



## ARTICLE

**Privatizing the Reservation?**

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**Abstract.** The problems of American Indian poverty and reservation living conditions have inspired various explanations. One response advanced by some economists and commentators, which may be gaining traction within the Trump Administration, calls for the “privatization” of Indian lands. Proponents of this view contend that reservation poverty is rooted in the federal Indian trust arrangement, which preserves the tribal land base by limiting the marketability of lands within reservations. In order to maximize wealth on reservations, policymakers are advocating for measures that would promote the individuation and alienability of tribal lands, while diminishing federal and tribal oversight.

Taking a different view, this Article complicates and challenges the narrative of Indian poverty and land tenure advanced by privatization advocates. We focus on real estate and housing in Indian Country to make three points. First, we argue that the salience of Indian homelands as places of collective religious significance, socioeconomic sustenance, and territorial governance has been lost in the privatization debate, which also largely disregards issues of remedial justice associated with conquest and colonization. Second, we introduce to the legal literature new empirical data and economic analysis from the Native Nations Institute demonstrating that the current system of land tenure in Indian Country is much more varied, and recent innovations in federal-tribal housing and finance

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programs are more promising, than some of the calls for privatization would suggest. Finally, using specific examples from Indian Country, we highlight a model of indigenous self-determination and sustainability, rooted in the international human rights movement, that deserves attention in ongoing domestic policy debates about land tenure, and which has the potential to advance the well-being of humanity more broadly.

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## Introduction

In popular culture, American Indian reservations often appear as islands of neglect and despair.<sup>1</sup> These depictions draw from grains of truth, some of them quite devastating. Last winter on the Pine Ridge Reservation in South Dakota, for example, a twelve-year-old girl reportedly attempted suicide because she was freezing.<sup>2</sup> Many Indian reservations are plagued by high rates of poverty,<sup>3</sup> along with substandard housing, poor health, crime, and other social ills.<sup>4</sup> The problems of Indian poverty and living conditions on reservations have inspired various explanations. But one account, advanced by economists and commentators,<sup>5</sup> has started to gain traction and is now seen as part and parcel

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1. A recent example is the film *Wind River*, in which a white FBI officer investigates the murder of an Indian woman against a backdrop of poverty and lawlessness on the frozen Wind River Indian Reservation in Wyoming. See WIND RIVER (Acacia Entertainment 2017); see also Ian Frazier, *On the Rez*, ATLANTIC (Dec. 1999), <https://perma.cc/DT47-MAB6> (“Bleak’ is the word attached in many people’s minds to the idea of certain Indian reservations . . .”). For a very different perspective, see DAVID TREUER, *REZ LIFE: AN INDIAN’S JOURNEY THROUGH RESERVATION LIFE* (2012) (describing the cultural cohesion of reservation life and its link to tribal sovereignty from the residents’ perspective).
  2. See Eleanor Goldberg, *Native Americans Who Can’t Afford Heat Take Desperate Measures to Stay Warm*, HUFFPOST (Jan. 13, 2018, 10:40 AM ET), <https://perma.cc/5KE6-CZ8X>.
  3. See, e.g., Jens Manuel Krogstad, *One-in-Four Native Americans and Alaska Natives Are Living in Poverty*, PEW RES. CTR.: FACT TANK (June 13, 2014), <https://perma.cc/EK3P-7XBK>.
  4. See Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy* 5 (Joint Occasional Papers on Native Affairs, Working Paper No. 1, 2010), <https://perma.cc/BVH8-KKGD>.
  5. For academic perspectives, see TERRY L. ANDERSON, SOVEREIGN NATIONS OR RESERVATIONS?: AN ECONOMIC HISTORY OF AMERICAN INDIANS 111-37 (1995) (arguing that lands held in fee are more agriculturally productive than trust lands); Terry L. Anderson & Bryan Leonard, *Institutions and the Wealth of Indian Nations*, in UNLOCKING THE WEALTH OF INDIAN NATIONS 3, 3-8 (Terry L. Anderson ed., 2016) (discussing the importance of transferable property rights); Terry L. Anderson, *How the Government Keeps Indians in Poverty*, WALL ST. J., Nov. 22, 1995, at A10 (“Indeed, a study of agricultural land on a large cross-section of Western reservations indicates that tribal trust land is 80% to 90% less productive than privately owned land.”); and Terry Anderson & Wendy Purnell, *Restoring Tribal Economies*, HOOVER INSTITUTION: DEFINING IDEAS (Dec. 20, 2017), <https://perma.cc/998H-RRFM> (noting that “a lack of property rights” is an “institutional gap” between Indians and other Americans).

For journalistic viewpoints, see, for example, Shawn Regan, *5 Ways the Government Keeps Native Americans in Poverty*, FORBES (May 13, 2014, 6:07 AM), <https://perma.cc/FD9D-TWQC> (arguing that federal Indian land management impoverishes Indians); and Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, ATLANTIC (July 30, 2016), <https://perma.cc/8G2E-TW4M> (arguing that making Indian land freely alienable would help Native people).

of an apparent desire to “privatize” Indian lands.<sup>6</sup> The argument is that reservation-based Indians don’t have “property rights,” which, in turn, shackles them and inhibits their ability to create wealth.<sup>7</sup> To address this issue, a long line of scholarship, led most prominently by Terry Anderson, has argued for increased individuation and alienability—and diminished federal responsibility—with respect to tribal lands and resources.<sup>8</sup> While the place of Indian lands seems longstanding, even permanent, in the United States,<sup>9</sup> these calls for modifications to the Indian land tenure system deserve serious consideration. The issue is particularly pressing in light of recent, significant changes in the political leadership in the United States.

Most recently, Indian lands and resources have become targets of the Trump Administration’s development agenda.<sup>10</sup> One of the first moves by the Administration was an attempt, still pending in the courts, to vastly shrink Bears Ears National Monument.<sup>11</sup> Under the Obama Administration,

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6. See Tom Perez, *Trump Is Breaking the Federal Government’s Promises to Native Americans*, L.A. TIMES (Aug. 7, 2017, 4:00 AM), <https://perma.cc/RFR5-6PSB>; Valerie Volcovici, *Trump Advisors Aim to Privatize Oil-Rich Indian Reservations*, REUTERS (Dec. 5, 2016, 3:23 AM), <https://perma.cc/RK6V-9FSV> (reporting that advisors to the Trump Administration’s transition team proposed putting 56 million acres of Indian trust lands into private ownership).

We define privatization in this context as the transfer of resources from public or government ownership and control to private or individual ownership, with an attendant increase in alienability and marketability, and a decrease in regulatory and other legal protections. See generally, e.g., Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL’Y REV. 6 (1988) (acknowledging the difficulty in defining privatization but locating its political origins in the opposition to the growth of government in the West); John B. Goodman & Gary W. Loveman, *Does Privatization Serve the Public Interest?*, HARV. BUS. REV. (Nov.-Dec. 1991), <https://perma.cc/GH3S-VM87> (analogizing to corporate takeovers in discussing whether privatization may both bring efficiency and serve the public interest). As in other contexts, the concept of privatization in Indian Country has legal, economic, political, and cultural dimensions.

7. See Anderson & Leonard, *supra* note 5, at 4-8. Though a longstanding proponent of free-market property rights in Indian Country, Anderson appears recently to have softened or broadened his views, taking into account cultural norms and tribal governance. See Anderson & Purnell, *supra* note 5.

8. See sources cited *supra* note 5.

9. See David H. Getches, *A Philosophy of Permanence: The Indians’ Legacy for the West*, J. WEST, July 1990, at 54 (explaining the “philosophy of permanence” which characterizes the relationship of tribes to their aboriginal lands).

10. See Perez, *supra* note 6 (describing a presidential signing statement that questioned the constitutionality of grants for tribal housing); see also Volcovici, *supra* note 6.

11. See Complaint for Injunctive and Declaratory Relief ¶¶ 113-133, Nat. Res. Def. Council, Inc. v. Trump, No. 1:17-cv-02606 (D.D.C. Dec. 7, 2017), 2017 WL 6055337; Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <https://perma.cc/L6TB-2JBR>.

Bears Ears was set aside in a unique tribal co-management program to protect the petroglyphs, monuments, and landscapes that are sacred to the tribes of the region.<sup>12</sup> But the designated area is also rich in natural resources,<sup>13</sup> and as the *New York Times* recently revealed, the Trump Administration's decision to diminish the National Monument and its protections for tribal culture was motivated by a desire to foster oil extraction.<sup>14</sup> Many other tribes control similar lands rich in natural resources that players in the extractive industries would almost certainly like to access with less regulatory oversight.<sup>15</sup> With respect to Indian reservations, President Trump's acting Assistant Secretary for Indian Affairs testified in favor of a controversial bill that would, upon request of an Indian tribe, require the Interior Department to take reservation land out of trust and put it in "restricted fee" status.<sup>16</sup> More recently, the new Assistant Secretary issued a decision regarding the Mashpee Wampanoag Tribe that "pave[d] the way for a reservation to be taken out of trust for the first time since the termination era."<sup>17</sup>

Given that President Trump has expressed a desire to privatize everything from national parks to air traffic control,<sup>18</sup> and given the unpredictability and volatility of the current political landscape, it is difficult to know how

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12. See Proclamation No. 9558, 82 Fed. Reg. 1139, 1139-40, 1143-44 (Jan. 5, 2017); see also Turkewitz, *supra* note 11.

13. See Laris Karklis et al., *Areas Cut Out of Utah Monuments Are Rich in Oil, Coal, Uranium*, WASH. POST (Dec. 7, 2017), <https://perma.cc/55S9-EZ83>.

14. See Eric Lipton & Lisa Friedman, *Oil Was Central in Decision to Shrink Bears Ears Monument, Emails Show*, N.Y. TIMES (Mar. 2, 2018), <https://perma.cc/D79M-4ES5>.

15. See Volcovici, *supra* note 6 ("The Council of Energy Resource Tribes, a tribal energy consortium, estimated in 2009 that Indian energy resources are worth about \$1.5 trillion. In 2008, the Bureau of Indian Affairs testified before Congress that reservations contained about 20 percent of untapped oil and gas reserves in the U.S. Deregulation could also benefit private oil drillers including Devon Energy Corp, Occidental Petroleum, BP and others that have sought to develop leases on reservations through deals with tribal governments.").

16. See *Leader of Bureau of Indian Affairs Among Witnesses for Controversial Tribal Land Bill*, INDIANZ.COM (Oct. 23, 2017), <https://perma.cc/D6EC-47U9>; see also American Indian Empowerment Act of 2017, H.R. 215, 115th Cong.

17. See *Trump Administration Takes Indian Country Back to Termination Era*, INDIANZ.COM (Sept. 10, 2018), <https://perma.cc/522N-GGSE>.

18. See, e.g., Russell Berman, *Why Trump Wants to Privatize Air-Traffic Control*, ATLANTIC (June 6, 2017), <https://perma.cc/PU6L-U5D7>; Michael Laris, *Trump Advisers Call for Privatizing Some Public Assets to Build New Infrastructure*, WASH. POST (May 23, 2017), <https://perma.cc/BGW8-NDR5>; Mary Catherine O'Connor, *As Trump Moves to Privatize America's National Parks, Visitor Costs May Rise*, GUARDIAN (June 25, 2017, 9:31 AM EDT), <https://perma.cc/6E WX-EMLV>.

seriously to take this threat or how extensive the scope of its impact might be. Yet in light of the resonance between this political conversation on privatization and the extensive body of scholarship arguing for more private property rights in Indian Country, there are important issues worth considering here. Among other things, privatization could have disproportionate impacts on Indian tribes, which are already under extreme stress, with conditions only made worse by the recent government shutdown.<sup>19</sup> Moreover, the President has long been on the record criticizing successful Indian economic development initiatives.<sup>20</sup> Thus, there is healthy skepticism about whether the advocated free-market approach to tribal property is based on a genuine concern for Indians' wealth or well-being.<sup>21</sup>

To fully understand what privatization might mean in Indian Country, consider the scope of tribal nations, their lands, and their governance systems. There are 573 federally recognized Indian tribes in the United States.<sup>22</sup> Together, federally recognized tribes occupy more than 300 Indian reservations in addition to more than 200 Alaska Native villages and certain other lands, which together comprise almost 4% of the total land area of the United States.<sup>23</sup> There is enormous variation between tribes in every respect, including quantity and type of land holdings, population size and demographics, and governance systems, to give only a few examples.<sup>24</sup>

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19. See, e.g., Juana Summers, *Looming Trump Budget Cuts Deepen Distress on Pine Ridge*, CNN POLITICS (updated May 28, 2017, 10:49 AM ET), <https://perma.cc/TY23-KBUB>; Catherine Van, *Government Shutdown Strains Native American Services*, KATU (Jan. 14, 2019), <https://perma.cc/G2P3-54PQ>.

20. See Tom Porter, *Trump Pocahontas Slur: The President Has a Long History of Insulting Native Americans*, NEWSWEEK (Nov. 28, 2017, 8:59 AM), <https://perma.cc/W3N5-TPXY> (reporting that in the 1990s, Trump tried to reduce competition from successful Indian casinos by questioning tribal members' ethnicity, suggesting that they were under mob control, and portraying tribal leaders as "cocaine traffickers and career criminals"); see also Shawn Boburg, *Donald Trump's Long History of Clashes with Native Americans*, WASH. POST (July 25, 2016), <https://perma.cc/822Y-3BJ2>.

21. Cf., e.g., Kelli Mosteller, *For Native Americans, Land Is More than Just the Ground Beneath Their Feet*, ATLANTIC (Sept. 17, 2016), <https://perma.cc/5UM3-DHBR> (arguing that private land ownership is not the solution to Indian poverty).

22. See *Mission Statement*, U.S. DEP'T INTERIOR: INDIAN AFF., <https://perma.cc/DWN3-AUVE> (archived Feb. 7, 2019). There are also many "unrecognized" tribes. See Matthew L.M. Fletcher, Commentary, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 491 (2006) (noting that there are "dozens, perhaps hundreds" of such tribes). Though there is a federal administrative process in place for achieving federal recognition, politics and bureaucracy will likely keep many of these tribes from ever being recognized. See generally *id.*

23. See Cornell & Kalt, *supra* note 4, at 1.

24. See, e.g., Duane Champagne, *Remaking Tribal Constitutions: Meeting the Challenges of Tradition, Colonialism, and Globalization*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 11, 12 (Eric D. Lemont ed., 2006) ("There is no single template [of governance] that will work for most tribal governments or  
*footnote continued on next page*

Furthermore, Indian nations are sovereigns within the federal system: They have extensive powers of self-governance and autonomy in internal relations;<sup>25</sup> have their own constitutions, laws, and court systems;<sup>26</sup> and assert inherent civil and criminal jurisdiction over their territories, albeit with some important limitations.<sup>27</sup>

Much of the tribal land in the United States is held in trust for Indian tribes by the federal government.<sup>28</sup> This means that title is split: The federal government holds “ultimate title” for the benefit of Indian tribes, which hold “title of occupancy.”<sup>29</sup> Under this arrangement, the government helps protect the tribal land base by prohibiting alienability<sup>30</sup> and restricting certain leases of those lands without federal approval.<sup>31</sup> Although there are federal statutes in place to address concerns raised by the trust status of Indian lands, it may nevertheless be more difficult to use trust lands as loan collateral than fee

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communities, since most have unique cultural and institutional arrangements and histories.”); Cornell & Kalt, *supra* note 4, at 1 (noting that a particular rancharia in California has under a dozen residents and a tiny reservation, whereas the Navajo reservation has over 175,000 residents and a land base the size of France); Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 610-11 (2004) (discussing the diversity of Indian tribal governance, including that of the Santa Ana Pueblo, Mississippi Choctaw, Navajo, Cherokee, Hualapai, and Northern Cheyenne tribes); Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1604 (2016) (describing the wide variation in demographics among the tribes involved in the Violence Against Women Reauthorization Act pilot program); *see also* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of the U.S. Code).

25. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).

26. *See* Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1053, 1084-86 (2007).

27. *See* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030-32, 2039 (2014) (discussing the inherent sovereignty of Indian tribes while noting the plenary control of Congress); Montana v. United States, 450 U.S. 544, 547, 563-66 (1981) (setting out a test for tribes’ exercise of civil jurisdiction over nonmembers on land owned in fee); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195, 208-12 (1978) (establishing certain limits to tribes’ criminal jurisdiction), *superseded in part by statute*, Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93 (1990) (codified at 25 U.S.C. § 1301 (2017)). *See generally* Riley, *supra* note 26.

28. *See* Joseph William Singer, Addison C. Harris Lecture, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 767 (2011).

29. *See id.* (quoting Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 592 (1823)).

30. *See infra* notes 105-15 and accompanying text.

31. *See, e.g.*, Indian Mineral Leasing Act of 1938, Pub. L. No. 75-506, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g) (authorizing tribal leasing of reservation lands for mineral development, subject to the approval of the Secretary of the Interior).

lands.<sup>32</sup> The duty to protect Indian tribes is rooted in treaties,<sup>33</sup> but its evolution has largely been developed through U.S. Supreme Court jurisprudence<sup>34</sup> and embodied in numerous federal statutes.<sup>35</sup> As of 2010, Indian reservations and lands held in trust by the federal government constituted approximately 70 million acres, a figure that includes the approximately 14 million acres of land owned by non-Indians within reservation boundaries.<sup>36</sup>

This trust arrangement is where privatization advocates locate their concerns regarding Indian poverty.<sup>37</sup> Common arguments advanced in this

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32. See MIRIAM JORGENSEN, NATIVE NATIONS INST., THE UNIV. OF ARIZ., ACCESS TO CAPITAL AND CREDIT IN NATIVE COMMUNITIES 47 & n.60 (2016) [hereinafter NNI REPORT], <https://perma.cc/ETU4-RTU2>.

33. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 295-97 (1942) (tracing trust duties to an 1856 treaty with the Seminole Nation); *The Wyandot Reserve at Upper Sandusky*, 3 Op. Att’y Gen. 458, 459 (1839); see also Act of Mar. 2, 1889, ch. 405, 25 Stat. 888, 888 (stating that lands were to be “reserved” “for the use and protection of the Indians receiving rations and annuities at the Pine Ridge Agency,” with repeated references to a treaty with the Sioux Nation (emphasis added)).

34. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); see also Mary Christina Wood, *Fulfilling the Executive’s Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration’s Promises and Performance*, 25 ENVTL. L. 733, 742 (1995).

35. See, e.g., American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (codified as amended at 25 U.S.C. §§ 161a, 162a, 4001-4061); Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8, 8 (“[T]he former Fort Apache Military Reservation . . . [is] hereby declared to be held by the United States in trust for the White Mountain Apache Tribe . . . .”); see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.05(1)(a), at 416-17 (2012 ed.) (“The trust relationship is a doctrine originating in common law, and also expressed in numerous treaties and statutes.” (footnote omitted)).

36. Cornell & Kalt, *supra* note 4, at 1; see *id.* (noting that the figure rises to 100 million acres when the lands of Alaska Native Corporations and Villages, which are not held in trust, are taken into account); see also *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 523-24 (1998) (discussing the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h (2017)), which took tribal land in Alaska out of trust). Since this figure was calculated, the federal government has continued to take land into trust for the benefit of Indian tribes, particularly during the Obama Administration. See William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 417 & n.8 (2016) (reporting the comments of a Department of the Interior official in the Obama Administration describing how the Administration had taken nearly 300,000 acres of land into trust for over one hundred tribes). *But see* Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 539-40 (2013) (noting that at least in some states, there is much more land moving from trust to fee status than the other way around).

37. See, e.g., Schaefer Riley, *supra* note 5 (“Reservation land is held ‘in trust’ for Indians by the federal government. The goal of this policy was originally to keep Indians contained to certain lands. Now, it has shifted to preserving these lands for indigenous peoples. But the effect is the same. Indians can’t own land, so they can’t build equity. This prevents American Indians from reaping numerous benefits.”); see also ANDERSON, *footnote continued on next page*

frame posit that if Indians could be liberated from restraints on the market for land and resources, they would no longer be poor.<sup>38</sup> Instead, they would build equity through home mortgages,<sup>39</sup> and tribal governments would promote development of energy and extractive industries.<sup>40</sup> Accordingly, some commentators argue that instead of the federal trust arrangement, Indian reservation lands should be held privately by individuals, such that those lands would be available for collateralization, development, and alienation on the real estate market,<sup>41</sup> which would in turn lead to wealth maximization.<sup>42</sup>

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SOVEREIGN NATIONS OR RESERVATIONS?, *supra* note 5, at 111-37 (contrasting the productivity of fee and trust lands); John Koppisch, *Why Are Indian Reservations So Poor?: A Look at the Bottom 1%*, FORBES (Dec. 13, 2011, 7:32 PM), <https://perma.cc/A37F-8PAA> (discussing poverty on the Crow Indian Reservation and among Canadian Indian bands).

38. See, e.g., Schaefer Riley, *supra* note 5 (“The economic devastation in American Indian communities is not simply a result of their history as victims of forced assimilation, war, and mass murder; it’s a result of the federal government’s current policies, and particularly its restrictions on Natives’ property rights.”).
39. See Koppisch, *supra* note 37 (discussing opportunities, or the lack thereof, to develop equity through home mortgages on Indian reservations). Income inequality, among other factors, increasingly inhibits the realization of the “American dream” for many lower-income Americans. See “*American Dream*” *Quickly Becoming an “Illusion,” Says UN Human Rights Expert*, UN NEWS (Dec. 15, 2017), <https://perma.cc/2EG6-GM5N> (“The American Dream is rapidly becoming the American Illusion, as the US now has the lowest rate of social mobility of any of the rich countries . . .” (quoting Philip Alston, United Nations Special Rapporteur on Extreme Poverty & Human Rights)).
40. See Nat’l Conference of State Legislatures, *U.S. Sec. for the Interior Ryan Zinke* at 3:13-:47, YOUTUBE (May 3, 2017), <https://perma.cc/K2BL-PMY5> (showing then-Secretary of the Interior Ryan Zinke at the 2017 National Tribal Energy Summit suggesting that “it’s time for a dialogue” regarding the status of Indian land and that if tribes “would have a choice of leaving the Indian trust lands and becoming a corporation, . . . some tribes would take it”). *But see* Perez, *supra* note 6 (“By steering the government toward Termination-era policies, Trump threatens the health and prosperity of Native Americans and drags us all backward.”).
41. See NAOMI SCHAEFER RILEY, *THE NEW TRAIL OF TEARS: HOW WASHINGTON IS DESTROYING AMERICAN INDIANS* 3-46 (2016) (critiquing Indian reservation and reserve systems in the United States and Canada and calling for reform that would allow individuals on reservations to participate more fully in real estate markets). For incisive criticism of *The New Trail of Tears*, see Matthew L.M. Fletcher, *Announcing Fletcher Commentaries on “The New Trail of Tears,”* TURTLE TALK (Sept. 6, 2016), <https://perma.cc/4646-R787>. See also, e.g., Matthew L.M. Fletcher, *First Commentary on TNTToT: Introduction—“Framed by a Friend,”* TURTLE TALK (Sept. 6, 2016), <https://perma.cc/B7CX-8GBG>; Matthew L.M. Fletcher, *Second Commentary on TNTToT: Chapter 1—“Turning Indian History Against Indians,”* TURTLE TALK (Sept. 8, 2016), <https://perma.cc/SLK5-T6WU>.
42. See Koppisch, *supra* note 37 (“If you don’t want private ownership, and want to stay under trusteeship, then I say, ‘fine.’ But you’re going to stay underdeveloped; you’re not going to get rich.” (quoting Terry Anderson, Exec. Dir., Prop. & Env’t Research Ctr.)).

We agree with the many scholars who argue that Indian lands are subject to a dense regulatory bureaucracy that must be streamlined.<sup>43</sup> Yet we also note the importance of federal interventions that foster economic efficiency in reservation development without full-scale dismantling of the trust relationship.<sup>44</sup> More to our point, we feel that much of the current discourse from economists and policymakers fails to appreciate the historical and contemporary complexities of the subject. Thus, given

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43. Federal management of trust lands has been a topic of serious concern in Indian Country for decades. A central issue has been the extent of federal bureaucratic oversight of tribal trust lands without adequate accountability or respect for tribes' right to self-determination. *See, e.g.*, Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1082 (1974) (critiquing the federal practice of treating Indian land leases as a source of revenue for other projects); Angelique EagleWoman, *Tribal Nations and Tribal Economics: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 WASHBURN L.J. 805, 815-16, 819-20 (2010) (arguing that the U.S. trust land system means that "Tribal Nations are caught up in a federal bureaucracy that has failed to protect tribal interests"); Stacy L. Leeds, *Moving Toward Exclusive Tribal Autonomy over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439, 441-42 (2006) (arguing for less federal oversight over tribal lands and natural resources); Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 514-18 (2017) (explaining that more bureaucratic control from the Bureau of Indian Affairs with regard to land use proliferates Indian landowners' withdrawal from active use and engagement in their own land, which in turn increases the apparent need for bureaucratic control and shields the lands from greater legislative oversight); *id.* at 533 ("[T]he restrictive administrative regime and patchwork jurisdictional framework take the blame for some of the worst and most persistent poverty in the United States in Indian reservations."); Jessica A. Shoemaker, Comment, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 770-72 [hereinafter Shoemaker, *Like Snow*] (pointing out that the 2000 amendments to the Indian Land Consolidation Act—designed to afford more flexibility to individual Indians—failed to do so, and instead gave more bureaucratic flexibility to the Secretary of the Interior); *id.* at 781-82 ("[T]he restrictions on *inter vivos* transactions in Indian Country should be reviewed and simplified so that only those actually necessary for the most basic federal recordkeeping and administrative responsibilities are left in place."); Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383, 398 (2015) (noting that the trust bureaucracy is an "important element[] of the Indian land tenure dilemma").

44. *See generally* DEP'T OF THE INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 8-16 (2013), <https://perma.cc/V3RT-RDTR> (detailing the long history of federal efforts to reform the management and administration of trust lands).

past failed efforts at privatization,<sup>45</sup> this Article challenges the theory that privatizing Indian lands is a solution to Indian poverty.<sup>46</sup>

Against the historical and legal landscape laid out herein, this Article advances a central thesis: Looking within and beyond the United States, there is a model of indigenous self-determination and a corresponding ethic of sustainability emerging as an alternative path to the privatization and wealth maximization rhetoric swirling around Indian policy today. We advance our thesis by making three central claims.

First, much of the discussion about privatization of Indian lands ignores indigenous perspectives on the legal and cultural history of indigenous lands.<sup>47</sup>

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45. See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284-85 (1955) (holding that aboriginal title afforded no more property rights than a license to be on the land, absent a recognition of the title by treaty or statute); LEWIS MERIAM ET AL., INST. FOR GOV'T RESEARCH, BROOKINGS INST., THE PROBLEM OF INDIAN ADMINISTRATION 7 (1928) [hereinafter MERIAM REPORT], <https://perma.cc/WW2N-8N4J> (describing the failure of the federal government's "policy of individual ownership of the land on reservations," under which "the expectation was that the Indians would become farmers"); see also Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.) (authorizing allotment of collective Indian lands into individualized parcels); cf. Meteor Blades, *New Drive to Privatize Indian Reservations Has Much in Common with Past Efforts to Steal Native Land*, DAILY KOS (Dec. 30, 2017, 9:00 AM PST), <https://perma.cc/S47V-S8BC> (drawing parallels between land dispossession policies of the nineteenth century and contemporary efforts by the Trump Administration to privatize Indian lands).

For background on failed federal policies, see LEONARD A. CARLSON, INDIANS, BUREAUCRATS, AND LAND: THE DAWES ACT AND THE DECLINE OF INDIAN FARMING 18-22 (1981) (explaining that the Indian General Allotment Act failed because Indians could not become yeoman farmers in one generation, particularly given the meager resources they were afforded); ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES (1972) (describing the destruction wrought by the removal of the Five Civilized Tribes from the Southeast to Oklahoma); and Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 13-16 (1995) (explaining that the Supreme Court's decision in *Lone Wolf v. Hitchcock*, which allowed Congress to unilaterally open unallotted Indian lands to settlement by non-Indians without tribal consent, was "greeted with cheers from local settlers and businessmen," only to be repudiated later on when the Meriam Report documented the devastating effects allotment had on "economic, social, cultural, and physical well-being of tribes"). See also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-68 (1903); MERIAM REPORT, *supra* note 45.

46. We are not alone in lodging this critique. See, e.g., Volcovici, *supra* note 6 ("Our spiritual leaders are opposed to the privatization of our lands, which means the commoditization of the nature, water, air we hold sacred . . . Privatization has been the goal since colonization—to strip Native Nations of their sovereignty." (quoting Tom Goldtooth, Exec. Dir, Indigenous Env'tl. Network)).

