17

Tribal Legal Institutions

Territorial jurisdiction will require tribes to promulgate and enforce rules. Every tribe has laws; however, tribal codes are not always well developed. This is partially due to the limits on tribal jurisdiction (discussed in Chapter 16) as tribes have better things to do, such as operate schools and health clinics, than design and debate legislation approximately 99 percent of the US population is largely exempt from. Consequently, many tribal codes have not been revised in recent years and existing tribal laws may be difficult to locate. As a result, many non-Indians view tribal law as a mystery.

Lack of knowledge about tribal law is compounded by the fear of tribal courts. People often presume tribal courts are biased, always ruling in favor of Indians against non-Indians. This fear helped strip tribes of their jurisdiction over non-Indians. In an opinion ruling against tribal jurisdiction over non-Indians, Justice Souter opined that "tribal courts differ from traditional American courts in a number of significant respects."[1] Justice Souter elaborated, "[T]ribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices ….'"[2] Other federal courts have gone further, describing tribal courts as "kangaroo court[s]"[3] and as "a national embarrassment."[4] But tribal courts and law get far more bad press than they deserve.

[1] Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring).
[2] *Id.* at 384.
[3] Little Horn State Bank v. Crow Tribal Court, 690 F. Supp. 919, 923 (D. Mont. 1988), *vacated*, 708 F. Supp 1561 (D. Mont.1989); Alvarez v. Tracy, 773 F.3d 1011, 1024 (9th Cir. 2014) (Kozinski, J., dissenting).
[4] United States v. Cavanaugh, 680 F. Supp. 2d 1062, 1072 (D.N.D. 2009), *rev'd*, 643 F.3d 592 (8th Cir. 2011).

17.1 TRIBAL LAW

Law is the body of rules regulating a group of people. When the law is violated, the government can impose consequences. Sources of law vary. Some are promulgated by legislatures, some by popular vote, and others crafted by judges. Laws reflect community values, so laws vary from nation to nation. In fact, laws can vary significantly between portions of a nation, like individual states in the United States. Despite the variance, there are universal norms across the globe. For example, murder is illegal in every nation. Of course, there are deviations on what counts as murder – such as self-defense and abortion – but the general principle stands: The intentional killing of a human being is prohibited wherever one may journey. Tribal law is no different.

Though all tribes are bound by the Indian Civil Rights Act, each of the 574 federally recognized tribes has its own laws. Tribal law reflects a tribe's values, and nearly every tribe actively incorporates its customs into laws. Importing ancient tribal customs into the twenty-first century may seem anachronistic, but it is not. Rather, applying customs and traditions in the courtroom is commonplace in the United States. For example, the United States Constitution is more than 200 years old and still serves as the United States' primary governing document. Furthermore, one of the leading schools of constitutional interpretation is originalism – seeking to apply the intent of the Constitution's drafters to the modern world. Even those who do not ascribe to originalism often resort to practices in the American colonies, and even old England, to discern a law's meaning. This is a logical step in the United States' common law process, whereby past judicial decisions serve as the foundation for future jurisprudence. Traditional tribal law is no different in this regard. Thus, former Navajo Nation Supreme Court Justice Tom Tso wrote, "Customary law will sound less strange if I tell you it is also called 'common law.'"[5]

Like the United States, tribes adapt their laws to fit the modern world. The Ho-Chunk Nation Trial Court explained, "Although the tribe would not have traditionally dealt in terms of currency, the sanctity and attendant responsibilities of an agreement were recognized as self-evident."[6] The Ho-Chunk court further explained:

[5] Tom Tso, *The Process of Decision-Making in Tribal Courts* 9 (Getches-Wilkinson Ctr. for Nat. Res., Energy, & the Env't, née Nat. Res. L. Ctr., U. of Colo. Sch. Of L., Occasional Paper, 1989), https://scholar.law.colorado.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1110&context=books_reports_studies [https://perma.cc/EVM9-VUCJ].

[6] Zwicke v. Houghton, 6 Am. Tribal L. 262, 267 (HCN Tr. Ct. Nov. 3, 2005), https://cite.case.law/am-tribal-law/6/262/ [https://perma.cc/C6LS-EY6F].

