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# Property Rights and Freedom: The Keys to Improving Life in Indian Country

*Adam Crepelle\**

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## *Abstract*

*American Indians are at the bottom of nearly every indicator of welfare and have been since the founding of the United States. The present paper focuses on but two of the causal agents: lack of private property rights and a dearth of economic freedom. Although addressing these issues will not solve all of Indian country's problems, strengthening property rights and improving economic freedom will generate opportunities for American Indians to improve their economic and social well-being. This recommendation is easy to implement and aligns well with tribal culture pre-contact.*

American Indians are the only race in the United States with an agency devoted exclusively to their welfare.<sup>1</sup> The Bureau of Indian Affairs (BIA) is an outgrowth of the unique political status occupied by American Indians and is one of the oldest bureaucracies in the country.<sup>2</sup> Though the BIA's mission is to

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1. See *A-Z Index of U.S. Government Departments and Agencies*, USA.GOV, <https://www.usa.gov/federal-agencies/a> (last visited Mar. 3, 2017) (providing a listing of all United States government agencies) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

2. See *Who We Are*, BUREAU OF INDIAN AFFAIRS, <https://bia.gov/WhoWeAre/index.htm> (last visited Apr. 18, 2017) (providing the structure and history of the agency) (on file with the Washington and Lee Journal

protect American Indian lands held in trust by the federal government and improve their general welfare,<sup>3</sup> they have remained at the bottom of the American economy for nearly 200 years and are by far the poorest racial group in the nation today.<sup>4</sup> Federal paternalism, usually wrought by the BIA, has stifled opportunity for American Indians.<sup>5</sup> They do not need more government “help”; rather, American Indians need property rights and economic freedom in order to prosper.<sup>6</sup>

Although not as technologically advanced as the Europeans, Amerindian life was good pre-European contact.<sup>7</sup> Explorers noted the American Indians were better nourished and more physically robust than the people of Europe.<sup>8</sup> Indeed, American Indians had surpluses of food as they produced enough in four months to feed themselves for a year.<sup>9</sup> Amerindians also had one of the world’s lowest rates of parasites, an indicator of health.<sup>10</sup> However, their lives changed drastically, and very much for the worse, post-European contact.

Diseases from Europe brought immeasurable harm to American Indian societies. Measles, mumps, syphilis, bubonic plague, and smallpox were unknown to the tribes; thus, they had no natural immunity to these diseases nor did they possess the medical knowledge to cure these ailments.<sup>11</sup> Smallpox was the

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of Civil Rights and Social Justice).

3. *See id.* (outlining agency goals and missions).

4. *See* Suzanne Macartney et al., U.S. CENSUS BUREAU, *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007–2011* 3 (Feb. 2013), <http://www.census.gov/prod/2013pubs/acsbr11-17.pdf> (providing statistical information on poverty rates based on race).

5. *See* Chris Edwards, *Indian Lands, Indian Subsidies, and the Bureau of Indian Affairs*, DOWNSIZING THE FED. GOV’T (Feb. 1, 2012), <https://www.downsizinggovernment.org/interior/indian-lands-indian-subsidies> (last visited Apr. 18, 2017) (outlining history of BIA activity and failures) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

6. *See id.* (concluding BIA is not essential to improving Amerindian life).

7. *See* ROBERT J. MILLER, RESERVATION “CAPITALISM” 29 (Bruce E. Johansen ed., 2013) (describing early quality of life of Amerindians).

8. *See id.* (detailing differences of diet between Amerindians and Europeans).

9. *See id.* at 17 (outlining Amerindian customs and ways of life).

10. *See id.* at 29 (providing evidence of Amerindian health).

11. *See* David S. Jones, *Virgin Soils Revisited*, 60 WM & MARY Q. 703 (Oct., 2003), <http://www.wlrhs.org/cms/lib09/NJ01001319/Centricity/Domain/100/Virgin>

deadliest of the old-world diseases, and it reduced tribal populations by up to 90 percent.<sup>12</sup> Such drastic depopulation was calamitous for American Indian societies, but dispossession of property had an effect on American Indian life almost as deleterious as disease.<sup>13</sup>

Europeans applied the Doctrine of Discovery to claim the lands of America.<sup>14</sup> This is an international law applied by Europeans to *terra nullius*, “empty land,” defined as an area inhabited by people who are not subject to international law nor belong to a recognized nation.<sup>15</sup> American Indians did not qualify for any rights under this theory, so European nations claimed lands in America by merely seeing the ground before any other European nation, and then performing a possessory ritual such as marking a tree or a planting a flag.<sup>16</sup> American Indian property rights were thus obviously violated under this scheme.<sup>17</sup> The Doctrine of Discovery is still valid in the United States and was cited by the Supreme Court as recently as 2005.<sup>18</sup>

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%20Soils%20Revisited%20by%20David%20S.%20Jones.pdf (discussing why American Indians were so susceptible to European pathogens); Melissa Sue Halverson, *Native American Beliefs and Medical Treatments During the Smallpox Epidemics*, ARCHIVING EARLY AMERICA, [http://www.earlyamerica.com/review/2007\\_summer\\_fall/native-americans-smallpox.html](http://www.earlyamerica.com/review/2007_summer_fall/native-americans-smallpox.html) (last visited Mar. 11, 2017) (describing how the impact of European diseases on Amerindians was compounded by their inability to treat these “New World” diseases) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

12. See MILLER, *supra* note 7, at 30 (noting that Amerindian populations were reduced by 80 to 90 percent due to epidemic diseases).

13. See Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U.L. REV. 379, 421 (1998) (explaining how Native American “tribes were deliberately impoverished in the 1800s in order to foster a dependence on America which would render them more docile.”).

14. See ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY* 12 (Bruce E. Johansen ed., 2006) (explaining that European countries developed the Doctrine of Discovery to justify dominion over non-European people).

15. See *id.* at 21 (defining *terra nullius*).

16. See *id.* at 15 (highlighting the cannons of the Doctrine of Discovery, including that discovery occurred by mere sight and symbolic rituals such as planting a flag).

17. See *id.* at 10 (noting the Doctrine of Discovery justified the loss of Native American property and sovereignty rights).

18. See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 n.1 (2005) (detailing the Doctrine of Discovery).

Transgressions against American Indian property continued soon after the United States' founding.<sup>19</sup> The first Trade and Intercourse Act of 1790 severely regulated trade with the Indian tribes,<sup>20</sup> and a version of this Act remains valid today.<sup>21</sup> The Trade and Intercourse Act greatly impaired tribal property rights, but these rights were eviscerated by the Indian Removal Act (IRA).<sup>22</sup> The IRA enabled the President to seize Indian lands and move them west of the Mississippi River.<sup>23</sup> Georgia, a state influential in passing the IRA, enacted a law forbidding white persons from entering the Cherokee Nation without the state's permission.<sup>24</sup> Although the law was struck down by the Supreme Court,<sup>25</sup> President Andrew Jackson refused to honor the decision.<sup>26</sup> Forced removal of the Cherokee from their ancestral lands proceeded in 1838.<sup>27</sup> The IRA is an example of the government using force to

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19. See MILLER, NATIVE AMERICA, *supra* note 14, at 25, 48 (providing an example of the United States carving away at Amerindian property rights, employing the Doctrine of Discovery, by passing Indian Treaties from 1789 to 1823).

20. Trade and Intercourse Act of 1790, ch. 33, § 1, 1 Stat. 137 (1790) (current version at 25 U.S.C. § 177 (Westlaw through Pub. L. No. 114-329)).

21. 25 U.S.C. § 177 *et seq.*

22. See Indian Removal Act of May 28, 1830, ch. 148, 4 Stat. 411 (1830) (providing “for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi.”).

23. 4 Stat. 411 (1830).

24. See Matthew L. Sundquist, *Worcester v. Georgia: A Breakdown in the Separation of Powers*, 35 AM. INDIAN L. REV. 239, 240 (2011) (indicating that it was a violation of Georgia law if whites living on Cherokee lands did not “acquire a license and take an oath to support and defend Georgia’s constitution.”); Tim Alan Garrison, *Worcester v. Georgia (1832)*, NEW GA. ENCYCLOPEDIA (Apr. 27, 2004), <http://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832> (last visited Apr. 22, 2017) (explaining how Georgia would seize land from Native Americans to give to white persons) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

25. See *Worcester v. Georgia*, 31 U.S. 515, 561–62 (1832) (indicating that “the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States” and ultimately striking down Georgia’s extension laws).

26. See Sundquist, *supra* note 24, at 246 (“[President Jackson stated, ‘The decision of the Supreme Court has fell still born . . . and they find that it cannot coerce Georgia to yield to its mandate.’”); Garrison, *supra* note 24 (“President Jackson did not enforce the decision against the state and instead called on the Cherokees to relocate or fall under Georgia’s jurisdiction.”).