47. See, e.g., *id.* As another example, consider Naomi Schaefer Riley's recent work *The New Trail of Tears*. In a book which is entirely devoted to the relationship between indigenous peoples and reservations, and which tries to convince the reader to support a privatization agenda, Schaefer Riley mentions the word "sacred"—most commonly used by indigenous peoples to define their relationship to their aboriginal lands and to the earth—in just one place. See SCHAEFER RILEY, *supra* note 41, at xi ("Every part of this  
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American Indian homelands, known as aboriginal territories, are places of collective religious significance, socioeconomic sustenance, and territorial governance.<sup>48</sup> These multivalent, often nonfungible, qualities were traditionally recognized in indigenous land tenure customs that sustained the people in their homelands, a way of life that was gravely threatened by conquest and settlement.<sup>49</sup> As Walter Echo-Hawk has written, the driving motivation for the colonization of North America was “to occupy the land and extract wealth for the benefit of settlers and elites in Europe.”<sup>50</sup> This history of disruption and dispossession left, among other things, a complex legacy of Indian land tenure.<sup>51</sup> All tribes lost significant portions of their land; some retained smaller reservations located within their aboriginal territories, while others were forcibly removed to distant and remote locations.<sup>52</sup> Today’s Indian Country poverty must be viewed in the context of losses of real and personal property that remain uncompensated; attendant injuries to family structures, governing institutions, and subsistence economies of tribal homelands; and racial discrimination by social and economic institutions.<sup>53</sup> These remedial justice issues and a common desire to reconstitute the relationship between

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earth is sacred to my people.” (quoting 1851 letter from Chief Seattle)). And she does so only in quoting from Chief Seattle’s 1851 letter to the U.S. government, and only to make the point that his speech was likely mistranslated and that non-Indians have the false idea that Indians are particularly attached to the earth. *See id.* at xi-xii.

48. *See generally* Frank Pommersheim, Essay, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246 (1989) (providing an account of the cultural, spiritual, and legal components of life on the reservation).
49. *See* Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1113-14 (2009).
50. WALTER R. ECHO-HAWK, *IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 53 (2013); *see also* ALEXANDRA HARMON, *RICH INDIANS: NATIVE PEOPLE AND THE PROBLEM OF WEALTH IN AMERICAN HISTORY* 1-16 (2010) (problematizing the economics of historical Indian wealth and white entitlement).
51. *See generally* ALLAN GREER, *PROPERTY AND DISPOSSESSION: NATIVES, EMPIRES AND LAND IN EARLY MODERN NORTH AMERICA* (2018) (describing the complex, fluid, and dynamic process of the development of property rights in the colonial era, and the corresponding displacement and dispossession of Native peoples).
52. *See, e.g.*, *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 113 (1938). For further examples, *see* Parts III.C.1-.3 below (describing the land losses or forcible removal of the Ho-Chunk, Citizen Potawatomi, and Penobscot tribes).
53. *See* NNI REPORT, *supra* note 32, at 4-5. For a review of how economic development is changing poverty in Indian Country, *see* ROBERT J. MILLER, *RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY* 48-57 (2012) (offering a detailed account of various forms of tribe-driven economic development in Indian Country).

tribes and their lands—which may stand in contrast to a privatization ethic—must inform any contemporary efforts to address Indian land tenure and poverty today.<sup>54</sup>

Second, we assert that much of the contemporary criticism of the trust arrangement fails to consider the true nature of land holdings in Indian Country, and also ignores the potentially dire consequences privatization poses to tribal sovereignty. The data cited in this Article suggest that the current system of land tenure in Indian Country is much more varied and complex than some of the calls for privatization would suggest. Today, Indian Country is already marked by various forms of ownership, from individual and tribal trust lands to restricted fee and fee simple lands. Fee lands within reservations may often be financed, developed, and sold like fee lands outside of reservations—assuming both that there is a liquid market for land and that banks are lending fairly.<sup>55</sup> And federal programs now allow for financing on trust lands, as we explore below.<sup>56</sup>

Perhaps more importantly, sales and mortgages involving fee lands within reservations have potentially dire consequences for tribal sovereignty. This point seems to have been obscured in the privatization debate. When Indians sell fee lands to non-Indians, those lands may pass from tribal to state jurisdiction, per a long line of modern Supreme Court cases.<sup>57</sup> And when tribal governments lose jurisdiction over their lands, they may be prevented from regulating health, safety, or welfare, even within reservation boundaries—with devastating and well-documented impacts on fundamental concerns like domestic violence prevention.<sup>58</sup> Indeed, this link between property and

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54. Cf. James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *The Situation of Indigenous Peoples in the United States of America*, ¶¶ 72-84, U.N. Doc. A/HRC/21/47/Add.1 (Aug. 30, 2012) [hereinafter Anaya Report] (“Determined action should take place within a cross-cultural, encompassing programme of reconciliation, aimed at closing the latent wounds and building just and equitable conditions, and at providing needed redress . . . . What is now needed is a resolve to take action to address the pending, deep-seated concerns of indigenous peoples, but within current notions of justice and the human rights of indigenous peoples.”).

55. See OFFICE OF THE COMPTROLLER OF THE CURRENCY, U.S. DEP’T OF THE TREASURY, GUIDE TO MORTGAGE LENDING IN INDIAN COUNTRY 8 (1997), <https://perma.cc/9ANN-6EAQ> (“Fee simple land owned by an individual within the boundaries of an Indian reservation does not carry the same restrictions as trust or restricted land and can be readily mortgaged.”).

56. See *infra* Part II.B.

57. See, e.g., *Montana v. United States*, 450 U.S. 544, 547, 566-67 (1981) (holding that the Crow Tribe did not have civil regulatory jurisdiction to regulate hunting and fishing by nonmembers on a non-Indian parcel held in fee simple absolute within the boundaries of the reservation).

58. See generally Riley, *supra* note 24 (discussing how the inability to keep reservation residents safe frustrates and impedes functional tribal governance, particularly when

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sovereignty is one reason why recent federal programs are carefully designed to increase the quantity of trust lands<sup>59</sup> and to enhance lending opportunities in Indian Country without destroying the tribal land base.<sup>60</sup>

Finally, our third objective is to animate the model of indigenous self-determination and sustainability that is currently emerging as an alternative (or perhaps a complement) to the privatization and wealth maximization rhetoric. This model is not our invention, but rather what we have observed in Indian Country.<sup>61</sup> As we visit and study reservation communities across the country, we note several dynamics. Wealth is important to American Indian people, especially to the extent that physical security and well-being are tied to financial resources. But there are other values motivating reservation-based land use programs, including the importance of tribe-driven decisionmaking and the cultural significance of tribal lands. While many tribal members now reside off reservations,<sup>62</sup> tribal homelands remain uniquely situated to perpetuate tribal lifeways, including religious practices, kinship relations, and subsistence hunting and gathering. There is little to no evidence of widespread interest among tribal members in developing a private market for land to the extent of dissolving reservations. Instead, many tribal leaders and members prioritize land use decisions geared toward exercising their right of self-determination and preserving healthy, permanent homelands.<sup>63</sup> Relying on several detailed examples from Indian Country, including the Ho-Chunk Tribe in Nebraska, Citizen Potawatomi Nation in Oklahoma, the Penobscot Tribe in

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an entire portion of the population—in this case, non-Indians—is not subject to tribal criminal jurisdiction).

59. Cf. *Mechoopda Tribe Scores Victory in Long-Running Fight over Homelands*, INDIANZ.COM (Apr. 13, 2018), <https://perma.cc/K5YW-XXKAP> (noting that the courts continue to uphold tribal land restoration through the fee-to-trust program, even as the Trump Administration is proposing changes, widely opposed in Indian Country, to limit the very same program).

60. See *infra* Part III.B.

61. See *infra* Part III.C. We have observed similar models in indigenous communities around the globe as part of our respective obligations working with the United Nations.

62. See Joe Whittle, *Most Native Americans Live in Cities, Not Reservations. Here Are Their Stories*, GUARDIAN (Sept. 4, 2017, 6:00 AM EDT), <https://perma.cc/G7T9-2NGR> (“Today, 78% of Native Americans live off-reservation, and 72% live in urban or suburban environments.”); see also Carpenter et al., *supra* note 49, at 1061 (“[A] connection between land and identity is a defining element of indigenous peoplehood.”).

63. Cf. Jefferson Keel & Ernie Stevens, Letter to the Editor, *Tribal Leadership Unified on Land Recovery, a Moral Obligation of the United States*, INDIAN COUNTRY TODAY (Jan. 30, 2018), <https://perma.cc/7YKQ-4JFG> (expressing strong opposition to draft regulations that would diminish tribes’ ability to take land into trust).

Maine, and the Kanatsiohareke Mohawk Community in New York, we describe and advance an alternative ethic of land use and development in Indian Country.<sup>64</sup>

Relatedly, we demonstrate that these tribal ethics are deeply embedded in the indigenous rights movement worldwide, reflected in such instruments as the United Nations Declaration on the Rights of Indigenous Peoples<sup>65</sup> and benchmarks like the United Nations's Sustainable Development Goals (SDGs).<sup>66</sup> In our view, the model of self-determination and sustainability in reservation land tenure has both descriptive power, in that it reflects what some tribes are already doing, and normative force, in that it may highlight best practices in promoting the well-being of Native peoples. These ethics indicate that many Indian people want and need a better standard of living, *and* that they also want to maintain the reservation as a political and cultural homeland forever, aspirations that transcend the mere creation of a market economy for land. Countries around the world are confronting their colonial pasts and contemplating the role that indigenous peoples play in meeting sustainable development goals with respect to poverty and environmental protection, as well as adapting to the challenges of climate change.<sup>67</sup> In short, while privatization is a popular and recurrent theme in some national debates, norms of self-determination and sustainability may help to inspire deeper thinking, reform, and planning around local, regional, and global issues in land management.

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64. *See infra* Part III.C.

65. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter United Nations Declaration on the Rights of Indigenous Peoples].

66. G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015) [hereinafter United Nations Sustainable Development Goals]; *see also Sustainable Development Goals*, UNITED NATIONS, <https://perma.cc/3AT2-9R9W> (archived Feb. 21, 2019).

67. *See, e.g.*, Justin Trudeau, Prime Minister, Can., Address to the 72nd Session of the United Nations General Assembly (Sept. 21, 2017) [hereinafter Trudeau General Assembly Address], <https://perma.cc/H2SS-SZ79>. For a compilation of articles by scholars working at the intersection of indigenous rights and climate change, *see CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES* (Randall S. Abate & Elizabeth Ann Kronk eds., 2013) (providing a comparative description of how indigenous peoples are responding to climate change, oftentimes with strategies arising from deeply embedded tribal norms of conservation and sustainability).

This Article proceeds as follows: Part I elaborates on the legal and cultural history of Indian land tenure as a fundamental backdrop to claims about the relationship between land status and poverty in Indian Country. Part II sets forth the current legal framework for reservation property and housing, including the Department of Housing and Urban Development's Section 184 program,<sup>68</sup> the Native American Housing Assistance and Self-Determination Act (NAHASDA),<sup>69</sup> and the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act.<sup>70</sup> We then evaluate these programs against new data on income, credit, and capital in Indian Country that further complicate the current story of Indian poverty and should inform any legal reform. Part III discusses tribal innovations in Indian land tenure and housing. These examples reflect an ethic of self-determination and sustainability and deserve attention in ongoing debates about well-being in Indian Country and beyond.

## **I. A Legal and Cultural History of Land Tenure in Indian Country**

Indigenous peoples have a unique relationship to the natural world and to the earth, which, in tribal oral histories, traces to time immemorial.<sup>71</sup> Tribal cultures are integrally tied to land and its rich natural and cultural resources.<sup>72</sup> Thus, for indigenous populations, all facets of Native life, including sovereignty, language, and religion, are bound to the natural world. This relationship, in turn, gives rise to indigenous peoples' cultural property, including ceremonies, rituals, art, and artifacts.<sup>73</sup> These indigenous cultural properties traverse and exist beyond the rigid legal doctrines of real, personal,

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68. See Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 184, 106 Stat. 3672, 3739-45 (codified as amended at 12 U.S.C. § 1715z-13a (2017)); *infra* Part II.B.1.

69. See Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (codified as amended in scattered sections of the U.S. Code); *infra* Part III.B.2.

70. See Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150 (codified as amended at 25 U.S.C. § 415 (2017)); *infra* Part II.B.4.

71. See Duane Champagne, *Challenges to Native Nation Building in the 21st Century*, 34 ARIZ. ST. L.J. 47, 50-51 (2002).

72. See, e.g., Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1122 (2004) ("Place is central to Navajo culture and identity, and understanding the modern Navajo Nation necessitates an understanding of the interconnectedness between the Diné [the Navajo people] and their land base.").

73. See Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 348-55 (2008) (explaining the effects of colonization on the cultural, philosophical, and religious aspects of Indians' existence).

and intellectual property in American law.<sup>74</sup> What is more common among indigenous peoples is a holistic view of the world, in which the natural world and all other aspects of indigenous life are linked rather than siloed.<sup>75</sup>

Accordingly, the way in which land is conceived, manifested, and protected by law is of critical importance to indigenous peoples. In the United States, land and jurisdiction—or property and sovereignty<sup>76</sup>—are mutually constitutive in the lives of indigenous peoples.<sup>77</sup> One unique feature of tribal peoples is the desire to experience property—real and otherwise—as a collective, facilitating tribes’ capacity to nurture and grow religious systems, rituals, economies, governance systems, and kin relations in a way that reflects indigenous values.<sup>78</sup> Concomitantly, because non-Indians have so often desired indigenous lands and resources, the taking of Indian property has, for centuries, impeded Indian life and threatened Indian cultural survival.<sup>79</sup>

In this Part, we provide a brief historical description of Indian lands—revered, held, lost, sold, taken, regained—and tie this history to our larger thesis. This Part pays particular attention to a collection of key moments in Indian land law that exemplify the desire to acquire Indian lands and resources, and the push and pull over privatization of Indian lands occurring over the past two hundred years, all building toward the complex system of land holdings seen today in Indian Country. This history also demonstrates the fallacy of the current, oversimplified calls for privatization of the reservation as a way of “protecting” Indian people.

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The picture of Indian property prior to contact from European colonizers is complex and dynamic. Prior to colonization, this continent was populated with hundreds of indigenous peoples, organized into a wide range of kinship

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74. See Carpenter et al., *supra* note 49, at 1033 (arguing that cultural property falls into the “grey area between these other realms”).

75. See Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 224 (2000).

76. See generally Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991) (explaining that tribal jurisdiction is quite often but not always coextensive with the tribe’s geographic boundaries, and that there is an inextricable link between a tribe’s property and the reach of its sovereign authority).

77. Cf. Carpenter et al., *supra* note 49, at 1033 (“[C]ultural property is often considered anathema to traditional property constructs and accordingly is afforded scant treatment in property theory.”).

78. See Riley, *supra* note 75, at 224.

79. See generally LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005) (explaining how law itself was shaped in the New World as an instrument for dispossession of Indian lands and cultures).

networks, clans, tribes, villages, and nations.<sup>80</sup> There existed enormous diversity between tribes in terms of language, religion, culture, and governance structure.<sup>81</sup> But a common feature of indigeneity was attachment to land in a spiritual sense.<sup>82</sup> For Native tribes, this continent is the place of origin and creation. Known as Turtle Island,<sup>83</sup> North America is Native peoples' sacred homeland, the site of physical and spiritual creation.<sup>84</sup> Tribal stories universally root indigenous peoples in this land, and often mark a tribe's journey from creation within its aboriginal homelands,<sup>85</sup> which—as we explain herein—may or may not be where the tribe's reservation was ultimately established.<sup>86</sup> This relationship to land is described as being of a sacred nature, characterized by rights, obligations, and mutual respect and need.<sup>87</sup> As stated by a Gwich'in leader: "We believe in the wild earth because it's the religion we're born with."<sup>88</sup> Similar commitments and belief systems can be found among tribes all across North America whose relationships to the land have survived and even transcended dispossession and colonization.<sup>89</sup>

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80. See Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 869 (2016).

81. See *id.*

82. See *id.* at 869-70.

83. See, e.g., DUANE CHAMPAGNE, NOTES FROM THE CENTER OF TURTLE ISLAND, at viii (2010) (noting that in Chippewa creation stories, "Turtle Island is the name given to the land"); ENCYCLOPEDIA OF THE HAUDENOSAUNEE (IROQUOIS CONFEDERACY) 318-19 (Bruce Elliott Johansen & Barbara Alice Mann eds., 2000) (noting that the Iroquois frequently refer to North America as "Turtle Island").

84. See Laura Adams Weaver, *Native American Creation Stories*, in 1 ENCYCLOPEDIA OF WOMEN AND RELIGION IN NORTH AMERICA 83, 83 (Rosemary Skinner Keller & Rosemary Radford Ruether eds., 2006) (describing Native American creation stories as intrinsically tied to the land).

85. See *id.*

86. See *infra* Part III.C.

87. See Denise Low, *Contemporary Reinvention of Chief Seattle: Variant Texts of Chief Seattle's 1854 Speech*, 19 AM. INDIAN Q. 407, 411 (1995); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1302-03 (2001); see also Carpenter et al., *supra* note 49, at 1062-63 (describing the "spiritual obligation" of the Navajo people "to stay within their homeland [and] care for it").

88. *Epigraph* to ARCTIC REFUGE: A CIRCLE OF TESTIMONY (Hank Lentfer & Carolyn Servid eds., 2001) (quoting Trimble Gilbert, Chief, Arctic Vill.); see also *Trimble Gilbert—2nd Traditional Chief*, TANANA CHIEFS CONF., <https://perma.cc/Z5G7-AV3J> (archived Feb. 23, 2019).

89. See Tsosie, *supra* note 87, at 1302-06.

Living together as an Indian community better enables tribes to maintain their indigenous languages, engage in cultural practices, and participate in ceremonial and religious traditions with other tribal people.<sup>90</sup> These are the places where tribal members grow their economies, build their homes and communities, go to school, and participate as citizens of their tribes.<sup>91</sup> Though there are aspects of indigenous identity and tribal peoplehood that transcend place, the core of indigenous nationhood and collectivism relies on a shared place of being. This is why, as explained more fully herein, destruction of a communal land base is itself destructive to tribal self-determination and cultural survival.

But indigenous peoples' right to live together as collective, self-determining peoples has been threatened since the point of contact. European arrival to the New World was almost immediately marked by a corresponding desire for land and resources.<sup>92</sup> U.S. law sanctioned the taking of Indian lands, as theories of property rights and racial hierarchy were aggressively employed to effectuate the transfer of property from Indians to whites.<sup>93</sup> This transfer meant ignoring or rejecting indigenous property rights systems already in place and imposing a new American framework that would swiftly and efficiently move lands and resources into new hands.<sup>94</sup> The Indians'

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90. See Carpenter et al., *supra* note 49, at 1113; see also Sarah James, *We Are the Ones Who Have Everything to Lose*, in ARCTIC REFUGE, *supra* note 88, at 3, 3-4.

91. See Carpenter et al., *supra* note 49, at 1113; Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1062-63 (2005); see also Anaya Report, *supra* note 54, ¶ 6 (“While the land holdings vary significantly among the tribes, in all cases they pale in comparison to the land areas once under their possession or control. Still, the diminished landholdings provide some physical space and material bases for the tribes to maintain their cultures and political institutions, and to develop economically.”).

92. See generally Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1 (2005) (tracing the “doctrine of discovery” and noting the role that it played in the fight over title to Indian lands by European powers tracing back to the fifteenth century).

93. See Riley & Carpenter, *supra* note 80, at 875 (discussing *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823)); see also *Johnson*, 21 U.S. (8 Wheat.) at 573, 590 (referring to “the tribes of Indians inhabiting this country” as “fierce savages” in contrast to the “superior genius of Europe,” and finding that tribes received “ample compensation” for colonization in the form of “civilization and Christianity”).

94. See ROBERTSON, *supra* note 79, at 118-29; ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 33-36 (2005).

“inferiority”—along the axes of race,<sup>95</sup> religion,<sup>96</sup> biology,<sup>97</sup> culture,<sup>98</sup> and relationship to property rights—was used to justify these acts.<sup>99</sup>

Even prior to the formation of the United States, treaty-making served as the “primary mechanism” for conveying land from Indians to whites.<sup>100</sup> These covenants between sovereigns—colonial powers on one side and Indian nations on the other—set forth the terms under which lands would be transferred.<sup>101</sup> Oftentimes, Indians agreed to cede lands in exchange for annuities, peace, and protection.<sup>102</sup> As more settlers arrived in the newly formed United States, Indians increasingly lost land and might.<sup>103</sup> More and more land was transferred from tribes to non-Indians, and these treaties began to read more like treaties of surrender or cession.<sup>104</sup> As demands for land increased, so did

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95. See NANCY SHOEMAKER, *A STRANGE LIKENESS: BECOMING RED AND WHITE IN EIGHTEENTH-CENTURY NORTH AMERICA* 129 (2004) (describing how the categorization of people by skin-color-based labels such as “red,” “white,” and “black” replaced other signifiers of difference, such as “Christian” and “non-Christian”).

96. See *id.*; Riley & Carpenter, *supra* note 80, at 877-78.

97. See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 40 (1992).

98. See ROBERT A. WILLIAMS, JR., *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION 195-96* (2012) (“The Reverend Samuel Purchas . . . ably catalogued the litany of stereotypes and clichés confirming that the savages of Virginia were perpetual enemies to the . . . form of civilization the English sought to plant in the New World . . .”).

99. See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 121-50 (1990) (chronicling how Europeans used law and religion as an effective instrument over centuries of genocidal conquest and colonization).

100. See Angela R. Riley, *The History of Native American Lands and the Supreme Court*, 38 J. SUP. CT. HIST. 369, 369 (2013).

101. See *id.*

102. For a collection of most of the several hundred treaties between the United States and Indian tribes, see 2 *INDIAN AFFAIRS: LAWS AND TREATIES* (Charles J. Kappler ed., 1904). For additional background on treaties between the United States and Indian tribes, see FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* (1994).

103. See, e.g., Treaty, Sioux Nation-U.S., Apr. 29, 1868, 15 Stat. 635; see also CAROLE E. GOLDBERG ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 10 (6th ed. 2010); ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800*, at 20-21 (1997) (noting that early treaties in the seventeenth and eighteenth centuries manifested European colonists’ desire for cooperation and were necessary for their survival).

104. See PHILIP J. DELORIA, *PLAYING INDIAN* 63-64 (1998) (“By the middle of the nineteenth century, most native people had . . . been made to disappear from the eastern landscape.”); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 177-80 (1999) (describing the detailed history of the United States’s efforts to remove the Chippewa from their aboriginal homeland).

ownership disputes. Ultimately, it was the Supreme Court that would define the scope of Indian property rights under American law.

In 1823, the Court decided *Johnson v. M'Intosh*,<sup>105</sup> the first of the “Marshall trilogy” of cases that set the foundation for Indian land rights that persists to this day.<sup>106</sup> The discrete property question in the case was actually quite confined.<sup>107</sup> But in his opinion for the Court, Chief Justice Marshall jumped over the most straightforward analysis of the case and, instead, answered a question with much larger legal impact: “what rights, if any, Indians had to their own lands.”<sup>108</sup>

In resolving this question, the Court adopted the doctrine of discovery, which “gave exclusive title to those who made it.”<sup>109</sup> As a result, tribes could occupy land—subject to purchase or conquest—but they could not alienate it.<sup>110</sup> This decision, based in racial hierarchy, reaffirmed a conception of European superiority over “the savage tribes of this continent.”<sup>111</sup> As Indian law scholar Robert A. Williams has noted, the Lockean view of the Indian as “the paradigm example of humanity in its pure, unadulterated savage state” was reified by the Court in *Johnson*.<sup>112</sup> Because Indians had left the land “wild” and had not mixed their labor with it in the way conceived of by Europeans, they had wasted it, and therefore could not acquire the same fee ownership rights in the land as

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105. 21 U.S. (8 Wheat.) 543 (1823).

106. See generally Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627 (2006) (examining the trilogy of cases that form “the basis for federal Indian common law”).

107. See Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1090-94 (2000).

108. *Id.* at 1073-74; see *Johnson*, 21 U.S. (8 Wheat.) at 572 (“The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.”). Chief Justice Marshall also assessed the question of what rules would govern claims by competing European sovereigns. See *Johnson*, 21 U.S. (8 Wheat.) at 572-73 (“On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. . . . But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves.”); see also Kades, *supra* note 107, at 1073-74.

109. See *Johnson*, 21 U.S. (8 Wheat.) at 574.

110. See Joseph William Singer, *Erasing Indian Country: The Story of Tee-Hit-Ton Indians v. United States*, in INDIAN LAW STORIES 229, 243-44 (Carole Goldberg et al. eds., 2011).

111. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288-90 (1955); see also *id.* at 279-80 (citing *Johnson*, 21 U.S. (8 Wheat.) at 587-88, 590-91).

112. See WILLIAMS, *supra* note 94, at 33, 47-70; see also JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, §§ 45-51, at 317-20 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1690).

could whites.<sup>113</sup> Connected to this was the Court's desire to reaffirm the exclusive power of the U.S. government—to the exclusion of private parties, states within the union, and foreign countries—to engage in land transactions involving Indian lands.<sup>114</sup> *Johnson* set the foundation for the federal Indian trust doctrine and the notion of split title seen in much of Indian Country today.<sup>115</sup>

In some respects, *Johnson* reached a compromise position. It recognized Indians' land rights and has helped tribes retain significant portions of land that likely would have been lost in the process of the settlement of the continent but for the split title.<sup>116</sup> At the same time, however, subsequent courts relied on *Johnson* and its progeny to justify the continued diminishment of Indian property rights and land holdings over time.<sup>117</sup>

Despite the Court's subsequent guarantees to protect Indian lands from encroaching states and settlers,<sup>118</sup> it was not to be. With pressure for Indian lands intensifying in the eastern United States, President Jackson and Congress put into place the Removal Act to "remove" the Indians from the southeastern United States to the uninhabited Indian Territory (what is now Oklahoma).<sup>119</sup> More than 80,000 Indians were forcibly marched on the Trail of Tears, the Trail of Death, and others, with significant percentages of the population perishing as a result.<sup>120</sup> The promise that accompanied removal was that tribes

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113. See LOCKE, *supra* note 112, bk. II, §§ 43-44, at 316-17.

114. See Singer, *supra* note 110, at 243-44.

115. *Johnson's* legacy was to deprive Indian nations the right to alienate their lands. Thus, even though tribes both then and today retain rights of occupancy among other rights, the U.S. government holds ultimate title in the property. See Singer, *supra* note 28, at 767.

116. See Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 492-94 (1994).

117. See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279-80, 284-85 (1955) (holding that the Fifth Amendment does not require compensation for the taking of aboriginal title).

118. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (holding that the laws of the state of Georgia had no force in Indian Country), *abrogated by Nevada v. Hicks*, 533 U.S. 353 (2001); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that tribes were not states or foreign nations but "domestic dependent nations").

119. See STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 191-227* (2005); see also Indian Removal Act, ch. 148, 4 Stat. 411 (1830) (codified as amended at 25 U.S.C. § 174 (2017)).

120. See BANNER, *supra* note 119, at 191; R. DAVID EDMUNDS, *THE POTAWATOMIS: KEEPERS OF THE FIRE 265-71* (1978) (recounting the removal of the Potawatomi, an event that has come to be known as the Trail of Death). See generally LYNN R. BAILEY, *THE LONG WALK: A HISTORY OF THE NAVAJO WARS, 1846-68* (2d prtg. 1970); RENNARD STRICKLAND, *THE INDIANS IN OKLAHOMA* (1980) (discussing the process by which the tribes of the southeastern United States were removed to the Indian Territory).

would live together on collective lands known as reservations, set apart from white expansion, and subject to their own laws and cultures.<sup>121</sup> Congress actively employed treaty-making to resolve disputes over boundaries<sup>122</sup> and secure peace with the tribes<sup>123</sup> before ending treaty-making altogether in 1871.<sup>124</sup>

But confining Indians onto reservations had devastating consequences, at least for some tribes. Unable to hunt, gather, fish, and live freely as they had for thousands of years, many reservation-based Indians became poverty stricken and wholly reliant on the federal government for food, subsidies, and survival.<sup>125</sup> Indian economies fell under the weight of westward expansion, as the American bison was hunted almost to extinction and reservation boundaries were increasingly policed with U.S. military force.<sup>126</sup>

Then, in the midst of the reservation experiment, federal policy shifted yet again. The promise of a separate and distinct Indian territory and an untouched communal land base, too, would be broken. Non-Indians flooded into Indian Territory on their way west, motivated by gold and land.<sup>127</sup> By the end of the nineteenth century, both “friends” and foes of Indian tribes—for disparate reasons—advocated aggressively for a policy of allotment, breaking up Indian reservations and reassigning individual plots of land to individual Indian families.<sup>128</sup> Privatization was the driving force. Romantic visions of “rugged

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121. See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14-19 (1987).

