

# THIS LAND IS MY LAND, THIS LAND IS YOUR LAND: MARKETS AND INSTITUTIONS FOR ECONOMIC DEVELOPMENT ON NATIVE AMERICAN LAND

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*When NASA was preparing for the Apollo project, they did some astronaut training on a Navajo Indian reservation. One day, a Navajo elder and his son were herding sheep and came across the space crew. The old man, who only spoke Navajo, asked a question, which his son translated. "What are the guys in the big suits doing?" A member of the crew said they were practicing for their trip to the moon. The old man got really excited and asked if he could send a message to the moon with the astronauts. Recognizing a promotional opportunity for the spin-doctors, the NASA folks found a tape recorder. After the old man recorded his message, they asked the son to translate. He refused. So the NASA reps brought the tape to the reservation, where the rest of the tribe listened and laughed, but refused to translate the elder's message to the moon. Finally, NASA called in an official government translator. He reported that the moon message said, "Watch out for these guys; they've come to steal your land."<sup>1</sup>*

## INTRODUCTION

If you drive between Window Rock and Gallup on a Friday after five at night, you will not be driving alone. All of the cars are pointed in one direction, away from the Navajo Nation and toward Gallup—the quintessential reservation border town. Although “Gallup and other border towns” are sometimes described primarily in relation to “increased alcoholism, vice activities, and venereal

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1. Shi Dineh.com, *The Internet’s Navajo Resource*, at <http://www.shidineh.com/jokes.html>.

diseases,”<sup>2</sup> the majority of those traveling to such towns are going for another reason: to spend their money at the American mecca, Wal-Mart, and other similar retail stores.<sup>3</sup> “Indians on reservations spend several hundred million dollars a year off-reservation for commodities ranging from groceries to auto parts.”<sup>4</sup> Lorraine Turner Ruffing believes that there are six major obstacles to Navajo Nation development; in particular, she believes that lack of commercial infrastructure ensures that “wages are usually spent off the reservation.”<sup>5</sup> Rumor has it that the Gallup Wal-Mart is one of the most successful in the United States, and while this produces benefits for off-reservation communities, whether this rumor is true or not,<sup>6</sup> significant reservation resources are escaping the more limited Native American reservation economies.<sup>7</sup>

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2. DONALD L. PARMAN, *THE NAVAJOS AND THE NEW DEAL* 292 (1976).

3. In his biography, former Navajo Chairman Peter MacDonald, famous for accepting bribes during negotiations for a tribal purchase of Big Boquillas Ranch, applauds the development of small on-reservation shopping centers and notes that trips off-reservation added significantly to the costs of even getting groceries for many Navajos. PETER MACDONALD, *THE LAST WARRIOR: PETER MACDONALD AND THE NAVAJO NATION* 256 (1993) (“The centers were especially important because basic businesses, such as supermarkets, had previously not been available to most of the people, some of whom had to drive to a major city to buy groceries. A cost analysis of the expense of such travel in the average pickup truck owned by the Navajo living in one of the six locations showed that, between gas and wear and tear on their vehicles, they spent fifty dollars beyond the cost of the groceries. The shopping centers not only offered the Navajo convenience, but enabled them to get ahead financially.”) For a description of the Big Boquillas Ranch situation, see *id.* at 274–77.

4. Daniel Cohen, *Tribal Enterprise*, *ATLANTIC MONTHLY*, Oct. 1999, reprinted in *NATIVE AMERICAN RESURGENCE AND RENEWAL: A READER AND BIBLIOGRAPHY*, at 351 (Robert N. Wells, Jr. ed., 1994) (noting further that border town businesses are rarely Native owned).

5. Lorraine Turner Ruffing, *Navajo Economic Development: A Dual Perspective*, in *AMERICAN INDIAN ECONOMIC DEVELOPMENT* 15, 44 (Sam Stanley ed., 1978).

6. A request to the Wal-Mart customer and student information resource hotline for this information was denied because according to the operator such cross-store comparisons are not released publicly. Interview with Wal-Mart Hotline (Sep. 23, 2004).

7. The border town success is driven in large part by tribal spending. Thus, while “[t]he poverty of Indians means that the effective demand for all goods is lower there,” it is not, at least thirty years after this description of effective demand, true that demand does not provide opportunity for on-reservation commercial development. ALAN L. SORKIN, *AMERICAN INDIANS AND FEDERAL AID* 84 (1971). *But see* MICHAEL JOSEPH FRANCISCONI, *KINSHIP, CAPITALISM, CHANGE: THE INFORMAL ECONOMY OF THE NAVAJO, 1868–1995*, at 90 (1998) (“The Navajo Nation has been hampered by a lack of successfully developing locally owned manufacturing or retail business operations; this in spite of a rapidly growing population. The lack of private sector development means the reservation cannot support itself. Employment opportunities are lacking, meaning welfare or off reservation employment become important. Those who stay and are not the labor aristocracy must deal with underemployment and unemployment. Most of the wealth generated by the extractive industries flows off the reservation. The businesses that exist on the reservation are largely owned by non-Diné who invest their profits elsewhere. About eighty percent of all businesses are controlled by non-Diné . . . . With such low personal incomes, most small businesses would fail anyway.”).

