as in *Montana v. Blackfeet Tribe*, may quickly be lost, as through *Cotton Petroleum v. New Mexico*. The cases were similar in that each plaintiff challenged a state's ability to tax mineral production on tribal reservations. In 1924 Congress permitted nondiscriminatory state taxes on royalties from minerals withdrawn from reservations, but did that power to tax survive subsequent legislation that streamlined leasing of tribal minerals though completely silent regarding state taxes? The Supreme Court's Canons of Construction of Indian Law require that "ambiguous expressions must be resolved in favor of the Indian … and Indian treaties must be liberally construed in [their] favor" (Wilkinson and Volkman 1975, 617). In *Montana v. Blackfeet Tribe* the Court decided the state taxing power could not survive the Canons and thus a state could not tax tribal royalties unless and until Congress reinvigorated the authorization. Sovereignty regained.

Could states tax mineral extraction companies making those severances? In *Cotton Petroleum* the Court held that the reservation hole in state sovereignty was too shallow to shield the companies, who were thus simultaneously subject to both sovereigns. Assuming that states, tribes, companies, and consumers—everyone that is except courts—are interested in average revenue paid and received and the level of output rather than in filamentary legal distinctions, then rudimentary economic theory seems to imply that *Cotton Petroleum* simply unraveled *Blackfeet Tribe*. Each case dealt with the distribution between state and tribe of returns from leasing Indian's mineral rights, but the cases reached diametrically opposing outcomes—*Blackfeet Tribe* implied that states were entitled to no share of economic rents from tribal minerals; *Cotton Petroleum* implied that by using an intermediary the states can tax at whatever rate they decide would maximize state revenue. Sovereignty relost.

That model may be unduly optimistic. Throughout the United States, specialized companies undertake nearly all mineral extraction, hinting that other forms of organization are more costly. Drilling on government land utilizes specialized private companies. Ranchers do not drill their own water wells, much less oil wells; specialized companies do. A tribe-owned company, however, is exempt from state taxes. The incoherence of the cases could result in small-scale and inefficient tribe-owned extractors (Haddock 2002). Every cent of tax a tribe saved would be a cent that a state would not receive, merely a transfer rather than an economic gain, while the

mineral withdrawals would become more costly than withdrawals beyond reservation borders, a waste.

C. Sovereignty Over Voluntary Relationships

> Truth is stranger than fiction … Fiction is obliged to stick to possibilities.
> Mark Twain (1897, ch. 15)

A derisively dismissed fictional account would be greeted with gape-mouthed wonder if gleaned instead from the media or a court record. Events transpiring more or less as usual are not news. News must be extraordinary, from a distribution's tails, the most remarkable aspects of the most remarkably bad or good events. The many normal events that must comprise the bulk of a credible work of fiction are by their nature unremarkable and thus unremarked by the media. The legal record censors data even more severely—social arrangements that work remarkably well are rarely litigated but may be news. Thus things can seem bizarrely risky on a reservation because outsiders ordinarily learn only of aberrational features of a few aberrational happenings, not the many humdrum events that fill out daily reservation life.

But whether or not perceptions are thus unfairly biased against reservations, those perceptions form the environment within which a tribe must seek capital. Indisputably, given enough time a tribe can invest in its reputational capital. But in the meantime many potential investors can afford little research to distinguish among tribes. To them a tribe is a tribe is a tribe. Thus one tribe's investment in reputation benefits hundreds of other tribes, while the cost of another's opportunism spreads across hundreds. Hence the prisoner's dilemma—if all others invest in reputation, a given tribe's most lucrative decision may be to behave opportunistically due to the diluted impact on its own reputation; if no other tribes invest in reputation, the demanded risk premium will be daunting in any case. So a tribe may elect to take what it has paid for, defiling all other tribes' reputations before they have an opportunity to execute the reverse tactic. The judiciary could help defeat that dilemma.