27. See Garrison, *supra* note 24 (“In 1838 the U.S. Army entered the Cherokee Nation, forcibly gathered almost all of the Cherokees, and marched them to the Indian Territory in present-day Oklahoma, in what became known as

transfer wealth from the Indians to Americans. Moreover, IRA enforcement exhibited manifest disregard for Amerindian property rights and the rule of law.

Treaties were another mechanism the federal government used to obtain American Indian resources. The United States entered into approximately 400 treaties with Indian tribes.<sup>28</sup> Treaties were contracts between tribes and the federal government whereby the former ceded land in exchange for a set of promises.<sup>29</sup> Each treaty was different, but they usually guaranteed tribes permanent homelands, known as Indian reservations, as well as food and various services.<sup>30</sup> Though the tribes honored their end of the “bargain,”<sup>31</sup> the federal government rarely did so.<sup>32</sup> Nor is there any legal obligation for the U.S. to honor its contractual obligations. The Supreme Court ruled the federal government can unilaterally break agreements with tribes because it has “paramount power over the property of the Indians.”<sup>33</sup> Likewise, the Supreme Court has ruled the government does not have to provide Indians with just compensation—as required by the Fifth Amendment—when it confiscates their property.<sup>34</sup> If the government would not recognize property rights expressly guaranteed to Amerindians, they had virtually no property rights at all.

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the Trail of Tears.”).

28. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 46 (4th ed. 2002) (2012).

29. *See id.* at 47 (“The vast majority of Indian treaties signed after 1783 had the same theme: the tribe relinquished land to the United States, and the tribe received a set of promises in exchange.”).

30. *See id.* (“While individual treaties differed from tribe to tribe . . . nearly all promised a permanent homeland, and many . . . contained federal promises to provide food, clothing, and services to the tribes.”).

31. *See id.* (noting that these “agreements” were for the most part compelled).

32. *See id.* (“Only rarely has the United States lived up to these types of promises, and those given the Yankton Sioux were broken soon after the treaty was signed.”).

33. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

34. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 290–91 (1955) (“[L]eav[ing] with Congress . . . the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.”).

Tribes on the Great Plains often had strong warrior cultures which made seizing their lands immensely difficult for the government.<sup>35</sup> The U.S. military realized these tribes would never submit to reservation life as long as the buffalo roamed; thus, the government sought to extirpate this creature<sup>36</sup> (the federal government also slaughtered Indian horse and sheep herds for the same purpose).<sup>37</sup> American military leaders ordered their troops to

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35. See *Warriors of the Plains: 200 Years of Native North American Ritual and Honour*, ROYAL ALBERT MEM'L MUSEUM & ART GALLERY (Sept. 22, 2012), <http://rammuseum.org.uk/past-exhibitions/warriors-of-the-plains/> (last visited Mar. 11, 2017) (highlighting that the men belonging to Plains Indian tribes were expected to become warriors) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also Helen, Tommaso, Hannah, & Tara, *Daily Life of Native Americans*, UNIV. OF CHICAGO <http://people.ucl.uchicago.edu/~snekros/2007-8%20webquests/Daily%20Life%2089/dailylife89.html> (last visited Apr. 18, 2017) (stating that male Plains Indians grew up training for military glory) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *American Indians or Native Americans*, HISTORY WORLD INT'L, [http://history-world.org/american\\_indians\\_or\\_native\\_ameri.htm](http://history-world.org/american_indians_or_native_ameri.htm) (last visited Mar. 3, 2017) (describing the symbol of the Plains Indian, the brave, “was a splendid horseman, hunter, and mounted warrior . . .”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Plains Indian Wars*, OXFORD COMPANION TO AMERICAN MILITARY HISTORY (2000), <http://www.encyclopedia.com/doc/1O126-PlainsIndianWars.html> (last visited Apr. 18, 2017) (noting that man for man, Plains Indian warriors were superior to American soldiers, but the American military had superior organization and weaponry) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Bryan Woolley, *The Frontier Forts of Texas*, TEXAS ALMANAC, <http://texasalmanac.com/topics/history/frontier-forts-texas> (last visited Mar. 3, 2017) (maintaining that “[t]o expect [the infantry] to chase down on foot the greatest horsemen in the world [the Comanche and Kiowa] was sheer governmental folly”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); David Quammen, *People of the Horse*, NAT'L GEOGRAPHIC (Mar. 2014), <http://ngm.nationalgeographic.com/2014/03/horse-tribes/quammen-text> (last visited Apr. 18, 2017) (describing the Comanche warriors as “lordly” when mounted) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

36. See J. Weston Phippen, *Kill Every Buffalo You Can! Every Buffalo Dead Is an Indian Gone*, ATLANTIC (May 13, 2016), <http://www.theatlantic.com/national/archive/2016/05/the-buffalo-killers/482349/> (last visited Apr. 18, 2017) (stating that killing the buffalo was a strategy to get the Indians to submit to living on reservations) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

37. See Woolley, *supra* note 35 (“Mackenzie ordered the horses slaughtered, thus destroying both the buffalo-centered economy of the Southern Plains tribes and their ability to continue raiding.”); see also Quammen, *supra* note 35 (noting American military leaders ordered the slaughter of over 7,000 captured horses to end Comanche resistance); Hal Cannon, *Sacred Sheep Revive Navajo Tradition*,

kill as many buffalo as possible;<sup>38</sup> moreover, they encouraged private hunters to slaughter buffalo too.<sup>39</sup> In fact, an American general stated that the buffalo hunters “did more to defeat the Indian nations in a few years than soldiers did in 50.”<sup>40</sup> The government’s attack on the Indian food supply reduced the buffalo population from approximately 50 million to approximately 300 by the end of the nineteenth century.<sup>41</sup> Destruction of the buffalo

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*For Now*, NPR (June 13, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=127797442> (last visited Apr. 18, 2017) (declaring that U.S. troops were ordered to destroy Navajo sheep) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *The History and Near Extinction of the Churro*, MYSTICAL MIST DESIGN (2008), <http://navajoshееproject.com/churrohistory.html> (last visited Apr. 18, 2017) (stating that in 1863, U.S. troops killed Navajo horses and slaughtered thousands of their sheep to deprive them of food as “part of a campaign [to destroy] all Navajo means of livelihood”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

38. See *The Buffalo War*, PBS, <http://www.pbs.org/buffalower/buffalo.html> (last visited Mar. 3, 2017) (describing how buffalo were hunted during the Westward expansion in the 1800s); see also Phippen, *supra* note 36 (quoting an American colonel’s statement, “Kill every buffalo you can! Every buffalo dead is an Indian gone . . .”); Thomas J. DiLorenzo, *The Feds versus The Indians*, 16 THE MISES INST. 1 (Jan. 1, 1998), [http://mises.org/freemarket\\_detail.aspx?control=99](http://mises.org/freemarket_detail.aspx?control=99) (last visited Apr. 18, 2017) (noting that it was “official government policy to slaughter as many buffalo as possible as a means of eventually starving out the Indians . . .”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

39. See David Malakoff, *American Buffalo: Spirit of a Nation*, PBS (Nov. 10, 1998), <http://www.pbs.org/wnet/nature/american-buffalo-spirit-of-a-nation-introduction/2183/> (last visited Apr. 18, 2017) (asserting that the government promoted the destruction of the buffalo while private hide-hunters were killing buffalo in mass) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Phippen, *supra* note 36 (noting that army leaders provided buffalo hunters with bullets).

40. Malakoff, *supra* note 39, at 1.

41. See Phippen, *supra* note 36 (noting that a contributing factor to the dramatic reduction of the buffalo population was “that for a long time, the country’s highest generals, politicians, even then President Ulysses S. Grant saw the destruction of buffalo as [a] solution to the country’s ‘Indian Problem.’”); see also Gilbert King, *Where the Buffalo No Longer Roamed*, SMITHSONIAN (July 17, 2012), <http://www.smithsonianmag.com/history/where-the-buffalo-no-longer-roamed-3067904/> (last visited Apr. 18, 2017) (detailing that the building of the Transcontinental Railroad, the sale of “buffalo robes and tongues,” and the hunting buffalo for sport all contributed to the buffalos’ demise) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

destroyed tribal cultures and forced the Plains Indians to acquiesce to reservation life.<sup>42</sup>

The reservations tribes were placed on by treaties proved ruinous for Amerindians. Desperate poverty snared many tribal economies,<sup>43</sup> and traditional tribal culture withered.<sup>44</sup> Reservation life turned formerly self-reliant individuals into dependent, despondent people.<sup>45</sup> The General Allotment Act of 1887 was intended to remedy the toxic effects of reservation life by making individual Indians owners of land;<sup>46</sup> however, it proved catastrophic as the Indian plight increased exponentially. Indians held 138 million acres of land when the Act was passed, but by 1934, their holdings were reduced to 48 million acres—much was unsuitable for farming.<sup>47</sup>

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42. See King, *supra* note 41 (stating that the construction of the railroad and the decimation of the buffalo population forced the Indians onto the reservation, which promised “religious instruction and basic supplies of food and clothing.”).