122. See, e.g., Treaty, U.S.-Wiandot Nation et al., art. III, Jan. 21, 1785, 7 Stat. 16, 17 (establishing a boundary line between the United States and the Wiandot and Delaware tribes).

123. See, e.g., Articles of Agreement and Confederation, Delaware Nation-U.S., art. II, Sept. 17, 1778, 7 Stat. 13, 13 (“That a perpetual peace and friendship shall from henceforth take place, and subsist between the contracting parties aforesaid, through all succeeding generations . . .”).

124. See Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71); see also WILKINSON, *supra* note 121, at 19 (“Congress’s decision in 1871 to bring treaty making with tribes to an end signaled a downgrading in the political status of tribes.”).

125. See Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1688-89 (2012).

126. See Angela R. Riley, *The Apex of Congress’ Plenary Power over Indian Affairs: The Story of Lone Wolf v. Hitchcock*, in *INDIAN LAW STORIES*, *supra* note 110, at 189, 197 [hereinafter Riley, *The Story of Lone Wolf*]; Riley, *supra* note 125, at 1699-700.

127. See ALBERT L. HURTADO, *INDIAN SURVIVAL ON THE CALIFORNIA FRONTIER* 100-24 (1988) (detailing the situation of California Indian tribes in the nineteenth century, who were engaged in conflicts with non-Indians over territory at the height of the gold rush and westward expansion).

128. See Riley, *The Story of Lone Wolf*, *supra* note 126, at 192 (describing how “powerful, diametrically opposed groups” all promoted allotment). See generally Royster, *supra* note 45 (describing the devastating consequences of allotment).

individualism” began to steamroll guarantees of Indian nationhood and continued collective existence.<sup>129</sup> To that end, Congress passed the General Allotment Act (also known as the Dawes Act) in 1887.<sup>130</sup> As President Theodore Roosevelt later asserted:

[T]he time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual.<sup>131</sup>

Allotment was based on a belief in the power of individual, private property rights. Both allies and enemies of Indian tribes believed that teaching Indians to respect private property; become Christian, yeoman farmers; and give up their tribal ways would be the best way to assimilate them into American life.<sup>132</sup> Through such privatization, Indians would lose their dependence on the federal government and would be freed from their supposedly uncivilized ways of being.<sup>133</sup> The other benefit, of course, was that allotment would break up the block of collectively held land in the Indian Territory, opening up space for white settlers and railroads.<sup>134</sup> Under the allotment agreements, allotted land would be held in trust by the federal government for a term of years before being converted to fee simple absolute, the same status as lands held by whites.<sup>135</sup> The remaining lands would be deemed “surplus” lands, and those lands would be made available for white settlement.<sup>136</sup> Indians would finally learn the value of private property, long held sacred by whites.

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129. See Riley, *supra* note 100, at 374-75.

130. Ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.).

131. Theodore Roosevelt, First Annual Message (Dec. 3, 1901), in 15 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1914, at 6641, 6674 (James D. Richardson ed., n.d.).

132. See Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1023 (1981) (“[F]riends’ of the Indians hoping to alter their ‘primitive’ living conditions supported allotment almost as strongly as those bent on divesting the Indians of their land . . .”); Riley & Carpenter, *supra* note 80, at 877-80 (detailing allotment-era policies of assimilation through Christianity, education, farming, and property distribution).

133. See Riley, *The Story of Lone Wolf*, *supra* note 126, at 201-02.

134. See FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920, at 42-53 (1984).

135. See Indian General Allotment Act § 5, 24 Stat. at 389-90 (codified as amended at 25 U.S.C. § 348 (2017)).

136. See *id.*; see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 555-57 (1903) (statement of the case) (referring to the “surplus of land” and “surplus lands” that tribes ceded through the allotment agreements); Joseph William Singer, Essay, *Lone Wolf, or How to Take Property by Calling It a “Mere Change in the Form of Investment,”* 38 TULSA L. REV. 37, 42-43 (2002).

The historical record reveals that tribes and individual Indians often vociferously rejected allotment, realizing that it was likely to bring greater poverty and despair.<sup>137</sup> Tribes gathered together and, along with their allies, advocated for their right to hang on to their collective lands, which had been guaranteed to them by treaties.<sup>138</sup> They also quickly came to understand that allotment was not a new beginning of freedom and independence as the federal government had promised, but the end.<sup>139</sup> Tribes that had already gone through the process of negotiating allotment agreements with the United States had been left with arid lands oftentimes unsuitable for farming.<sup>140</sup> Moreover, by destroying tribes' ability to live together, practice culture, speak a common language, and engage in ceremonies, allotment divided land and people, upending tribal lifeways and causing irreparable and devastating economic, social, and cultural disruption.<sup>141</sup>

Tribal resistance notwithstanding, allotment was a *fait accompli*.<sup>142</sup> When the tribes refused to sign the allotment agreements, fraud and deception were used to acquire the requisite signatures.<sup>143</sup> Congress proceeded to dismantle tribal governments<sup>144</sup> and break Indian treaties.<sup>145</sup> When tribes fought back, the Supreme Court held that abrogation of Indian treaties was a political issue not to be decided by the courts.<sup>146</sup> Moreover, tribes were not entitled to compensation, as breaking up the reservations guaranteed by treaty was not a Fifth Amendment taking, but merely a "change in the form of investment of Indian tribal property."<sup>147</sup>

Allotment forced the "privatization" of Indian lands onto tribes. With so little capital, education, and training—not to mention the poor quality of the lands they acquired—Indians could not become successful farmers in one

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137. See Riley, *The Story of Lone Wolf*, *supra* note 126, at 202-03.

138. See *id.* at 195-96, 202-05.

139. See *id.* at 203-05.

140. See *id.* at 189-90.

141. See *id.* at 190.

142. See *id.* at 202-03.

143. See *id.* at 202-05; see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 561 (1903) (statement of the case) (discussing allegations of fraud).

144. See, e.g., Curtis Act of 1898, ch. 517, §§ 26, 28, 30 Stat. 495, 504-05 (abolishing the tribal governments of the Five Tribes in Oklahoma).

145. See *Lone Wolf*, 187 U.S. at 565-66 (upholding Congress's abrogation of the Medicine Lodge Treaty); see also Riley, *The Story of Lone Wolf*, *supra* note 126, at 189.

146. See *Lone Wolf*, 187 U.S. at 565-66.

147. See *id.* at 564-68.

generation.<sup>148</sup> Though lands stayed in trust for a term of years,<sup>149</sup> once the trust status lifted, the land was free from restriction and could be taken from Indians. Through foreclosure for unpaid state taxes, deception by unscrupulous buyers, and out of sheer desperation in the face of poverty, massive amounts of land swiftly shifted from Indian to non-Indian hands.<sup>150</sup> Even “Big Pasture,” the almost 500,000 acres of common lands set aside for the collective use by the Kiowa, Comanche, and Apache, was opened up to white settlement within a few years.<sup>151</sup>

Accordingly, allotment did not make Indians rich, secure, or more respectful of private property. Allotment was devastating in terms of Indian land loss.<sup>152</sup> By the end of the allotment period, Congress had authorized the allotment of 118 Indian reservations, making settlement by whites available on 44 of them.<sup>153</sup> Indian lands were reduced by approximately 90 million acres—two-thirds of all tribal lands—during the allotment period.<sup>154</sup> Total tribal land holdings were reduced from 138 million acres in 1887 to a mere 48 million acres by 1934.<sup>155</sup>

Allotment also resulted in a terrible “tragedy of the anticommons.”<sup>156</sup> Of those allotted lands for which the trust status was not lifted and that remained in Indian hands, the vast majority passed from Indian heir to Indian heir by the laws of intestate succession.<sup>157</sup> As these lands remained in trust, the

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148. See MERIAM REPORT, *supra* note 45, at 7. See generally *id.* (describing the devastating losses to land and tribalism due to allotment, and repudiating the policy).

149. See *supra* text accompanying note 135.

150. See BRIAN W. DIPPIE, *THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY* 308 (1982); Christopher A. Karns, Note, *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation: State Taxation as a Means of Diminishing the Tribal Land Base*, 42 AM. U. L. REV. 1213, 1213-14 (1993); see also Royster, *supra* note 45, at 12 (“Thousands of Indian owners disposed of their lands by voluntary or fraudulent sales; many others lost their lands at sheriffs’ sales for nonpayment of taxes or other liens.”).

151. See BLUE CLARK, *LONE WOLF V. HITCHCOCK: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY* 90-94 (1994).

152. See Royster, *supra* note 45, at 12-13, 13 n.59 (providing details on allotment-era land loss).

153. OFFICE OF INDIAN AFFAIRS, DEP’T OF THE INTERIOR, *INDIAN LAND TENURE, ECONOMIC STATUS, AND POPULATION TRENDS* 6 (1935).

154. JOSEPH WILLIAM SINGER, *PROPERTY* § 15.3.1, at 787 (5th ed. 2017).

155. *Id.*

156. See generally Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

157. See Shoemaker, *Like Snow*, *supra* note 43, at 738.

federal government promised to manage the resources from those lands—oil extraction, grazing leases, and the like—and return the proceeds to the owners.<sup>158</sup>

What resulted was an unduly bureaucratic administrative system which ultimately collapsed under its own weight. Land allotted in 40- to 160-acre parcels at the turn of the twentieth century descended over numerous generations to an exponentially expanding number of heirs.<sup>159</sup> The interests in allotment became so fractionated that by 2002, there were 1.4 million ownership interests of 2% or less.<sup>160</sup> The average allotment had forty or more co-owners.<sup>161</sup> By 2003, around 18,000 of these interestholders were earning virtually no income from their land and had account balances of \$1 per year or less.<sup>162</sup> And the U.S. government had the ultimate responsibility to manage all of these interests in trust for the benefit of individual Indians, regardless of the size of the interest.<sup>163</sup>

Perhaps not surprisingly, the United States did not administer the accounts properly. Gross mismanagement plagued the system, and Eloise Cobell, a member of the Blackfeet Tribe, filed a class action lawsuit in 1996.<sup>164</sup> The class—comprising approximately 300,000 individuals<sup>165</sup>—sought an accounting for the trust money held on behalf of the beneficiaries and alleged that the federal government had breached its fiduciary duties to the

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158. See *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 8-10 (D.D.C. 1999), *aff'd and remanded sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

159. See *id.* at 17 n.14; Shoemaker, *Like Snow*, *supra* note 43, at 737-38; see also Indian General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389-90 (1887) (codified as amended at 25 U.S.C. § 348 (2017)); Rebekah Martin, Comment, *Defending the Cobell Buy-Back Program*, 41 AM. INDIAN L. REV. 91, 97 (2016) (“The growing problem of fractionated interests resulted in major losses of land value for indigenous families for generations, and continued to increase exponentially over the years.”).

160. See *Management of Indian Tribal Trust Funds: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. 142 (2002) [hereinafter *Trust Funds Hearing*] (statement of Jim Cason, Associate Deputy Secretary of the Interior, and Neal A. McCaleb, Assistant Secretary for Indian Affairs).

161. See *Cobell*, 91 F. Supp. 2d at 17 n.14 (reporting this figure as of 1999).

162. See DEP’T OF THE INTERIOR, COMPREHENSIVE TRUST MANAGEMENT PLAN app. A at A-1 (2003), <https://perma.cc/8DKT-HS58>.

163. See American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, § 102(a), 108 Stat. 4239, 4240 (codified at 25 U.S.C. § 4011(a) (2017)); see also *Trust Funds Hearing*, *supra* note 160, at 142 (“Even though these accounts today might generate less than one cent in revenue each year, each must be managed, without the assessment of any management fees, with the same diligence that applies to all accounts.”).

164. See *Cobell v. Salazar*, 679 F.3d 909, 913 (D.C. Cir. 2012); Martin, *supra* note 159, at 104.

165. See Bill McAllister, *Indian Leaders Sue Government over Mismanaged Trust Funds*, WASH. POST (June 11, 1996), <https://perma.cc/6UWQ-8MGR>.

accountholders.<sup>166</sup> In the words of the D.C. Circuit, “[t]he trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long.”<sup>167</sup> Ultimately, the case was settled by an act of Congress.<sup>168</sup> The settlement included money for a land buyback program, which has been remarkably successful in reconsolidating Indian lands and furthering Indians’ ability to keep tribes together geographically and culturally, while also facilitating tribal economic development.<sup>169</sup> A full discussion of the *Cobell* settlement, and how it has provided an important counterpoint to privatization of lands, is included in Part II below.<sup>170</sup>

But the real property losses and financial costs of allotment are only one part of the story. Along with a push toward privatization came a corresponding effort to individualize Indians themselves. In the colonial mindset, advancing private property rights went hand in hand with forced assimilation, which decimated the collective, communal life of tribes.<sup>171</sup> Languages, religions, and even Indian governments were strictly prohibited or criminalized.<sup>172</sup> Children were stolen by government agents and taken away to boarding schools.<sup>173</sup> If tribes persisted in maintaining ceremonies and sacraments, they were threatened with incarceration and starvation.<sup>174</sup> Some Indians were even massacred for

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166. See *Cobell v. Norton*, 240 F.3d 1081, 1092-93 (D.C. Cir. 2001).

167. *Id.* at 1086. The district court was even harsher, stating that “[i]t would be difficult to find a more historically mismanaged federal program.” *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 6 (D.D.C. 1999), *aff’d and remanded sub nom. Cobell*, 240 F.3d 1081.

168. See Claims Resolution Act of 2010, Pub. L. No. 111-291, § 101, 124 Stat. 3064, 3066-70; see also *Consultations on Cobell Trust Land Consolidation*, U.S. DEP’T INTERIOR, <https://perma.cc/BG77-2JYE> (archived Feb. 7, 2019).

169. See *Consultations on Cobell Trust Land Consolidation*, *supra* note 168; INDIAN TR. SETTLEMENT, <https://perma.cc/5HTZ-8MPK> (last updated Aug. 17, 2018).

170. See *infra* Part II.B.3.

171. See Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. REV. 605, 621-23 (2006).

172. See, e.g., Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 408-10 (2012) (identifying and analyzing federal legislative programs that outlawed Indian religious practices); Rebecca Tsosie, *NAGPRA and the Problem of “Culturally Unidentifiable” Remains: The Argument for a Human Rights Framework*, 44 ARIZ. ST. L.J. 809, 854 (2012).

173. See generally *AWAY FROM HOME: AMERICAN INDIAN BOARDING SCHOOL EXPERIENCES, 1879-2000* (Margaret L. Archuleta et al. eds., 2000) (using first-person accounts and photographs to describe the Indian boarding school experience); *TIM GIAGO, CHILDREN LEFT BEHIND: THE DARK LEGACY OF INDIAN MISSION BOARDING SCHOOLS* (2006) (providing an account of how Christianity was used in the missionary boarding schools to destroy the traditional religious and cultural beliefs of Native children). For more on the “educational aims” of Indian boarding schools, see *DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928*, at 21-24 (1995).

174. See Carpenter, *supra* note 172, at 408-09.

practicing their religions.<sup>175</sup> The government justified all of this assimilation as being in Indians' best interest, believing they would abandon tribal ways of life in exchange for civilization and Christianity.<sup>176</sup>

The U.S. government eventually realized its error and deemed allotment a resounding failure.<sup>177</sup> In response, Congress passed the Indian Reorganization Act (IRA)<sup>178</sup> in 1934 to halt the process of allotment, indefinitely extend the trust status of allotments so that they could not be leased or sold without federal approval, provide for the organization of tribal governments, and create a comprehensive scheme of land acquisition and consolidation.<sup>179</sup>

One of the most significant features of the IRA—and the one most vociferously challenged today<sup>180</sup>—is the section 5 land acquisition provision, discussed more fully in Part II below.<sup>181</sup> This provision authorizes the Secretary of the Interior to acquire land in trust for Indian tribes.<sup>182</sup> In recent decades, the land acquisition procedures have been employed regularly—particularly during the Obama Administration—to reacquire hundreds of thousands of acres of land for the benefit of Indian nations.<sup>183</sup> But the process is controversial in numerous respects. First, it disrupts the status quo of power shared among tribal governments, state governments, and the federal government. Questions of regulation and taxation, among others, follow the decision of whether land

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175. See generally, e.g., JAMES MOONEY, *THE GHOST-DANCE RELIGION AND WOUNDED KNEE* (Dover Publ'ns, Inc. 1973) (1896) (providing a first-person account of the Wounded Knee Massacre from a Bureau of Ethnology official).

176. See Royster, *supra* note 45, at 9 (“Assimilation was viewed as both humanitarian and inevitable.”).

177. See MERIAM REPORT, *supra* note 45, at 7.

178. Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended in scattered sections of 25 U.S.C.).

179. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 35, § 1.05, at 81-82.

180. See, e.g., *Stand Up for Cal! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 226-27, 276-302, 323 (D.D.C. 2016) (rejecting a challenge to the taking of land into trust for the North Fork Rancheria of Mono Indians in California), *aff'd*, 879 F.3d 1177 (D.C. Cir. 2018); *Grand Traverse Cty. Bd. of Comm'rs*, 61 I.B.L.A. 273, 273, 279-83, 285 (2015) (rejecting a challenge to a trust acquisition for the Grand Traverse Band of Ottawa and Chippewa Indians); see also Wood, *supra* note 36, at 417 n.9 (collecting cases).

181. See *infra* Part II.B.3.

182. See Indian Reorganization Act § 5, 48 Stat. at 985 (codified as amended at 25 U.S.C. § 5108 (2017)); see also 25 C.F.R. §§ 151.1-.15 (2018); Wood, *supra* note 36, at 417. But see *Carcieri v. Salazar*, 555 U.S. 379, 388, 395 (2009) (limiting the Secretary's ability to take land into trust under the IRA to only those tribes that were “under the federal jurisdiction of the United States when the IRA was enacted in 1934”). For a full discussion of the fee-to-trust provisions of the IRA, see Part II.B below.

183. See Wood, *supra* note 36, at 417 & n.8; Press Release, U.S. Dep't of the Interior, *Obama Administration Exceeds Ambitious Goal to Restore 500,000 Acres of Tribal Homelands* (Oct. 12, 2016), <https://perma.cc/LS67-NSXF>.

is under tribal-federal or state jurisdiction.<sup>184</sup> Not surprisingly, then, these fee-to-trust transfers have been vehemently opposed by states and private citizens, with several cases resulting in Supreme Court holdings limiting the IRA's scope.<sup>185</sup> Moreover, the current Administration has demonstrated a desire to halt fee-to-trust transfers, and, in some cases, to destroy tribal trust land status altogether.<sup>186</sup>

Less than fifteen years after the passage of the IRA, U.S. policy toward Indian tribes shifted yet again—back toward an ideology of individualism and private property rights, this time fueled by American imperialism and the growing Cold War. In the now-infamous *Tee-Hit-Ton Indians v. United States* decision, the Supreme Court held that the aboriginal title of Native peoples—because it had never been recognized by treaty or statute—amounted to no more than a license to be on the land.<sup>187</sup> Therefore, just compensation for the taking of tribal land was not constitutionally required.<sup>188</sup> Not long before, Congress had passed the so-called Termination Acts, which were designed to destroy tribal trust holdings, liquidate tribal assets, extinguish the federally recognized status of tribes, and thus end the unique obligations owed to tribes by the federal government.<sup>189</sup> The rhetoric and end game were entirely reminiscent of the allotment-era philosophy: a turn away from tribalism and collective property, and a focus on assimilation and private property.<sup>190</sup>

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184. This is a principle as old as the field of federal Indian law itself. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (holding that the laws of the state of Georgia had no force in Indian Country).

185. See, e.g., *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225-28 (2012) (allowing a suit challenging the Secretary's attempt to take land into trust under the IRA to go forward); *Carcieri*, 555 U.S. at 388, 395.

186. See *supra* text accompanying notes 16-17.

187. See 348 U.S. 272, 277-80 (1955).

188. See *id.* at 281-82, 288-91.

189. See Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2017); and 28 U.S.C. § 1360 (2017)) (granting states jurisdiction over tribal lands); H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) (announcing that many tribes, including all tribes in certain states, "should be freed from Federal supervision and control"); see also, e.g., Act of Aug. 23, 1954, Pub. L. No. 83-627, 68 Stat. 768 (terminating federal supervision over the lands of the Alabama and Coushatta Tribes of Texas). For background on the Termination Acts, see NICHOLAS C. PEROFF, *MENOMINEE DRUMS: TRIBAL TERMINATION AND RESTORATION, 1954-1974*, at 15-18 (1982); and Carole Goldberg, *President Nixon's Indian Law Legacy: A Counterstory*, 63 UCLA L. REV. 1506, 1510-11 (2016).

190. See DUANE CHAMPAGNE & CAROLE GOLDBERG, *CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280*, at 8-9 (2012); CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280*, at 1-2 (1997); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 812-13 (2006) (noting that the Termination Acts diminished federal criminal jurisdiction much "in the same

*footnote continued on next page*

Between 1953 and 1964, Congress terminated a total of 109 tribes.<sup>191</sup> Concomitantly, Termination took 2.5 million acres of Indian land out of trust and stripped 12,000 American Indians of tribal membership that had previously been recognized by federal law.<sup>192</sup>

Not unlike past privatization efforts, this Termination experiment was an abject failure and had devastating impacts on Indian people.<sup>193</sup> Reservations were sold, and many Indians lost their homes.<sup>194</sup> Education levels declined<sup>195</sup> while poverty rates ballooned<sup>196</sup> among Indians of terminated tribes. Discrimination and lack of education prevented Indians from getting jobs in white society.<sup>197</sup> With Termination's failures evident, the voices of opposition—both Indian and non-Indian—grew stronger.<sup>198</sup> States, in particular, did not want to have to step into the role, previously occupied by

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way that the allotment policies did” and that tribal lands previously held in trust “became ordinary private property subject to state jurisdiction”).

191. *History and Culture: Termination Policy 1953-1968*, PARTNERSHIP WITH NATIVE AM., <https://perma.cc/TN4G-9S3S> (archived Feb. 7, 2019).

192. *Id.*

193. See, e.g., VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 15-21 (1983) (describing Termination as a failure and noting its “unmistakable and significant” impact on Indian tribal culture).

194. See, e.g., Act of Sept. 5, 1962, Pub. L. No. 87-629, 76 Stat. 429 (providing for the sale of part of the Ponca Reservation); Act of Aug. 27, 1954, Pub. L. No. 83-671, 68 Stat. 868 (providing for the sale of part of the Uintah and Ouray (Ute) Reservation); Act of Aug. 13, 1954, Pub. L. No. 83-587, 68 Stat. 718 (providing for the sale of the Klamath Reservation); see also TASK FORCE ON TERMINATED & NONFEDERALLY RECOGNIZED INDIANS, REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS 25-29 (1976) [hereinafter TASK FORCE TEN REPORT]; Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1025-26, 1025 n.260 (1981); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151-54 (1977).

195. See S. LYMAN TYLER, INST. OF AM. INDIAN STUDIES, BRIGHAM YOUNG UNIV., INDIAN AFFAIRS: A STUDY OF THE CHANGES IN POLICY OF THE UNITED STATES TOWARD INDIANS 127-28 (1964); see also TASK FORCE TEN REPORT, *supra* note 194, at 38, 50-51, 61-65 (describing the effects of Termination on the Klamath Tribe).

196. See Chambers & Price, *supra* note 43, at 1076 (“As a result of termination, the poverty of terminated Indians unquestionably intensified, lands passed out of Indian hands . . . , unemployment rose from previously high levels, and federal services were withdrawn and not adequately supplanted by states and counties.” (footnote omitted)); Frederick J. Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600, 616 (1976) (“Indians who were members of terminated tribes were not equipped for assimilation. Many, having spent their proceeds rapidly, ended up as wards of the state in fact, if no longer in law.”).

197. See TASK FORCE TEN REPORT, *supra* note 194, at 60-61.

198. See ALVIN M. JOSEPHY, JR., THE INDIAN HERITAGE OF AMERICA 355-57 (rev. ed. 1991).

the federal government, of providing services to tribes and Indians.<sup>199</sup> As with past privatization efforts, these devastating consequences led to repudiation of the Termination policy in the 1960s,<sup>200</sup> which ushered in a new era of self-determination.

American Indians began to steadily mobilize as part of the “Red Power” movement in the 1960s and 1970s, on the heels of the larger civil rights movement within the United States.<sup>201</sup> Indians both on and off reservations advanced collective tribal rights, demanding that treaties be honored, Indian rights be respected, and the federal government live up to its promises.<sup>202</sup> Self-determination became the policy of the day, with a focus on Indian self-governance and economic development.<sup>203</sup> Legislation was passed to decriminalize Native religions,<sup>204</sup> protect Native languages,<sup>205</sup> and even return some sacred lands to Native peoples.<sup>206</sup> Reinvigorated by a larger movement for social justice, tribes that had endured the Termination era began to actively pursue justice in the courts. Tribes filed lawsuits against states that had purchased Indian lands in violation of federal law.<sup>207</sup> In some cases, they prevailed.<sup>208</sup>

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199. See, e.g., GARY ORFIELD, *A STUDY OF THE TERMINATION POLICY* 6-7 (1964) (reproducing statements of opposition by members of Congress from Florida, Montana, North Dakota, and Texas).
200. The Kennedy Administration completed and implemented plans for previously enacted Termination acts but did not push for more such acts to be passed. See FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* ch. 2, § F1, at 182-83 (1982 ed.); JOSEPHY, *supra* note 198, at 355. The Johnson Administration likewise did not make any effort to increase the scope of Termination. See FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW*, *supra*, ch. 2, § F1, at 184-85.
201. See CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS*, at xiii (2005); see also *id.* at 129-30.
202. See *id.* at xiii; see also *id.* at 132-37.
203. See *id.* at 194-98 (explaining President Nixon's policies toward Indian affairs and the programs started by the Office of Economic Opportunity during the Nixon era).
204. See American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. §§ 1996-1996a (2017)).
205. See Native American Languages Act, Pub. L. No. 101-477, tit. I, 104 Stat. 1152, 1153-56 (1990) (codified as amended at 25 U.S.C. §§ 2901-2906 (2017)).
206. See, e.g., Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (restoring land of the Taos Pueblo). For more on the taking of Blue Lake from the Taos Pueblo and the special religious circumstances under which it was restored, see R.C. Gordon-McCutchan, *The Battle for Blue Lake: A Struggle for Indian Religious Rights*, 33 J. CHURCH & ST. 785 (1991).
207. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 229 (1985) (describing the challenge brought by the Oneida Nation to a land purchase by the State of New York which allegedly violated the Nonintercourse Act of 1793); see also Act of Mar. 1, 1793, ch. 19, 1 Stat. 329 (repealed 1796).
208. See, e.g., *Oneida Indian Nation*, 470 U.S. at 230, 233, 240, 253-54.

The effort to reclaim tribal homelands was a driving force then, and it remains so today.<sup>209</sup> With increasing economic development on Indian reservations under a policy of self-determination,<sup>210</sup> tribes began buying back their own lands on the open market in fee simple absolute.<sup>211</sup> They then sought for those lands to be brought into trust pursuant to the Secretary of the Interior's power under the IRA.<sup>212</sup> In this sense, tribes sought to advance their own sovereignty and self-determination, not only by expanding their land base but also by engaging in the hard work of nation building, bolstered by a collective, communal existence afforded by a shared tribal territory.<sup>213</sup> In recent years, hundreds of thousands of acres of land have been taken back into trust for Indian tribes.<sup>214</sup>

In stark contrast to the nineteenth-century prophecy of the “vanishing Indian,” which was employed to justify taking “vacant” land and treating Indians as objects and commodities, Indians and Indian tribes have refused to go away.<sup>215</sup> Having maintained their collective identities, cultures, languages, religions, and communal land bases through hundreds of years of colonization, Indian tribes have endured. Tribal governments now exercise control over reservations whose land holdings are as complex and dynamic as the history of Indian policy itself. In many respects, land ownership in Indian Country

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209. See Wood, *supra* note 36, at 415-17 (explaining that tribes are currently reacquiring Indian lands, often using the procedures set forth in the IRA).

210. See Angela R. Riley & Adeleene M. Rockwell, Essay, *The United States Country Report of Special Rapporteur S. James Anaya: Reflections and Aspirations*, 32 ARIZ. J. INT'L & COMP. L. 183, 192 (2015).

211. See, e.g., Timberly Ross, *Indian Tribes Buy Back Thousands of Acres of Land*, NEWSDAY (Dec. 27, 2009, 2:22 PM), <https://perma.cc/E67X-9A4Y> (discussing the massive buyback efforts of tribes across the country and attempts to have purchased land put back into trust); see also Lorie M. Graham, *The Racial Discourse of Federal Indian Law*, 42 TULSA L. REV. 103, 113-14 (2006) (reviewing WILLIAMS, *supra* note 94) (describing the Oneida Tribe's efforts “to rebuild their economic base under the federal policy of self-determination”).