> [A]ccording to the Ho-Chunk Nation's traditions and customs, once an agreement for the performance of services or production of goods is made, the parties have a duty to fulfill their obligations, meaning that it was wrong for one party to keep a benefit obtained from an agreement without providing the agreed upon compensation.[7]

That is, the Ho-Chunk may not have traditionally used American dollars to engage in commerce, but the animating principle of honoring one's word carries into the twenty-first century.

Indians have the same basic needs and desires as other people, so tribes frequently adopt the laws of the surrounding state. Moreover, a matter may cross over the reservation–state border. Having similar laws minimizes friction in transborder disputes because the law is the same in either jurisdiction. Adopting the same laws as the surrounding state also makes it easier for parties to find lawyers in tribal disputes. Additionally, tribal law is often viewed with greater legitimacy when it parallels western law, such as procedural safeguards tribes must abide by to prosecute non-Indians under the Violence Against Women Act. Thus, the Confederated Tribes of the Grand Ronde passed an ordinance adopting the Oregon Commercial Code and contract law.[8] Nonetheless, tribal councils do not always legislatively adopt state law, so tribal judges often incorporate state law through jurisprudence. For example, the Hopi Court of Appeals adopted Arizona's definition of tortious interference with contractual relations because no tribal law was promulgated for the tort and "the tort is not inconsistent with Hopi law or Hopi notions of fairness and justice."[9]

Although tribal law is often consistent with general United States laws, there can be significant differences as a result of distinct values. Two examples from the Navajo Nation are illustrative. In the United States, a person's domicile is based upon the person's physical presence plus an intention to remain there indefinitely. However, the Navajo Nation Supreme Court viewed domicile differently declaring:

> By custom, Navajos consider themselves to be from the same area their mothers are from. Thus, wherever they may be, they return home frequently for religious ceremonies and family functions, as well as to vote. By custom,

[7] *Id.* at 267 n.2 (quoting Ho-Chunk Nation v. Olsen, No. CV 99-81, WL 35716348, 2 Am. Tribal L. 299, 304 (HCN Tr. Ct. Sept. 18, 2000)).

[8] Confederated Tribes of Grand Ronde, Tribal Ct. Ordinance ch. 302(g)(2), https://weblink.grandronde.org/WebLink/DocView.aspx?id=33973&page=8&dbid=0&repo=Grand-Ronde&searchid=fea8bbb4-8e24-4347-898e-97347722cf96 [https://perma.cc/JX9J-WGEC].

[9] Governing Bd. of Educ. of the Hotevilla Bacavi Cmty. Sch. v. Shingoitewa, Nos. 97AP000001, 96-CV-00029, 1 Am. Tribal L. 322, 328 (Hopi Tr. Ct. of App. 1998), https://cite.case.law/am-tribal-law/1/322/ [https://perma.cc/R6VY-DAPQ].

Navajos are allow [*sic*] to register and vote in the area where they are from, rather than where they live.[10]

The Navajo Nation can also diverge from mainstream Anglo law in the statute of limitations. Statutes of limitations are the time period when a legal claim can be filed. Once the statute of limitations expires, the plaintiff may no longer bring the claim – regardless of its merits. The purpose of statutes of limitations is to provide individuals with finality rather than having to live with the chronic fear they may be sued for something they did long ago. Statutes of limitations also facilitate judicial efficiency by preventing the courts from being clogged with antiquated claims.[11] The Navajo Nation Supreme Court eschewed the statute of limitations in *Ben* v. *Burbank*.[12]

The case arose when Lucy Ben refused to pay Tom Burbank for construction work. Burbank filed suit to collect the debt more than four years after the contract was breached. Ben did not contest the validity of Burbank's claim. Instead, Ben argued whether she paid Burbank was irrelevant because the statute of limitations had lapsed. The Navajo Nation district denied her claim. Ben appealed to the Navajo Nation Supreme Court alleging the trial court applied the wrong statute of limitations and the outcome was fundamentally unfair to her.