43. See MEIZHU LUI ET AL., *THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE* 33 (2006) (“During the colonial era, up until 1934, and the more recent post-colonial era, up until the present, economic relations and political structures have transformed self-provisioning tribal nations into totally dependent welfare enclaves.”).

44. See Michael Adamson, *Native Americans: Victims of Bureaucracy*, FOUND. FOR ECON. EDUC. (Dec. 1, 1987), [http://fee.org/the\\_freeman/detail/native-americans-victims-of-bureaucracy](http://fee.org/the_freeman/detail/native-americans-victims-of-bureaucracy) (last visited Apr. 18, 2017) (“Government subsidies and controls mask the consequences of irresponsibility. If conditions are not established which permit failure, failure is collectivized and compounded throughout the culture”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752, 1763 (2016) (discussing how Courts of Indian Offenses were “blunt tools of assimilation” employed on tribal land).

45. See Adamson, *supra* note 44 (“The reservation system was enforced through dependency: The Native American knew that he could drink and gamble his money away and be sure to keep his home and land.”); PEVAR, *supra* note 28, at 65 (noting the federal government’s poor policies towards the Indians and quoting the former Assistant Secretary of Indian Affairs claim that the BIA’s purpose was to weaken the Indians).

46. See General Allotment Act of 1887, 25 U.S.C. § 331 (1887), *repealed by* Pub. L. No. 106-462, 114 Stat. 2007 (codified at 1 U.S.C. § 106(a)(1)) (authorizing the Chippewa Indian to hold “an ‘allotment’ . . . [meaning] an allocation of land on the White Earth Reservation” in Minnesota).

47. See LUI, *supra* note 43, at 242 (stating that Native Americans “lost much of the land through fraud, illegal purchase, court cases, ‘incompetence hearings,’ and murder,” resulting in “land made useless by division, as it was unsuitable for farming, and cattle couldn’t graze on tiny allotments.”).

Federal power also increased over the land that supposedly remained under Indian control. Congress doubted tribes' ability to prosecute crimes and passed the Major Crimes Act (MCA) in 1885.<sup>48</sup> The MCA was a massive assault on tribal sovereignty, and its constitutionality was challenged one year later.<sup>49</sup> The Supreme Court admitted Congress had no power under the commerce clause to regulate crime in Indian territory.<sup>50</sup> Though the Court could find no constitutional authority for the MCA, it reasoned that the power to enact the law "must exist"<sup>51</sup> because it thought Amerindians are inept and reliant on the federal government.<sup>52</sup> The Court's upholding of legislation Congress had no power to enact in the first place denied American Indians the protections of the law.

Federal policy toward the Indians began to change in the twentieth century as efforts were made to alleviate the dire circumstances in which many Amerindians found themselves. All Indians were granted citizenship in 1924.<sup>53</sup> This, theoretically, provided them with all the benefits of citizenship without diminishing their rights as tribal citizens.<sup>54</sup> However, citizenship did little to allay Amerindian woes as the first sentence of a 1928 Institute for Government Research report noted: "An

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48. See Philip J. Prygoski. *From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty*, ABA, [http://www.americanbar.org/content/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/marshall.html](http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/marshall.html) (last visited Apr. 2, 2017) ("The theory underlying [the MCA] was that Indian tribes were not competent to deal with serious issues of crime and punishment") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

49. See *id.* ("The Major Crimes Act was a great intrusion into the internal sovereignty of the tribes in that it deprived the tribes of the ability to try and to punish serious offenders in Indian country.").

50. See *United States v. Kagama*, 118 U.S. 375, 378–79 (1886) (stating that Congress has no authority under the Commerce Clause to regulate crimes within the Indian territory).

51. See *id.* at 384–85 ("It must exist in that government, because it never has existed anywhere else; because the theatre of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.").

52. See *id.* at 384 ("They are communities *dependent* on the United States, dependent largely for their daily food; dependent for their political rights.").

53. 8 U.S.C. § 1401(b).

54. See American Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (providing the Secretary of the Interior the authority to issue certificates of citizenship to American Indians).

overwhelming majority of the Indians are poor, even extremely poor. . . .”<sup>55</sup> Things only got worse during the Great Depression leading to the Indian Reorganization Act of 1934.

This so-called “Indian New Deal” was intended to restore tribal sovereignty, prevent further erosion of tribal land bases and according to the Supreme Court, “to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.”<sup>56</sup> The Act succeeded in preventing land erosion but did relatively little to improve tribal sovereignty because the Secretary of the Interior was granted power over virtually all tribal activities.<sup>57</sup> Although the Indian Reorganization Act was a small step toward tribal sovereignty, political and economic freedom were far from reality for this community.

In the years since the Indian Reorganization Act, little has improved for many Amerindians as seven of the eight poorest counties in America are majority American Indian.<sup>58</sup> Tribal economies remain stagnant. The average unemployment rate in Indian country today is 50 percent.<sup>59</sup> Where poverty and unemployment fester, crime thrives. Indian country is no exception as American Indians have a violent victimization rate double that of any other race.<sup>60</sup>

Amerindians have the highest binge and heavy alcohol use rates<sup>61</sup> as well as the highest rate of illicit drug use of any racial

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55. BROOKINGS INST., *THE PROBLEM OF INDIAN ADMINISTRATION* 3 (1928).

56. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973).

57. Indian Reorganization Act, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479); see Matthew L.M. Fletcher, *The Myth of the Model IRA Constitution?*, *TURTLE TALK* (Nov. 21, 2007), <https://turtletalk.wordpress.com/2007/11/21/the-myth-of-the-model-ira-constitution/> (last visited Apr. 18, 2017) (stating he teaches his students that the Indian Reorganization Act tribal constitutions required that tribes get the Secretary of the Interior’s approval “for everything up to and including breathing.”).

58. S. REP. NO. 111-118, at 2 (2010) (Conf. Rep.).

59. *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the Comm. on Indian Affairs*, 111th Cong. 1 (2010) (statement of Hon. Byron L. Dorgan, Chairman, S. Comm. on Indian Affairs).

60. STEVEN W. PERRY, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *AMERICAN INDIANS AND CRIME* 7 (2004).

61. U.S. DEP’T OF HEALTH AND HUMAN SERVICES., *SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN. CTR. FOR BEHAVIORAL HEALTH STATISTICS AND*

group.<sup>62</sup> American Indians are also the race with the highest rate of suicide,<sup>63</sup> and the federal government deserves more than a small share of the blame for this. Approximately one-third of American Indian children were taken from their parents and placed in custodial care between the late 1960s and early 1970s;<sup>64</sup> furthermore, the government admitted to forcibly sterilizing up to a quarter of American Indian women during the 1970s.<sup>65</sup> These are assaults on the most personal of property rights—those of the flesh: the rights to reproduce and raise children. Deprivation of these rights is likely to cause despair, precipitating the socioeconomic conditions in much of Indian country today.

Nevertheless, some tribes have acquired wealth, usually through gaming or natural resources. Money has cured poverty in these communities, but wealth has become a new plague for some of these tribes. The Seminole Tribe of Florida has gone from poverty to tremendous fortune in recent years and recently made per capita payments to citizens of \$120,000 per year.<sup>66</sup> Yet Seminole life expectancy has decreased as wealth has increased.<sup>67</sup> Moreover, the Shakopee Tribe of Minnesota is the nation's wealthiest rendering per capita payments to each citizen of \$84,000 per month.<sup>68</sup> The Shakopee have an unemployment rate

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QUALITY, RESULTS FROM THE 2012 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF THE NATIONAL FINDINGS, figure 3 (2013), <http://www.samhsa.gov/data/nsduh/2012summnatfinddetttables/nationalfindings/nsduhresults2012.htm#fig3.3> (last visited Apr. 18, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

62. *Id.* at figure 2.1.

63. See CTR. FOR DISEASE CONTROL AND PREVENTION, SUICIDE STATISTICS AT A GLANCE (2015), <https://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.pdf> (giving the likelihood, in percentages, for citizens of different races to commit suicide, and showing that Native Americans commit suicide at a rate higher than all other races, besides bi-racial people).