212. See Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 445-62 (2002-2003) (discussing the process by which tribes request that the Secretary of Interior bring lands into trust); see also Indian Reorganization Act, Pub. L. No. 73-383, § 5, 48 Stat. 984, 985 (1934) (codified as amended at 25 U.S.C. § 5108 (2017)); 25 C.F.R. §§ 151.1-15 (2018).

213. See generally REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT (Miriam Jorgensen ed., 2007).

214. See Press Release, Office of the Sec'y, U.S. Dep't of the Interior, Secretary Jewell Kicks Off White House Tribal Nations Conference (Nov. 13, 2013), <http://perma.cc/65T9-JUSP>.

215. For the definitive text on the “vanishing Indian” phenomenon, particularly as it pertained to the East Coast, from which many tribes had been moved, see DELORIA, *supra* note 104.

reflects a muddle of federal law and policy, with virtually every strand of Indian property tied in some way to a past effort to control or police Indian property rights.

Indeed, history has taught that efforts to “help” Indians through privatization of property and forced assimilation lead to disastrous results. The only policy that has ever resulted in Indian tribes’ flourishing is one of self-determination, where tribes are empowered to break from colonial domination, be self-governing peoples, and disrupt expectations of the settler state—on their own terms.

In Part II below, we turn to federal programs that are intended to ameliorate some of the impediments to borrowing in Indian Country, highlighting new demographic information and instances where federal legislation attempts to empower tribes to determine their own futures.

## **II. Privatizing Indian Country**

There is little doubt that real challenges are present in Indian Country, with housing specifically and real estate development more broadly. With regard to residential real estate, Indians continue to experience problems of both “quantity and quality” in the housing market.<sup>216</sup> There is inadequate housing stock to meet the current demand in Indian Country, such that many homes are severely overcrowded and in need of substantial repairs.<sup>217</sup> At the same time, with increased economic growth on reservations, many Indians are seeking to enter the housing market, putting further strain on limited supply.<sup>218</sup> Both housing development and maintenance require access to capital, which has historically been a problem in Indian Country.<sup>219</sup>

The trust status of tribal lands is tied to the problem of inadequate access to capital. This is where privatization proponents come in. A major concern for critics, as well as other policymakers, is that the trust status of reservation lands deters banks from extending credit for Indian Country housing.<sup>220</sup> When Indian borrowers face challenges using trust lands as collateral for loans due to the “split title,”<sup>221</sup> housing development—which is arguably tied to wealth

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216. See NNI REPORT, *supra* note 32, at 45-46.

217. See *id.* at 45-47.

218. See *id.* at 28, 45, 56.

219. See *infra* Part II.A.

220. See NNI REPORT, *supra* note 32, at 47.

221. See *supra* note 115 and accompanying text.

accumulation—is concomitantly impeded.<sup>222</sup> Because of these factors, advocates of privatizing Indian Country see the narrative of Indian poverty as linked to the trust status of reservation lands.<sup>223</sup>

Despite privatization’s rhetorical appeal, this Article pushes back on the theory that privatization will produce the economic, social, and cultural outcomes for Indian Country that its proponents predict. In this Part, we highlight two areas where we feel the privatization literature has failed to engage with new data emerging from Indian Country.

First, drawing on a 2016 report by Miriam Jorgensen and the Native Nations Institute (NNI),<sup>224</sup> as well as Jorgensen and Randall Akee’s corresponding data review,<sup>225</sup> we contend that the introduction of new demographic information into the privatization debate significantly complicates the picture of Indian Country income, wealth, and development in ways critical to the conversation. While we are careful to note the limitations of what we can learn from the data, and point out places where questions remain unanswered, we find that these recent reports provide a first step for better understanding Indian Country, which has been woefully understudied.<sup>226</sup> Moreover, we assert that these data can and should be used to inform policy reforms and other innovations that are far more nuanced than broad-brush calls for privatization, and which may better serve the more complex goals of tribal communities, including “Native nation building.”<sup>227</sup>

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222. See NNI REPORT, *supra* note 32, at 47-48.

223. See, e.g., Anderson, *How the Government Keeps Indians in Poverty*, *supra* note 5, at A10.

224. In 2013, the U.S. Treasury Department commissioned researchers from the NNI and the Harvard Project on American Indian Economic Development to do a major study on credit and capital in Indian Country as a follow-up to a 2001 study on reservation-based lending. See NNI REPORT, *supra* note 32, at i, 1-2. The resulting report provided extensive analysis of the general issues, including a lengthy discussion of housing finance in Indian Country. See *id.* at 45-59.

225. MIRIAM JORGENSEN & RANDALL K.Q. AKEE, NATIVE NATIONS INST., THE UNIV. OF ARIZ., ACCESS TO CAPITAL AND CREDIT IN NATIVE COMMUNITIES: A DATA REVIEW (2017) [hereinafter NNI REPORT DATA REVIEW], <https://perma.cc/4VQ2-LU7C>.

226. See NNI REPORT, *supra* note 32, at 10 (“American Community Survey data often are too imprecise to be useful to Native Community (or even federal) policymakers. Native Americans often remain unidentified in other national data collection efforts because oversampling to account for their outcomes is expensive. And, carefully and comprehensively collected tribal-level or other Native Community-level data often remain unanalyzed and unreported for lack of funding or lack of capacity.”); Cornell & Kalt, *supra* note 4, at 8 (“Data on economic conditions in Indian Country as a whole are sparse . . .”).

227. See *What Is Native Nation Building?*, U. ARIZ. NATIVE NATIONS INST., <https://perma.cc/ENJ6-DEVL> (archived Feb. 7, 2019) (“Nation building refers to efforts Native nations make to increase their capacities for self-rule and for self-determined, sustainable community and economic development. Nation building involves building institutions  
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A. Innovations in Indian Country Housing

To understand how Indian communities are changing—and, concomitantly, how these changing demographics serve as a vital counterpoint to the privatization narrative—it is critical to begin with a baseline understanding of Indian reservations and their residents.

Tribal members living on reservations today are the poorest racial group in the United States, just as they have been for decades.<sup>228</sup> Indian poverty rates are consistently higher than those of non-Indians. In the period from 2006 to 2014, 32% of Indians lived in poverty, compared to 24% of non-Indians.<sup>229</sup> Although there is wide variation across different reservations, many tribal communities also experience challenges with drug and alcohol abuse, school dropouts, poor health conditions, high rates of suicide, and violent crime.<sup>230</sup> These data are unsurprising; they reflect the consequences of colonization and assimilation, policies under which Indians were “plunged into a near-assetless state for at least a century.”<sup>231</sup> Many tribes’ reservations are comprised of lands with “little or no value.”<sup>232</sup> Such poverty, produced by a discriminatory and unjust system, has been very difficult to dismantle, tending to perpetuate itself from one generation to the next.<sup>233</sup>

In addition to poverty, lack of capital has also been identified as a “significant constraint” on economic development in Indian Country, including on home ownership.<sup>234</sup> Reports, such as the one produced by the Native American Lending Study (NALS), have documented the extreme impediments faced by reservation-based Indians who seek access to credit and capital.<sup>235</sup>

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of self-government that are culturally appropriate to the nation and that are effective in addressing the nation’s challenges.”).

228. See Cornell & Kalt, *supra* note 4, at 5.

229. NNI REPORT, *supra* note 32, at 4.

230. See Cornell & Kalt, *supra* note 4, at 5; Randall C. Swaim & Linda R. Stanley, *Substance Use Among American Indian Youths on Reservations Compared with a National Sample of US Adolescents*, JAMA NETWORK OPEN 6-8 (May 31, 2018), <https://perma.cc/YN4L-PFWZ>; see also Naomi Schaefer Riley, Opinion, *To Solve Alcoholism, Native Americans Must Look Inside Reservations*, USA TODAY (May 18, 2017, 5:02 AM ET), <https://perma.cc/LXM9-LXU4>.

231. See NNI REPORT, *supra* note 32, at 5.

232. See *id.*

233. See *id.*

234. See *id.* at 1; see also, e.g., Ezra Rosser, *Rural Housing and Code Enforcement: Navigating Between Values and Housing Types*, 13 GEO. J. ON POVERTY L. & POL’Y 33, 66-70 (2006); CMTY. DEV. FIN. INSTS. FUND, U.S. DEP’T OF THE TREASURY, THE REPORT OF THE NATIVE AMERICAN LENDING STUDY 1-2 (2001) [hereinafter NALS REPORT], <https://perma.cc/HXJ4-4FB5>.

235. See NALS REPORT, *supra* note 234, at 1-2, 4-6; see also NNI REPORT, *supra* note 32, at 1.

Congress, too, has recognized that solutions are needed to address the impacts of Indian Country's unique land tenure system in the context of housing and collateralization.<sup>236</sup>

While acknowledging the dismal reality of Indian poverty and Indians' overall well-being, we note that the statistics are rapidly changing. While the data show it will likely take nearly forty years under current growth rates for reservation-based Indians' per capita income to reach that of the general U.S. population, the trend is positive and, in some respects, quite dramatic.<sup>237</sup> The income of Indians living on the reservation, as well as the concomitant social conditions on reservations, are improving—and at a much higher rate than that of the general American population. Stephen Cornell and Joe Kalt—cofounders of the Harvard Project on American Indian Economic Development, which has studied economic development and Native governance in Indian Country for decades<sup>238</sup>—found that the personal income of Indians has steadily increased since the 1990s, greatly outpacing that of the United States as a whole.<sup>239</sup> Similarly, the NNI has reported that between 2000 and 2010, the per capita income of reservation-based Indians grew faster than that of the United States as a whole.<sup>240</sup> Unsurprisingly, poverty rates also fell faster among Indian Country residents than among the general U.S. population.<sup>241</sup>

Cornell and Kalt link these remarkable, positive changes in reservation conditions to the shift to decreased federal oversight and increased tribal autonomy and self-determination.<sup>242</sup> Indeed, their work has “point[ed] to the major changes in federal policy toward Indian nations that constitute the era of self-determination as the central causal factor explaining why it took until the latter 20th century for significant and sustained development progress to take

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236. See, e.g., *Housing Partnerships in Indian Country: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 112th Cong. 18-19 (2012) (statement of Cheryl A. Causley, Executive Director, Bay Mills Indian Housing Authority). Some legislative responses are discussed in Part II.B below.

237. See NNI REPORT, *supra* note 32, at 5-7. *But see id.* at 6 (“Critically, the reported statistics are averages, and the members of some Native Communities are doing much better than the members of others.”).

238. See *About Us*, HARV. PROJECT ON AM. INDIAN ECON. DEV., <https://perma.cc/7J98-BWVJ> (archived Feb. 7, 2019).

239. See Cornell & Kalt, *supra* note 4, at 5; *see also id.* (“This holds true for both tribes with much-publicized casino gambling and for non-gaming tribes.” (citation omitted)).

240. See NNI REPORT DATA REVIEW, *supra* note 225, at 1.

241. *See id.*

242. See Cornell & Kalt, *supra* note 4, at 8-14.

hold in Indian Country.”<sup>243</sup> The NNI has come to the same conclusion, noting that tribal self-determination and self-governance are “the real drivers of recent economic change in Native Communities.”<sup>244</sup>

These trends and findings connect back to the larger issue of privatization. As history has shown, privatization may have many consequences, one of which is that it makes individual Indians less likely to live communally, or to share spaces where indigenous languages are spoken and ritual ceremonies performed. In fact, some research suggests that collective tribal life may also be associated with better economic outcomes. For instance, Cornell and Kalt have found that economic growth and good governance are positively correlated with a “lack of cultural assimilation,” a finding based on indicators such as whether a tribe has a thriving Native language, and the extent to which it adheres to traditional Native religions, ceremonies, and cultural practices.<sup>245</sup> Thus, while it is important not to overstate the link, tribal engagement in cultural practices appears to at least be related to improved economic growth. As we have written in the past, and as a bevy of research confirms, tribes cannot continue to adequately engage in collective, communal activities unless they have a common land base where it is possible for them to live together, speak a common language, and practice their culture and traditions.<sup>246</sup> In this sense, the research indicating that a strong collective land base and shared tribal cultural life are linked with greater economic success should at least give pause to proponents of privatization. At a minimum, this challenges the theory that more private property necessarily leads to better conditions. In fact, just the opposite may be true.

Moreover, before we accept the argument that federal laws meant to ameliorate problems of lending and economic growth in Indian Country are doomed to fail, it is vitally important to think about them in the context of time. For one thing, the federal government only began an aggressive policy in favor of tribal self-determination in the 1970s.<sup>247</sup> Accordingly, many of the

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243. *Id.* at 10.

244. NNI REPORT, *supra* note 32, at 6.

245. Cornell & Kalt, *supra* note 4, at 10 (emphasis omitted).

246. See Carpenter et al., *supra* note 49, at 1113; Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn't*, in REBUILDING NATIVE NATIONS, *supra* note 213, at 3, 18, 30; see also McCoy, *supra* note 212, at 422 (“Indian trust land provides for tribes’ spiritual, physical, economic, and political well-being . . .”).

247. See Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended in scattered sections of 25 U.S.C.); see also Cornell & Kalt, *supra* note 4, at 10, 17-18 (noting that ISDEAA is viewed as “a turning point” at which the federal government shifted from “one-size-fits-all” approaches to Indian Country to an approach that empowers tribes to initiate and employ policies,  
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statutory schemes we discuss in the next Subpart are quite recent, and have been available to facilitate lending in Indian Country for only one generation of reservation residents (at least in most cases). Moreover, to the extent access to capital and credit is important for economic growth, there has historically been a paucity of economic institutions in or anywhere near Indian Country.<sup>248</sup> But this, too, is changing. In 2001, there were a mere fourteen Native Community Development Financial Institutions (CDFIs) nationwide.<sup>249</sup> By March 2016, this number had grown to seventy.<sup>250</sup>

In sum, we find that the rapidly shifting demographics of Indian Country require that we more thoughtfully approach potential lending and borrowing solutions. We contend that these new data paint a picture of peoples in flux. Instead of a rush to privatization, these changes ought to be taken into account in shaping policy, a subject we take up in the next Subpart.

#### B. Assessing Federal Statutory Programs

In the last several decades, Congress has enacted a set of statutory reforms meant to empower tribes and individual Indians in their quests for home ownership, and to advocate for their access to other forms of economic development.<sup>251</sup> Some of these programs are designed not only to solve some of the lending puzzles presented by trust land, but also to facilitate tribal self-determination and to aid tribes in preserving their tribal land bases. A common feature of the programs is the extent to which they shift power from federal to tribal governments, putting tribes in control of their own destinies.

In this Subpart, we provide a description and analysis of several federal programs directly aimed at alleviating some of the concerns raised about trust land on reservations. We also explain how these programs fit into broader federal Indian law policy.<sup>252</sup> We review, in turn, the Housing and Community

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laws, and governmental structures that are tailored to their own tribal governance and growth).

248. See NNI REPORT, *supra* note 32, at 1.

249. See *id.* at 13-14.

250. *Id.* at 14. This includes four CDFIs located in Alaska and seven in Hawaii, leaving a total of fifty-nine in the lower forty-eight states. *Id.*

251. See *id.* at 93-96.

252. As mentioned at the outset, we focus here on land, real estate, and housing, leaving questions about Indian natural resources to others. For a general primer, see JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS (2d ed. 2008).

For commentary on issues surrounding Indian natural resources in the current political context, see, for example, Sarah Krakoff, *Just Transitions?*, LAW & POL. ECON. (Jan. 29, 2018), <https://perma.cc/Q8T8-MBN2> (assessing poverty and other issues associated with the declining coal industry on Crow, Hopi, and Navajo reservations);  
*footnote continued on next page*

Development Act of 1992; NAHASDA; the *Cobell* settlement and Land Buy-Back Program,<sup>253</sup> in addition to other fee-to-trust procedures; and the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act. By examining the empirical effectiveness and remaining challenges associated with each program, it is possible to get a clearer sense of what is actually happening on the ground in Indian Country, and where specific efforts at reform—including calls for privatization—do and do not make sense.

### 1. The Housing and Community Development Act of 1992

One of the core pieces of legislation dealing with the trust status issue in Indian residential housing is the Housing and Community Development Act, enacted by Congress in 1992.<sup>254</sup> The legislation created a program—known as the HUD Section 184 lending program—which provides a complete federal guarantee to banks for loans made to Indian individuals or housing authorities on tribal lands, both trust and fee.<sup>255</sup> The statute was enacted to respond to the

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and Sarah Krakoff, *Standing with Tribes Beyond Standing Rock*, HARV. C.R.-C.L. L. REV.: AMICUS BLOG (Apr. 21, 2017), <https://perma.cc/2797-US3M> (arguing that tribal sovereignty is a first-order value in assessing natural resource proposals on lands adjoining tribal communities).

For an assessment of natural resource development vis-à-vis the federal-Indian trust relationship, see JAMES ROBERT ALLISON III, *SOVEREIGNTY FOR SURVIVAL: AMERICAN ENERGY DEVELOPMENT AND INDIAN SELF-DETERMINATION* (2015) (examining indigenous peoples' encounters with the energy industry in the United States, including environmental resistance, assertions of political autonomy, and tribal entrepreneurship); DONALD L. FIXICO, *THE INVASION OF INDIAN COUNTRY IN THE TWENTIETH CENTURY: AMERICAN CAPITALISM AND TRIBAL NATURAL RESOURCES* (2d ed. 2012) (exploring the pressures of American capitalism and federalism through case studies of tribal natural resources, and introducing indigenous structures and values as a means of understanding and responding to these pressures); and Carla F. Fredericks, *Plenary Energy*, 118 W. VA. L. REV. 789 (2015) (arguing that the “trust-sovereignty continuum” would benefit from federal recognition of “free, prior and informed consent” as a standard for resource development involving Indian tribes).

253. See *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012); *infra* Part III.C.3; see also Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (codified as amended in scattered sections of the U.S. Code); INDIAN TR. SETTLEMENT, *supra* note 169.
254. Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified as amended in scattered sections of the U.S. Code).
255. See *id.* § 184, 106 Stat. at 3739-45 (codified as amended at 12 U.S.C. § 1715z-13a (2017)); see also *Section 184 Home Loan Guarantee: An Explanation*, 1ST TRIBAL LENDING, <https://perma.cc/9UBT-J5T9> (archived Feb. 7, 2019); *Section 184 Indian Home Loan Guarantee Program*, U.S. DEP'T HOUSING & URB. DEV., <https://perma.cc/TP5V-GYQ5> (archived Feb. 7, 2019). In 2000, Congress added the Section 184A program governing Native Hawaiians. See Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-569, tit. V, subtitle B, sec. 514, § 184A, 114 Stat. 2944, 2989-97 (codified at 12 U.S.C. § 1715z-13b); see also *Loan Guarantees for Native Hawaiian Housing (Section 184A)*, U.S. DEP'T HOUSING & URB. DEV., <https://perma.cc/JGF3-VDWW> (archived Feb. 28, 2019).

concern that because most Indian lands are held in trust, they cannot be used as collateral for loans.<sup>256</sup> Historically, this meant that the standard residential mortgage lending system excluded most reservation-based Indian borrowers, and home ownership in Indian Country—arguably a mechanism for wealth creation—was startlingly low.<sup>257</sup> The Act responded to this deficiency: Its guarantee removes most of the risk associated with making residential loans for homes on trust lands. Borrowers, in turn, are incentivized to use the program because of low down payments, fixed-rate mortgages, and the lack of a requirement to carry mortgage insurance or be in a certain income range.<sup>258</sup>

The legislation is designed to create a housing and lending market for Indians living on trust land, further tribal self-governance, and preserve the tribal land base. It does this in a variety of ways. As for the first goal, Section 184 loans are exclusively meant to support single-family residences of one to four units and cannot be used for commercial purposes.<sup>259</sup> To respond to the restrictions on alienation, Section 184 loans typically require the tribal government to assign to a tribal member the right to use the parcel for purchasing, building, or refinancing a home on trust land.<sup>260</sup> Tribal governments do so through a home-site lease, which is typically fifty years, but must be at a minimum the term of the mortgage plus ten years.<sup>261</sup>

Moreover, the statute furthers tribal self-governance and land base preservation in a variety of interconnected ways. A growing body of research in the field of Indian law has demonstrated that “good governance” in Native communities is often an indicator of healthy economic and social conditions.<sup>262</sup> The Section 184 program encourages this type of nation building by requiring

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256. See NNI REPORT, *supra* note 32, at 47-52.

257. See *id.* at 45-47.

258. *Id.* at 48-49.

259. *Tribe and TDHE Section 184 Resources*, U.S. DEP’T HOUSING & URB. DEV., <https://perma.cc/U9FN-723Q> (archived Feb. 7, 2019).

260. See Office of Native Am. Programs, U.S. Dep’t of Hous. & Urban Dev., *Mortgage Lending Process in Indian Country* (2006), <https://perma.cc/S238-U2JF>; *Tribe and TDHE Section 184 Resources*, *supra* note 259.

261. See *Trust Land Basics: HUD 184 Loans for Trust Lands*, 1ST TRIBAL LENDING, <https://perma.cc/436Y-HRUL> (archived Feb. 7, 2019).

262. For a theoretical examination of good Native governance, see Riley, *supra* note 26, (exploring “good Native governance” and how it is reflected in, among other things, governing institutions with legitimacy and accountability). See also Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 734 (2006) (arguing in the context of tribal criminal jurisdiction that “[a]ccountability and control of governing institutions has become a key indicator of tribal success in improving tribal economic and social conditions”).

that foreclosure and eviction proceedings be heard in tribal court.<sup>263</sup> Thus, tribes must have procedural and substantive safeguards in place before taking on Section 184 loans. This includes ensuring effective eviction and foreclosure procedures, and maintaining strong, stable tribal justice systems and courts to administer the laws.<sup>264</sup> To ensure the tribal land base is maintained, in the event of default on the loan, the lender can only liquidate the lease and asset after first offering to transfer the loan to another eligible tribal member, the tribe itself, or the federal government.<sup>265</sup>

Undoubtedly, despite best efforts, inefficiencies remain in the system. Redundant procedures and outmoded requirements may still serve as significant barriers to a functioning market. For example, to be eligible for the Section 184 program, the holder of trust land must receive a title report from the Bureau of Indian Affairs (BIA).<sup>266</sup> But inefficiencies within the BIA, along with inadequate recordkeeping, mean that it often can take from several weeks to over a year for borrowers to receive the documentation necessary to complete a loan.<sup>267</sup> This delay has deleterious effects on home ownership as families lose interest and motivation, and move on or give up on trying to secure mortgages.<sup>268</sup>

But examples of tribes taking over the management and adjudication of Section 184 housing issues demonstrate that empowering tribes to handle their own affairs oftentimes produces the more efficient and fair result. For instance, some tribes have reclaimed the approval process from the federal government, procuring all the trust land records regarding their reservations that had previously been held by the BIA.<sup>269</sup> When tribes control the process, they can create systems to produce the records swiftly, sometimes even within twenty-four hours.<sup>270</sup> The NNI Report describes the positive shift that occurred when the Saginaw Chippewa Tribe reclaimed its trust land documents from the BIA

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263. See *Tribe and TDHE Section 184 Resources*, *supra* note 259; see also U.S. DEP'T OF HOUS. & URBAN DEV., SECTION 184 INDIAN HOUSING LOAN GUARANTEE PROGRAM: PROCESSING GUIDELINES 2011, § 2.3(C), <https://perma.cc/W6UD-HDU6> ("To preserve tribal autonomy in the governing process, the federal agencies . . . will not prescribe a format or specific wording for foreclosure and eviction procedures.").

264. See *Tribe and TDHE Section 184 Resources*, *supra* note 259 (noting that in order to participate in the Section 184 program, tribes must first "acknowledge[] that should eviction and foreclosure procedures not be enforced, the [government] will cease making new loan guarantees within the tribe's area of jurisdiction").

265. See *Section 184 Home Loan Guarantee: An Explanation*, *supra* note 255.

266. See *Trust Land Basics: HUD 184 Loans for Trust Lands*, *supra* note 261.

267. See NNI REPORT, *supra* note 32, at 52.

268. See *id.*

269. See *id.*

270. See *id.*

and created its own recordkeeping office.<sup>271</sup> This “transformed the process” of obtaining land title records and “accelerated home ownership” on the reservation.<sup>272</sup> Similarly, though there remains some skepticism by lenders about the fairness of tribal courts in foreclosure proceedings, initial anecdotal evidence indicates these concerns may be overblown. As one tribal justice attorney has noted:

I’m amazed by the number of attorneys who have told me they represent a bank, and they make no attempt to repossess collateral or foreclose on properties because they say they have understood that the tribal court is not available to provide a remedy to a non-member. Then they come into court and they realize that the system is actually more creditor-friendly than the state court system. So I think the number one misperception is that the tribal court is politically driven, will never make a decision contrary to a tribal member’s interest; it’s just simply not true.<sup>273</sup>

Indeed, tribes recognize that having “an empowered and impartial tribal judicial system creates an atmosphere of fair play” and may actually promote better economic outcomes for tribes.<sup>274</sup>

The economic impact of Section 184 has been quite remarkable. Since 2001, “Section 184-guaranteed mortgage lending on tribal and individual (allotted) trust lands has increased ten-fold.”<sup>275</sup> By 2013, the total amount of Section 184 lending for homes on trust land had reached nearly \$420 million (adjusted for inflation).<sup>276</sup> However, the data reveal that the trend toward lending for mortgages on fee lands still vastly outpaces lending on trust lands nationwide. By 2013, loans for homes on fee simple land exceeded \$3.4 billion.<sup>277</sup>

Yet Indians on reservations still struggle to obtain credit, and while it is true that mortgage credit is particularly difficult to obtain for trust land, the fact that lands are held in trust does not seem to fully explain this challenge.<sup>278</sup> Some scholars locate the resistance to lending in Indian Country to distrust and

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271. *See id.*

272. *Id.*

273. *Id.* at 76 (quoting B.J. Jones, Dir., Tribal Judicial Inst., Univ. of N.D. Sch. of Law).

274. *See id.* at 74.

275. *Id.* at 49.

276. *Id.*

277. *Id.* These numbers are somewhat skewed because in some places, like Oklahoma, lending is usually for homes on fee simple land since “most tribes lack reservations per se.” *See id.*

278. *See id.* at 47-48 (noting that “in mainstream real estate lending, lenders use land and the structures on it as security,” but that “not all credit problems are due to a lack of collateral”); *see also* OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 55, at 7 (“Because federal law generally prohibits a lender from obtaining a mortgage on real property held in trust by the federal government for an Indian tribe, tribal trust and restricted lands present the greatest challenge to extending credit.” (footnote omitted)).

discrimination directed toward Indians, tribes, and reservations themselves.<sup>279</sup> The 2001 NALS report confirmed similar findings.<sup>280</sup> It identified poor credit histories (often linked to limited access to capital), misconceptions about tribal courts and tribal governments, distrust between banks and tribes, and discrimination against Indians as some of the remaining barriers to home ownership on reservations.<sup>281</sup> Indians tend to borrow at much higher interest rates than whites, are more likely to be denied mortgages, and have lower credit scores overall.<sup>282</sup> All of these factors undoubtedly contribute to slower growth in mortgage markets for trust land.

In sum, the Section 184 program has had tremendously positive impacts in Indian Country. To be sure, more research is needed to identify why housing on trust land has experienced significantly slower growth than that on fee land. But it is evident that as reservation-based Indians' income and access to capital increase, they will be better positioned to access the housing markets in their communities. Some tribes are even establishing banks to put in place their own lending systems.<sup>283</sup> While not a perfect fix, the Section 184 program attempts to advance home ownership, maximize economic growth, and promote tribal governance, all while preserving the collective land base.

## 2. The Native American Housing Assistance and Self-Determination Act (NAHASDA)

As part of the affirmation of its trust responsibility to tribal governments, in 1996, Congress enacted NAHASDA,<sup>284</sup> which reorganized the system of Indian housing assistance by eliminating several separate HUD programs and replacing them with block grants given directly to tribes.<sup>285</sup> The program

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279. See NNI REPORT, *supra* note 32, at 1. For example, reservation residents have lower credit scores than individuals living immediately outside reservation boundaries, regardless of race. NNI REPORT DATA REVIEW, *supra* note 225, at iv.

280. See NALS REPORT, *supra* note 234, at 44-48; *see also* NNI REPORT, *supra* note 32, at 1; *supra* text accompanying note 235.