The Navajo Nation Supreme Court rejected Ben's arguments. The Court acknowledged statute of limitations had expired but turned to traditional Navajo law:

> Navajo common law is the first law of our courts and we will abide by it whenever possible. Therefore, we agree with [Burbank] that the Navajo way of *k'e* is the prevailing law to be applied. *K'e* recognizes "your relations to everything in the universe," in the sense that Navajos have respect for others and for a decision made by the group. It is a deep feeling for responsibilities to others and the duty to live in harmony with them. It has to do with the importance of relationships to foster consensus and healing. It is a deeply-felt emotion which is learned from childhood. To maintain good relations and respect one another, Navajos must abide by this principle of *k'e*.[13]

Building off the discussion of *k'e*, the court noted Ben admitted she failed to honor her agreement to pay Burbank. This violated the Navajo

[10] Halona v. MacDonald, 1 Nav. R. 189, 195 (Nav. Ct. App. 1978) (per curiam), https://cite.case.law/navajo-rptr/1/189/ [https://perma.cc/EA8U-QNFT].

[11] Brian Slodysko, *Why Do We Have Statutes of Limitations?*, Chi. Tribune (Dec. 7, 2011), www.chicagotribune.com/news/ct-xpm-2011-12-08-ct-talk-statutes-of-limitations-1208-20111208-story.html [https://perma.cc/W56F-ZMLS].

[12] Ben v. Burbank, 7 Nav. R. 222 (Nav. Sup. Ct. 1996).

[13] *Id.* at 224.

tradition "that when people make promises between one another, oral or written, they should honor those promises."[14] The court also emphasized the relationship between the parties. While they were not blood relatives, they were members of the same clan. Being clan relatives amplified Ben's duty to compensate Burbank because "one must respect his or her relatives in order to maintain social order."[15]

Given the importance of respecting one's agreements and relationships, the Court expressed disdain with Ben's defense:

> Appellant's brief repeatedly discussed trying to calculate the specific date the contract went into effect in order to support her argument that the district court applied the wrong statute of limitations. However, there was very little discussion as to why she was refusing to pay for the work done. It appeared that Appellant was hiding behind her statute of limitations claim in order to avoid paying for the work. This is not the Navajo way.[16]

The Navajo Nation Supreme Court emphasized it was not setting forth a general rule for contracts but addressing the specific facts of the case. And based upon the facts, it believed "substantial justice was done" by holding Ben to her agreement.[17]

Ben v. *Burbank* shows how traditional tribal law can provide a unique perspective on justice. Whether the Navajo Nation Supreme Court decided *Ben* "right" is relative. Most American judges would probably accept Ben's statute of limitations defense without much debate, and according to the law, they would be correct. Nevertheless, most American judges – and Americans – probably would not be outraged with the ruling in *Ben*. In fact, many may desire the outcome the Navajo Nation Supreme Court reached. After all, Ben admitted she owed Burbank money for the work he performed. Requiring her to pay her debt is hardly inequitable. Regardless of one's personal thoughts about the case's outcome, the Navajo Nation Supreme Court was in the best position to make a judgment about the events occurring on Navajo land.

Nevertheless, there are legitimate critiques of tribal law. One is that many tribal codes are inchoate. Tribes are often small, have severely limited resources, and have little commercial activity occurring on their land. Thus, tribes have had little reason to establish comprehensive codes. Courts can, and do, fill the gaps in tribal law by referring to outside

[14] *Id.*
[15] *Id.* at 225.
[16] *Id.*
[17] *Id.* at 226.

sources, such as state and federal law; nonetheless, published laws are necessary to provide businesses and other actors with certainty. Similarly, tribal laws are often difficult to locate. The lack of easily accessible published law is particularly true in the realm of jurisprudence. Even if tribal laws are posted on a website, finding and navigating the website can be challenging. Inaccessibility cloaks tribal law in secrecy and leads many individuals to fear the worst. Lack of funding, poor access to the internet, and myriad other issues have made publishing laws a relatively low priority for many tribes. To be sure, tribes are increasingly making their laws available through their own websites and online legal databases. However, many tribes have a long way to go in publishing their laws.

17.2 TRIBAL COURTS

Tribal courts come in a variety of structures. Most tribal courts are largely carbon copies of the state and federal court systems; that is, they employ an adversarial system. Tribal courts often contain both a trial court and an appellate court. Tribal courts typically serve a single tribe although approximately seven intertribal courts exist that serve two or more tribes. Five tribes have federal Code of Federal Regulations (CFR) courts that are funded and operated by the federal government. Notwithstanding, CFR courts enforce laws enacted by the tribes and assert the tribes' own sovereignty rather than delegated federal sovereignty.[18] In addition to adversarial courts, many tribes also have alternative dispute resolution systems, often known as peacemaker courts. As the name suggests, peacemaker courts attempt to restore harmony to the parties through dialogue aimed at addressing the underlying source of the dispute.