The diversity that might permit a litigant to remove a case to federal court for trial is often useless in cases contesting Indian rights, where remedies at tribal law must often be exhausted before a federal appeal can be lodged. An appellate court readily reverses errors of law but is far more deferential toward trial court findings of fact. In common parlance that means that the trial court's findings do not have to be airtight,

merely supported by substantial evidence though there may be other evidence pointing in the opposite direction. Then litigants will be assumed to have behaved as the trial court perceived, though the appellate court will overrule if the trial court erroneously held that a losing party had no right to behave that way, or that a winning party did have the right to behave as found. If crucial facts have not been found at all the appellate court typically will not find them, but will remand the case to the trial court for further findings of fact. Thus the motivating behavior is rarely an issue on appeal, only its damnability.

Thus tribes are left on the horns of a dilemma: (1) Given the issue and tribe, some tribal courts apply law based on tribal customs and thus unpredictable to non-Indian investors.[25] Admittedly, after exhausting tribal remedies a litigant may sometimes successfully challenge that court's jurisdiction. Then, depending on subject matter jurisdiction the case essentially begins anew in federal district or state court. Courts may treat litigation—in this instance duplicative litigation—and lost time as costless, but investors do not. (2) Due both to animus and statistical discrimination there is a long history of jury, even judicial, bias against Indians in state courts, especially pronounced in states with large Indian populations.[26] Thus, due to a fear of bias, individual Indians and tribes hesitate to form agreements that potentially will require them to litigate before state courts while non-Indian investors resist agreements that may require them to litigate a case under an unfamiliar tribal law.

A widened range of disputes that require exhaustion of tribal remedies mitigates Indians' fear of state courts but exacerbates non-Indians' fear of tribal courts. When litigating outside their reservation Absaroka litigants were long required to employ an unfamiliar English tongue. Though the federal court refused to permit it, many would think it only fair if a railroad were expected to litigate on the reservation before a judge

[25] In some cases the Constitution's Supremacy Clause supplants tribal with federal or even state law, and when there is no tribal law on point some tribes permit their courts to adopt federal law, the law of other tribes, or occasionally state law. Nonetheless the "Supreme Court's mandate to lower federal courts to defer to tribal courts for initial resolution of most reservation disputes has placed increased responsibility on tribal courts … [that] must compete for limited resources with other vitally necessary tribal programs … There is a widespread feeling held by many non-Indians that tribal judges are biased against them. There are also complaints of incompetence, and even corruption in some tribal courts. Tribal traditions of deference to the consensus-building process within the tribe may constrain the process of judicial review of executive and legislative branch actions" (Getches, Wilkinson, and Williams 1993, 522).

[26] {@@Complete the quote and citation from S Ct from about 1896? that "often the deadliest enemies of Indian tribes are the inhabitants of the states where they are located."}

speaking Absaroka (citation). But a tribe cannot deposit fair in the bank. Non-Indians will barely notice if the Absaroka refuse to come off their reservation, but the Absaroka cannot help but recognize that many non-Indian investors refuse to come onto it.

In recognition, many tribes endeavor to meet high ethical standards.[27] Making that known to investors, however, is a long, tedious, expensive process, and even those laudable efforts by individual tribes are thwarted if an opportunistic renegade chooses to make a quick strike, enriching itself while sullying the reputations of Indians as a group.

As with states or the nation itself, tribal governments can only be sued after clearly and expressly waiving sovereign immunity (unless Congress has waived it for them). That demonstrably stops few private parties from dealing with state and national governments, but investors find a larger legal record in those venues and thus find it easier to evaluate the sovereign's reputation (Haddock 1994). Moreover, though every state can borrow from private lenders even on those occasions when it refuses to waive its immunity, due to their poor record some states are regarded as more risky than others and as a consequence pay higher risk premiums. The matter thus is not merely whether a tribe can attract investment capital but also the terms under which they can attract it.