281. See NALS REPORT, *supra* note 234, at 39, 44-48; *see also* NNI REPORT, *supra* note 32, at 1.

282. See NNI REPORT, *supra* note 32, at 48.

283. *See, e.g., First National Bank & Trust Co., CITIZEN POTAWATOMI NATION*, <https://perma.cc/WZ6G-G5V4> (archived Feb. 7, 2019) (describing the "largest tribally owned national bank in the United States," which is owned by the Citizen Potawatomi Nation in Oklahoma).

284. Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (codified as amended in scattered sections of the U.S. Code); *see id.* § 2, 110 Stat. at 4017-18 (codified as amended at 25 U.S.C. § 4101 (2017)).

285. *See id.* § 101, 110 Stat. at 4022-23 (codified as amended at 25 U.S.C. § 4111); BRUCE E. FOOTE, CONG. RESEARCH SERV., RS21241, FACT SHEET ON THE NATIVE AMERICAN HOUSING ASSISTANCE AND SELF-DETERMINATION ACT OF 1996 (NAHASDA) 1-4 (2002). One of the programs authorized by NAHASDA was the Indian Housing Block Grant, a  
*footnote continued on next page*

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provides more steady streams of funding for tribes and distributes them in such a way that tribes can more readily use and leverage the capital.<sup>286</sup> Ultimately, the statute empowers tribes to implement extended leaseholds for “housing development and residential purposes,” with the lease term capped at fifty years.<sup>287</sup>

Without question, NAHASDA has had at least moderate success.<sup>288</sup> Some tribes, like the Navajo Nation, have greatly benefited from the program,<sup>289</sup> though this may have been due, at least in part, to unique internal expertise.<sup>290</sup> It is important to caution against “Band-Aid solutions” that fail to address the

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formula-based grant program. See *Indian Housing Block Grant Program*, U.S. DEP’T HOUSING & URB. DEV., <https://perma.cc/LVG9-WK7T> (archived Mar. 1, 2019); see also Native American Housing Assistance and Self-Determination Act §§ 101-106, 110 Stat. at 4022-30 (codified as amended at 25 U.S.C. §§ 4111-4116). The other was the Title VI Loan Guarantee, which provides guarantees for private market housing loans. See *Tribal Housing Activities Loan Guarantee Program (Title VI)*, U.S. DEP’T HOUSING & URB. DEV., <https://perma.cc/Z3S6-LT44> (archived Mar. 1, 2019); see also Native American Housing Assistance and Self-Determination Act §§ 601-605, 110 Stat. at 4046-48 (codified as amended at 25 U.S.C. §§ 4191-4195). For the regulations issued under NAHASDA, see 24 C.F.R. §§ 1000.1-.558 (2018); *id.* app. A at 719-21; and *id.* app. B at 721-27.

Congress amended NAHASDA in 2000 to add similar programs for Native Hawaiians who reside on Hawaiian Native lands. See Hawaiian Homelands Homeownership Act of 2000, Pub. L. No. 106-569, tit. V, subtitle B, 114 Stat. 2944, 2966-97 (codified at 12 U.S.C. § 1715z-13b (2017); and 25 U.S.C. §§ 4221-4243). For the regulations implementing the Native Hawaiian Housing Block Grant program, see 24 C.F.R. §§ 1006.1-.440.

286. See NANCY PINDUS ET AL., OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP’T OF HOUS. & URBAN DEV., HOUSING NEEDS OF AMERICAN INDIANS AND ALASKA NATIVES IN TRIBAL AREAS: A REPORT FROM THE ASSESSMENT OF AMERICAN INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN HOUSING NEEDS 1 (2017), <https://perma.cc/673K-METJ>.
287. See Native American Housing Assistance and Self-Determination Act § 702(a)-(b), 110 Stat. at 4050-51 (codified at 25 U.S.C. § 4211(a)-(b)).
288. See, e.g., Ezra Rosser, *The Trade-Off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291, 346-48 (2005) (describing how the program has benefited the Navajo Nation); see also PINDUS ET AL., *supra* note 286, at xv.
289. See Rosser, *supra* note 288, at 347-48.
290. See *id.* at 348 (“It is not coincidental that the Navajo Nation gained relative to other tribes . . . through NAHASDA, for the [Navajo Housing Authority’s] head, Chester Carl, was instrumental in drafting it and he is considered to be . . . one of the, if not the, foremost expert on both NAHASDA and Native American housing generally.”).

underlying problems of economic distress and poverty in tribal communities,<sup>291</sup> and it is reasonable to be skeptical about programs that continue to “funnel[] money” into Indian Country for housing programs without a broader, more comprehensive scheme for getting to the root of the problems.<sup>292</sup> But where there has been even modest success, we can see a clear strand of self-determination.<sup>293</sup> The most effective path, then, may be for those studying the reservation housing crisis—and especially tribes themselves—to learn from past mistakes, and to “develop the infrastructure and support systems necessary to sustain reservation housing development.”<sup>294</sup> This approach is supported by evidence of rapid demographic changes in Indian Country, increased education levels among tribal members, and expanding economic development opportunity on reservations.

### 3. The *Cobell* settlement and Indian Reorganization Act section 5

In addition to programs that impact existing land, for many tribes, the ability to reclaim lands by increasing the number of acres held in trust by the United States has been a central feature of nation building and self-determination. There have been major changes in fee-to-trust procedures in the last ten years, and these changes can be attributed to innovations spurred by all three branches of government.

Of particular note is the *Cobell* class action, addressing the federal government’s gross mismanagement of Individual Indian Money Accounts that arose

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291. During hearings on NAHASDA in the House of Representatives, Representative Joseph Kennedy said the following:

The truth of the matter is, if any Member takes the time to look at Indian housing in America, it has one severe problem that is not addressed in any way, shape, or form in this legislation, and that is that it is terribly underfunded. We can do all sorts of things and make block grants and do all sorts of Band-Aid solutions to the problem, but until we start funding Indian housing to a point where we actually provide people with shelter that is decent, affordable, and works, then none of these Band-Aid solutions are going to make the slightest bit of real difference in terms of the day-to-day lives of tribe after tribe, Indian family after Indian family, across this country.

So let us not pretend in any way that the legislation that we have today will significantly change the lives and the housing concerns of the vast majority of Indians.

142 CONG. REC. 25,753 (1996) (statement of Rep. Kennedy); see also Virginia Davis, *A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation*, 18 HARV. BLACKLETTER L.J. 211, 236-37 (2002); Courtney Eagan-Smith, Comment, *A House with No Walls: The Federal Government’s Role in Indian Housing*, 44 TULSA L. REV. 447, 454-55 (2008).

292. See Davis, *supra* note 291, at 237.

293. See, e.g., Rosser, *supra* note 288, at 347-48 (discussing the benefits the Navajo Nation has reaped from NAHASDA).

294. Davis, *supra* note 291, at 237.

out of the fractionation of allotted lands.<sup>295</sup> At \$3.4 billion, the legislatively devised settlement with the United States was the largest settlement with the federal government in history.<sup>296</sup> The *Cobell* settlement sought to compensate for a century of theft, corruption, and mismanagement of individual Indian trust accounts.<sup>297</sup> One piece of the settlement was a buyback program, pursuant to which \$1.9 billion was allocated to purchase and consolidate fractionated tribal interests that had made enormous swaths of land in Indian Country virtually useless.<sup>298</sup>

The buyback program was set to run ten years, during which time the federal government would establish a streamlined payout structure that would enable holders of fractionated interests to consolidate and sell their lands.<sup>299</sup> Specifically, the program provided an option whereby the interestholders could sell their interests to the federal government, which would keep the lands in trust to rebuild tribal land bases.<sup>300</sup> This was a core feature of the settlement, as tribes sought to expand and consolidate the Indian trust land base for purposes of “conservation, stewardship, [and] economic development.”<sup>301</sup> The program had the added benefit of relieving the federal government of the enormous burden of managing interests that were often worth far less than the cost of administration.<sup>302</sup> In contrast to a legacy of

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295. See *supra* notes 156-69 and accompanying text; see also *Cobell v. Salazar*, 573 F.3d 808, 809 (D.C. Cir. 2009).

296. See *Judge Approves \$3.4 Billion in Indian Royalties Settlement*, N.Y. TIMES (June 20, 2011), <https://perma.cc/GQ3L-WYDZ>.

297. See *id.*

298. See Jered T. Davidson, Comment, *This Land Is Your Land, This Land Is My Land?: Why the Cobell Settlement Will Not Resolve Indian Land Fractionation*, 35 AM. INDIAN L. REV. 575, 598 (2010-2011); see also *id.* at 614 (“[T]he perpetuation of fractionated interests ‘leads to environmental degradation, poverty, and unemployment.’” (quoting Brian Sawers, *Tribal Land Corporations: Using Incorporation to Combat Fractionation*, 88 NEB. L. REV. 385, 423 (2009))).

299. See U.S. DEP’T OF THE INTERIOR, 2016 STATUS REPORT: LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS 1 (2016), <https://perma.cc/V33P-34J2>.

300. See *id.*; see also *id.* app. A at A-12 (“Selling . . . interests results in land consolidation, which enables tribes to manage and use reservation lands for the benefit of the tribal community and generations to come. Tribes are able to utilize consolidated lands for purposes consistent with the values and needs of their members, whether for housing, community centers or businesses, or for recreational or cultural purposes. Reducing fractionation reinforces the cultural and economic future of tribes . . .”).

301. See *id.* at 1.

302. See *The Status and Future of the Cobell Land Consolidation Program: Oversight Hearing Before the Subcomm. on Indian, Insular & Alaska Native Affairs of the H. Comm. on Nat. Res.*, 115th Cong. 7 (2017) (statement of James Cason, Acting Deputy Secretary, United States Department of the Interior); see also BrieAnn West, *Mediating Our Future: The Role of the Land Buy-Back Program in Rebuilding Confidence and Strengthening Trust Between Tribal*  
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failed federal Indian Country programs, the *Cobell* buyback was a success. By 2016, the federal government had purchased nearly 1.7 million acres of land, which were then returned in trust to tribal governments for reconsolidation.<sup>303</sup>

At the same time that the *Cobell* litigation was settled, the Secretary of the Interior began actively utilizing section 5 of the IRA to bring fee lands into trust for the benefit of tribal governments.<sup>304</sup> During the Obama Administration, encouraged by a President supportive of tribal self-determination and Indian nations' self-sufficiency, the Secretary took over 500,000 acres of land into trust.<sup>305</sup>

Tribal land reacquisitions can be controversial and highly contested.<sup>306</sup> Nevertheless, the process of consolidation of fractionated Indian land interests, along with fee-to-trust mechanisms, has facilitated the steady growth of Indian lands,<sup>307</sup> and, we argue, has better positioned tribes to engage in self-determination. In particular, a strong land base enhances collective, tribal life, which research has suggested may be associated with better economic outcomes for tribes.<sup>308</sup> It also means that tribes are able to focus on programs—like developing and supporting housing markets—that will sustain reservation residents into the future.<sup>309</sup>

#### 4. The HEARTH Act

In 2012, Congress passed the HEARTH Act,<sup>310</sup> which “makes it possible for tribes to offer 25-year, renewable land leases to interested parties for business

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*Nations and the United States Government*, 35 J. NAT'L ASS'N ADMIN. L. JUDICIARY 481, 517-18 (2015).

303. See U.S. DEP'T OF THE INTERIOR, *supra* note 299, at 1-2.

304. See *supra* text accompanying notes 180-82.

305. See Wood, *supra* note 36, at 417 & n.8; Press Release, U.S. Dep't of the Interior, *supra* note 183.

306. See, e.g., *Trump Administration Takes Indian Country Back to Termination Era*, *supra* note 17 (noting that the Trump Administration is attempting to take back lands that were placed into trust for the Mashpee Wampanoag through the IRA).

307. See *Leader of Bureau of Indian Affairs Among Witnesses for Controversial Tribal Land Bill*, *supra* note 16 (noting that more than 500,000 acres of land were put into trust during the Obama Administration, and close to 2 million acres more came back within tribal control and ownership through the buyback programs set up via the *Cobell* settlement); see also Kelsey J. Waples, Comment, *Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 PEPP. L. REV. 251, 298 (2012).

308. See *supra* text accompanying notes 245-46.

309. See Carpenter et al., *supra* note 49, at 1024 (noting that securing indigenous peoples' rights to lands and resources can meaningfully advance self-determination).

310. Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150 (codified as amended at 25 U.S.C. § 415 (2017)).

and agricultural purposes and leases of up to 75 years for residential, recreational, religious, or educational purposes.”<sup>311</sup> Participating tribes obtain the Secretary of the Interior’s front-end approval of tribal leasing codes, such that they need not seek approval on a lease-to-lease basis going forward, a process which facilitates tribal self-governance.<sup>312</sup>

The tribal autonomy facilitated by the HEARTH Act also allows for greater economic development. It empowers tribes to implement their own processes, thus improving efficiency, reducing the transaction costs of seeking BIA approval, and enhancing tribal land authority over land use.<sup>313</sup> So far, tribes appear to be using the HEARTH Act primarily to facilitate leasing for business, including natural resource development.<sup>314</sup> But it is apparent that the Act has the potential to streamline the process for residential leaseholds on trust land as well.

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This Part has endeavored to demonstrate that privatization—which presents potentially enormous costs to tribal governments and Indian people—is, at the very least, premature. The data demonstrate that changing demographics, combined with federal policies and a shift toward models of tribal self-determination, may present much greater potential for improving economic, social, and cultural outcomes in Indian Country.<sup>315</sup> Collective tribal life requires a stable and secure—and ideally, contiguous—land base where Indians can live together as a tribal community. It is quite apparent that policies that bolster and advance tribal sovereignty, tribal self-determination, and cultural survival produce the best outcomes in Indian Country. With the vast geographic, cultural, linguistic, and demographic differences between tribes in Indian Country, empowering tribes to develop their own systems of housing has been shown to be more effective than any other policy.<sup>316</sup> Thus, we conclude that calls for privatization are at best premature, and at worst,

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311. NNI REPORT, *supra* note 32, at 52; *see* HEARTH Act § 2(2), 126 Stat. at 1151-53 (codified as amended at 25 U.S.C. § 415(h)).

312. *See* NNI REPORT, *supra* note 32, at 52.

313. *See id.*

314. *See id.* at 52 n.63.

315. Some scholars and policy experts, including the NNI (which collected and analyzed much of the underlying data used in this Part), have devised some concrete recommendations for addressing shortfalls in the present system of Native housing. *See, e.g., id.* at 58-59. While we commend that work, we do not have room to engage with it here.

316. *Cf., e.g.,* Riley, *supra* note 125, at 1730-31 (“Tribes’ freedom to tailor gun laws to meet the needs of local communities empowers Indian nations to implement regulations and protections that are particularly suited to them.”).

completely misguided. Instead, we acknowledge and argue for policies and solutions that are not focused on binary choices, but that are instead based in an ethic of tribal self-determination and sustainability, notions we take up fully in the following Part.

### III. Self-Determination and Sustainability

In this Part, we turn to what is really at stake in the privatization debate—the ability of indigenous peoples to survive *as* indigenous peoples. In the context of the United States, we believe that the survival of Indian tribes is desirable<sup>317</sup> and that it requires the maintenance of tribal homelands—places where indigenous peoples can live according to cultural values, maintain political freedom, and enjoy economic well-being.<sup>318</sup> In previous work, we have described this as the relationship between “property and peoplehood,” arguing that certain lands and resources deserve legal protection because they are tied to the collective identity and survival of indigenous peoples.<sup>319</sup> While cultural norms and property rights are both dynamic, we have argued that they often remain tied, from a descriptive perspective, to collective indigenous values that are normatively critical to the flourishing of Indian people.<sup>320</sup>

By contrast, privatization proponents often characterize Indian societies differently, stating, for example, that “Indians were no more or less individualistic than other societies,” calling into question “myths that Indians were able to set aside self-interest and live in harmony with one another and with nature.”<sup>321</sup> To the extent that tribes may have had cultural norms related to collective land use, some authors describe an “evolution” from localized gathering to horse-mounted hunting that places Indians within a model of “institutional change” that seems to foretell a desire for increasing independence and autonomy.<sup>322</sup> Within this discussion, there are theoretical, descriptive, and normative questions that we address here.

Consider some of the leading voices in the debate. The Peruvian economist Hernando de Soto became a cause célèbre arguing for the formalization of institutions and individual land titling, opening the door for investment and

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317. See Gregory H. Bigler, *Traditional Jurisprudence and Protection of Our Society: A Jurisgenerative Tail*, 43 AM. INDIAN L. REV. 1, 8 (2018-2019) (“Creating a society independent of the larger society around us is not the goal. Rather, the desire is to have a society that retains distinct attributes derived from our past, which allows continuity of our unique culture and society.” (footnote omitted)).

318. See *supra* text accompanying note 246.

319. See Carpenter et al., *supra* note 49, at 1028.

320. See *id.* at 1026-28.

321. See, e.g., ANDERSON, SOVEREIGN NATIONS OR RESERVATIONS?, *supra* note 5, at 176.

322. See, e.g., *id.* at 47-65.

alienation across Latin America.<sup>323</sup> De Soto's work was initially concerned with the specific situation of squatters in Lima who lacked formal institutions or property rights.<sup>324</sup> De Soto argued that migrants coming into urban areas were living largely in "informal settlements" characterized by features such as informal organizations (instead of government cabinets), informal records of land (instead of government-issued titles), informal land speculators and transactions (instead of real estate brokers and contracts), and informal housing (instead of permitted houses or regulated neighborhoods).<sup>325</sup> His work *The Other Path* championed individual slum dwellers in Lima, arguing that their impoverished condition was caused not by their own lack of industry, but by bureaucracy and oligarchy that stymied free-market conditions.<sup>326</sup> In his next work, the famous *The Mystery of Capital*, de Soto advanced case studies in Cairo, Lima, Manila, Mexico City, and Port-au-Prince as bases for his conclusion that 85% of all urban land and 40% to 53% of all rural land in the developing world is held either informally or illegally.<sup>327</sup> The upshot is that \$9.3 trillion worth of land is held but not owned, and therefore is left stagnating in unproductive arrangements that could be remedied by land titling.<sup>328</sup>

De Soto has been influential across the world. In the 1980s and 1990s, he and his message of ownership became popular with people across the political spectrum hoping to champion the rise of the poor within a capitalist system.<sup>329</sup>

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323. See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000); *This Land Is Your Land: A Conversation with Hernando de Soto*, WORLD POL'Y J., Summer 2011, at 35. De Soto's work has been the subject of extensive treatment by U.S. property law scholars. See generally, e.g., HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY (D. Benjamin Barros ed., 2010) (applying de Soto's work to a variety of property law issues).

324. See HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 12-13 (June Abbott trans., 1989).

325. See *id.* at 17-57.

326. See *id.* at 11.

327. See DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 323, at 27-34.

328. See *id.* at 32; see also Chris Arsenault, *Property Rights for World's Poor Could Unlock Trillions in "Dead Capital": Economist*, REUTERS (July 31, 2016, 9:15 PM), <https://perma.cc/FK35-WC6G> ("Providing the world's poor with titles for their land, homes and unregistered businesses would unlock \$9.3 trillion in assets, de Soto estimates, an unprecedented sum to reduce poverty.").

329. See Alan Gilbert, *On the Mystery of Capital and the Myths of Hernando de Soto: What Difference Does Legal Title Make?*, 24 INT'L DEV. PLAN. REV. 1, 2-3 (2002); see also Rashmi Dyal-Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 RUTGERS L.J. 59, 59-61, 59 nn.1-2 (2007) (collecting sources on de Soto's influence worldwide, including his work with the World Bank as well as his relationships with the governments and leaders of Mexico, Egypt, El Salvador, Ghana, and the Philippines).

Critics have questioned de Soto on a number of fronts, including both his methodology and prescriptions.<sup>330</sup> Others have noted that “security of tenure does not require the issue of full legal title,” that “massive titling program[s] are being conducted for reasons that have nothing to do with helping the poor,” and that these efforts cost governments less than the provision of social services.<sup>331</sup> The true “vulnerability” of informal land tenure may not reduce to questions of title; instead, it might also implicate factors such as “the identity of the original owner, the location of the land, alternative uses for the land, the nature of the government and the date of the next election.”<sup>332</sup>

In many respects, American Indian land is situated differently from the land in some of de Soto’s case studies: American Indians are not squatters and they do not lack property rights; federal law has recognized Indian property rights and tribes’ localized systems of property, going back to at least the eighteenth century.<sup>333</sup> Yet de Soto’s work has influenced discourse on the land tenure situation in U.S. and Canadian indigenous communities. In an edited collection titled after de Soto’s first popular work *The Other Path*, Terry Anderson and colleagues published *Self-Determination: The Other Path for Native Americans*, a collection of essays considering problems related to indigenous property rights.<sup>334</sup> The editors’ foreword frames the issues through de Soto’s work, setting a strong tone in favor of an economic view of land as protected by private property rights.<sup>335</sup>

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330. For criticisms in the academic literature, see, for example, Scott J. Shackelford, *Neither Magic Bullet nor Lost Cause: Land Titling and the Wealth of Nations*, 21 N.Y.U. ENVTL. L.J. 272, 293-96 (2014) (commenting on the methodology used in *The Mystery of Capital*); and Christopher Woodruff, *Review of de Soto’s The Mystery of Capital*, 39 J. ECON. LITERATURE 1215 (2001) (reviewing DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 323).

331. See Gilbert, *supra* note 329, at 7.

332. *Id.*

333. See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 603 (1823) (“It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned.”); see also *id.* at 543-45 (statement of the case) (describing property arrangements dating to the 1600s); *id.* at 593 (majority opinion) (“The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.”); Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV’T L. REV. 1, 25-27 (2017) (describing these passages from *Johnson* as supporting the notion that “Indian nations ha[d] their own tribal property law”).

334. SELF-DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS (Terry L. Anderson et al. eds., 2006) [hereinafter THE OTHER PATH FOR NATIVE AMERICANS]; see Terry L. Anderson et al., *Foreword to THE OTHER PATH FOR NATIVE AMERICANS*, *supra*, at ix, ix (“In many ways, this book has been inspired by the work of Hernando de Soto.”).

335. See Anderson et al., *supra* note 334, at ix.

While expressing support for tribal “sovereignty,”<sup>336</sup> the editors’ view of that concept is particularized. In mainstream Indian policy and scholarship, tribal sovereignty is largely understood to mean the inherent, reserved rights of Indian tribes as governments to exercise jurisdiction over their territories and members for purposes of maintaining the health, safety, and welfare of the reservation and its residents.<sup>337</sup> *The Other Path for Native Americans* emphasizes Indian autonomy from the federal government primarily in economic terms; the editors and some of the contributors are at best indifferent to Indian autonomy in terms of tribal governments’ jurisdictional authority over reservations.<sup>338</sup> We believe this position reveals discomfort with the federal Indian land tenure arrangement that undergirds tribal jurisdiction and also, perhaps, with tribal government itself. *The Other Path for Native Americans* describes Native reserves and reservation lands as “encumbered with a complicated variety of collective and suboptimal individual property rights that often get in the way of productivity and investment.”<sup>339</sup> It also calls for “limits” on tribal sovereignty.<sup>340</sup>

The essays by the contributing authors explore the points about property and economy through case studies that sometimes take a more nuanced view of the role of history, tradition, and culture in indigenous communities. In their essay about property rights in the fur trade, Ann Carlos and Frank Lewis recognize that “native societies in eighteenth-century Canada and even earlier understood aspects of territoriality, trespass, and property ownership.”<sup>341</sup> However, some of these societies’ understanding of property rights may have weakened with the introduction of European diseases that diminished the

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336. See *id.* at ix-x.

337. See, e.g., Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 5-7 (Harvard Univ. John F. Kennedy Sch. of Gov’t Faculty Research Working Paper Series, No. RWP04-016, 2004), <https://perma.cc/43DZ-J94S>.

338. See Anderson et al., *supra* note 334, at ix (“The authors in this collection argue that self-determination and sovereignty, essential as they are, will be fruitless if they only mean the transfer of political control from Washington and Ottawa to band and tribal authorities without limits on the sovereign.”).

339. *Id.*

340. See *id.*; see also David D. Haddock & Robert J. Miller, *Sovereignty Can Be a Liability: How Tribes Can Mitigate the Sovereign’s Paradox*, in *THE OTHER PATH FOR NATIVE AMERICANS*, *supra* note 334, at 194, 194 (“[T]he sovereignty that US law recognizes in tribes comes in varieties, some that threaten those who might most aid impoverished Indians, namely, potential investors. An offer to limit one’s own discretion—in other words, an offer to weaken one’s own powers—may be necessary and desirable in order to achieve consensual, mutually beneficial undertakings.”).

341. See Ann M. Carlos & Frank D. Lewis, *Native American Property Rights in the Hudson Bay Region: A Case Study of the Eighteenth-Century Cree*, in *THE OTHER PATH FOR NATIVE AMERICANS*, *supra* note 334, at 68, 88.

labor force.<sup>342</sup> Carlos and Lewis also recognize the distinct treatment of animals used by Cree hunters for food and subsistence (common property and thus conserved) and those used for trade (individual property and thus hunted to depletion).<sup>343</sup> In our view, this essay (more so than the framing provided by the editors in the foreword) appropriately considers questions about economy in the fur trade, and even commodification of animals, as not merely about whether Indians had property rights, but as informed by a complicated mix of tradition, history, and subsistence patterns.

In the same collection, Thomas Flanagan and Christopher Alcantra use de Soto as a point of departure for a discussion of customary land rights among Pikani, Blood, and Siksika communities in Canada.<sup>344</sup> They note that customary land rights may be “easily subordinated to collective purposes,” which “may be an advantage in the sense of being congruent with the prevailing cultural beliefs and political system on many reserves,”<sup>345</sup> even if they are difficult to enforce judicially.<sup>346</sup> Arguing that it would be misguided to impose reform from the outside, the authors offer some recommendations “for how customary rights could be made to work better for those First Nations that find them to be a good fit with their culture but who also wish to participate successfully in the modern economy.”<sup>347</sup> These include documenting customary land tenure, formalizing rental contracts, and creating dispute resolution mechanisms.<sup>348</sup> In our view, these suggestions reflect cultural and other values in scholarly analysis of land reform.

Beyond *The Other Path For Native Americas*, de Soto’s influence in U.S. indigenous affairs has been felt in his praise for the Alaska Native Claims Settlement Act (ANCSA), a federal statute that grants Alaska Native villages fee title and sets forth a corporate structure for land and resource development.<sup>349</sup>

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342. *See id.* at 83-84.

343. *See id.* at 69-70.

344. *See* Thomas Flanagan & Christopher Alcantara, *Customary Land Rights on Canadian Indian Reserves*, in *THE OTHER PATH FOR NATIVE AMERICANS*, *supra* note 334, at 134, 136-37 (invoking de Soto’s *The Mystery of Capital* for the point that squatters in third-world countries are poor because their capital, largely unrecognized by the state as property, is “dead” (citing DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 323, at 5-6)).

345. *Id.* at 150.

346. *See id.* at 151-53 (describing how customary land rights are largely unenforceable in Canadian courts).

347. *Id.* at 155.

348. *See id.* at 156-57.

349. *See* Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629h (2017)); *Alaska Natives Defend Culture with Economic Power*, MORGAN HOWARD (Nov. 26, 2012), <https://perma.cc/PM3L-5YWH> (acknowledging the varied viewpoints held by Alaska Natives on de Soto’s approach to property rights); Instituto Libertad y Democracia, *The Mystery of Capital Among the Indigenous Peoples of the Amazon*, VIMEO *footnote continued on next page*

Notably, both ANCSA and de Soto's praise for it have been subject to criticism on the basis that they impose a capitalist model on indigenous communities.<sup>350</sup>

An additional intervention we wish to make in the scholarship on American Indian property vis-à-vis de Soto's theories concerns the characterization of land and resources as "capital" or "wealth." We seek in particular to suggest that the literature has not fully considered whether usage of these terms matches indigenous peoples' concepts and experiences, largely because indigenous voices have not been fully empowered in research or policy work. De Soto's goal is to enliven "dead capital"—land that is difficult to sell, develop, or finance.<sup>351</sup> Anderson has similarly expressed a wish to "unlock the wealth of Indian Nations" by freeing up land and resources for exploitation.<sup>352</sup> In our view, both scholars appear to work from the premises of land as an inanimate resource and wealth maximization as a normative goal, two assumptions that may be inapposite when applied to the situation of indigenous peoples.<sup>353</sup> In the cosmologies of many indigenous peoples, undeveloped lands and resources are not dead; they are living beings sharing the world in relationship

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(Sept. 14, 2009), <https://perma.cc/DND7-A45S> (providing commentary on ANCSA by de Soto); see also Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73, 79, 147-49 (1999) (analyzing Alaska Natives' views of ANCSA).