Each tribe sets its own criteria for judges. Some tribes require their judges to be citizens of the tribe and may even require the judge to be fluent in the tribe's Indigenous language. Other tribes require their judges to be citizens of an Indian tribe, but many tribes permit non-Indians to serve as judges. Tribal judges are not always required to possess law degrees though a surprisingly high number of state court judges do not have law degrees either.[19] Nevertheless, many tribal judges have law degrees as well as membership in a state bar association. Indeed, several tribal judges are law professors. At least a handful of tribal judges serve

[18] Denezpi v. United States, 596 U.S. 591, 594–95 (2022).

[19] Sara Sternberg Green & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1291 (2022).

concurrently as judges in the surrounding state's court system. When it comes to pay, some tribal judges are poorly compensated while others earn more than their state court counterparts.

Regardless of the requirements to serve on a tribal judiciary, tribal judges do their best to administer justice in an impartial manner. Studies have consistently shown tribal courts are fair – to both Indians and non-Indians.[20] Indeed, non-Indians frequently prevail in tribal courts. A study of the Mississippi Band of Choctaw Indians (MBCI) tribal courts – conducted while Dollar General was contesting the fairness of the MBCI judiciary – surveyed approximately 5,000 cases involving nonmembers and found "[o]ver 85% of the suits involving nonmembers resulted in a settlement or a win for the non-Indian party."[21]

Like all human institutions, tribal courts will occasionally err, but it is unlikely that any tribal court judge would be as bold as former West Virginia Supreme Court Chief Justice Richard Neely,[22] who declared:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will re-elect me.[23]

Despite this open admission of favoritism, there was no attempt to strip West Virginia of jurisdiction over out-of-staters. Instead, the West Virginia judiciary remained presumptively fair and impartial to all persons.

The presumption is just the opposite when it comes to tribal courts. A prime example occurred in a 2020 federal district court case.[24] The federal judge was tasked with determining whether an arbitration agreement between non-Indians and the Tunica-Biloxi Tribe of Louisiana was valid. The tribe argued the arbitration agreement was valid in part because the

[20] Bethany Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L. J. 1047 (2005); Alexander S. Birkhold, *Predicate Offenses, Foreign Convictions, and Trusting Tribal Courts*, 114 Mich. L. R. Online 155, 159 (2016); M. Gatsby Miller, *The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction over Nonmembers in Civil Cases*, 114 Colum. L. Rev. 1825, 1839 n.85 (2014).

[21] Brief for Respondents at 7, Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 579 U.S. 545 (2016) (per curiam) (No. 13–1496).

[22] John Raby, *Former W. Va Judge Known for Eye-Raising Statements Dies at 79*, U.S. News (Nov. 9, 2020, 2:50 PM), www.usnews.com/news/us/articles/2020-11-09/former-wva-judge-known-for-eye-raising-statements-dies-at-79 [https://perma.cc/9VNM-H4M7].

[23] Richard Neely, The Product Liability Mess: How Business Can Be Rescued from the Politics of State Courts 4 (1988).

[24] Dunn v. Global Trust Mgmt., LLC, 506 F. Supp. 3d 1214 (M.D. Fla. 2020).

non-Indians had the ability to opt out of arbitration and pursue their claims in tribal court. However, the federal judge rejected the tribe's argument because "[h]ad Plaintiffs opted out of arbitration, they would have found themselves in front of the Tribal Court – still subject to tribal law and unable to raise Florida-law claims, only in a distant and more unfriendly forum."[25] The federal judge did not describe what made the tribal court "unfriendly." Accordingly, it seems the federal judge assumed the Tunica-Biloxi judge was a tribal citizen without any law training who was appointed to the bench solely to rule in favor of the tribe.