Exacerbating their problem, tribal governments face strenuous constraints as a result of their trust relationship with the United States, often leaving them powerless to endow reservation assets to individual members. So regardless of the preferences of its members or the tribal government itself, a tribe typically owns or controls most reservation land, natural resources, and business. Most reservation enterprise is in consequence unavoidably controlled by an entity with sovereign immunity, and that naturally invites inordinate investor scrutiny. And unlike states or the U.S., which can adopt general class-wide waivers to attract investors who may be unknown to them in advance, individualized process is required for waivers that affect trust property as the U.S. is the legal owner, the tribe or individual being merely the beneficial owner. Thus BIA approval must be sought (and potentially refused) after an investor has incurred the cost of negotiating a contract. Investors will assume the risk that the BIA may frustrate their costly negotiations with the tribe only when the expected payout is enhanced.

Though it may place them under the oversight of a potentially hostile state court, most tribes will waive their immunity if a proposal promises sufficient return, though projects that offer marginal positive benefits are more likely to go forward off the

[27] See the discussion in Haddock and Miller (2004) regarding the Mississippi band of Choctaw Indians.

reservation than on it.[28] For instance, to reassure a public at risk of injury in their casinos, resorts, and such, many tribes have adopted tort claims acts mandating procedural limitations similar to those of states and the U.S. Some tribal governments have contracted to provide members with services formerly coming from the U.S. government. Congress has provided that the employees of those undertakings are to be treated as though they were U.S. employees, with injured persons having a remedy against the U.S. government in federal court. Many tribes carry liability insurance and expressly waive immunity with respect to their carriers.

Carefully drawn arbitration clauses in contracts have successfully waived tribal sovereign immunity, as in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe.* The Potawatomi and C & L contracted for construction of a tribal commercial building to be located out of Indian country. The contractual language did not mention sovereign immunity at all, but the Court held unanimously that a waiver was clear due to two provisions. First, "[a]ll . . . disputes . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. . . . The award rendered by the arbitrator . . . shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof." Second, a choice-of-law clause that read: "The contract shall be governed by the law of the place where the Project is located."

On the other side of the ledger, however, one finds immunity nightmares. Pursuant to a management agreement, in 1990 Tamiami Partners, Ltd. (TPL) invested six and a half million dollars to buy land for the Miccosukee Tribe and to construct a bingo hall. Disputes arose, and the Miccosukee soon filed suit in tribal court. TPL immediately filed a federal lawsuit to enforce the agreement's arbitration clause and to enjoin the Miccosukee from taking control of the operation. The federal court ruled that the Miccosukee had waived sovereign immunity by agreeing to arbitration, but stayed its proceedings until TPL exhausted its tribal court remedies. The Miccosukee appealed to the Eleventh Circuit, which ruled there was no federal subject matter jurisdiction (*Tamiami Partners v. Miccosukee Tribe I* 1993).

TPL then filed a new complaint. The federal trial court concluded that it had subject matter jurisdiction but that sovereign immunity barred TPL's suit against the

[28] Though studying United States rail history rather than the history of Indian reservations, an exhaustive empirical study by Fogel (1964) led to the conclusion that dependable economic progress more likely arises from a multitude of unimpressive projects than from a few individually impressive ones.

Miccosukee, the tribal business council, and the tribal gaming agency, but not against individual defendants. All parties appealed (*Tamiami Partners v. Miccosukee Tribe II* 1995). The appellate court agreed that the trial court had subject matter jurisdiction over three of TPL's new claims but the management agreement waived immunity only to suits regarding arbitration, defeating TPL's breach of contract claim. TPL's claim against individual tribal officers was permitted to proceed—prospective injunctive relief can be had against a government official to prevent violations of law (*Ex Parte Young*).

But after four years of further litigation the Eleventh Circuit found the second amended complaint to be "a thinly-disguised attempt . . . to obtain specific performance of the Tribe's obligations" by suing individual defendants. Since the suit was thus construed to actually be against the Miccosukee, sovereign immunity protected the individuals (*Tamiami Partners v. Miccosukee Tribe III* 1999, 1225-26). The court remanded the case again for trial on the arbitration issues. After more than ten years, the reach of tribal immunity rather than fact was still being litigated in 2002.