64. N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 17 (2009).

65. 1976: *Government Admits to Forced Sterilization of Indian Women*, U.S. NAT'L LIBRARY OF MED., <http://www.nlm.nih.gov/nativevoices/timeline/543.html> (last visited April 7, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

66. MILLER, RESERVATION "CAPITALISM," *supra* note 7, at 89.

67. *Id.*

68. *America's Most Luxurious Reservation: Huge Homes of Country's Richest Native American Tribe Where Members Make \$1M Each*, DAILY MAIL (Feb. 4, 2013), <http://www.dailymail.co.uk/news/article-2272793/Shakopee-Mdewakanto-Members-Minnesota-tribe-earn-1million-year-tax-free.html> (last visited Apr. 18,

of 99 percent,<sup>69</sup> and barely half of their youth graduate high school.<sup>70</sup>

Money alone is not the solution to Indian Country's problems because it is merely an instrument of commerce and a measure of value.<sup>71</sup> Money is a product of ideas and effort—not their source.<sup>72</sup> Wealth acquired without effort often causes trouble. Hence, a Senior Official at the Bureau of Indian Affairs observed that reservation crime spikes when there is a cash infusion from the federal government.<sup>73</sup> However, these federal dollars are often the only monies tribal economies receive because the BIA's bureaucratic management suffocates commercial opportunities.<sup>74</sup>

The BIA's red tape traps many American Indians in poverty.<sup>75</sup> Nothing can happen in Indian country without the BIA's

2017).

69. *Id.*

70. Steve Date, *Flood of Casino Money Brings Challenges--and Opportunities--for Reservation Schools*, MINNPOST (Dec. 12, 2012), <http://www.minnpost.com/politics-policy/2012/12/flood-casino-money-brings-challenges-and-opportunities-reservation-schools> (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

71. See Adam Smith, *Of the Causes of Improvement in the Productive Powers of Labour, and of the Order According to which Its Produce is Naturally Distributed Among the Different Ranks of the People*, in AN INQUIRY INTO THE NATURE THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776) (arguing that the value of money is measured against labor and the relative valuation of the person who holds the money itself), reprinted in THE TWO NARRATIVES OF POLITICAL ECONOMY 132 (Nicholas Capaldi & Gordon Lloyd eds., 2010).

72. See *id.* at 410 (explaining that the true value or price of anything is relative to what the person who wishes to acquire the item and the trouble of acquiring the item).

73. See Kellie Lunney, *Crime Scene*, GOV'T EXEC., <http://www.govexec.com/feature/crime-scene-feature/> (last visited Mar. 5, 2017) (discussing why crime tends to increase when the federal government provides payouts which creates an environment where more individuals have cash on hand, thus creating a "target-rich environment for criminals" on the reservation) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

74. See Annie Lowrey, *Pain on the Reservation*, N.Y. TIMES (July 12, 2013), <http://www.nytimes.com/2013/07/13/business/economy/us-budget-cuts-fall-heavily-on-american-indians.html?pagewanted=all&r=0> (last visited Apr. 18, 2017) ("The local economy is not just reliant on transfers it receives from the federal government; it in no small part consists of them") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

75. See *id.* (explaining reservations' dependence on the government payouts and that the decrease in federal support has deepened the "poverty trap," which will likely continue to plague the reservations for generations).

approval.<sup>76</sup> For example, acquiring a permit to engage in energy development on tribal lands requires companies go through forty-nine steps and gain the approval of four federal agencies;<sup>77</sup> in sharp contrast, only four steps are necessary for companies doing business outside of Indian country.<sup>78</sup> This bureaucratic management is supposedly done to protect Amerindian interests,<sup>79</sup> but the facts reveal a different story. The contracts negotiated by the BIA on behalf of American Indians with energy companies are, according to the congressionally created Indian Policy Review Commission, “among the poorest agreements ever made.”<sup>80</sup> Further evidence indicating that federal bureaucracy hurts American Indians more than it helps is evidenced by the billions of dollars it has “lost” from American Indian accounts.<sup>81</sup>

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76. See Shawn Regan, *5 Ways the Government Keeps Native Americans in Poverty*, FORBES (Mar. 13, 2014), <https://www.forbes.com/sites/realspin/2014/03/13/5-ways-the-government-keeps-native-americans-in-poverty/#59901d5f2c27> (last visited Apr. 18, 2017) (describing the overt control that the federal government and federal agencies have over every aspect of American Indian reservation land, economies, and legal systems) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

77. See Shawn Regan & Terry L. Anderson, *The Energy Wealth of Indian Nations*, 3 L.S.U. J. OF ENERGY L. AND RES. 195, 208 (2014) (“On Indian lands, companies must go through four federal agencies and 49 steps to acquire a permit to drill, compared with only four steps when drilling off of the reservation”) (on file with the Washington and Lee journal of Civil Rights and Social Justice).

78. See *id.* (explaining the availability of shale oil and gas reserves under Indian reservations and the inability to access the resources stemming from the burdensome bureaucratic process and the relative ease companies and organizations go through when accessing these resources off reservation); see also Regan, *supra* note 76 (describing the bureaucratic red tape that prevents tribes from being able to capitalize on the natural resources on their land simply).

79. See *id.* at 202 (articulating the legislative intent for extreme regulatory restriction, citing arguments from legislators that these restrictions help to protect the welfare of American Indians residing on these reservations).

80. See Shawn Regan, *Unlocking the Wealth of Indian Nations: Overcoming Obstacles to Tribal Energy Development*, 1 PERC POLY PERSPECTIVE 4, 10 (2014), <http://perc.org/sites/default/files/pdfs/IndianPolicySeries%20HIGH.pdf> (explaining the historical undervaluation of tribal leases and concluding that the leases negotiated for the reservations on behalf of the American Indians residing there were incredibly misguided).

81. See Julia Whitty, *Elouise Cobell's Bittersweet Victory*, MOTHER JONES (Dec. 9, 2009), <http://www.motherjones.com/mojo/2009/12/elouise-cobells-bittersweet-victory> (last visited Apr. 18, 2017) (asserting that the federal government never paid hundreds of thousands of American Indians money they were owed for use of their lands “for their mineral and agricultural rights over 100 years”) (on file with the Washington and Lee Journal of Civil Rights and

The BIA's regulation leaves the residents of Indian country with little control over their land.<sup>82</sup> In fact, Indian reservation economies are so regulated that President Reagan's Secretary of the Interior stated, "If you want an example of the failure of socialism, don't go to Russia, come to America and go to the Indian reservations."<sup>83</sup> Because the government holds land in trust for individual Indians, they only have a possessory right<sup>84</sup> in their lands. The government has decided that the possessory interest must be passed in equal shares to American Indian heirs;<sup>85</sup> consequently, over 1,000 Amerindians can have a possessory interest in a single tract of trust land.<sup>86</sup> Using trust land in a manner agreeable to each possessor is impossible, so the property remains undeveloped.<sup>87</sup>

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Social Justice).

82. See Regan & Anderson, *supra* note 77, at 198 (stating that American Indians, traditionally, were denied autonomy of their lands by the Federal Government for much of the previous centuries).

83. See *Watt Sees Reservations as Failure of Socialism*, N.Y. TIMES (Jan. 19, 1983), <http://www.nytimes.com/1983/01/19/us/watt-sees-reservations-as-failure-of-socialism.html> (last visited Apr. 18, 2017) (summarizing the statements of Regan's Secretary of the Interior, James Watts, labeling the Indian reservations as a "failure of socialism.").

84. See *Possession*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "possession" as "the fact of having or holding property in one's power," but noting that possession is "distinct and separable both from real and from apparent ownership, though often concurrent with one or both of them."); *Possession Versus Ownership*, FREE DICTIONARY: LEGAL DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Possession+versus+Ownership> (last visited Mar. 28, 2017) (providing the distinction between possessory rights and full property ownership rights) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

85. See Regan, *Unlocking the Wealth of Indian Nations*, *supra* note 80, at 13–14 (describing land fractionation that resulted from the individual trusts of land that were passed down in equal shares to multiple heirs, leading to hundreds or thousands of heirs that may claim a parcel of property).

86. See Jake Russ & Thomas Stratmann, *Creeping Normalcy: Fractionation of Indian Land Ownership* 16 (CESifo Working Paper Series, Working Paper No. 4607, 2014), <https://ssrn.com/abstract=2398273> (articulating the possessory interest issue facing Indian heirs who all own the same interest to single tracts of land) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

87. See Regan, *Unlocking the Wealth of Indian Nations*, *supra* note 80, at 14 (explaining that all heirs must weigh in on any decisions on land development and other issues related to the land, making it nearly impossible to reach a unanimous decision as to what to do with the land).

Bureaucracy often leads to corruption,<sup>88</sup> and this has led to doubts about tribal judicial systems.<sup>89</sup> Indian tribes are sovereign nations,<sup>90</sup> and thus have jurisdiction over their land absent divestiture by congress<sup>91</sup> or a ruling by the Supreme Court.<sup>92</sup> Since Indian tribes were not parties to the Constitutional Convention, they are not bound by it.<sup>93</sup> Indian tribes are bound by the Indian Civil Rights Act of 1968 (ICRA)<sup>94</sup> though, and it guarantees that individuals on tribal land receive Bill of Rights

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88. See LUDWIG VON MISES, *BUREAUCRACY* 71–72 (1944) (“But it fails to mention that both industrial inefficiency and corruption are the consequences of methods of government interference with business as applied in these countries.”).