The reality is quite different. The Tunica-Biloxi Tribe of Louisiana's judge at the time of the federal court case was Robert Johnson. Judge Johnson is Caucasian. He earned a Juris Doctor from Loyola University New Orleans College of Law and is a member of the Louisiana State Bar Association. Prior to presiding over the Tunica-Biloxi court, Judge Johnson was a state prosecutor. He also served in the Louisiana House of Representatives for twelve years, including as House Minority Leader.[26] If Judge Johnson were presiding in a state or federal courtroom, his competence and impartiality would not be questioned. Nonetheless, the federal judge did not bother inquiring into who served on the Tunica-Biloxi court; the federal judge simply assumed the tribal judge was biased. As long as non-Indians are allowed to presuppose tribal judges lack legal sophistication, tribal court jurisdiction will continue to be undermined.

The fear of tribal courts is exaggerated, but uneasiness about being hailed into a foreign court is deeply ingrained in the American psyche. Hence, the Founding Fathers enshrined a provision in the Constitution – diversity jurisdiction – allowing citizens of different states to litigate state law issues in federal court. The Founding Fathers did this because they feared state juries, as well as elected state judges, would be biased against out-of-state residents. Unlike state courts, the judges in federal courts serve for life and cannot have their salaries reduced, so they can make decisions without fear of political repercussions. Consequently, diversity jurisdiction played a key role in developing a national economy by ensuring individuals would have their rights adjudicated in a neutral tribunal regardless of which state they conducted business.[27]

[25] *Id.* at 1239.

[26] *Marksville Representative Appointed to Lead Legislative Position*, KALB (Mar. 20, 2018), www.kalb.com/content/news/Marksville-representative-appointed-to-lead-legislative-position-477374203.html [https://perma.cc/GZ37-V5SA].

[27] William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 Am. Bar Ass'n J. 601, 604 (1922).

While parties can invoke diversity jurisdiction to elude potentially biased state judges, they cannot use diversity jurisdiction to escape tribal courts because tribal courts exist independently of the United States Constitution. Concerns of bias are elevated because some tribal courts are not independent branches of government, which poses the threat of political interference in the judicial process. However, it must be noted, the United States designed many of these tribal governments with the Indian Reorganization Act (IRA).[28] The IRA did not provide tribes with independent courts.[29] Though a growing number of tribes are reforming their laws to establish an independent judiciary, some tribal courts remain subordinate branches of government. There are occasional anecdotes of tribal legislatures and executives interfering in the judicial process.[30] Furthermore, juries in tribal courts are usually composed of the tribe's citizens, and given that many tribal populations are small, there is fear of jury bias in favor of tribal citizens. Therefore, non-Indians often despair at the thought of being forced to litigate in tribal court.

17.3 TRIBAL LEGAL BUREAUCRACY

Perhaps the most legitimate critique of tribal legal institutions is inadequate tribal bureaucracy. Bureaucracy is the system of government agencies responsible for implementing laws. As with courts, laws are largely feckless without the necessary administrative structure, and tribes have not always done well with implementing laws. Joseph Austin's experience registering a business is illustrative.

Austin grew up on the Navajo Nation and speaks fluent Navajo.[31] His father served on the Navajo Nation Supreme Court. Inspired by his father, Austin earned a degree in business then graduated from law school. He proceeded to earn a Master of Laws in international

[28] Indian Reorganization Act of 1934, Pub. L. No. 73–383, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5144 (2024)).

[29] *Tribal Executive Branches: A Path to Tribal Constitutional Reform*, 129 HARV. L. REV. 1662, 1688 (2016).

[30] ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 121 (2012).

[31] Joe Austin, *How Many Lawyers Does It Take to Register a Business on the Navajo Nation?*, OLEA, SOLÓRZANO & AUSTIN (AUG. 6, 2020), www.team-osa.com/blank-7/2020/08/11/how-many-lawyers-does-it-take-to-register-a-business-on-the-navajo-nation [https://perma.cc/SQ6B-WT6S].

economic law and policy. He is currently pursuing a Doctor of Juridical Science. Austin is also licensed to practice law in state and tribal courts, including the Navajo Nation. Growing up on the Navajo Nation and having many clients there, Austin sought to register his law firm on the Navajo Nation.