Whichever party ultimately does win, TPL undoubtedly regrets having become involved with the Miccosukee; whichever party should win, widely reported news of the litigation must trouble anyone contemplating new investments on a reservation, not just that of the Miccosukee. Few people have direct knowledge of the merits of the dispute, nor could they until the case proper can surmount seemingly endless procedural hurdles. What investors do understand only too well is that issues that have led TPL to seemingly interminable litigation with an Indian tribe would have been irrelevant had they contracted instead with a private party at a location off any reservation.

Political upheaval can also upset investor projections. The Rosebud Sioux and Sun Prairie negotiated a lease to place pork production facilities on tribal lands in order to employ members (*Rosebud Sioux Tribe v. McDivitt*).[29] Construction commenced within five days of a BIA lease approval after its determination that the operation would have no significant environmental impact. Environmental groups promptly brought suit. The Assistant Secretary of Interior for the BIA voided the lease, claiming that the BIA—not Sun Prairie—had failed to comply with the National Environmental Policy Act.

Acting in unison, the Sioux and Sun Prairie sued, winning a permanent injunction restraining the BIA from interfering with construction or operation of the

[29] A number of similar examples are discussed in Haddock and Miller (2004).

project. As the BIA appealed, a tribal referendum was narrowly decided against the project and a newly elected tribal council voted to support the BIA. Though no issues of fact were decided the court then held that Sun Prairie alone could not contest the BIA's lease invalidation, dismissed its complaint, and lifted the injunction. Thus, a tribal election occurring after the contract was signed doomed Sun Prairie's chances even to litigate the case. The tribal council then asked the BIA to close completed facilities that had cost Sun Prairie roughly twenty million dollars to construct. Unsurprisingly, Sun Prairie continues to litigate.

Politically motivated diminution of property rights deleteriously affects the investment climate on reservations. Perhaps investment could be had more easily if tribes adopted a constitutional provision such as that of the U.S. Constitution (U.S. Const. Art I, § 10) that bars government alteration of vested contractual rights.

D. Self Help: Mightn't A ***Good Tribe Seal of Approval*** Help?

A far-sighted sovereign has an incentive to form a reputation that shows that investors within its realm will not find the returns from their investments confiscated or destroyed through the sovereign's opportunism or capriciousness. Such a reputation arises most directly from a history of observed court successes by aggrieved co-investors when their suits against the sovereign are meritorious. But being small and poor with relatively few investment opportunities, many tribal reservations possess thin legal histories on point. Tribal sovereigns could instead rely on a stronger sovereign to bond their good behavior. But as the plight of Tamiami Partners and Sun Prairie illustrated above, investors might well doubt that federal courts dependably provide that bond. How then might a tribe avoid paying investors high risk-premiums, resorting to costly tribal ownership, and foregoing some opportunities altogether? Perhaps simply by making the federal and state court systems largely extraneous in the view of potential investors.

A tribe intent on acting as a reliable sovereign could, in effect, magnify its reputation by forming a group of like-minded tribes. The group members would commit to bring disputes before a pre-designated arbitrator under a limited number of

well-specified options regarding sovereign waivers of immunity.[30] A member selecting an option that waived more immunity for a particular undertaking could expect to pay investors lower risk premiums while one opting to waive less would of course pay more. Stated differently, investors would willingly undertake more marginal projects in the realms of tribes willing to waive more of their sovereign immunity in arbitration. Ideally the options would be formulated with explicit textual discussion that made the intent quite transparent to the investors and the arbitrator. The group of tribes collectively could bond commitments by individual member tribes by agreeing to hold a portion of each tribe's assets within the jurisdictions of other members.[31]