89. See U.S. GOV’T ACCOUNTABILITY OFFICE, *GAO-11-252, INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS* 19 (2011), <http://www.gao.gov/assets/320/315698.pdf> (stating that cozy relationships between some tribal councils and tribal courts spurs questions about their integrity).

90. See *Okl. Tax Comm’n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (“Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and their territories.”); see also *Worcester v. Georgia*, 31 U.S. 515, 557 (1832) (noting that Indian nations are “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.”).

91. See *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”); *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F. Supp. 3d 1221, 1228 (D. Nev. 2014) (“Congressionally recognized tribes retain all aspects of sovereignty . . . with three exceptions: (1) they may not engage in foreign commerce or foreign relations; (2) they may not alienate fee simple title to tribal land without the permission of Congress; and (3) Congress may strip a tribe of any other aspect of sovereignty at its pleasure” (internal citations omitted)).

92. See, for example, *Oliphant v. Suquamish Indian Tribe, et al.*, 435 U.S. 191 (1978) (holding Indian tribes have no criminal jurisdiction over non-Indians); Matthew Fletcher, *Statutory Divestiture of Tribal Sovereignty*, *FED. LAWYER* (Apr. 2017), <http://www.fedbar.org/Publications/The-Federal-Lawyer/Statutory-Divestiture-of-Tribal-Sovereignty.aspx?FT=.pdf> (discussing the Supreme Court’s role in the erosion of tribal sovereignty).

93. See *Talton v. Mayes*, 163 U.S. 376, 384–85 (1896) (“[T]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States.”).

94. 25 U.S.C. §§ 1301–1341 (2012).

type protections.<sup>95</sup> Tribes exercising special jurisdiction under the Violence Against Women Reauthorization Act of 2013<sup>96</sup> have proven themselves competent to prosecute non-Indians.<sup>97</sup> Nevertheless, ICRA does not provide a contracts clause.<sup>98</sup> Most tribal constitutions do not contain provisions prohibiting the tribal government from violating contracts.<sup>99</sup> Without a contracts clause type provision, tribes can use their sovereign status to impair contracts, and this has a chilling effect on business development. Indeed, a tribe nearly lost a seven billion dollar investment because the company feared the tribe would use its sovereign status to alter the deal.<sup>100</sup>

Weak property rights in Indian country smother tribal economies because this discourages investments. For this reason,

95. See 25 U.S.C. § 1302(a) (2012) (stating that Indian tribes may not infringe certain rights—nearly identical to those set forth in the Bill of Rights—in exercising their powers of self-government); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978) (noting that ICRA was designed to protect individual Indians from arbitrary and unjust action by tribal governments).

96. See Violence Against Women Reauthorization Act of 2013 § 204(b)(1), 25 U.S.C. § 1304 (2012) (“[T]he powers of self-government of a participating tribe include the inherent power of the tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.”).

97. See *Tribal Implementation of VAWA*, NAT’L CONG. OF THE AM. INDIANS, <http://www.ncai.org/tribal-vaawa/pilot-project-itwg/pilot-project> (last visited Mar. 28, 2017) (reporting the number of criminal domestic violence cases involving non-Indians handled by Indian tribes since VAWA 2013; for instance, “[s]ince the first arrest of a non-Indian defendant, non-Indians account for 25 percent of the [Pascua Yaqui] tribe’s domestic violence cases”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Justus Caudell, *Sessions Questioned About Voting Record on Colville Supported VAWA*, TRIBAL TRIBUNE (Jan. 11, 2017), [http://www.tribaltribune.com/news/article\\_5cfff92-d82f-11e6-a61a-9fdcbfe85698.html](http://www.tribaltribune.com/news/article_5cfff92-d82f-11e6-a61a-9fdcbfe85698.html) (last visited Apr. 18, 2017) (quoting Senator Patrick Leahy, “None of the non-Indians who’ve been prosecuted [under VAWA jurisdiction] have appealed to federal courts.”).

98. See *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319 (1982) (noting that a claim of damages for breach of contract “does not rise to the level of a constitutional deprivation to be redressed under the ICRA.”).

99. See MILLER, RESERVATION “CAPITALISM,” *supra* note 7, at 143 (analyzing the impact of tribal contracts).

100. See John Koppisch, *Why Are Indian Reservations So Poor?*, PROP. & ENV’T RES. CTR. (Oct. 1, 2012), <http://perc.org/articles/why-are-indian-reservations-so-poor-0> (last visited Apr. 18, 2017) (discussing how property rights can influence contract investment deals) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

houses are rarely built in Indian country, but mobile homes are abundant.<sup>101</sup> Similarly, private land adjacent to reservations out-produces reservation land by 30 to 90 percent because property rights are stronger there.<sup>102</sup> Bureaucracy and shaky property rights have prevented an estimated 1.5 trillion dollars in reservation natural resources from being developed.<sup>103</sup> Furthermore, Indian country residents cannot use their land as collateral,<sup>104</sup> and this greatly restricts economic opportunity.

Despite all the federal red tape that suffocates Indian country, there is no constitutional authority for it. The Constitution's Commerce Clause is often presented as the source of federal power over Indian affairs.<sup>105</sup> It states: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."<sup>106</sup> Since the 1980s, the Supreme Court has claimed the Indian Commerce Clause was intended to give Congress power over Indian affairs.<sup>107</sup> However, the Supreme Court flatly rejected this notion in 1886 when it held that construing the Indian Commerce Clause as giving Congress the power to do more than regulate trade with Indians "would be a very strained construction of the clause."<sup>108</sup> Justice Thomas has

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101. See *id.* (explaining why reservations contain a high amount of mobile homes).

102. See *id.* (analyzing how property rights on the reservation compare to private property located outside of the reservation).

103. See Regan, *5 Ways the Government Keeps Native Americans in Poverty*, *supra* note 76 (discussing how lacking certain property rights has impacted reservation development).

104. See JAMES ANAYA, NAT'L CONGRESS OF AM. INDIANS, IN THE UNITED STATES: A PRESSING NEED TO DEVELOP TRIBAL ECONOMIES—REGAINING SOVEREIGNTY OVER OUR LAND (2012), [http://www.ncai.org/attachments/PolicyPaper\\_ZaUKbiqVSBaoDXYLfDvhjJaJRrptXYDVUNsGkGWYDFLFRnStL\\_UNDRIP%202012%20%20NCAI%20Written%20Statement%20-%20LW%20042512f.pdf](http://www.ncai.org/attachments/PolicyPaper_ZaUKbiqVSBaoDXYLfDvhjJaJRrptXYDVUNsGkGWYDFLFRnStL_UNDRIP%202012%20%20NCAI%20Written%20Statement%20-%20LW%20042512f.pdf) (examining economic development on tribal lands).

105. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian Affairs.").

106. U.S. CONST. art. 1, § 8, cl. 3.

107. See N. BRUCE DUTHU, SHADOW NATIONS: TRIBAL SOVEREIGNTY AND THE LIMITS OF LEGAL PLURALISM 150–51 (2013) (noting the Supreme Court's shifting stance on the source of federal power over Indian affairs).

108. See *United States v. Kagama*, 118 U.S. 375, 378 (1886) (rejecting broad interpretation of the Commerce Clause).

questioned the source of federal authority over Indian affairs<sup>109</sup> as has a litany of scholarship.<sup>110</sup>

Canada's First Nations, the Canadian equivalent of U.S. Indian tribes, face many of the same socioeconomic obstacles such as weak property and dense bureaucracy.<sup>111</sup> The First Nations realize the land tenure system puts them at an economic disadvantage; for example, investing on First Nation territory is approximately five times more costly than on standard Canadian lands.<sup>112</sup> Thus, some of Canada's First Nations are pushing for private land ownership.<sup>113</sup> The First Nations Property Ownership

109. See *United States v. Lara*, 541 U.S. 193, 224 (2004) (Thomas, J., concurring) (“I cannot agree that the Indian Commerce Clause ‘provide[s] Congress with plenary power to legislate in the field of Indian affairs.’”); *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2566–67 (2013) (Thomas, J., concurring) (“Although this Court has said that the ‘central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs,’ neither the text nor the original understanding of the Clause supports Congress’ claim to such ‘plenary’ power” (citation omitted)).

110. See generally Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U.L. REV. 201 (2007); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE. L.J. 1012 (2015); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 132 (2006) (noting the “missing constitutional source of authority for Congress and the President to make federal Indian legislation and policy in the first instance.”).