Austin read the Navajo business laws and mailed in his paperwork – there's no e-filing – to the Navajo Department of Economic Development (DED). He did not hear back, so he called to inquire about the delay. Austin learned his address was a problem. Navajo law requires the business' registered agent to reside on the Navajo Nation. The trouble is Austin, like many other Navajo, does not have a street address at their reservation residence. Thus, Austin listed a P.O. Box, which again is common practice on the Navajo Nation. Rather than using the P.O. Box address, the DED required would-be registrants to draw a map leading to their domicile. Befuddled but with new direction, Austin proceeded to draw a map. He used a Google image, listed mile markers, and drew a few key indicators.

After not hearing from the DED for several weeks, Austin called again. The DED told Austin, based upon his map, it did not believe he resided on the Navajo Nation. Perplexed, Austin attempted to convince the bureaucrat that he lived on the reservation. He succeeded. However, his registration was denied anyway. Turns out, he forgot to submit a refiling fee meaning he had to restart the entire registration process. At this point, Austin gave up on the idea of his registering his business on the Navajo Nation.

Austin's situation is not anomalous. One tribe required businesses wishing to operate on its land to lease land from the tribe. Completing the leasing process took more than 100 steps and more than a year.[32] No business wants to deal with this when it can open off reservation in less than a month. Similarly, about two dozen tribes have adopted secured transaction laws at the urging of economists and lawyers, most notably the Model Tribal Secured Transaction Act (MTSTA).[33] The MTSTA is

[32] Stephen Cornell, Professor, U. of Ariz., Speech at the Mont. Indian Bus. Conf.: Tribal-Citizen Entrepreneurship: What Does It Mean for Indian Country, and How Can Tribes Support It? (Feb. 2, 2006), www.minneapolisfed.org/article/2006/tribalcitizen-entrepreneurship-what-does-it-mean-for-indian-country-and-how-can-tribes-support-it [https://perma.cc/UB7A-WJC2].

[33] Nat'l Conf. Comm'rs on Unif. St. Ls., Implementation Guide and Commentary to the Model Tribal Secured Transactions Act 14 (2005), www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/ieed/pdf/idc1-024560.pdf [https://perma.cc/877U-GF22].

supposed to increase lender certainty by allowing lenders to perfect security interests in the borrower's collateral. The trouble is, no tribe has developed a robust, publicly searchable filing system.[34]

Without a filing system, the MTSTA is of little value.[35] Some tribes have tried to overcome this issue by using the surrounding state's filing system.[36] This is practical in the sense that the state's system already exists and people are comfortable with it, so the tribe can save money by using the existing system. The tradeoff, however, is that relying on the state system to implement a tribe's own laws can undermine the tribe's sovereignty. For example, New York may copy Delaware's corporate law, but New York will implement its own registry and use its own court system to enforce the New York corporate code. To do otherwise would be relinquishing sovereignty to Delaware.

Poorly developed tribal bureaucracies arise from the same reasons as the underdevelopment of tribal law. The dearth of private sector activity in most of Indian country means no one is registering corporations or security interests under tribal law; hence, tribes have little reason to develop the bureaucratic machinery necessary to facilitate these transactions. But without the aforementioned institutions, individuals cannot meaningfully access tribal commercial law. The absence of commercial institutions creates uncertainty and increases transaction costs. Businesses detest both, so by failing to invest in legal bureaucracies, tribes hinder their ability to attract outside capital.

Financial limitations are a major reason why tribal commercial bureaucracies are underdeveloped. Inadequate funds make it difficult for tribes to hire qualified personnel. Resource constraints also present an obstacle to training people for jobs. Moreover, most people are unwilling to relocate to a remote reservation for a position as a low- to mid-level tribal bureaucrat. This is particularly true given the shabby housing in much of Indian country.[37] As a result of these factors, tribal legal bureaucracies are often suboptimally staffed.

[34] William H. Henning, Susan M. Woodrow, & Marek Dubovec, *A Proposal for a National Tribally Owned Lien Filing System to Support Access to Capital in Indian Country*, 18 Wyo. L. Rev. 475, 492 (2018).

[35] *Id.*

[36] Adam Crepelle, *Getting Smart About Tribal Commercial Law: How Smart Contracts Can Transform Tribal Economies*, 46 Del. J. Corp. L. 469, 491–92 (2022).

[37] United States v. Cavanaugh, 680 F. Supp. 2d 1062, 1072 (D.N.D. 2009), *rev'd*, 643 F.3d 592 (8th Cir. 2011); U.S. Gov't Accountability Off., GAO-11-252, Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts 22 (2011).