Suppose that a member tribe refused to abide by an arbitrator's decision, forcing the matter into court. As discussed above, *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe* demonstrated that at least some arbitration commitments are secure in federal court, but even so enforcement would be delayed by the litigation, and both delay and the litigation itself are costly. To discourage such suits the group's charter would stipulate that bringing a previously arbitrated dispute to court would serve immediately to evict the suing tribe from group membership, forcing it henceforth to rely entirely on its own besmirched reputation. The other members would then permit the aggrieved investors to bring suit in their own tribal courts to attach assets of the offending tribe that were being held within those jurisdictions. An action in federal court seeking to overturn those tribal awards would force one sovereign to sue other sovereigns who, as a condition of their group membership, would categorically have refused to waive any immunity against that suit. There would of course be no charter stipulation barring a tribe from initiating a suit to enforce an arbitrator's award that was favorable to the tribe if the investors refused to abide by it.

> [T]rusted private arbitrators provide an alternative to a court system, not by directly enforcing contracts but by generating the public information necessary to allow reputational mechanisms to enforce them. Third parties [need not] investigate a dispute in detail in order to learn who was at fault. They [need only] find out which party the [arbitrator has] ruled against. … If private enforcement of contracts via reputation and social pressure is less expensive and more reliable than enforcement via the court system, people whose social institutions make such private enforcement practical have a competitive advantage over those who must rely on the courts (Friedman 2000, 146).

[30] Though their legal systems left domestic investment highly insecure, present and former communist countries greatly improved their ability to enter capital markets by inserting contractual clauses that compelled arbitration, a Swiss arbitrator often being designated (Böckstiegal 1984; Benson 1999).

[31] The use of hostage assets to bond agreements was discussed in Williamson (1983; 1984).

Even if the group were of modest size to begin with, early improvements in the members' ability to attract investors would induce additional tribes to apply for membership. As new tribes joined investors awareness of the group would gradually increase and the value of membership would grow. With scrupulous *ex post* enforcement of their clear *ex ante* intentions, the tribal group might soon find that investors considered its members more desirable investment sites than some less dependable states. Since state and national courts would rarely be required to adjudicate member-investor disputes, the tribal group would unilaterally have retrieved an important measure of the sovereignty that had once been taken from them without consent.

IV. Conclusion

As a group, the indigenous peoples of the Americas suffer the continents' worst poverty, education, and health (Carlson 1997). The early period of contact between Indians and Europeans often witnessed mutually beneficial exchanges while later years witnessed substantial conflict, but one way or another most of the accessible and productive land between Tierra del Fuego and Hudson Bay eventually became owned by the immigrants and their progeny, or by their governments. Well over a century after the 1886 defeat of Geronimo's Apache band—the last to pose a serious military threat within the United States—utilization of the residual Indian resources remains severely encumbered by government policy designed for tribes posing a military threat to the United States and consisting of primitive people unready to cope with a modern world. Maladroit national constraints on Indian resource utilization translate into poor incentives for investment.

But Indians are sovereign, subordinate to the national sovereign, in many ways parallel to states. Indian sovereignty has recently been enhanced not by any substantial strengthening of individual sovereignty of tribal members but by recapturing limited tribal sovereignty from states and more extensive tribal power over consensual arrangements. States are the tribes' chief competitors for investment—competitors with two notable advantages: States have a great deal of ongoing enterprise that has tested their inclinations and supplied a grown body of precedent, and, being larger, individual states risk substantially more in the way of future investments than individual tribes do.

It is a mistake to view the dearth of tribal precedent mainly as a problem for investors—they often have reasonably good off-reservation substitute opportunities. It is instead a problem for the tribes. Rightly or wrongly, many investors are skeptical of tribal courts while Indians are skeptical of state courts. There are undoubtedly many ways to ameliorate that problem while a good tribal reputation is formed. Perhaps counterintuitively, but one tool for reassuring potential investors would be for tribes consciously to structure their laws and contracts with an eye to facilitating federal court intervention in disputes, or even evicting that court system altogether through formation of intertribal compacts that would compel arbitration and mutual bonding of commitments. Given that the cost falls more heavily on tribes than on potential investors, crafting a solution would likewise be of more benefit to tribes than investors.