350. See, e.g., THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION 5-19 (1985) (analyzing testimony from Alaska Natives demonstrating how ANCSA's imposition of corporate structures on Native villages endangered their traditional and cultural values, as well as their economies); *Alaska Natives Defend Culture with Economic Power*, *supra* note 349.

351. See DE SOTO, THE MYSTERY OF CAPITAL, *supra* note 323, at 5-13; see also *id.* at 37 ("[T]rillions of dollars . . . [are] ready to be put to use if only the mystery of how assets are transformed into live capital can be unraveled."); *Key Concepts: Dead Capital*, GLOBALIZATION CROSSROADS: POWER OF THE POOR WITH HERNANDO DE SOTO, <https://perma.cc/VFN4-KDYR> (archived Mar. 2, 2019).

352. See Anderson & Leonard, *supra* note 5, at 4-5.

353. For other criticism of de Soto's theory as applied to indigenous peoples, see, for example, Patrick Wieland & Thomas F. Thornton, *Listening to (Some) Barking Dogs: Assessing Hernando de Soto's Recipe for the Development of the Amazon Natives of Peru*, 30 HARV. J. ON RACIAL & ETHNIC JUST. 131, 132 (2014) (arguing that the "economic integration" of Amazon Natives, advocated by de Soto, may further expose their land resources to appropriation and trigger their "cultural and social disintegration").

with others.<sup>354</sup> Indigenous peoples' aspirations may challenge many perceptions of their economic, moral, and societal understandings of "wealth."<sup>355</sup>

Therefore, without entering into age-old debates about whether nonfungible values in land can be monetized or personal relationships captured in economic modeling, we nonetheless wish to explore some of the gaps in privatization theory as applied to the American Indian context. Property theorists Abraham Bell and Gideon Parchomovsky have proposed a conceptualization of property "lost in translation" to describe what happens when localized property systems (such as the American Indian system, the Arctic Sámi system, and Israeli kibbutzim) interact with more dominant systems around them.<sup>356</sup> They observe that as a matter of economic "network effects," translation costs must be taken into account when legal systems try to address the tragedy of the commons or the underutilization of commonly owned lands.<sup>357</sup> This account fills one gap missing in de Soto's account by acknowledging that American Indians do have their own property systems, officially recognized in U.S. law.<sup>358</sup> But its discussion of integrating local with dominant property systems misses, or at least underemphasizes, the political context of power and subordination in which American Indians operate vis-à-vis the United States.

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354. This worldview is shared, with variations, by many indigenous peoples, such that we could cite the oral and written traditions of dozens, if not hundreds or thousands of indigenous peoples. For just two examples, see ROBIN WALL KIMMERER, *BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE, AND THE TEACHINGS OF PLANTS* 3-10 (2013) (discussing the Haudenosaunee oral tradition and the relationship between Skywoman and the natural world); and NILS-ASLAK VALKEAPÄÄ, *TREKWAYS OF THE WIND* (Ralph Salisbury et al. trans., 1994) (collecting Sámi *yoiks*, or singing poems, evoking the living nature of the landscape in Sámi cultural and human ecology). For a survey treatment of the relationship between indigenous women and the land in oral and written tradition, see STEPHANIE J. FITZGERALD, *NATIVE WOMEN AND LAND: NARRATIVES OF DISPOSSESSION AND RESURGENCE* (2015).

355. Cf. HARMON, *supra* note 50, at 11 ("By emphasizing intercultural discourse about wealth, this book also defies Indian economic history's regrettable isolation from the rest of economic history."); Jonathan Thompson, *The Ute Paradox*, *HIGH COUNTRY NEWS* (July 12, 2010), <https://perma.cc/SXB8-D7VH> ("[The leaders of the Southern Ute tribe] were just—to the finest detail—great tacticians and strategists," says David Lester, a national leader in Native American economic development since 1969 and leader of the Council of Energy Resource Tribes since 1982. "Their motive wasn't money, although money was important to them. . . . The money was a means to higher ends. It was about protecting the tribe and developing a foundation and developing a cultural community distinct from surrounding communities.") (second alteration in original).

356. See Abraham Bell & Gideon Parchomovsky, *Property Lost in Translation*, 80 U. CHI. L. REV. 515, 522-35 (2013).

357. See *id.* at 519-20, 564-69.

358. See *id.* at 523-24.

Joseph Singer has highlighted these power dynamics in terms of “sovereignty and property.”<sup>359</sup> If American Indian tribes lose property, then they lose sovereignty, and vice versa; these losses compound the epic dispossession on which the country was founded.<sup>360</sup> Neither loss is acceptable in a democratic society only now grappling with its history of conquest and colonization.<sup>361</sup> Similarly, Thomas Merrill and Henry Smith have noted the moral necessity of remedying American Indian claims as a case that merits “refinements” to the usual bright-line rules of property.<sup>362</sup>

These theorists have laid important groundwork for considering a sounder approach to American Indian property issues going forward. Yet questions of Indian peoples’ own aspirations and cosmologies remain open and largely uninvestigated by the current political proposals for privatization. Indeed, imposing a framework of private ownership, land titling, and wealth maximization on Indian tribes may represent an example of what Stephen Cornell and Joe Kalt have called the problem of “cultural match.”<sup>363</sup> In other words, the external model of privatization may not fit the situation of indigenous peoples on the ground, and may thereby create challenges of efficacy and legitimacy.

In our view, a framework of self-determination and sustainability may better capture the elements largely missing from the economic and legal accounts to date of Indian land tenure. Self-determination refers to the right of indigenous peoples to express and realize their own aspirations in government, culture, society, and economy,<sup>364</sup> while sustainability describes an ethic of

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359. See generally Singer, *supra* note 76 (arguing that the land rights and political powers of Indian tribes are interrelated as a matter of federal Indian law, often to the detriment of tribes).

360. See *id.* at 6; see also *id.* at 9-10 (discussing a series of U.S. Supreme Court decisions diminishing tribal jurisdiction over lands within reservations based on the property status of the land and the racial identity of the person sought to be regulated).

361. See, e.g., Singer, *supra* note 333, at 2-8.

362. See Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1852, 1876, 1890-91 (2007) (“When proposals are made to . . . restore land taken from Native American tribes in violation of treaty rights, few voices are raised questioning the wisdom of trying to sort out the claims to these assets, which were taken many decades ago. Wrongful dispossession of property should be vindicated, apparently without regard to the costs or inconvenience of attempting to do so after a long passage of time.” (footnote omitted)).

363. Cf. Stephen Cornell & Joseph P. Kalt, Commentary, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J. 187, 201-05 (1998) (explaining that institutions of government imported from the outside may not have internal legitimacy or functionality when imposed on Indian tribes, who do better when government reflects aspects of traditional culture).

364. See U.N. Charter art. 73; see also International Covenant on Civil and Political Rights art. 1, ¶ 1, adopted Dec. 19, 1966, S. TREATY DOC. NO. 95-20 (1978), 999 U.N.T.S. 171, 173.

resilient living in one's environment.<sup>365</sup> Deeply influential in the indigenous rights movement as well as international policy on poverty,<sup>366</sup> these norms carry the legitimacy of "bottom-up" advocacy movements, ultimately adopted in instruments and programs of the United Nations and regional human rights systems.<sup>367</sup> The United Nations Declaration on the Rights of Indigenous Peoples, for example, holds "significant normative weight" both as a product of indigenous struggle and its grounding in the United Nations Charter and international treaties.<sup>368</sup> The United Nations's SDGs set forth a long-range plan for addressing economic needs and environmental realities in a framework of human rights.<sup>369</sup> These and other instruments give rise to a model of self-determination and sustainability with the capacity to reflect and empower indigenous peoples' own values on policy and well-being on reservations. While international human rights law is only beginning to gain traction with respect to the situation of indigenous peoples in the United States,<sup>370</sup> the norm of "self-determination" has defined federal Indian policy

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365. See, e.g., Amy Klemm Verbos & Maria Humphries, *A Native American Relational Ethic: An Indigenous Perspective on Teaching Human Responsibility*, 123 J. BUS. ETHICS 1, 2 (2014).

366. Cf. Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENVTL. & ENERGY L. & POL'Y J. 188, 202-03 (2009) (arguing that the "domestic framework that governs tribal sovereignty over the reservation environment is currently inadequate" and ought to be made more consistent with the United Nations Declaration on the Rights of Indigenous Peoples).

367. See JAMES (SA'KE') YOUNGBLOOD HENDERSON, *INDIGENOUS DIPLOMACY AND THE RIGHTS OF PEOPLES: ACHIEVING UN RECOGNITION* 9-12 (2008) (providing an indigenous perspective of the movement leading to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples).

368. See Press Release, General Assembly, *Implementation of Indigenous Rights Declaration Should Be Regarded as Political, Moral, Legal Imperative Without Qualification*, Third Committee Told, U.N. Press Release GA/SHC/3982 (Oct. 18, 2010), <https://perma.cc/2MMZ-3YHG>; see also United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 65; S. JAMES ANAYA, *INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES* 73-76 (2009) (elaborating on the norm of self-determination).

369. See United Nations Sustainable Development Goals, *supra* note 66; see also *Sustainable Development Goals*, *supra* note 66.

370. See Press Release, Office of the Press Sec'y, The White House, *Remarks by the President at the White House Tribal Nations Conference* (Dec. 16, 2010) [hereinafter *Obama White House Press Release*], <https://perma.cc/8XCF-9UDK> (announcing President Obama's support for the United Nations Declaration on the Rights of Indigenous Peoples).

since the 1970s.<sup>371</sup> Similarly, sustainability has become a powerful concept—or at least an inspirational term—in many realms of American society, and certainly in environmental policy.<sup>372</sup>

Scholarship reveals a spectrum of current approaches to land tenure, ranging from pragmatic variations on the federal Indian law scheme described above<sup>373</sup> to international activism focused on asserting indigenous concepts of space.<sup>374</sup> To some extent, the pragmatic examples embrace some capitalist values, with modifications for indigenous cultural norms. The more radical examples envision a complete reformation of indigenous peoples' relationship with the neoliberal state, usually drawing from indigenous geopolitics and socioeconomics to reject capitalism and suggest a return to traditional forms of organization. Many examples fall somewhere in between—that is, within the reality of the lived experiences of indigenous peoples following five hundred years of conquest and colonization. But what they have in common is that they all challenge privatization as an adequate approach to Indian land tenure today.

In the remainder of this Part, we set forth indigenous worldviews on land and property; the paradigm of self-determination and sustainability from international human rights law that reflects these worldviews; and examples from Indian Country revealing these values and practices in action, offering an alternative to privatization for the well-being of indigenous peoples on tribal lands.

#### A. Indigenous Worldviews and Property Laws

Many American Indian tribes maintain deeply constitutive relationships with the land and its elements. A tribe's way of life and its very existence may depend on a relationship with the land dating back to creation stories.<sup>375</sup> This

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371. See Special Message to the Congress on Indian Affairs, PUB. PAPERS 564, 565-67 (July 8, 1970) [hereinafter Nixon Indian Affairs Address] (calling for “self-determination without termination” in federal Indian policy (capitalization altered)).

372. See, e.g., *Sustainability*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/ZX5P-98T4> (last updated Oct. 18, 2016).

373. See, e.g., NICHOLAS CHRISTOS ZAFERATOS, *PLANNING THE AMERICAN INDIAN RESERVATION: FROM THEORY TO EMPOWERMENT* 1-10, 35-71 (2015) (advancing an approach to reservation land planning policy grounded significantly in the self-governance model of federally recognized Indian tribes); see also *supra* Part II.

374. See JASKIRAN DHILLON, *PRAIRIE RISING: INDIGENOUS YOUTH, DECOLONIZATION, AND THE POLITICS OF INTERVENTION* 74-76 (2017) (citing scholarship describing the United Nations Working Group on Indigenous Populations as “enabling a substantive and diverse group of activists to engage in a number of battles . . . through the deployment of the notion of ‘Indigenous place,’” a concept which “articulates a specific and meaningful relationship between Indigenous peoples, culture, and their territories”).

375. See Weaver, *supra* note 84, at 83 (asserting that Indian origin stories typically begin with an “earthdiver” or “emergence”); see also JACE WEAVER, *NOTES FROM A MINER'S* footnote continued on next page

is not a stereotype or romanticism, but rather an empowering, pluralistic reality with ramifications for reservation land tenure. Indian norms and values regarding land are reflected in the law of many (but not all) tribes. Consider two examples.

The Navajo (Diné) Nation is a tribe of several hundred thousand members, located in the Four Corners region.<sup>376</sup> The Fundamental Law of the Navajo Nation provides that “[t]he four sacred elements of life, air, light/fire, water and earth/pollen in all their forms must be respected, honored and protected for they sustain life.”<sup>377</sup> The law further provides:

The rights and freedoms of the people . . . to the use of land, natural resources, sacred sites and other living beings must be accomplished through the proper protocol of respect and offering and these practices must be protected and preserved for they are the foundation of our spiritual ceremonies and the Diné life way . . . .

. . . It is the duty and responsibility of the Diné to protect and preserve the beauty of the natural world for future generations.<sup>378</sup>

By prescribing rights and duties among the people and the land, “[t]hese laws provide sanctuary for the Diné life and culture, our relationship with the world beyond the sacred mountains, and the balance we maintain with the natural world.”<sup>379</sup> These values guide tribal real estate policy. The Navajo Land Department works to “acquire, record, regulate, value, and preserve our sacred Navajo lands (Diné Bí Kéyah).”<sup>380</sup> Similarly, the Navajo Housing Authority emphasizes “family growth,” “strength,” and “beauty” in housing policy.<sup>381</sup>

The Yurok Tribe, by contrast, is a smaller community located in Northern California.<sup>382</sup> The Constitution of the Yurok Tribe affirms the people’s relation to all living beings within the landscape as follows: “Our people have always lived on this sacred and wondrous land along the Pacific Coast and inland on the Klamath River, since the Spirit People, Wo-ge’ made things

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CANARY: ESSAYS ON THE STATE OF NATIVE AMERICA 218 (2010) (“Every Native people has some form of origin story.”).

376. See NAVAJO DIV. OF HEALTH & NAVAJO EPIDEMIOLOGY CTR., NAVAJO POPULATION PROFILE: 2010 U.S. CENSUS 8, 41 (2013), <https://perma.cc/3HJP-GQEJ>.

377. NAVAJO NATION CODE tit. I, § 205(A) (2009). For access to the Navajo Nation Code, see *Navajo Nation Code*, 24TH NAVAJO NATION COUNCIL, <https://perma.cc/HCS9-VG4W> (archived Mar. 2, 2019).

378. NAVAJO NATION CODE tit. I, § 205(F)-(G).

379. *Id.* § 202.

380. See NAVAJO LAND DEP’T, <https://perma.cc/2REH-MB9V> (archived Feb. 7, 2019).

381. See NAVAJO HOUSING AUTHORITY (capitalization altered), <https://perma.cc/Y6S6-V769> (archived Feb. 7, 2019).

382. See *History/Culture*, YUROK TRIBE, <https://perma.cc/T4EV-UXFU> (archived Mar. 2, 2019).

ready for us and the Creator, Ko-won-no-ekc-on Ne-ka-nup-ceo, placed us here.”<sup>383</sup> This spiritual sensibility informs tribal law and governance, in that “[f]rom the beginning, we have followed all the laws of the Creator, which became the whole fabric of our tribal sovereignty.”<sup>384</sup> These values dictate specific land management practices:

We pray for the health of all the animals, and prudently harvest and manage the great salmon runs and herds of deer and elk. [W]e never waste and use every bit of the salmon, deer, elk, sturgeon, eels, seaweed, mussels, candlefish, otters, sea lions, seals, whales, and other ocean and river animals. We also have practiced our stewardship of the land in the prairies and forests . . .<sup>385</sup>

Accordingly, the tribe is deeply engaged in the process of reclaiming tribal lands, conserving fisheries and forests, and addressing climate change.<sup>386</sup>

For many indigenous peoples, the natural landscape is simultaneously a homeland as well as a source of physical subsistence, spiritual practice, and, as Leanne Simpson has recently written, a “pedagogy” for living.<sup>387</sup> Simpson shares a story from her Nishnaabeg culture called “Binoojiinh Makes a Lovely Discovery.”<sup>388</sup> In the story, a Nishnaabeg child learns from his ancestors to make maple syrup from sap.<sup>389</sup> As Simpson explains, “[s]ettlers easily appropriate and reproduce the content of the story every year when they make commercial maple syrup in the context of capitalism.”<sup>390</sup> De Soto might say that the non-Indian maple harvesters tap capital (sap) that was otherwise dead.<sup>391</sup> But Simpson says that settlers “completely miss the wisdom that underlies the entire process because they deterritorialize the mechanics of maple syrup production from Nishnaabeg intelligence.”<sup>392</sup>

What is the alternative to dead capital? Simpson explains that the Nishnaabeg word “*gaa-izhi-zhaawendaagoziyaang*” means “given lovingly to us by

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383. YUROK TRIBE CONST. pmbl. (emphasis omitted).

384. *Id.*

385. *Id.*

386. See Ginger Strand, *Carbon Cache*, NATURE CONSERVANCY (Oct. 1, 2016), <https://perma.cc/FW6Z-23A6>. For additional information on indigenous models of “stewardship,” see ANNE ROSS ET AL., INDIGENOUS PEOPLES AND THE COLLABORATIVE STEWARDSHIP OF NATURE: KNOWLEDGE BINDS AND INSTITUTIONAL CONFLICT 235-60 (2011).

387. See LEANNE BETASAMOSAKE SIMPSON, AS WE HAVE ALWAYS DONE: INDIGENOUS FREEDOM THROUGH RADICAL RESISTANCE 145-73 (2017).

388. See *id.* at 145-49.

389. See *id.* at 146-53.

390. *Id.* at 154.

391. See *supra* text accompanying note 351; see also *supra* notes 323-32 and accompanying text.

392. SIMPSON, *supra* note 387, at 154.

the spirits.”<sup>393</sup> This word, she says, describes perfectly the gift of the sap and the ethic of making syrup taught in the Binoojiinh story.<sup>394</sup> The maple tree “has agency” and “does not have to produce sap.”<sup>395</sup> Thus the people enter into a “balanced relationship of mutuality” by giving tobacco to the tree in gratitude for its gift.<sup>396</sup> They then cut and shunt the tree with cedar, wait patiently, collect and boil the sap, and share it with family, all through a process that regenerates the relationship with the natural world as well as the traditional knowledge associated with this process.<sup>397</sup> More broadly, Simpson says, coming to know the land “takes place in the context of family, community, and relation . . . and [is] profoundly spiritual in nature.”<sup>398</sup> In our view, Simpson’s story of the tree, the sap, and the maple syrup suggests an alternative to treating resources as dead capital. It reveals a relationship of reciprocity and spirituality shared by humans and the natural world, in which a resource is not necessarily there to be extracted and exploited, but rather to be carefully nurtured as a living relative.

In some tribes, tribal law and tradition may have protected lands and resources by devices that we might recognize as restrictions on alienation and land use regulation. Cherokee custom, for example, traditionally regulated homes and corn fields consistent with the cosmology of Selu, the corn mother, as well as with a matrilineal and matrilocal clan system.<sup>399</sup> Under this traditional system, often known as the Clan Law, women owned the homes and fields, which were kept within the family or clan for generations.<sup>400</sup>

In 1808, by which point whites had married into the tribe and other social changes had taken place, the Cherokee Nation enacted a new law to allow for property to descend from fathers to children.<sup>401</sup> Yet, as Rennard Strickland has

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393. *Id.* at 149 (citing WENDY MAKOONS GENIUSZ, *OUR KNOWLEDGE IS NOT PRIMITIVE: DECOLONIZING BOTANICAL ANISHINAABE TEACHINGS* 67 (2009)).

394. *Id.*

395. *Id.* at 157.

396. *Id.*

397. *See id.* at 150.

398. *See id.* at 150-51.

399. *See* CAROLYN ROSS JOHNSTON, *CHEROKEE WOMEN IN CRISIS: TRAIL OF TEARS, CIVIL WAR, AND ALLOTMENT, 1838-1907*, at 14 (2003); WILMA MANKILLER & MICHAEL WALLIS, *MANKILLER: A CHIEF AND HER PEOPLE* 19 (1993); THEDA PERDUE, *CHEROKEE WOMEN: GENDER AND CULTURE CHANGE, 1700-1835*, at 44-46 (1998); James Mooney, *Myths of the Cherokee*, in 1 NINETEENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY TO THE SECRETARY OF THE SMITHSONIAN INSTITUTION, 1897-98, at 3, 242-49 (1900).

400. *See* Wilma Dunaway, *Rethinking Cherokee Acculturation: Agrarian Capitalism and Women’s Resistance to the Cult of Domesticity, 1800-1838*, 21 *AM. INDIAN CULTURE & RES. J.*, no. 1, 1997, at 155, 170.

401. *See* THEDA PERDUE, *SLAVERY AND THE EVOLUTION OF CHEROKEE SOCIETY, 1540-1866*, at 51 (1979) (describing how in 1808, the Cherokee Nation Council gave protection to

*footnote continued on next page*

written, “[a]t least five major social policies or goals of Cherokee society are reflected in the inheritance laws” of the 1800s.<sup>402</sup> Among these are “the prevention of tribal lands from passing into the control of noncitizens,” the “equality of women,” and “resistance to Cherokee migration to the Cherokee Nation West.”<sup>403</sup> Indeed, in the face of encroaching settlers and pressure to move westward, in 1828 the Cherokee Nation Council strengthened protections for the communal nature of lands by prescribing the death penalty for any individual who sold land without the authority of the tribal government.<sup>404</sup> Some restraints on alienation beyond the tribe have persisted into modern times.<sup>405</sup> The Hopi Tribe also has complex systems of traditional land tenure<sup>406</sup> that have given rise to modern rules of inheritance and land use among villages and families.<sup>407</sup>

Of course, tribes vary with respect to how they treat land within their reservations, especially contemporarily.<sup>408</sup> Some tribes, such as the Hoopa, distinguish between lands that must be protected as sacred, religious sites, and

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“children as heirs to their father’s property and to the widow’s share” (quoting Act of Sept. 11, 1808, in LAWS OF THE CHEROKEE NATION: ADOPTED BY THE COUNCIL AT VARIOUS PERIODS 3, 3 (Tahlequah, Cherokee Nation, Cherokee Advocate Office 1852)); see also FAY A. YARBROUGH, RACE AND THE CHEROKEE NATION: SOVEREIGNTY IN THE NINETEENTH CENTURY 29 (2008) (“Cherokee legislators adopted some American understandings of property and inheritance laws so that white men could leave property to their Cherokee children. This shift was a revolutionary change in thinking for a traditionally matrilineal society in which children inherited property and clan identity through their mothers.” (footnote omitted)).

402. RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 97 (1975).

403. *Id.*

404. See *id.* at 77.

405. See Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 KAN. J.L. & PUB. POL’Y 491, 495 (2000) (noting restraints on “outside alienation” in modern Cherokee property law).

406. See, e.g., Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319, 332-46 (2007-2008) (illustrating these complexities with an example of a land dispute in Hopi tribal court).

407. See, e.g., JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 99 (2008) (describing a property claim as “an expression not of the daughter’s sole possessory interests but of Hopi traditions of matrilineal inheritance”); see also Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL’Y 761, 765 (1999-2000) (“The [Hopi] Constitution . . . reserves village jurisdiction over family disputes and relations, the inheritance of property of village members, and the assignment of farming land.”).

408. See generally, e.g., INDIGENOUS PEOPLES AND REAL ESTATE VALUATION (Robert A. Simons et al. eds., 2008) (surveying varying methods of real estate valuation among different indigenous peoples).

lands that may be used for housing or development.<sup>409</sup> The Navajo Nation, for example, has to some extent, permitted coal mining on the reservation, while also trying to protect the four sacred mountains from development projects.<sup>410</sup> The Southern Ute tribe, through development of coal-bed methane and natural gas on the reservation, combined with energy investments off the reservation, has reportedly “achieved cultural, environmental and economic self-determination.”<sup>411</sup>

Although a spiritual relationship with the land is common to many Indians, it is not universally practiced amid contemporary “settler colonial” realities.<sup>412</sup> Because European colonists came to North America to stay, their mode of colonization displaced indigenous peoples from their homelands. As a result, some Indian tribes have been violently relocated from their traditional territories; they no longer live within their sacred landscapes. Although some were able to carry their land-based traditions with them—such as the Muscogee Creek Nation bringing the sacred fires of its ceremonial grounds to Indian Territory (now Oklahoma)—for other tribes, things may be quite different.<sup>413</sup>

Specifically with respect to housing, even tribal members who hold more secular attitudes toward the land may value the community cohesiveness that is afforded by reservation life. Instead of “[h]ome ownership” in the sense of “Western concepts of equity accumulation, appreciation, and privacy,” living on the reservation “suggests a non-possessive concept that reflects a traditional value of sharing shelter with an extended family.”<sup>414</sup> Now the challenge is to articulate a framework to explain those dynamics and their relationship with the larger, non-Indian society.

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409. See, e.g., *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1208 (9th Cir. 2001) (en banc) (describing the dispute over development near a Hoopa sacred site); see also MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* 519-24 (2011) (discussing the Hoopa Valley Tribal Court of Appeals’s decision in the case).

410. See James Rainey, *Lighting the West, Dividing a Tribe*, NBC NEWS (Dec. 18, 2017), <https://perma.cc/7GPG-MPKJ> (describing coal mining on Navajo land); see also *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1098 (9th Cir. 2008) (en banc) (W. Fletcher, J., dissenting) (discussing the sacred Navajo mountains).

411. See Thompson, *supra* note 355 (reporting on the wealth-producing impacts of energy development and the associated tribal political and cultural dynamics).

412. For a discussion of settler colonialism, see generally Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387 (2006).

413. See Bigler, *supra* note 317, at 17-24.

414. ZAFERATOS, *supra* note 373, at 87.

B. The Human Rights Paradigm: Self-Determination and Sustainability

1. Self-determination

Self-determination refers to the aspiration and capacity of peoples to regulate their own territory and citizenry.<sup>415</sup> As referenced above, the United Nations Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly in 2007 by a vote of 144-4 (with 11 nations abstaining).<sup>416</sup> In 2011, the United States reversed its earlier opposition to the Declaration and issued a statement explaining its new position.<sup>417</sup> Australia, Canada, and New Zealand have also reversed their original oppositions.<sup>418</sup> By any measure, the Declaration is a standard-setting document, now reflecting the views of 148 nations of the world on treatment of indigenous peoples.<sup>419</sup> One of the Declaration's most fundamental principles is the recognition that "peoples"—alongside states and individuals—are rightsholders as a matter of international law.<sup>420</sup> Indigenous peoples have an inalienable right to self-determination, defined as the right to decide their own destiny in the international legal order, along with other rights including property, equality, culture, development, and political participation.<sup>421</sup> Past policies—such as Indian removal, allotment, and Termination—would almost certainly violate today's human rights

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415. See *supra* text accompanying note 364.

416. See *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS, <https://perma.cc/74SC-C2G9> (archived Feb. 7, 2019) (providing the vote totals for and against the Declaration); see also *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 65.

417. See Obama White House Press Release, *supra* note 370; see also Valerie Richardson, *Obama Adopts U.N. Manifesto on Rights of Indigenous Peoples*, WASH. TIMES (Dec. 16, 2010), <https://perma.cc/26M2-MT2P> (discussing President Obama's statement of support for the Declaration).

418. See Richardson, *supra* note 417.

419. See Megan Davis, Commentary, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELB. J. INT'L L. 439, 440 (2008) (discussing how adoption of the Declaration "provides an opportunity to expound upon indigenous peoples' experiences of standard-setting" in the United Nations).

420. See *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 65, art. 3; see also S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 97-128 (2d ed. 2004) (discussing the status of self-determination as a fundamental human right and *jus cogens* norm of international law).

421. For the Declaration's provisions on self-determination, see *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 65, art. 3; on land and property, see *id.* arts. 10-11, 25-26, 28; on equality and nondiscrimination, see *id.* arts. 2, 8-9, 14-16, 21; on culture, see *id.* arts. 8, 11, 15, 31; on development, see *id.* art. 3; and on political participation, see *id.* arts. 5, 18, 27, 41.

standards.<sup>422</sup> Looking forward, honoring self-determination means that indigenous peoples should enjoy a right to their continued existence as tribal peoples.<sup>423</sup> To the extent that current privatization proposals express indifference to the survival of Indian tribes as such, they are woefully out of step with international norms<sup>424</sup> and indigenous aspirations.<sup>425</sup>

In the United States, federal Indian policy is already somewhat consistent with the Declaration in ways that are relevant to this Article.<sup>426</sup> Consistent with article 3 of the Declaration, the United States has formally recognized the “self-determination” of Indian tribes since 1970.<sup>427</sup> And advocates are continually working to realize more fully the norm of self-determination on a practical level.<sup>428</sup> Similarly, article 28 of the Declaration calls upon states to redress the dispossession of indigenous lands.<sup>429</sup> While the United States has

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422. See, e.g., *id.* art. 10 (“Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”).