17.4 STRENGTHENING TRIBAL LAW

To be treated as nations, tribes must strengthen their legal institutions. Foremost, tribes must make their laws, procedures, and jurisprudence publicly available. Governments make and enforce laws; hence, tribes must do what governments do if tribes desire to be treated as governments. Tribes with well-developed laws need only make them readily available. This could mean creating a tab on the tribe's own website. It could just as easily publish its laws through an online legal directory. Or it could do both. Greater access means more people can learn about tribal law, and as more people realize tribes enact and enforce laws, more people will view tribes as bona fide governments.

For tribes with less well-developed legal systems, tribes can pull from outside sources. Other tribes are legitimate sources of law, and even state or federal rules can be a reasonable choice for tribes to build around. To be sure, scholars have decried tribes' adoption of state and federal law.[38] However, tribes have always incorporated new ideas into their societies. Law is no different. As the Navajo Nation Supreme Court explained, "That a provision in the Navajo Nation Code is adopted from an outside source does not, by itself, make it illegitimate ...."[39] The question is not so much where does the law originate as does the law reflect the tribe's values? Tribal legislative bodies are the best entity to make this decision.

When tribal governments fail to legislate, they create uncertainty as to what law governs their land. Moreover, failure to enact laws gives federal and state courts a reason to claim authority over tribal land as the tribe itself does not appear to be governing if there is no tribal law. This is not to say tribes need to completely revise their entire codes overnight, but tribes must become more active in the legislative sphere if they want to be treated as sovereigns by other governments.

When adopting new laws, tribes should be mindful that laws evolve. That is, adopting a law today does not bind the tribe to it for all time. Of course, a society's laws should not be in a constant state of flux as this is nearly as bad as not having any laws. Rather, the point is tribes can modify their laws based upon changing circumstances. A foreseeable

[38] *E.g.*, Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L. J. 1, 4 (2018); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 244–48 (1994).

[39] Fort Defiance Housing Corp. v. Lowe, 8 Nav. R. 463 (Nav. Sup. Ct. 2004), https://cite.case.law/navajo-rptr/8/463/ [https://perma.cc/TWL2-C4SR].

circumstance is a tribe gradually drifting away from following state law and instead developing its own laws as its legal system evolves. The Mashantucket Pequot Tribal Nation Tort Claims Law explicitly anticipates this scenario, declaring as "the tribal court and tribal law continue to develop … there is no need to direct the court to follow state law as a tribal law."[40]

17.5 STRENGTHENING TRIBAL INSTITUTIONS

Tribal courts are constantly improving. They are doing this by merging the best of their Indigenous traditions and the United States legal system. As a practical matter, many tribes are generally comfortable with the design of the mainstream, United States justice systems; that is, a judge presides over the case and each party has an advocate. And as noted, mimicking the state and federal courts helps tribes gain greater legitimacy in the eyes of non-Indians, which matters when fighting to be treated as a government. During his 1994 confirmation hearing to serve on the United States Court, Stephen Breyer was asked, "[S]hould litigants in Indian Country be able to appeal to the Federal district court at the end of their journey through the tribal courts?"[41] Breyer answered, "Well, my substantive instinct is, of course, that if the procedures and protections in the tribal court can be brought to match those in the Federal court, the problem will tend to go away, because then, of course, you would have the same protection in both places."[42] That is, if tribal courts provide procedural safeguards greater than or equal to the federal standard, there would be fewer reasons to appeal a tribal court decision in federal court.

That is not to say tribal court innovation should be discouraged. On the contrary, Justice Sandra Day O'Connor wrote tribal courts have "much to teach the other court systems operating in the United States."[43] Accordingly, Justice O'Connor said tribal courts "need not … replicate the process undertaken in State and Federal courts."[44] Justice O'Connor

[40] Barnes v. Mashantucket Pequot Gaming Enter., 4 Mash. Rep. 404, No. MPTC-CV-2006-196 (Mashantucket Pequot Tri. Ct. July 26, 2006) 33 ILR 6089, 2006 Mashantucket Trib. LEXIS 12, at *5.

[41] *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 254 (1994).

[42] *Id.*

[43] Sandra D. O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L. J. 1, 3 (2013).