Humans seem hardwired to see economic relationships as a series of zero-sum games where one party benefits only if another suffers (Rubin 2003), but modern life actually is full of mutually-beneficial opportunities. In those positive sum games the main problem is not how to take a larger share from a partner, but how to persuade a stranger to become a partner in the first place. If so, then when the intent of the parties was clear *ex ante* it is bound to be mutually disadvantageous in the long run to seize *ex post* opportunities that are inconsistent with that intent. Though a bird in the hand might be worth two in the bush, it is doubtful that bird could be worth two hundred, two thousand, or two million birds in the bush.

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APPENDIX: Reservation Land Quality

Obtaining reliable market measures of Indian land quality is difficult—with so much Indian land held in trust by the United States, little of it trades in fee simple. If the trustee acted as a responsible, competent agent one might infer land quality from the present value of the flow of royalties for surface and mineral rights, but the trustee does not behave that way (Anderson and Lueck 1992; Clinton, Goldberg, and Tsosie 2003, 508-25). Instead, we exploit state level data on private farmland value (USDA 1997) to infer potential value of Indian land in the same state, using reservation area by state (U.S. Bureau of Indian Affairs 1995, D2-D3).[32] We multiply Indian acreage in a state by the average per acre value of all farm real estate in that state to estimate very roughly the *potential* value of the state's Indian land. Aggregating across states and dividing by total Indian acreage aggregated across those same states yields a rough estimate of the average potential per acre value of Indian land. That is then compared with that of all farm real estate in the lower forty-eight states,[33] implying a potential average per acre value of Indian land between 73% and 76% of the national average.

Computed that way, the obvious source of difference between the Indian and national averages arises because tribes were nearly always moved away from coastal locations where land values are relatively high and toward arid and semi-arid interior locations. As illustration, consider that the Cherokee were forcibly removed from southeastern states, where average farm real estate values are now roughly $1,700 per acre, to a smaller area in Oklahoma, where the corresponding value is $610. Similarly, some bands of Dakota Indians were forced from Minnesota, where average land value is $1,160 per acre, to reservations in the two states now named for the tribe, where, as with the Cherokee, average land values are on the order of one-third of the level in the

[32] The published BIA data includes only the twenty states that have the largest Indian land areas, New York being the twentieth with three-tenths of one percent of the total. As map 1 indicates, however, reservation land is highly concentrated west of the one-hundredth meridian, and the data coverage is nearly 95%.

[33] Only Arizona contains more Indian land than Alaska, but the Federal Census of Agriculture makes no estimate of the per acre value of Alaskan farm real estate. Consequently Alaska could not be used in our estimate. If, as seems likely due to climate and transport disadvantages, per acre Alaskan farm real estate value is at or near the national minimum, including that state would lower our estimate of reservation land value potential. No Indians came from Hawaii nor were any removed there. Native Hawaiians are beyond the scope of this book, but in any event that population has never been treated by the United States as a sovereign nation (perhaps to their loss) nor placed under the trusteeship of the BIA (certainly to their gain).

original homeland. Roughly ninety percent of Indian land in the lower forty-eight states is in the mountains, deserts, and western plains, more than half in only three states—Arizona, New Mexico, and South Dakota (U.S. Bureau of Indian Affairs 1995, D2-D3). Among the lower forty-eight states that contain as much as one-percent of Indian land, only Oregon and Washington have seacoasts, and even there reservations are predominately trans-mountain rather than on the well-watered western slopes.

If Indian land values within states are as biased as they are within the nation, our estimate is an upper bound. For instance, the citrus and vegetable farms of Arizona that rely on irrigation water from the Colorado River must account for much of that state's farm value, but most reservation land is on the state's opposite side. Throughout the U.S. those reservations that were surveyed and allotted among tribal members, with "surplus" land sold by the trustee to the U.S. government for white homesteading, were selected from those with the most potentially productive land. Though the remaining tribal land is proving increasingly useful for non-agricultural purposes, that was hardly expected, intended, or germane when reservations were being formed.