423. See *id.* art. 9 (“Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.”).

424. See ANAYA, *supra* note 420, at 97-98.

425. See Bigler, *supra* note 317, at 42-59 (describing the aspirations of the Muscogee Creek and Euchee tribes with respect to human rights); *supra* text accompanying note 338.

426. For a theoretical view on the implementation of human rights as a matter of international, domestic, and tribal law, see Kristen A. Carpenter & Angela R. Riley, Essay, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173 (2014).

427. See Nixon Indian Affairs Address, *supra* note 371, at 565-67 (announcing a federal policy of recognizing the “self-determination” of Indian tribes); see also United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 65, art. 3 (“Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

428. See, e.g., Robert J. Miller, *Consultation or Consent: The United States’ Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 48-53 (2015) (describing consultation with Indian tribal governments as a means of achieving federal Indian self-determination policy).

429. Article 28 states:

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 65, art. 28, ¶ 1; see also *id.* art. 28, ¶ 2 (“Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.”).

not fulfilled this obligation in any broad sense, it has made some progress through various land claims settlements, the IRA, the *Cobell* settlement, and other programs allowing tribes to reacquire lands and take them into trust.<sup>430</sup>

Ultimately, self-determination means that indigenous peoples, as *peoples*, have the right to “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>431</sup> In the United States, this means that each tribal government has the right not to be swept up in others’ priorities of wealth maximization. As a matter of remedial and ongoing self-determination, federal Indian land tenure policy that reflects tribal norms, aspirations, cultures, and values must be allowed to mature and flourish, even as it is continually reformed to improve the lives of Indians.

## 2. Sustainability

In the human rights framework, sustainability addresses the ongoing relationship between humans and their environment, and includes an element of reconciliation for past harms among peoples and landscapes.<sup>432</sup> From an ecological perspective, sustainability describes the ability of biological systems to maintain their diversity and productivity.<sup>433</sup> Socially, the concept of sustainability recognizes the interdependence of human beings and the environment, and resilient living within that relationship.<sup>434</sup> Economically, sustainability has been described as a way of doing business that seeks “alignment of a firm’s prosperity with the best interests of the planet.”<sup>435</sup> In all these respects, sustainability is consistent with many indigenous worldviews in which decisions about current resources are made with an eye toward future generations and the ability of a people to live harmoniously and perpetually in their homeland.<sup>436</sup>

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430. For a full discussion of these programs, see Part II.B above.

431. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 65, art. 3.

432. For a primer on indigenous peoples and sustainable development, and a discussion of remedies for violations of indigenous rights in this context, see Indian Law Res. Ctr., *Indigenous Peoples and Sustainable Development: Protecting Our Rights* (n.d.), <https://perma.cc/R9TZ-DCND>.

433. For a genealogy of the concept of sustainability in U.S. environmental policy, see NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *SUSTAINABILITY AND THE U.S. EPA* 15-33 (2011).

434. See, e.g., Joern Fischer et al., *Advancing Sustainability Through Mainstreaming a Social-Ecological Systems Perspective*, 14 CURRENT OPINION ENVTL. SUSTAINABILITY 144 (2015).

435. See Yvon Chouinard et al., *The Sustainable Economy*, HARV. BUS. REV. (Oct. 2011), <https://perma.cc/4E3N-PABG>.

436. See generally Giorgia Magni, *Indigenous Knowledge and Implications for the Sustainable Development Agenda*, 52 EUR. J. EDUC. 437 (2017).

Sustainability is not just an indigenous rights issue, of course; indeed, there is great resonance among the interests and challenges faced by indigenous peoples and others in this realm. Across the board, environmental rights have often been pitted against economic development, including in current policy debates in the United States.<sup>437</sup> Yet the United Nations's SDGs take a different approach, integrating poverty alleviation and economic development with environmental and climate policy.<sup>438</sup> The seventeen SDGs reflect a new sustainable development agenda, entitled "Transforming Our World: The 2030 Agenda for Sustainable Development," which was adopted by the United Nations General Assembly in 2015.<sup>439</sup> Administered by the United Nations Development Programme (UNDP), the SDGs came into effect in 2016 and are funded through 2030.<sup>440</sup> The agenda serves as a "universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity."<sup>441</sup>

The United Nations's plan for implementing the SDGs focuses on "poverty alleviation, democratic governance and peace building, climate change and disaster risk, and economic inequality."<sup>442</sup> The UNDP provides support to governments to integrate the SDGs into their national development plans and policies, and fosters partnerships among governments, industry, and civil society toward those ends.<sup>443</sup> On the one hand, studies have shown that no country is yet on track to meet the SDGs,<sup>444</sup> and the United States, along with

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437. See, e.g., Lipton & Friedman, *supra* note 14 (reporting on President Trump's attempt to diminish the size of a national monument in order to make lands available for oil exploration).

438. See United Nations Sustainable Development Goals, *supra* note 66; see also *Sustainable Development Goals*, *supra* note 66.

439. See United Nations Sustainable Development Goals, *supra* note 66. See generally Ved P. Nanda, *The Journey from the Millennium Development Goals to the Sustainable Development Goals*, 44 DENV. J. INT'L L. & POL'Y 389 (2016) (providing a history of the United Nations's adoption of sustainability platforms).

440. *Sustainable Development Goals*, UNITED NATIONS DEV. PROGRAMME, <https://perma.cc/FJU7-X3ZV> (archived Feb. 7, 2019).

441. *Id.*

442. *Id.*

443. See United Nations Dev. Programme, UNDP Support to the Implementation of Sustainable Development Goal 16: Promote Peaceful and Inclusive Societies, Provide Access to Justice and Build Effective, Accountable and Inclusive Institutions 3 (2016), <https://perma.cc/B5JG-DMEU>.

444. See, e.g., Aart de Geus & Jeffrey Sachs, *Foreword to* JEFFREY SACHS ET AL., BERTELSMANN STIFTUNG & SUSTAINABLE DEV. SOLS. NETWORK, SDG INDEX AND DASHBOARDS REPORT 2018: GLOBAL RESPONSIBILITIES; IMPLEMENTING THE GOALS, at viii (2018), <https://perma.cc/6KTJ-Y37V>.

Russia, is lagging behind other countries in this regard.<sup>445</sup> But, on the other hand, the United States is reporting on its progress,<sup>446</sup> and officials of the Environment and Natural Resources Division within the Department of Justice have said that the SDGs offer an important “lens” through which to view federal policy.<sup>447</sup>

Along these lines, we highlight the SDGs for their potential to impact national policies on economic and environmental issues, especially those affecting indigenous peoples. Canadian Prime Minister Justin Trudeau made these connections explicit in his 2017 address to the United Nations General Assembly.<sup>448</sup> His speech connected the conquest of indigenous peoples with current impediments to sustainability on a national and global level, in terms of both historical and current realities.<sup>449</sup> As Prime Minister Trudeau acknowledged, the colonial process harmed aboriginal people, the landscape, and society more broadly.<sup>450</sup> Today, Canada is also home to polluted waters, inadequate housing, racial discrimination, and failing schools, affecting both indigenous and nonindigenous sectors of society.<sup>451</sup> Thus, meeting the SDGs, including “decent work and economic growth”<sup>452</sup> and “making communities safe and sustainable places to live,”<sup>453</sup> will require interrelated reforms in indigenous and mainstream communities alike.<sup>454</sup>

In today’s world, indigenous peoples and settler societies are inextricably linked as common occupants, or at least close neighbors, of the same

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445. See Eshe Nelson, *The US and Russia Are Doing the Least to Achieve the UN’s Sustainable Development Goals*, QUARTZ (July 17, 2018), <https://perma.cc/3ZST-GSJX>.

446. See U.S. National Statistics for the U.N. Sustainable Development Goals, SUSTAINABLE DEV. GOALS, <https://perma.cc/3FGT-5FSK> (archived Feb. 7, 2019).

447. See, e.g., John C. Cruden, *The Work of the Department of Justice Environment and Natural Resources Division: Promoting Environmental Rule of Law and the Advancement of Sustainable Development Goals*, 12 S.C. J. INT’L L. & BUS. 145, 167-68 (2016). It is unclear as of this writing whether the change in administration following Cruden’s publication portends an official change in federal policy toward the SDGs, but news sources have noted that the Trump Administration has failed to make, and may even be undermining, progress in this realm. See, e.g., Nelson, *supra* note 445; Fiona Roberts, *SDGs Versus Trump: Who Will Triumph?*, CORP. CITIZENSHIP: BRIEFING (Dec. 14, 2017), <https://perma.cc/65NT-XQT2>.

448. See Trudeau General Assembly Address, *supra* note 67.

449. See *id.*

450. See *id.*

451. See *id.*

452. Cf. United Nations Sustainable Development Goals, *supra* note 66, ¶¶ 8.1-10, 8.a-b (detailing Goal 8 of the SDGs—to “[p]romote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all”).

453. Cf. *id.* ¶¶ 11.1-7, 11.a-c (detailing Goal 11 of the SDGs—to “[m]ake cities and human settlements inclusive, safe, resilient and sustainable”).

454. See Trudeau General Assembly Address, *supra* note 67.

landscapes. Therefore, as scholars and advocates have begun to note, healing from the experiences of political conquest and environmental degradation often go hand in hand, especially on Indian reservations.<sup>455</sup> Thus, an emerging—and in our view, powerful—model of “sustainability” includes an aspect of “reconciliation” with indigenous peoples.

Canada is approaching reconciliation through the work of its Truth and Reconciliation Commission, which in 2009 began a “multi-year process to listen to Survivors, communities and others affected by” abuse of Indian children in government-run boarding schools.<sup>456</sup> Based on the testimony it received, the Commission made recommendations for measures to improve Canada’s governance of education, health care, culture, and child welfare as they impact indigenous peoples.<sup>457</sup> Importantly, the Commission also called for adoption of the United Nations Declaration on the Rights of Indigenous Peoples as a framework for reconciliation.<sup>458</sup>

Commentators have subsequently linked the Truth and Reconciliation Commission’s calls to action and the United Nations’s SDGs, noting, for example, that to meet the United Nations’s sustainability goals on health, Canada should specifically address the Commission’s recommendations on “measurable goals to identify and close the gaps in health outcomes between Aboriginal and non-Aboriginal communities,” including indicators such as infant mortality, maternal health, suicide, mental health, addictions, life expectancy, birth rates, chronic diseases and the availability of appropriate health services.<sup>459</sup> In this way, the goal of “reconciliation” with indigenous peoples is linked—in our view, appropriately so—to norms of sustainability, such as health and well-being.

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455. See, e.g., Sarah Krakoff, *Settler Colonialism and Reclamation: Where American Indian Law and Natural Resources Law Meet*, 24 COLO. NAT. RESOURCES ENERGY & ENVTL. L. REV. 261, 263 (2013) (“[C]urrent debates about Indian water settlements, access to land for religious and cultural purposes, and even economic and social legislation can be seen in their proper context, as measures of corrective justice that recognize indigenous peoples’ preexisting political, moral, and legal claims, rather than as special rights doled out to select minorities.”).

456. See *The National Centre for Truth and Reconciliation*, NAT’L CTR. FOR TRUTH & RECONCILIATION, <https://perma.cc/QMB4-MH89> (archived Mar. 27, 2019).

457. See TRUTH & RECONCILIATION COMM’N OF CAN., TRUTH AND RECONCILIATION COMMISSION OF CANADA: CALLS TO ACTION (2015), <https://perma.cc/9VVV-8ELT>.

458. See *id.* ¶¶ 43-47.

459. Livia Bizikova, *Three Ways Canada Can Make Progress with the Sustainable Development Goals*, INT’L INST. FOR SUSTAINABLE DEV. (Nov. 24, 2016), <https://perma.cc/PD8L-HTZM> (quoting TRUTH & RECONCILIATION COMM’N OF CAN., *supra* note 457, ¶ 19).

This is not to say that Canada has satisfactorily accounted for its indigenous peoples' problems,<sup>460</sup> or that the SDGs are a perfect formula.<sup>461</sup> At the same time, we find the turn to sustainability helpful as we consider human rights issues facing indigenous peoples in the United States. One serious concern in Canada, as in the United States, is poverty in reservation communities.<sup>462</sup> Yet, the leader of the Canadian government is not suggesting that the solution for poverty is to monetize or sell off the remaining lands of aboriginal peoples. To the contrary, Prime Minister Trudeau has suggested a plan for both poverty amelioration and environmental health founded on reconciliation between indigenous peoples and the settler state.<sup>463</sup> With respect to the United States, United Nations experts have made similar suggestions that link the unresolved nature of indigenous land claims with contemporary reservation poverty.<sup>464</sup> Moving forward, indigenous self-determination and sustainability offer a normative vision for the future of Indian Country largely missing from the privatization debate.

### C. Examples from Indian Country

To illustrate our theoretical points, in this Subpart we provide detailed descriptions of examples from Indian Country that show this normative vision for indigenous well-being in action. One of the powerful attributes of self-determination is that it is fundamentally pluralistic: It empowers indigenous peoples to make their own decisions, including deciding the metes and bounds of sustainable practices in their cultures and communities. Thus, the model of self-determination and sustainability accommodates a range of possibilities.

In many communities, wealth maximization is not the only value—or even the primary one—animating land tenure. It is not that Indians wish to

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460. See, e.g., *Indigenous Leaders Give Trudeau Government Failing Grade on Delivering Promises*, CBC RADIO: CURRENT (updated Jan. 26, 2017), <https://perma.cc/39DL-2B2K>.

461. See, e.g., Ingo Keilitz, *The Trouble with Justice in the United Nations Sustainable Development Goals 2016-2030*, 7 W.M. & MARY POL'Y REV. 1 (2016) (arguing that the SDGs are flawed because they are not sufficiently “specific, measurable, attainable, relevant, and time-bound”).

462. See, e.g., Jordan Press, *Over 80% of Reserves Have Median Income Below Poverty Line, Census Data Shows*, GLOBAL NEWS (Oct. 10, 2017, 2:43 PM), <https://perma.cc/YMK8-ZZJY>.

463. See Trudeau General Assembly Address, *supra* note 67.

464. See Anaya Report, *supra* note 54, ¶ 37 (“The conditions of disadvantage of indigenous peoples undoubtedly are not mere happenstance. Rather, they stem from the well-documented history of the taking of vast expanses of indigenous lands with abundant resources, along with active suppression of indigenous peoples’ culture and political institutions, entrenched patterns of discrimination against them and outright brutality, all of which figured in the history of the settlement of the country and the building of its economy.”); see also *id.* ¶¶ 72-78.

remain poor; of course, they do not.<sup>465</sup> Rather, wealth in indigenous communities is often tied to human comforts and collective well-being versus individual profit, status, or advancement. The NNI conducted interviews that give some perspective:

During the consultations, focus groups, and listening sessions held to inform this report, participants were asked to look ahead to the year 2024 and imagine that their communities enjoyed full access to capital and credit. Participants shared their visions of warm and efficient houses, quality water and food, a choice of financial institutions able to assist in building community and individual wealth, and tribal governments and businesses working in concert on economic and community development. They described vibrant Native Communities that offered residents—and those who wanted to return home—opportunities to build good lives.<sup>466</sup>

To a significant extent, such visions may be accomplished by reforms to the existing system of Indian land tenure. As noted above, the NNI has concluded that “land privatization is not necessary for economic growth and development.”<sup>467</sup> Moreover, it has noted that “economic and housing developers in Native Communities (and their funders) should not assume that fee simple land holding is the optimal land holding system, and that the primary obstacle to sustainable development on Indian lands is communal land tenure.”<sup>468</sup>

Thus, instead of abolishing the trust system, the NNI recommends other reforms, including reducing the bureaucracy around the titling process (and for tribes to take charge of such programs); tailoring lending practices to changing Indian Country income demographics, looking to the growing middle class for partnership; and educating banks on lending in Indian Country to recognize that tribal governments, institutions, and citizens are good clients.<sup>469</sup>

In the discussion that follows, we assess several examples from tribal communities, including the Ho-Chunk, Citizen Potawatomi, Penobscot, and Kanatsiohareke Mohawk tribes. Among these four examples we find a spectrum of approaches to housing and development, drawn both from our conventional academic reading and our visits to Indian Country. Some tribes are taking a relatively aggressive approach to housing and finance, including development on fee simple lands, but without abolishing the trust relationship;

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465. See, e.g., Thomas Kaplan, *In Tax Fight, Tribes Make, and Sell, Cigarettes*, N.Y. TIMES (Feb. 22, 2012), <https://perma.cc/A28Q-DZTL> (“We tried poverty for 200 years . . . . We decided to try something different.” (quoting interview with a leader of the Oneida Nation)).

466. NNI REPORT, *supra* note 32, at 10.

467. *Id.* at 57; see *supra* Part II.A.

468. NNI REPORT, *supra* note 32, at 57.

469. See *id.* at 58-59, 71.

many tribes are working with existing federal lending programs to improve housing and development opportunities on trust lands (akin to the NNI's suggestions); and a few tribes are rejecting the legacy of federal Indian land tenure altogether as grounded in a system of capitalist oppression, and seeking instead to return to a more traditional indigenous approach to land tenure.

All of these approaches to land tenure, no matter how modest or transformative, reflect the norms of self-determination and sustainability—and not, for the most part, an ethic of wealth maximization or a preference for privatization. The tribal programs also teach that while Indian land tenure in North America goes back to time immemorial, the contemporary measures that attempt to remedy the history of conquest and colonization are quite embryonic. With only a generation or two of eligibility for land recovery programs and even less time to experiment<sup>470</sup> with new mortgage and finance options, tribes and Indian people have shown remarkable progress—progress that we contend should be permitted to mature and evolve.

1. Ho-Chunk: sustainable economies and pragmatic innovation on the reservation

The Ho-Chunk people, previously known as Winnebago, originally occupied 10 million acres of land between the Mississippi and Rock Rivers.<sup>471</sup> After a number of removals and relocations, there are now two federally recognized tribes, one in Nebraska and one in Wisconsin.<sup>472</sup> The Nebraska reservation was created by treaties of 1865 and 1874, and later allotted, a process that decreased the size of the tribal land base by two-thirds.<sup>473</sup> This Subpart focuses on the Nebraska reservation and its members' recent innovations in the realm of property and development.

Following the deprivations caused by historical policies, the Ho-Chunk of Nebraska “struggled for many years with low income, high unemployment and a lack of affordable housing,” and “these economic problems and ensuing social

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470. Cf. Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775 (2014) (exploring tribal governments' capacity to further values associated with federalism, including diversity, pluralism, innovation, and experimentation in government). Singel's observation could support the idea that tribes should have some opportunity to experiment with different forms of land ownership.

471. *Ho-Chunk Nation: Hochungra—The People with the Big Voice*, WIS. FIRST NATIONS, <https://perma.cc/QV8P-B7AL> (archived Feb. 7, 2019).

472. See *Federal and State Recognized Tribes*, NAT'L CONF. ST. LEGISLATURES, <https://perma.cc/TF3K-G7MY> (last updated Nov. 2018) (listing the Ho-Chunk of Wisconsin and the Winnebago of Nebraska as federally recognized tribes). For an oral history of the Ho-Chunk people, see *Ho-Chunk History*, PBS (Aug. 24, 2015), <https://perma.cc/Z5DF-NUPJ>.

473. See WINNEBAGO TRIBE NEB., <https://perma.cc/ZN57-AE4Q> (archived Mar. 3, 2019).

problems encouraged many Tribal members to leave the reservation in search of new opportunity or to not seek a job at all because it would disqualify them from federal housing.<sup>474</sup> At the same time, because of the lack of retail and other commercial opportunities, reservation residents spent their meager income elsewhere, causing further impoverishment—a problem that has been identified as reservation “leakage.”<sup>475</sup> The challenge facing many tribes is how to create long-term, sustainable economic development that both improves the standard of living on reservations and sustains tribal cultures.

Noting that it can be challenging, the leading experts in “Native Nation Building”<sup>476</sup> have argued that tribes must solve the problem of “separat[ing] day-to-day enterprise management from politics” in order to allow for effective economic development.<sup>477</sup> Thus, the Ho-Chunk tribal government’s Department of Housing administers tribal housing, complete with a mortgage program for construction and renovations.<sup>478</sup> Its mission is to “strategically and efficiently” develop housing and stimulate a reservation-based housing market.<sup>479</sup> And the tribe has an extensive code, including provisions for the leasing of trust lands and tribal court jurisdiction over foreclosures, as required for participation in the Section 184 program.<sup>480</sup>

Commercial real estate development is run by Ho-Chunk, Inc., a corporation chartered under tribal law.<sup>481</sup> One of the corporation’s important innovations has been its integrated approach to housing, employment, and

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474. *Ho-Chunk Village: Overview*, HO-CHUNK INCORPORATED, <https://perma.cc/33M7-UFUK> (archived Feb. 7, 2019).

475. See MILLER, *supra* note 53, at 4, 113-14, 135-37. See generally Gavin Clarkson & Alisha Murphy, *Tribal Leakage: How the Curse of Trust Land Impedes Tribal Economic Self-Sustainability*, 12 J.L. ECON. & POL’Y 177 (2016).

476. See *What Is Native Nation Building?*, *supra* note 227 (“Nation building refers to efforts Native nations make to increase their capacities for self-rule and for self-determined, sustainable community and economic development.”).

477. See Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in *WHAT CAN TRIBES DO?: STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* 1, 29-34 (Stephen Cornell & Joseph P. Kalt eds., 2d prtg. 1993).

478. See *Department of Housing: Mission Statement*, HO-CHUNK NATION, <https://perma.cc/GR5W-M83B> (archived Mar. 3, 2019); see also Dep’t of Hous., Ho-Chunk Nation, *Existing Mortgage Assistance* (2017), <https://perma.cc/JP2T-GYCW>; Dep’t of Hous., Ho-Chunk Nation, *Home Repair Loan Program* (2017) [hereinafter *Ho-Chunk Home Repair Loan Program Policy*], <https://perma.cc/8UKJ-CSH5>.

479. See, e.g., *Ho-Chunk Home Repair Loan Program Policy*, *supra* note 478, at 1.

480. See HO-CHUNK NATION CODE tit. 8, § 5(13)(a)(3)(iii), (14)(e) (2016); *supra* text accompanying notes 263-64; see also *supra* Part II.B.1.

481. See *Ho-Chunk Inc.*, REFERENCE FOR BUS., <https://perma.cc/5NJ2-Q9TS> (archived Feb. 7, 2019).

retail—that is, creating a community where people can live, work, and shop.<sup>482</sup> Progress in each dimension has fed the other. Ho-Chunk, Inc. has also been involved in government contracts, real estate development, and e-commerce.<sup>483</sup> These business developments have led to new job opportunities, but have also created a need for more housing.<sup>484</sup> As Lance Morgan, the CEO and President of Ho-Chunk, Inc., explained to NNI researchers:

A majority of the [Nebraska Ho-Chunk's] housing is owned by the tribal government and has income restrictions, which ironically forced our emerging middle class to leave our community to find housing. The very people who should be natural community leaders were moving to communities where housing was readily available and . . . not participating fully in our growing economy.<sup>485</sup>

The tribe and corporation have used several mechanisms to resolve these issues. Ho-Chunk Village, a multiuse project located within the reservation, is aimed at building wealth by cultivating homeownership.<sup>486</sup> The project is located on forty acres of fee land within the reservation.<sup>487</sup> In this regard, it is an example of reclaiming for tribal purposes land that went into fee during allotment. The NNI calls this an example of “in-fill housing development,” which “leverag[es] multiple sources of funds . . . to promote asset building through homeownership.”<sup>488</sup> With Ho-Chunk Village, the approach includes “discounted lots, collaboration with a manufactured home supplier wholly owned by Ho-Chunk Inc., . . . and substantial down payment assistance.”<sup>489</sup>

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482. See *Ho-Chunk Village: Master Plan & Gallery*, HO-CHUNK INCORPORATED, <https://perma.cc/P6VA-KKSM> (archived Feb. 7, 2019); *Ho-Chunk Village: Overview*, *supra* note 474.

483. See *Harvard Grad Turns Ho-Chunk Inc. Into \$65 Million Company*, SIOUX CITY J. (Mar. 14, 2003), <https://perma.cc/J2BU-PCFA> (“The company now owns 10 gasoline stations in Iowa and Nebraska; a construction firm based in South Sioux City; a modular home building company in Minnesota; an American Indian news Web site and an Indian gift shop on the Internet; a reservation-based telephone systems company that does government contract work; and has invested in 17 hotels and nine apartment complexes from California to Minnesota.”).

484. See *Ho-Chunk Village: Overview*, *supra* note 474.

485. NNI REPORT, *supra* note 32, at 56 (second alteration in original) (quoting Lance Morgan, CEO & President, Ho-Chunk, Inc.).

486. See *id.* at 54; see also Kevin Abourezk, *Winnebago Tribe Sees Boost in Home Ownership as More Return to Reservation*, INDIANZ.COM (Feb. 22, 2018), <https://perma.cc/MEQ5-TGJ8>.

487. NNI REPORT, *supra* note 32, at 54.

488. *Id.*

489. *Id.*

Indeed, the assistance with down payments has been a critical aspect of the program.<sup>490</sup> As a result, “[n]ew homeowners are emerging in record levels.”<sup>491</sup>

Beyond just creating new homeowners, Ho-Chunk Village is also creating safe housing options for residents of various income levels, as well as fostering intergenerational living patterns on reservations through rental properties and senior living.<sup>492</sup> The program has been so successful that the tribe may soon need to acquire more land.<sup>493</sup> And it has recently moved into clean energy development.<sup>494</sup> Thus, we offer the Ho-Chunk of Nebraska as an example of pragmatic innovation in Indian land tenure toward building a sustainable economy.<sup>495</sup>

## 2. Citizen Potawatomi: institution building and economic development following a legacy of removal

The Potawatomi people traditionally lived in the Great Lakes region, but were rounded up by the federal government and marched away from their traditional homelands south through the plains and the Midwest.<sup>496</sup> In the mid-1800s, a band of Potawatomi signed a new treaty with the United States, providing for a reservation in current-day Oklahoma and conferring U.S. citizenship on the band’s members, who became known as the “Citizen

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490. See *Local Initiatives Promote Home Ownership in Indian Country*, EVIDENCE MATTERS (Office of Policy Dev. & Research, U.S. Dep’t of Hous. & Urban Dev., Washington, D.C.), Spring 2015, at 22, 24, <https://perma.cc/3JMV-4U76>.

491. Press Release, Ho-Chunk, Inc., Ho-Chunk, Inc. CEO Receives Award from U.S. Department of Commerce Agency (July 28, 2014), <https://perma.cc/G683-DR7Y>.

492. See NNI REPORT, *supra* note 32, at 54 (“[Ho-Chunk Village’s] mixed-use housing, retail, workplace, and recreational space blends the ideas of new urbanism, active living, and culturally appropriate development in an intentionally created community subdivision designed . . . to meet the needs of an economically developing yet steadfastly traditional Native nation.”).

493. See *id.*

494. See, e.g., Kevin Abourezk, *Winnebago Tribe Sees Power from Solar Energy as Boost to Sovereignty*, INDIANZ.COM (Mar. 7, 2018), <https://perma.cc/5B77-Z79F>.

495. For another example of sustainability and innovation in Indian land tenure, see Thunder Valley Cmty. Dev. Corp., *Ecosystem of Opportunity: A Short Thunder Valley CDC Documentary*, YOUTUBE (May 8, 2015), <https://perma.cc/6D6J-PG8K> (addressing sustainability on the Pine Ridge reservation in South Dakota—one of the poorest reservations in the country—where a thirty-four-acre housing, retail, and community space was sited with attention to larger issues of climate adaptation). See also *Community Development*, THUNDER VALLEY CDC, <https://perma.cc/E5BC-UFGV> (archived Mar. 3, 2019); *Thunder Valley Master Plan*, PYATT STUDIO, <https://perma.cc/JCU2-R9R5> (archived Mar. 3, 2019).