[44] *Id.*

noted tribal courts can operate at a faster pace and with less procedural stuffiness than state or federal courts.[45] She appreciated tribal courts' ability to develop unique means to resolve disputes.[46] Justice O'Connor also acknowledged that traditional Indigenous dispute resolution methods, like peacemaking, are being examined across the world as alternatives to the adversarial model of justice.[47]

As long as tribes respect the rights of parties, it does not matter how they decide to structure their courts. Many tribes will choose the western model, and others may prefer a more traditional, Indigenous method. Some tribes may choose to develop a western court and a peacemaker court as the tribe may believe each forum is superior for particular types of disputes, like alternative dispute resolution for child custody and familial matters. Tribes may choose to substitute technology, such as artificial intelligence, for a judge. Allowing tribes to experiment helps spur policy innovation throughout the United States.

17.6 TRIBAL INSTITUTIONS AND ECONOMIC DEVELOPMENT

When it comes to sparking tribal economies, tribes may benefit from following a more conventional approach. Businesses are usually conservative. They often value uniformity because it lowers transactions costs; hence, states adopted the Uniform Commercial Code to facilitate interstate commerce. Tribes have been urged to adopt certain uniform commercial laws for the same reasons. While diversity has its perks, if each of the 574 federally recognized tribes adopts its own laws governing business formation, registration, and contract enforcement, an individual must learn an entirely new set of rules on each reservation. Furthermore, the individual will have to learn an entirely new judicial system. This is inefficient.

Tribes can surmount this obstacle by creating business courts, as approximately half of the states have already done. As the name suggests, business courts hear only business disputes. Judges in state business courts are experts in the subject matter, and this is particularly important when dealing with complex, commercial transactions. Expert judges plus limited dockets enable business litigation to proceed at a faster rate. Business courts benefit the entire judicial system by removing cases from the mainline docket thereby promoting judicial efficiency. Businesses

[45] *Id.*
[46] *Id.*
[47] *Id.* at 6.

have expressed their support for business courts, and simply creating a business court may stimulate economic development by signaling to investors the jurisdiction is serious about commerce.

Tribes can reap the same benefits by creating an intertribal business court. Intertribal courts already exist, and an intertribal court often has more resources than the court of a single tribe. Plus, business is a subject matter particularly well-suited for intertribal collaboration because commerce has universal norms. An intertribal business court would significantly reduce uncertainty about tribal courts because businesses would know where their disputes will be litigated. Furthermore, an intertribal business court could serve as a centralized repository for business filings, such as corporate registrations and security interests. A centralized database for business filings can lead to greater resources which will allow the court to improve administrative capacity. If the intertribal business court has an easily navigable website with the relevant laws, procedures, jurisprudence, and judicial biographies illuminating the qualifications of the judges, outside investors will have little reason to worry about the capacity or fairness of the intertribal business court.

Businesses have been involved in many challenges to tribal jurisdiction, and when tribal court jurisdiction is challenged, tribal sovereignty is imperiled. A high-quality, intertribal business court can greatly reduce the odds of businesses challenging tribal jurisdiction. To be sure, a business could contest jurisdiction anyway, but the argument will not hinge on the court's fairness or quality. In fact, businesses may prefer the intertribal forum to a state forum or arbitration if the tribal institution is fair, adroit, and efficient.

None of this is to say how tribes should design their laws or institutions. As sovereigns, tribes have the right to make their own decisions about the structure of their institutions. However, it is important to note that a nation's institutions play a large role in determining its destiny. With the freedom to make choices comes the freedom to make mistakes. Some decisions will work well, and some will not produce the desired result. The important thing is tribes have the ability to sculpt their own institutions and pursue their own goals. If a tribe likes the path a law has put it on, the tribe should keep the law. If a tribe is dissatisfied with the course it is on, the tribe can choose to enact new legislation or continue to bear the costs of the law. The tribe itself – rather than the federal government – must be responsible for determining the direction its institutions take.

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Tribal legal institutions are vital to tribes operating as governments. Tribes should enact laws that reflect their values and make the laws available to the world. As tribal laws become more well-known, the fear of tribes operating as governments will dissipate. And as people come to respect tribal law, it will force them to reckon with the United States' narrative about tribes as simple, unsophisticated savages prior to European arrival.