111. See KAMLOOPS CHAMBER OF COMMERCE, FIRST NATIONS INFRASTRUCTURE INSTITUTE, [http://www.kamloopschamber.ca/uploads/4/1/3/7/41370989/17.02.28\\_first\\_nations\\_infrastructure\\_institution.pdf](http://www.kamloopschamber.ca/uploads/4/1/3/7/41370989/17.02.28_first_nations_infrastructure_institution.pdf) (describing the problems encountered by the First Nation due to weak property rights).

112. See *id.* (“First Nations are constrained by high transaction costs, nearly four to six times higher than on non-First Nation lands. These high transaction costs arise because the legal and administrative framework to facilitate investment on First Nation land is largely missing.”); *The First Nations Fiscal Management Act (FMA)*, FIRST NATIONS FIN. MGMT. BD. (2014), <http://fnfmb.com/about-us/our-legislative-authority/> (last visited Apr. 18, 2017) (“It is 4 to 5 times more expensive to make investments on First Nation lands due to lack of investor confidence, legislative uncertainty, unavailable financial information and statistics etc.”).

113. See Nancy Schaefer Riley, *One Way to Help Native Americans: Property Rights*, ATLANTIC (Jul. 30, 2016), <http://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/> (last visited Apr. 18, 2017) (suggesting changes to Federal policy as a solution for addressing Native American property rights) (on file with the Washington and Lee Journal of Social Justice); Tristin Hopper, *B.C. First Nation Leads Historic and Controversial Move Toward Aboriginal Private Home Ownership*, NAT’L POST (Nov. 8, 2013), <http://news.nationalpost.com/2013/11/08/b-c-first-nation-leads-historic-and-controversial-move-toward-aboriginal-private-home-ownership/> (last visited Apr.

Act will give Canada's indigenous people the right to transfer land title and eliminate bureaucracy.<sup>114</sup> Using their land as collateral to start businesses and engage in other forms commerce is seen as a way for Canada's First Nations to break the cycle of dependency.<sup>115</sup>

Many American Indian communities have been trapped in the cycle of dependency since being forced onto reservations.<sup>116</sup> This culture can be traced to the assault on Amerindian property rights and the consequent loss of freedom. Creating dependency was the purpose of the BIA according to a former BIA director who stated the federal government "sought to make tribal governments weak, and the Indian people weaker still."<sup>117</sup> Hence, contemporary reservation culture is not necessarily traditional Amerindian culture. Historically American Indians were granted tremendous freedom by their tribes, and this explains their relative comfort living like a "savage" versus the squalid quality of life on many Indian reservations that has continued to this day.

One justification popularly offered for riding roughshod over the property rights of the original settlers of the territory is that if we did not engage in such an unjustified act, "we would have to give the entire country back to the Indians."<sup>118</sup> Not so, not so. At

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18, 2017) (explaining how native homes could now be bought and sold like any other property in Canada, without special permission) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

114. See *Proposal*, INDIGENOUS LAND TITLE INITIATIVE, <http://ilti.ca/en/proposal/> (last visited Mar. 6, 2017) (describing goals of proposed property reform legislation) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

115. Hopper, *supra* note 113.

116. See Regan, *5 Ways the Government Keeps Native Americans in Poverty*, *supra* note 76 (describing actions taken by the federal government to continue the cycle of poverty for Native Americans).

117. PEVAR, *supra* note 28, at 65.

118. See generally Chris McGreal, *US Should Return Stolen Land to Indian Tribes, says United Nations*, GUARDIAN (May 4, 2012), <https://www.theguardian.com/world/2012/may/04/us-stolen-land-indian-tribes-un> (last visited Apr. 18, 2017); Jillian Rayfield, *Latest Right-Wing Freak-Out: Obama Wants to Give Manhattan Back to Native Americans*, TPM (Dec. 28, 2010), <http://talkingpointsmemo.com/muckraker/latest-right-wing-freak-out-obama-wants-to-give-manhattan-back-to-native-americans> (last visited Apr. 18, 2017); see Walter Olson, *Give it Back to the Indians?*, CITY JOURNAL (2002), <https://www.city-journal.org/html/give-it-back-indians-12380.html> (last visited Apr. 18, 2017) (contending that tribal efforts to reclaim their ancestral lands are unjust).

present, there are some 330 million inhabitants of the U.S.<sup>119</sup> Even so, there are vast empty spaces in the land, particularly west of the Mississippi River, in the Rocky Mountains, and in Alaska.<sup>120</sup> It is worth noting that “give the entire country back” is the phrase used; the word “back” is an admission that Indians owned the land.

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119. See Florence Fu & Chris Weller, *Half of the US Population Lives in these 9 States*, BUS. INSIDER (June 22, 2016), <http://www.businessinsider.com/half-of-the-us-population-lives-in-just-9-states-2016-6> (last visited Apr. 18, 2017) (“More than 330 million people live in the United States, but that doesn’t mean the population is distributed evenly.”).

120. The U.S. government claims every square inch of “its” land, but has never homesteaded any of it. That is the libertarian criteria of just ownership of land titles. See Walter E. Block, *Earning Happiness Through Homesteading Unowned Land*, 15 J. SOC. POL. & ECON. STUD. 2, 237–53 (1990) (commenting on RICHARD STROUP, *BUYING MISERY WITH FEDERAL LAND* (1990)); see generally Walter E. Block, *On Reparations to Blacks for Slavery*, 3 HUM. RTS. REV. 4, 53–73 (2002); Walter E. Block & Michael R. Edelstein, *Popsicle Sticks and Homesteading Land for Nature Preserves*, 7 ROMANIAN ECON. & BUS. REV. 1, 7–13 (2012), <http://www.rebe.rau.ro/REBE%207%201.pdf>; Walter E. Block & Guillermo Yeatts, *The Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace’s ‘Toward a Better Distribution of Land: The Challenge of Agrarian Reform,’* 15 J. NAT. RESOURCES & ENV’T. L. 1, 37–69 (2000); Per Bylund, *Man and Matter: How the Former Gains Ownership of the Latter*, 4 LIBERTARIAN PAPERS 1, 4–5 (2012), <http://libertarianpapers.org/articles/2012/lp-4-1-5.pdf>; HANS-HERMANN HOPPE, *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY* (1993); Hans-Hermann Hoppe, *Of Private, Common, and Public Property and the Rationale for Total Privatization*, 3 LIBERTARIAN PAPERS 1, 1–13 (2013), <https://mises.org/library/private-common-and-public-property-and-rationale-total-privatization> (last visited Apr. 18, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Stephan N. Kinsella, *Homesteading, Abandonment, and Unowned Land in the Civil Law*, MISES INST. (May 22, 2013), <https://mises.org/blog/homesteading-abandonment-and-unowned-land-civil-law> (last visited Apr. 18, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); JOHN LOCKE, *AN ESSAY CONCERNING THE TRUE ORIGIN, EXTENT AND END OF CIVIL GOVERNMENT* 17–19 (1689); ELLEN FRANKEL PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* (1987); SAMUEL PUFENDORF, *NATURAL LAW AND THE LAW OF NATIONS (DE OFFICIO HOMINIS ET CIVIS PROUT IPSI PRAESCRIBUNTUR LEGE NATURALI)* (1673); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO* 1 (2006), [https://mises.org/system/tdf/For%20a%20New%20Liberty%20The%20Libertarian%20Manifesto\\_3.pdf?file=1&type=document](https://mises.org/system/tdf/For%20a%20New%20Liberty%20The%20Libertarian%20Manifesto_3.pdf?file=1&type=document); Michael S. Rozeff, *Original Appropriation and Its Critics*, LEE ROCKWELL.COM (Sept. 1, 2005), <https://www.lewrockwell.com/2005/09/michael-s-rozeff/original-appropriation-and-its-critics/> (last visited Apr. 18, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); Carl Watner, *The Proprietary Theory of Justice in the Libertarian Tradition*, 6 J. LIBERTARIAN STUD. 3, 289–316 (2014), [http://mises.org/journals/jls/6\\_3/6\\_3\\_6.pdf](http://mises.org/journals/jls/6_3/6_3_6.pdf).

The idea of American Indians living in collectivist societies, much like Indian reservations today but with more space, is not new. Interestingly, two of the most historically influential philosophers of political economy mentioned the Amerindian. John Locke thought the American Indians were lazy as they left the rich American soil largely untapped.<sup>121</sup> Locke did acknowledge Amerindians had at least basic property rights noting the deer belongs to the Indian who kills it.<sup>122</sup> Jean Jacques Rousseau envisioned American Indians as “noble savages;” however, he thought Amerindians had advanced to a stage just outside the state of natural equality.<sup>123</sup> Neither man was correct as American Indian economies pre-European contact scarcely resembled those of either man’s description.