496. See CHRISTOPHER WETZEL, *GATHERING THE POTAWATOMI NATION: REVITALIZATION AND IDENTITY* 22-31 (2015).

Potawatomi.”<sup>497</sup> Like most tribes in Oklahoma, the Citizen Potawatomi Nation’s reservation was opened up to allotment in the late 1800s, and a great deal of the treaty land was lost.<sup>498</sup> Once reduced to owning only a few acres of trust land, \$550 in the bank, and a single trailer that served as tribal headquarters,<sup>499</sup> the tribe has now emerged as a model of economic and governance success in Indian Country. As of 2007, the Nation’s holdings include a bank, a casino, restaurants, a golf course, a discount food store, a farm, and a radio station.<sup>500</sup>

With a focus on political self-determination and economic self-sufficiency, the Citizen Potawatomi government has continuously reinvested earnings into programs and services that help improve the lives of tribal members, including education, health, housing, and social services.<sup>501</sup> In addition, the tribe has taken advantage of relatively recent guideline changes that allow tribes and tribally designated housing entities to provide access to Section 184 loans beyond their tribal boundaries if they submit documentation demonstrating that the tribe has a historical connection to the areas or that tribal members live in those areas.<sup>502</sup>

A key feature of governance within the Citizen Potawatomi Nation is that the tribe has taken decisionmaking power back from the federal government.<sup>503</sup> Once the tribe took back this power over federal trust management,

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497. See The Harvard Project on Am. Indian Econ. Dev., Honoring Nations All-Stars Profile: Constitutional Reform; Citizen Potawatomi Nation 1-2 (2014), <https://perma.cc/J3J4-SVKR>.

498. See Mark Welliver, *CP 87 and CP 100: Allotment and Fractionation Within the Citizen Potawatomi Nation*, U.N.M. SCH. L.: TRIBAL L.J. (2001-2002), <https://perma.cc/WFP7-WFSL>.

499. Cornell & Kalt, *supra* note 246, at 3; see also The Harvard Project on Am. Indian Econ. Dev., *supra* note 497, at 3.

500. Cornell & Kalt, *supra* note 246, at 3; see also The Harvard Project on Am. Indian Econ. Dev., *supra* note 497, at 5-6 (detailing the tribe’s economic successes).

501. Gosia Glinska, *Citizen Potawatomi Nation Reverses Decline Through Strong Leaders, Entrepreneurship*, WASH. POST (July 18, 2014), <https://perma.cc/27K9-2SM4>.

502. See *Citizen Potawatomi Home Loan HUD 184 Loan Program*, TODAY LENDING, <https://perma.cc/X9QM-7RQJ> (archived Feb. 7, 2019); Press Release, U.S. Dep’t of Hous. & Urban Dev., HUD Approves Indian Area Expansion for Five Tribes (Apr. 27, 2005), <https://perma.cc/BR74-GVVD> (“Under the new guidelines, tribes and tribal housing entities can provide Section 184 homeownership opportunities beyond their reservations if they submit documentation demonstrating that the tribe has a historical connection to the areas to be served or if tribal members reside in those areas.”).

503. See The Harvard Project on Am. Indian Econ. Dev., Honoring Nations: 2010 Honoree; Citizen Potawatomi Nation Constitutional Reform 2 (n.d.), <https://perma.cc/7HFA-36EC> (“Recognizing that the creation of a new government would be a work in progress, the 2007 Constitution removed the need for federally-supervised constitutional elections and Bureau of Indian Affairs approval of any future constitutional amendments.”).

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the tribe reported a greater than 300% increase in trust fund account revenues.<sup>504</sup> The tribe's commitment to developing banking resulted in the creation of a Community Development Corporation which provides capital, training, and services for entrepreneurial small business owners.<sup>505</sup> The tribe has proven the effectiveness of self-governance by demonstrating incredible success in economic development as well as a slew of new businesses and jobs.<sup>506</sup>

Moreover, to strengthen internal and external legitimacy, the Citizen Potawatomi Nation underwent a constitutional reform in the 1980s.<sup>507</sup> To strengthen tribal institutions, ensure legitimacy, and create stable forums for the resolution of disputes, the revised constitution moved the tribe away from an IRA-style government and toward one that had a clearly defined separation of powers.<sup>508</sup> For the Citizen Potawatomi, like other tribes, this process of constitutional reform was essential for good governance.<sup>509</sup>

Despite having been removed from its traditional lands as part of the Trail of Death, the tribe has adapted to its new home in Oklahoma while maintaining or renewing cultural values and practices.<sup>510</sup> The Citizen Potawatomi Nation and many of its members have "kept their traditions alive as Keepers of the Fire."<sup>511</sup> The tribal government has fostered cultural practices in its new location by, for example, starting an aviary with rescued bald

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504. THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 22-23 (2008).

505. See The Harvard Project on Am. Indian Econ. Dev., *supra* note 497, at 1-3.

506. See *id.* at 2-3.

507. See *id.* at 3-5.

508. See CITIZEN POTAWATOMI NATION CONST. art. 5 (providing for a tribal council); *id.* art. 6 (providing for executive officers); *id.* art. 11 (providing for a supreme court); see also The Harvard Project on Am. Indian Econ. Dev., *supra* note 497, at 4-5.

509. See Joseph Kalt, *Constitutional Rule and the Effective Governance of Native Nations*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS, *supra* note 24, at 184, 208-10.

510. See The Harvard Project on Am. Indian Econ. Dev., *supra* note 497, at 1-2, 2 fig.3 (describing the forced relocations of the tribe); *id.* at 10-11 ("Even after multiple forced relocations and failed assimilation attempts, Citizen Potawatomi Nation demonstrates that it is possible for a tribe to reassert control of tribal government and remove the ineffective, standardized governance structures created by outsiders. . . . Trusting in the cultural foundations that supported the Potawatomi people long before settlers arrived, the Citizen Potawatomi Nation, once again, governs itself with an inclusive Potawatomi model.").

511. See *Symbolism Behind CPN Tribal Seal More than a Casual Decoration*, CITIZEN POTAWATOMI NATION (Dec. 21, 2016), <https://perma.cc/7M6F-GS6P>; see also The Harvard Project on Am. Indian Econ. Dev., *supra* note 497, at 9-10.

eagles.<sup>512</sup> The eagle feathers gathered from natural molting have enabled the tribe to revitalize a tribal naming ceremony, which usually involves the gifting of an eagle feather to the recipient.<sup>513</sup> Ceremonial grounds, naming ceremonies, and other cultural activities reflect the tribe's removal from aboriginal territories and its facility in holding on to cultural tradition in the face of forced adaptation.

### 3. Penobscot: finance and culture after land claims

The Penobscot are an Algonquin (or Wabanaki) people, indigenous to the Penobscot River watershed located in Maine, New Brunswick, and Nova Scotia.<sup>514</sup> Known for their baskets<sup>515</sup> and canoes,<sup>516</sup> the Penobscot are part of the Wabanaki Confederacy, comprised of the Mi'kmaq, Maliseet, Passamaquoddy, and Abenaki Indians.<sup>517</sup> Today, the tribe occupies a reservation on Indian Island in the Penobscot River.<sup>518</sup>

While pursuing housing and finance programs, the Penobscot tribe is simultaneously honoring and revitalizing the cultural traditions growing out of island life.<sup>519</sup> The tribe's efforts are remarkable for many reasons, not least of which is that like other tribes indigenous to the east coast of North America,

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512. See *Eagle Aviary*, CITIZEN POTAWATOMI NATION, <https://perma.cc/PV6A-YT54> (archived Feb. 7, 2019).

513. For background on the Citizen Potawatomi naming ceremony, see *The Potawatomi Naming Ceremony*, CITIZEN POTAWATOMI NATION (June 11, 2013), <https://perma.cc/6LD3-CZCS>.

514. See William H. Rodgers, Jr., *Treatment as Tribe, Treatment as State: The Penobscot Indians and the Clean Water Act*, 55 ALA. L. REV. 815, 826-27 (2004). See generally Micah A. Pawling, *A "Labyrinth of Uncertainties": Penobscot River Islands, Land Assignments, and Indigenous Women Proprietors in Nineteenth-Century Maine*, 42 AM. INDIAN Q. 454 (2018).

515. See PAULEENA MACDOUGALL, *THE PENOBSCOT DANCE OF RESISTANCE: TRADITION IN THE HISTORY OF A PEOPLE 189-91* (2004).

516. See *id.* at 183-84.

517. See *Abenaki*, ENCYCLOPÆDIA BRITANNICA, <https://perma.cc/5Z4U-L2HV> (archived Apr. 4, 2019).

518. See *Indian Reservation, Penobscots*, ME: ENCYCLOPEDIA, <https://perma.cc/EK9Y-7DAS> (last updated May 5, 2018).

519. See *Cultural & Historic Preservation*, PENOBSCOT INDIAN NATION, <https://perma.cc/3XMG-BJH3> (archived Feb. 7, 2019) (noting that the tribe's staff operates "multiple programs . . . to preserve the rich culture and history that is so important to the people of the Penobscot Nation"); *Housing Department*, PENOBSCOT INDIAN NATION, <https://perma.cc/2RRY-HSK7> (archived Feb. 7, 2019).

the Penobscot have borne the brunt of European conquest without any break since the 1600s.<sup>520</sup> The development of industry in the region created “legacy pollution” that stretched into the modern era.<sup>521</sup>

In the 1970s, the Passamaquoddy Tribe filed claims for a significant portion of the lands of the State of Maine,<sup>522</sup> ushering in a movement of New England tribes suing for their aboriginal lands under the Trade and Intercourse Acts.<sup>523</sup> The Maine Indian Claims Settlement Act of 1980, one of the first major legislative attempts to remedy the taking of northeastern lands, recognized the reservation.<sup>524</sup>

One notable aspect of the Maine Indian Claims Settlement Act was its extension of state law over aspects of reservation governance.<sup>525</sup> While state intrusions into tribal matters are often perceived as an assault on tribal sovereignty, the Penobscot Tribe has been able to develop a varied set of options for reservation housing that rely on state programs. For example, the State of Maine’s Indian Housing Mortgage Insurance Program provides mortgage insurance for property on tribal lands, and loan guarantees for up to thirty years for individuals buying or building homes within Indian Country in Maine.<sup>526</sup>

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520. See generally PAUL BRODEUR, *RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY, AND PENOBSCOT INDIANS OF NEW ENGLAND* (1985) (describing tribal relationships with colonists and, later, with Americans).

521. See Jamie Bissonnette Lewey, *For the Penobscot Nation, the Water in the River Is the Blood in Their Veins*, BANGOR DAILY NEWS (Jan. 5, 2016, 12:10 PM), <https://perma.cc/9KUX-JDPR>.

522. See *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 376, 378-79 (1st Cir. 1975); Joseph G.E. Gousse, Comment, *Waiting for Gluskabe: An Examination of Maine’s Colonialist Legacy Suffered by Native American Tribes Under the Maine Indian Claims Settlement Act of 1980*, 66 ME. L. REV. 535, 542 (2014) (“Native Americans in Maine would assert the largest, most groundbreaking land claims the world had ever seen, challenging the legitimacy of Maine’s title to more than two-thirds of its state territory.”). This litigation led to the settlement of a broader set of Maine Indian land claims, including those of the Penobscot. See *Maine Indian Claims Settlement Act of 1980*, Pub. L. No. 96-420, 94 Stat. 1785.

523. See Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729 (codified as amended in scattered sections of 25 U.S.C.); Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137. See generally BRODEUR, *supra* note 520 (reviewing tribes’ claims for land allegedly wrongfully taken by New England states in violation of the Trade and Intercourse Acts, which prohibited alienation of tribal lands without federal approval).

524. See Maine Indian Claims Settlement Act §§ 4-7, 94 Stat. at 1787-95; see also Sarah Krakoff & Kristen Carpenter, *Repairing Reparations in the American Indian Nation Context*, in *REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 251, 260 (Federico Lenzerini ed., 2008). For the State of Maine’s implementing provisions, see ME. STAT. tit. 30, §§ 6201-6214 (2018).

525. See Maine Indian Claims Settlement Act § 6, 94 Stat. at 1793-94.

526. See *Indian Housing Mortgage Insurance Program*, ME. HOUSING, <https://perma.cc/K79T-4HZR> (archived Mar. 9, 2019).

The tribe also leverages the resources of the Four Directions Development Corporation, a Native CDFI established by the four federally recognized tribes in Maine, which helps tribes and tribal members navigate barriers to funding opportunities.<sup>527</sup> Four Directions became a certified lender under the federal Section 184 program, which means that it can work directly with clients under the terms described above.<sup>528</sup> As a lender, Four Directions is sensitive to the issues and circumstances of tribal members.<sup>529</sup> In addition, Four Directions provides education as well as a local program for energy cost savings renovations.<sup>530</sup> The program has been successful: Many Four Directions clients “now own their own homes, save money on upkeep and maintenance, and have substantially improved credit scores.”<sup>531</sup> Finally, Four Directions has also “developed a means to foreclose on mortgages on Penobscot lands while still preventing any transfer of lands to noncitizens.”<sup>532</sup> Under “Trustee Agreement” mortgages, a group of trustees (tribal citizens and board members) take title of the customer’s real estate upon default.<sup>533</sup> “The Penobscot Leasing Code . . . allows these foreclosures on Penobscot land, pursuant to a proceeding in tribal court.”<sup>534</sup>

The Penobscot Tribe also revitalized the community’s access to the lands and rivers that are so important to its culture.<sup>535</sup> Homes throughout the Tribe’s island are linked by a “Medicine Trail,” connecting individual families to one

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527. See FOUR DIRECTIONS DEV. CORP., <https://perma.cc/P9BC-9AMU> (archived Feb. 7, 2019).

528. See Fed. Reserve Bank of Minneapolis, Mortgage Lending in Indian Country: Foundational Investments & Future Pathways to Homeownership 2 (Sept. 13-15, 2016) <https://perma.cc/3R33-RPRA>; see also NNI REPORT, *supra* note 32, at 53; *supra* Part II.B.1.

529. See FOUR DIRECTIONS DEV. CORP., *supra* note 527 (describing common barriers to asset building faced by tribal members).

530. See *Four Directions Development Corporation*, ME. INITIATIVES, <https://perma.cc/8CRP-TSRD> (archived Feb. 7, 2019) (noting that since its founding, Four Directions “has deployed over \$10.5 million in mortgage, home improvement, energy efficiency, business, and consumer loans to over 200 Maine families and has provided over 700 tribal members with credit and budget counseling, financial literacy training, and homeownership education”); see also Fed. Reserve Bank of Minneapolis, *supra* note 528, at 1-3 (providing a case study on Four Directions’s mortgage lending in Indian Country).

531. NNI REPORT, *supra* note 32, at 53 (noting that Four Directions clients saw their credit scores rise by an average of 53 points).

532. *Id.*

533. *Id.*

534. *Id.*

535. See U.S. Dep’t of Hous. & Urban Dev., *Penobscot Indian Nation—Indian Nation LEED Homes* at 2:13-3:59, YOUTUBE (June 3, 2013), <https://perma.cc/DCU2-BYGU> (describing how home ownership and real estate development is important to tribal culture).

another as well as to the plants they use for traditional medicines.<sup>536</sup> A new dock on the river has revitalized intergenerational connections and the emotional well-being that comes with them.<sup>537</sup>

The ability to reestablish the ties between tribal members and the environment, both natural and built, is a key aspect of contemporary Indian land tenure under a model of self-determination and sustainability. For example, the Puyallup Tribe has new tribal housing—built by cutting-edge designers in Washington State—which has been modeled after the traditional Salish-style longhouse and created with a space for ceremonies and dances.<sup>538</sup> And at Ohkay Owingeh Pueblo in New Mexico, a major effort to restore the ancient mud and straw buildings surrounding the plaza has allowed for the traditions relying on ceremonial kivas, dances in the Plaza, and feasts in family homes to continue contemporarily.<sup>539</sup> Here and elsewhere, major developments in Native architecture are restoring homes, in the truest sense, to indigenous peoples in the United States.<sup>540</sup>

#### 4. Kanatsiohareke Mohawk Community: healing the land and the people

The Kanatsiohareke (pronounced “Gah-nah-joe-hah-lay-geh”<sup>541</sup>) Mohawk Community has significantly, and literally, departed from the reservation setting as a place for restoring land tenure. From their modern home on the St. Regis Mohawk Reservation, some tribal members have moved to a place named Kanatsiohareke to pursue a more traditional way of life.<sup>542</sup>

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536. See *id.* at 2:13–53.

537. See *id.* at 2:55–3:24.

538. See *Project of the Year—Place of Hidden Waters; Puyallup Longhouse*, 7 DIRECTIONS (Feb. 23, 2012), <https://perma.cc/X3FY-WALA>; Sustainable Native Cmty., *Puyallup Tribe of Indians: Place of Hidden Waters*, VIMEO (June 13, 2013), <https://perma.cc/V34E-G9WP>.

539. See Reed Karaim, *It Takes a Village: The Story of Ohkay Owingeh*, NAT’L TR. FOR HISTORIC PRESERVATION (Jan. 1, 2015), <https://perma.cc/Q8AK-X7W3>; Press Release, Ohkay Owingeh Hous. Auth., *Owe’neh Bupingeh Preservation Plan to Receive 2013 HUD Secretary’s Opportunity and Empowerment Award* (Jan. 9, 2013), <https://perma.cc/2CYN-45QY>.

540. See generally JOY MONICE MALNAR & FRANK VODVARKA, *NEW ARCHITECTURE ON INDIGENOUS LANDS* (2013).

541. See *About the Kanatsiohareke Mohawk Community*, KANATSIOHAREKE MOHAWK COMMUNITY, <https://perma.cc/FU6E-KPQT> (archived Feb. 7, 2019).

542. See Scout MacEachron, *We Are Still Here: The Kanatsiohareke Mohawk Community (Part 1)*, YOUTUBE (Dec. 19, 2008), <https://perma.cc/4JKV-FKXN> (recounting the community’s unique experience with cultural revitalization); see also Scout MacEachron, *We Are Still Here: The Kanatsiohareke Mohawk Community (Part 2)*, YOUTUBE (Dec. 19, 2008), <https://perma.cc/6EHA-CPQ2>; Scout MacEachron, *We Are Still Here: The Kanatsiohareke Mohawk Community (Part 3)*, YOUTUBE (Dec. 19, 2008), <https://perma.cc/L9KH-88BC>.

The St. Regis (or Akwesasne) Mohawk Reservation stretches across the U.S.-Canadian border.<sup>543</sup> The Mohawk are one of the six tribes of the Haudenosaunee Confederacy who maintain many aspects of traditional government as well as the matrilineal clan system.<sup>544</sup> Their treaty relationships with the United States date back to the time of George Washington.<sup>545</sup>

Beginning in 1762, mills and dams were built by private, non-Indian interests on the St. Regis River.<sup>546</sup> Hydropower operations later disrupted the annual salmon run from the St. Lawrence River, depriving the reservation residents of one of their staple foods, and adversely affecting the populations of salmon and other migratory fish.<sup>547</sup> By 2010, the St. Regis tribe acquired the license and later dismantled one of the most disruptive dams, thereby opening the river for migratory fish runs and leading to the revitalization of the river and its valley.<sup>548</sup>

In recovering from experiences of conquest and colonization, St. Regis community members have taken different approaches to questions of land tenure and development. On the U.S. side, in Hogansburg, New York, the tribe decided to open a casino.<sup>549</sup> The engagement of outside operators to run the casino, in particular, inspired a group of “traditionalists” to leave the reservation in pursuit of a lifestyle committed to tribal values.<sup>550</sup> They returned to ancestral lands in the Mohawk Valley near Albany to start an “immersion community” and “steep themselves in the language, spirituality, myths, rituals, values and culture of their ancestors.”<sup>551</sup> Their leader, Tom Sakokwenionkwas Porter, said at the time that not only had Akwesasne

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543. See Darren Bonaparte, *Akwesasne: A Border Runs Through It*, INDIAN COUNTRY TODAY (Feb. 25, 2017), <https://perma.cc/NAV8-ARB3>.

544. *Clan System*, HAUDENOSAUNEE CONFEDERACY, <https://perma.cc/9T4R-9Q78> (archived Feb. 7, 2019).

545. See WILLIAMS, *supra* note 103, at 4-6 (discussing the “Two Row Wampum treaty belt,” an embodiment of the treaty between the Haudenosaunee and Western colonizing nations); Dale T. White, *Indian Country in the Northeast*, 44 TULSA L. REV. 365, 367-70 (2008) (discussing early treaties between the Haudenosaunee and the United States).

546. See Karen Graham, *Hogansburg Hydroelectric Dam Taken Down by Native American Tribe*, DIGITAL J. (Dec. 11, 2016), <https://perma.cc/4BD8-T5DL>.

547. See Mary Esch, *Mohawks Become First Tribe to Take Down a Federal Dam*, NYUP.COM (updated Dec. 11, 2016, 1:29 PM), <https://perma.cc/2DQC-J59G>; Lauren Rosenthal, *With Mixed Emotions, St. Regis Mohawk Tribe Says Goodbye to Hydroelectric Dam*, NCPR (Aug. 31, 2016), <https://perma.cc/TX5D-JLEP>.

548. See Esch, *supra* note 547; Graham, *supra* note 546; Rosenthal, *supra* note 547.

549. See Paul Zielbauer, *With Casino, St. Regis Mohawks Hope to Reverse Their Fortunes*, N.Y. TIMES (Apr. 12, 1999), <https://perma.cc/2NCH-9YX8>.

550. See Mary Esch, *Mohawks Seek to Save Language, Revive Culture*, L.A. TIMES (Jan. 16, 1994), <https://perma.cc/SF4P-GC96>.

551. *Id.*

become industrialized and the rivers poisoned with toxins, but that a new culture around gaming, tax breaks, and contraband had degraded the tribe's traditional roots.<sup>552</sup>

"Reestablished" as a homeland in 1993, the Community's place name refers to a formation in a nearby creek "carved by water and rock scouring a hole into a creek bed."<sup>553</sup> The ancient Mohawk people called the area Kanatsiohareke, or "The Place of the Clean Pot."<sup>554</sup> The people moved onto the property in 1993, and they began the work of renovating buildings, planting gardens, introducing a herd of cattle, opening a native craft store and bed and breakfast, and offering language immersion workshops and festivals.<sup>555</sup> The residents live on the income from these activities, as well as on donations of money and labor.<sup>556</sup> Community outreach activities help to build relationships with non-Indians, including youth visitors, and to advance education about the Mohawk people.<sup>557</sup>

Twenty-five years after the refounding of this indigenous community on its traditional lands, Kanatsiohareke is, at least by its own description, "a sustainable, living Onkwehon[]we [Mohawk] community grounded in Rotinonhsionni [Haudenosaunee] culture—its language, land, and social structure."<sup>558</sup> Community life is organized around sustainable farming and gardens, Mohawk language immersion, and traditional religious and cultural activities.<sup>559</sup>

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552. *See id.* ("There is another kind of poisoning at Akwesasne, Porter said: a poisoning of the spirit, an erosion of cultural integrity. It comes, he said, in the form of bingo halls, cigarette smuggling, tax-free gasoline and casinos.").

553. *See About the Kanatsiohareke Mohawk Community*, *supra* note 541.

554. *See id.*

555. *See Daily Life*, KANATSIOHAREKE MOHAWK COMMUNITY, <https://perma.cc/8L36-S66Y> (archived Feb. 7, 2019); Lisa Matthews, *More than Words—Mohawk Language and Cultural Revitalization in New York*, CULTURAL SURVIVAL (Dec. 2003), <https://perma.cc/NXM5-MDEK>.

556. *See Daily Life*, *supra* note 555.

557. *See id.*

558. KANATSIOHAREKE MOHAWK COMMUNITY, <https://perma.cc/Z4GV-TQUQ> (archived Mar. 4, 2019).

559. *See Daily Life*, *supra* note 555; Matthews, *supra* note 555.

One interesting study considered the Kanatsiohareke Community's success at growing sweetgrass, a culturally significant plant, on the reclaimed lands<sup>560</sup>—success which may be emblematic of the success of the entire experiment. As another researcher has explained, Kanatsiohareke has fostered “healing”—of both the land and the people—from the experiences and injuries of colonialism.<sup>561</sup>

Relatedly, for purposes of our analysis, it is important to recognize the complexity of the situation, which is literally layered with different forms of land tenure. Archaeologically, Kanatsiohareke is the site of Mohawk villages going back all the way to the twelfth century.<sup>562</sup> After the Revolutionary War, Mohawks were forced by white settlers to leave the Mohawk Valley, but they carried a prophecy that told of someday returning to their traditional homeland.<sup>563</sup> That prophecy was passed down intergenerationally through the oral tradition until the 1990s, when Porter left Akwesasne and brought others back to their ancestral home in the Mohawk Valley.<sup>564</sup>

The irony, perhaps, in the context of this Article is that the acquisition of Kanatsiohareke, the traditional Mohawk lands, was accomplished through a free-market real estate transaction—the Community purchased the lands at auction and continues to own them as a nonprofit entity rather than as a federally recognized Indian tribe.<sup>565</sup> Indeed, while certain indigenous scholars

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560. See Daniela J. Shebitz & Robin W. Kimmerer, *Reestablishing Roots of a Mohawk Community and a Culturally Significant Plant: Sweetgrass*, 13 RESTORATION ECOLOGY 257, 257 (2005).

561. See Elisabeth Holm, “It Feels Like a Healing Process . . .”: The Maintenance of Traditional Values Among the Mohawk of Akwesasne 1-4, 61-69 (2008) (unpublished M.A. thesis, University of Tromsø), <https://perma.cc/4X54-X4GU>.

562. See *Our History*, KANATSIOHAREKE MOHAWK COMMUNITY, <https://perma.cc/6V2H-XZLM> (archived Feb. 7, 2019).

563. See *id.*

564. See Esch, *supra* note 550; *Our History*, *supra* note 562.

565. See Bob Cudmore, *Focus on History: Mohawks Occupied Land in June 1957*, DAILY GAZETTE (Sept. 17, 2011). See generally TOM SAKOKWENIONK WAS PORTER, KANATSIOHAREKE: TRADITIONAL MOHAWK INDIANS RETURN TO THEIR ANCESTRAL HOMELAND (2006) (setting forth the story of the return to the homeland). For a somewhat critical view of Kanatsiohareke as taking an isolationist approach to reform, see Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805, 936 (1998) (“[T]ribal members who actually believe that they can start their own small communities in this modern, hostile world—such as has occurred at . . . Kanatsiohareke—ignore the reality that being Indian means being part of an Indian community.”).

and activists have called quite critically for a reexamination of the contemporary tribal nation—especially the ways in which it may “mimic” the larger nation state<sup>566</sup>—others recognize nuance in various strategies to maintain tradition amid contemporary circumstances. As Samuel Rose has said:

Kanatsiohareke’s traditionalism is as an alternative present and the potential for an alternative future for Mohawk people. It is the struggle to maintain the idea and the attempt at an alternative for Mohawk people beyond neotribal capitalism: an alternative that actualizes—rather than fetishizes—a land and place-based livelihood. Here it is struggling within and against the past and the present to build an alternative future, which is also a future that resembles certain desirable facets of the past.<sup>567</sup>

At this point in the struggle for self-determination and sustainability, there is something powerful to be said for navigating these complicated realities of property and culture: “Despite its struggles and setbacks, Kanatsiohareke continues into the present as the only Mohawk residential community in the ancestral homelands of the Mohawk valley.”<sup>568</sup>

### Conclusion

The realities of land tenure in contemporary indigenous communities are neither uniform nor romantic, but instead diverse and complicated.<sup>569</sup> Today, Indian reservations are comprised of both fee and trust lands, with opportunities for federal, state, and tribal government programs, as well as for both public and private investment. Amid all of this complexity, the vision we see emerging across Turtle Island is one of self-determination and sustainability, without need or desire for widespread, top-down privatization. Privatization might—in our view—be highly destructive to Indian communities. As an alternative, this model of self-determination and sustainability should be considered for its descriptive resonance and normative force in modern policy debates on American Indian land tenure. The model

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566. See, e.g., Taiaiake Alfred & Jeff Corntassel, *Being Indigenous: Resurgences Against Contemporary Colonialism*, 40 GOV'T & OPPOSITION 597, 597-600 (2005).

567. Samuel W. Rose, *The Historical Political Ecological and Political Economic Context of Mohawk Efforts at Land Reclamation in the Mohawk Valley*, 31 J. HIST. SOC. 253, 262-63 (2018).

568. *Id.* at 263.

569. See, e.g., Gaby Galvin, *Tribal Housing Reveals Inequalities in Indian Country*, U.S. NEWS & WORLD REP. (Sept. 23, 2017, 12:00 AM), <https://perma.cc/78J2-GG8W>.

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may also be relevant for policymakers and community leaders working on issues of rural poverty, climate change, and other contemporary challenges that come with living on this earth in an era of globalization.<sup>570</sup> In this regard, indigenous peoples will continue to advance thinking and practices more broadly, informed by human rights and lived experiences, for the well-being of humanity.

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570. See generally GLEB RAYGORODETSKY, *THE ARCHIPELAGO OF HOPE: WISDOM AND RESILIENCE FROM THE EDGE OF CLIMATE CHANGE* (2017) (describing the relationship between indigenous peoples and ecosystems that gives indigenous peoples a unique vantage point on biological and cultural diversity amid development and urbanization).