To be fair, the views Locke and Rousseau had of Amerindians were formed on the basis of relatively little information about Indian tribes.<sup>124</sup> Myths, such as those that the Amerindians were limited to wandering hunter-gatherer societies, still persist today.<sup>125</sup> Contrary to the popular view of nomadic peoples, the

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121. See JOHN LOCKE, *THE TWO NARRATIVES OF POLITICAL ECONOMY* 18 (Nicholas Capaldi & Gordon Lloyd eds., 2010) (1690) (describing the process by which labor creates value in the western system, in contrast with the Native American utilization of land in previous years).

122. See *id.* at 13 (noting that the “venison, which nourishes the wild Indian . . . must be his . . . before it can do him any good for the support of his life.”).

123. *Id.* at 70–71.

124. See Samuel Goldman, *Misreading Locke*, AM. CONSERVATIVE (Sept. 20, 2012), <http://www.theamericanconservative.com/2012/09/20/misreading-locke/> (last visited Apr. 18, 2017) (“Locke seems to have been mistaken about the agricultural practices of at least some Indian tribes, which may have met his own criteria for ownership.”); *The Great Philosophers: Jean-Jacques Rousseau*, PHILOSOPHERS’ MAIL, <http://thephilosophersmail.com/virtues/the-great-philosophers-jean-jacques-rousseau/> (last visited Apr. 18, 2017) (discussing the sixteenth century reports of American Indians that Rousseau used to craft his philosophy); MILLER, RESERVATION “CAPITALISM,” *supra* note 7, at 10 (noting that Euro-American settlers routinely lied about and ignored American Indians and their governments).

125. See Steve Russell, *Science Blows Up Big Lies: Pre-Columbian Peoples Skilled Farmers, and Many Millions Killed by Invasion*, INDIAN COUNTRY TODAY (Aug. 24, 2015), <https://indiancountrymedianetwork.com/history/events/science-blows-up-big-lies-pre-columbian-peoples-skilled-farmers-and-many-millions-killed-by-invasion/> (last visited Apr. 18, 2017) (“The atmospheric CO2 study dealt blows to two myths, one having to do with how many people died in the foreign disease epidemics and the other something mentioned regularly in U.S. Indian

majority of tribes resided in permanent or semi-permanent towns.<sup>126</sup> Amerindians planted and harvested crops, intermingling labor with the Earth, well before Europeans set foot on the continent.<sup>127</sup> According to Lockean theory, this made them legitimate owners of the land.<sup>128</sup> Some believe the notion that American Indians owned nothing more than their captured prey and a few personal items arose in order to justify the confiscation of Amerindian property.<sup>129</sup> For example, Chief Justice John Marshall justified the confiscation of Indian land by asserting they were nomadic and nonagricultural in *Johnson v. M'Intosh*<sup>130</sup> despite the fact that he knew Indians were farmers.<sup>131</sup> As Justice

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law decisions: that the persons indigenous to the Americas were all hunter-gatherers and therefore had interests in the land inferior to the interests of proper farmers.”).

126. See MILLER, RESERVATION “CAPITALISM,” *supra* note 7, at 12 (noting the complex nature of the majority of native societies, based on the planting of crops, presence of permanent cities and towns, and sophisticated forms of government that ran contrary to European impressions at the time).

127. See William G. DiNome, *American Indians*, ENCYCLOPEDIA OF NORTH CAROLINA (William S. Powell ed., 2006), <http://www.ncpedia.org/american-indians/before-europeans> (last visited Mar. 29, 2017) (noting that Indians were planting crops and farming by around 1000 B.C.) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *Study Reveals Environmental Impact of American Indian Farms Centuries before Europeans Arrived in North America*, SMITHSONIAN INSIDER (May 9, 2011), <http://insider.si.edu/2011/05/native-americans-were-changing-environment-in-north-america-long-before-european-settlers-arrived/> (last visited Apr. 18, 2017) (stating that Indians were farming in the Delaware River Valley at least 500 years before Europeans set foot in the area); *Agriculture, American Indian*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/history/dictionaries-thesauruses-pictures-and-press-releases/agriculture-american-indian> (last visited Mar. 29, 2017) (declaring that American Indians were farming corn and other crops over hundreds of years before Europeans arrived in America) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

128. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION, SECOND TREATISE ¶ 32 (“As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common.”).

129. MILLER, RESERVATION “CAPITALISM,” *supra* note 7, at 10.

130. See 21 U.S. 543 (1823) (holding that a land title conveyed by the Piankeshaw Tribe was not valid because the Piankeshaw never had true “ownership” of the property due to the colonialization of the New World by the British and subsequent defeat of the British by the new American government).

131. See *id.* at 590 (describing the Indian tribes as “fierce savages . . . whose subsistence was drawn chiefly from the forest” and claiming that “[t]o leave them in possession of their country, was to leave the country a wilderness.”); *but see*

William Douglas noted, although Indians did not have European-style records, an Indian “knew the land where he lived and for which he would fight. If the standards of the frontier are to govern, his assertion to ownership and its recognition by the United States could hardly have been plainer.”<sup>132</sup>

Land in pre-contact America was owned by the separate tribal governments and their citizens in common.<sup>133</sup> Individual Amerindians had possessory rights to specific plots of land and were free to cultivate their property as they saw fit.<sup>134</sup> Individual Indians were even allowed to retain uncultivated land and farm it.<sup>135</sup> The Indians who cultivated the land maintained their usufructuary rights as long as they continued to work the land.<sup>136</sup> Labor creating a property right in land is a concept Locke would have appreciated.<sup>137</sup>

Tribal property rights extended beyond farming the land.<sup>138</sup> Many tribes issued fishing rights;<sup>139</sup> thus, individuals and families of Indians owned specific fishing sites.<sup>140</sup> These fishing sites could

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also *Mental Correction at the Court*, INDIAN COUNTRY MEDIA NETWORK (Mar. 9, 2006), <https://indiancountrymedianetwork.com/news/mental-correction-at-the-court/> (last visited Apr. 18, 2017) (asserting that Justice Marshall knew, as it was common knowledge at the time, that the Indians in the eastern United States “were not savage nomads at all, but residents of settled, self-governing communities”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

132. *Northwestern of Bands of Shoshone Indians v. United States*, 324 U.S. 335, 360 (1945) (Douglas, J., dissenting).

133. See MILLER, RESERVATION “CAPITALISM,” *supra* note 7, at 12 (“[The land] was owned by the tribal government and the citizens in common.”).

134. See *id.* (“The fact that land was communal property of the tribe did not prevent individual citizens, families, and clans from acquiring and exercising rights to use specific pieces of land.”).

135. See *id.* (explaining how even “nomadic” tribes returned to cultivate and farm specific plots of land).

136. See *id.* (“Under Anglo-American property law, and also under tribal property rights systems, usufructuary rights are private property.”).

137. See THE TWO NARRATIVES OF POLITICAL ECONOMY, *supra* note 71, at 16 (describing John Locke’s beliefs about labor, as relating to property rights).

138. See MILLER, RESERVATION “CAPITALISM,” *supra* note 7, at 14 (“[T]ribes and Indian cultures recognized other private property rights in land than just agricultural rights.”).

139. See *id.* (“Tribes in the West that relied heavily on fishing naturally developed personal and private property rights that demonstrated the importance of this resource.”).

140. See *id.* (giving the example of Columbia River salmon fishing sites that

not be accessed without the owner's permission.<sup>141</sup> Similarly, the owner of the area could dispose of the land as he wished; that is, the owner could bequeath it to heirs, rent or sell it.<sup>142</sup> Some tribes took the concept of property rights to a level modern libertarians would admire. For example, the Nootka people allowed individuals to own specific areas of the ocean.<sup>143</sup>

Outside of earthen property, Amerindians privately owned all of their possessions.<sup>144</sup> Tribes developed laws to protect private property; in fact, many tribes had intellectual property laws; e.g., certain individuals or families had exclusive rights to use certain images, stories, ceremonies, and medicines among other things.<sup>145</sup> The best known pre-contact Amerindian law is the *Kaianrekowa*, the Great Law of Peace.<sup>146</sup> This document united five tribes creating the Iroquois Confederacy.<sup>147</sup> The Great Law of Peace

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consisted of man-made wooden platforms or well-located rocks that established personal and private property assets).

141. *See id.* (explaining that if a property owner gave permission to fish on their property, that permission could be revoked at any time if the property owner was not catching enough fish).

142. *See id.* (stating that these kinds of property rights were firmly established in myriad Oregon and California tribes).

143. *See id.* (listing clam beds, salvage rights on the beaches, fishing spots, and even sea lion rocks in the ocean as other individual privately owned property rights recognized by the Nootka people); *see generally* WALTER E. BLOCK & PETER LOTHIAN NELSON, *WATER CAPITALISM: THE CASE FOR PRIVATIZING OCEANS, RIVERS, LAKES, AND AQUIFERS* (2015) (arguing that water is merely fast-moving land and that the homesteading mechanism is the best way to allocate water resources).

144. *See* MILLER, RESERVATION "CAPITALISM," *supra* note 7, at 15 (noting that Indians also privately owned as personal property their animals, clothing, cooking utensils, housing, tools, weapons, and canoes in addition to other items).

145. *See id.* (describing the family privately owned carved images as images that could be on houses, in ceremonial dances, marriage ceremonies, names, stories and legends, medicines, and masks).

146. *See generally* *The Great Law of Peace of the Longhouse People*, MANATAKA AM. INDIAN COUNCIL, <http://www.manataka.org/page135.html> (last visited Mar. 29, 2017) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

147. *See id.* ("With the statesmen of the League of Five Nations, I plant the Tree of Great Peace.").

includes provisions for separation of powers,<sup>148</sup> private property rights,<sup>149</sup> and a general welfare clause.<sup>150</sup>

As a result of the rule of law and private property rights, American Indian culture was based upon the individual.<sup>151</sup> The Cherokee had seven directions: North, South, East, West, Up, Down, and Where You Are.<sup>152</sup> By naming “Where You Are” as a direction, the Cherokee placed individuals at the center of their own universe.<sup>153</sup> Tribes also allowed individuals to change their names to reflect their individual achievements or passions.<sup>154</sup> Moreover, Plains Indians would mark their arrows so hunters could identify their kills.<sup>155</sup> This shows Amerindians using property rights to encourage marksmanship skill as hunters were rewarded for success.

Individual Indians hoped to excel financially. Perhaps no personal item was of more value to Amerindians than the horse,

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148. See, e.g., *id.* (explaining that a chief could be brought before the Council for review and then be separately reviewed by the Council of War Chiefs).

149. See, e.g., *id.* (“A certain sign shall be known to all the people of the Five Nations which shall denote that the owner or occupant of a house is absent.”).

150. See, e.g., *id.* (“There shall be one war chief from each nation, and their duties shall be to carry messages for their chiefs, and to take up arms in case of emergency.”).

The people who wish to convey messages to the chiefs of the League shall do so through the war chief of their nation. It shall always be his duty to lay the cases, questions, and propositions of the people before the council of the League.

*Id.*

151. See Amy Sturgis, *Liberty in Perfection: Freedom in Native American Thought*, FOUND. FOR ECON. EDUC. (Sept. 1, 1999), <https://fee.org/articles/liberty-in-perfection-freedom-in-native-american-thought> (last visited Apr. 18, 2017) (“Native American culture and politics revolved around the individual”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

152. See *id.* (“The position of Where You Are put the individual at the center of her universe, with the other six directions dependent on her.”).

153. See *id.* (“While this symbolic position honored the individual as the star in her own universe, it also implied that she possessed the power and the opportunity to keep that universe in balance.”).

154. See *id.* (“An act of heroism, a discovered talent, a cultivated physical or spiritual trait, even a famous relative could be cause for name-changing.”).

155. See Terry Anderson, *Property Rights Among Native Americans*, FOUND. FOR ECON. EDUC. (Feb. 1, 1997), <https://fee.org/articles/property-rights-among-native-americans> (last visited Apr. 18, 2017) (“Disputes over whose arrow killed the buffalo were settled by the hunt leader”) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

and these animals were always individually owned.<sup>156</sup> Hence, the Amerindian legal framework spurred equestrian entrepreneurship such as training and leasing stallions.<sup>157</sup> Some Indians were better businessmen than others, so horses were unevenly distributed.<sup>158</sup> Indeed, some Indians owned over 1,000 horses.<sup>159</sup> The free market Amerindian economy also offered Indians the opportunity to engage in professions requiring specialization such as warriors, doctors, manufacturers, and singers.<sup>160</sup>

An Amerindian's riches could be used for leisure or to generate more wealth.<sup>161</sup> Surpluses were of obvious value to tribes, and Amerindians worked to achieve excess.<sup>162</sup> Surpluses entered the market encompassing what is today the entire continental United States and parts of Canada.<sup>163</sup> Tribes along the Mississippi Valley imported obsidian from Montana and silver from as far as Ontario, Canada.<sup>164</sup> To facilitate trade, paved roads thirty feet wide and countless miles long were built.<sup>165</sup> Likewise, great cities were formed including Cahokia, near present day St. Louis, Missouri.<sup>166</sup> Cahokia contains the world's largest earthwork standing thirty

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156. See MILLER, RESERVATION "CAPITALISM," *supra* note 7, at 11, 15 (demonstrating that "truly communal property was scant among Indians.").

157. See *id.* at 15 (describing the impact of private horse ownership on the market for horses).

158. See *id.* at 15–16 (indicating that horse ownership of individuals in tribes was neither proportional nor uniform).

159. See *id.* (stating that of 20,000 horses owned by members of the Cayuse tribe, individual members sometimes owned over a thousand horses individually).

160. See *id.* at 16 (explaining that the Makeh Tribe and others "had specific career paths" with a diverse collection of occupations available).

161. See *id.* at 17 (explaining that wealth allowed Native Americans to engage in leisure activities such as art and elaborate social ceremonies).

162. See *id.* (indicating that tribes understood the advantages an economic surplus could bring, such as additional time for leisure activities).

163. See *id.* at 19 (indicating that these surpluses that individual tribes held allowed for a massive trading network to develop with the surplus goods).

164. See *id.* (explaining that the cultures that developed in the Mississippi valley experienced extraordinary prosperity that allowed for trade in luxury goods).

165. See *id.* (explaining that the Chaco tribe developed a road network to connect its cities to its farms and other outlying settlements).

166. See *id.* at 20 (explaining that Cahokia is a U.N. World Heritage site that sits roughly eight miles from modern day St. Louis).

meters high and covering fourteen acres; whereas, the Great Pyramid of Cheops in Egypt covers only thirteen acres.<sup>167</sup>

Amerindians desired wealth because their cultures often linked status to opulence.<sup>168</sup> Tribal culture celebrated private charity, so people did not use their government to redistribute wealth.<sup>169</sup> For this reason, wealth was respected because great philanthropic feats require large fortunes.<sup>170</sup> Tribal potlatches were elaborate ceremonies where an individual would give away all his wealth.<sup>171</sup> Potlatches had palpable benefits for members of the community,<sup>172</sup> and the newly impoverished individual would begin his quest to accumulate wealth soon after the festival.

Business occurred through mutual exchange, as would be expected of any society that values the rule of law and private property.<sup>173</sup> American Indians engaged in commerce with both barter and currency.<sup>174</sup> Tribes used various currencies including wampum, turquoise, and deerskins.<sup>175</sup> Amerindians even guaranteed their wares and could purchase items on credit.<sup>176</sup> These markets were governed by established rules and used standardized measurements.<sup>177</sup> Clearly, American Indians were not communists pre-contact; rather, they celebrated private property and individual initiative.

Thus, American Indians had thriving economies and individual liberty pre-contact. The devastation wrought by old

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167. *See id.* (explaining that the population of the city at its peak was anywhere between 20,000 and 50,000, making it larger than London at the time).

168. *See id.* at 17 (explaining that some tribes in the Pacific Northwest displayed their wealth by pouring whale oil on guests).

169. *See id.* (indicating that potlatches were the primary source of wealth redistribution in tribes that observed them).

170. *See id.* (indicating that this type of charitable gift giving has a competitive aspect to it that related to social status).

171. *See id.* (explaining that potlatches were a main source for one to gain fame and renown through charitable acts).

172. *See id.* (explaining how potlatches benefited the entire community by serving as a wealth-distribution mechanism).

173. *See* MILLER, RESERVATION "CAPITALISM," *supra* note 7, at 21 (describing the existence and function of Amerindian entrepreneurship).

174. *Id.* at 16.

175. *Id.* at 24.

176. *Id.* at 23.

177. *Id.*

world diseases cannot be undone; however, the assault on American Indian property rights can end. Replacing the BIA's reign over Indian country with simple, clear rules securing private property would be a good place to start. The economic freedom<sup>178</sup> accompanying this system would provide American Indians with a greater opportunity to participate in the private sector economy. American Indians once thrived in a free market, and they will again if they can break free from the red tape that has been holding them down for centuries.

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178. *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., The Univ. of Chi. Press 1977) (1776) (providing an eloquent demonstration that economic freedom, rooted in strong property rights, leads to prosperity); JAMES GWARTNEY, ROBERT W. LAWSON & WALTER E. BLOCK, ECONOMIC FREEDOM OF THE WORLD, 1975-1995 (1996) (presenting empirical evidence in support of the contention that economic freedom leads to prosperity).