This Essay focuses on reservation economic development through land regime possibilities. The choice of “possibilities” rather than “changes” is deliberate: as an initial matter, “change” implies the necessity for change, while “possibilities” includes the possibility of economic development under the current land regime. Economic theory suggests a wide range of possible land regimes.

This Essay describes reservation land regimes and economies, and then shows how two economic theories can enhance understanding of reservation development and can lead to both shared and divergent policy prescriptions. Part I of the Essay presents the current land regime and economic development found on most reservations, drawing predominantly from the Navajo Nation.<sup>8</sup> Through demographic (Section I.A.), economic (Section I.B.), social (Section I.C.), and legal political lenses (Section I.D.), Part I aims to provide the groundwork necessary for understanding application of the economic theories contained in Parts II & III.

Part II considers reservation land regimes according to the perspective found in neo-classical economics. This part explores the consequences and advantages of the neo-classical economic emphasis on market solutions to encourage development related to: clear user rights to individual parts of land (Section II.A.), the feasibility of development and business capital lending associated with land (Section II.B.), and the efficient allocation of user rights through the market (Section II.C.). In much the same way that Part II used neo-classical economics, Part III uses New Institutional Economics (NIE) to consider reservation land regimes. NIE’s institutional focus when thinking through economic development suggests that tribes could facilitate the establishment of effective land regimes through three related goals. Part III presents these as: lowering transaction costs associated with land use (Section III.A.), managing of divergent power/interest groups (Section III.B.), and effectively supporting tribal communal objectives and social capital (Section III.C.).

The hope when presenting first one and then another economic framework is not to favor one or the other. Instead, by presenting the perspectives found in both theories, and their related sets of recommendations, this Essay aims to show the range of alternatives available to tribal leaders. The goal is to utilize economic theory to study the Native American experience and to show that “economic theory is sufficiently flexible to contribute to our understanding of

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8. The pick of the Navajo Nation is based both on my deeper understanding of Navajo issues and on the powerful role Navajos and the Navajo government has for other tribes. See Sam Stanley, *Conclusion* to AMERICAN INDIAN ECONOMIC DEVELOPMENT, *supra* note 5, at 579, 584 (“The Navajo are a key group for any discussion of the Indian future . . . . Other tribes will watch them closely.”). See also Lawrence T. Morgan, Speaker of the Navajo Nation Council, Speaker Morgan’s Quarterly Message (Oct. 14, 2003) reprinted in LEGISLATOR (Navajo Nation Council Newsletter), Nov. 1, 2003, at 3, available at [www.navajonationcouncil.org/releases.htm](http://www.navajonationcouncil.org/releases.htm) (“The Navajo Nation is the largest tribe in the United States, and we often set the agenda for the rest of the United States Indian nations, whether we realize it or not.”).

Indian economic history.”<sup>9</sup> This discussion should not be taken as advocating a definitive set of policies for every tribe.

It is important at this stage to provide a few introductory remarks that will help the reader understand where I am coming from and what my background means in terms of this analysis. Robert A. Williams, Jr. noted in *Vampires Anonymous* that many in my profession, legal academia (and certainly in economics as well), are “storyhaters,” for whom autobiographical elements to scholarly writing are looked down upon for not having an “objectively neutralized cultural style.”<sup>10</sup> Yet in writing this piece, it is crucial to establish the lens through which I view tribal economic development so that the reader can better understand my suggestions. I am an Anglo who grew up on the Navajo Nation and whose parents still live there. Yet I try to remain mindful of the dangers of my background and role. In the very influential *Custer Died for Your Sins*, Vine Deloria Jr. dedicates a chapter, “Anthropologists and Other Friends,” to pointing out the ineffectual, absurd, and dangerous nature of non-Indian scholarship aimed at “helping” or analyzing Indian communities.<sup>11</sup> And although Deloria’s perspective can be critiqued,<sup>12</sup> I have read too many overly romantic or judgmental Anglo written articles not to be wary of the limitations of my own scholarship. My perspective does, for example, begin with the paired assumptions that economic growth can and should reach reservations, and that the U.S. and tribal governments can improve upon past performance and institutional arrangements.<sup>13</sup>

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9. Ronald L. Trosper, *That Other Discipline: Economics and American Indian History*, in *NEW DIRECTIONS IN AMERICAN INDIAN HISTORY* 199, 220 (Colin G. Calloway ed., 1988).

10. Robert A. Williams, Jr., *Representing Race: Vampires Anonymous and Critical Race Practice*, 95 *MICH. L. REV.* 741, 741 (1997).

11. VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 78–100 (1969). See also Raymond De Mallie, *Pine Ridge Economy: Cultural and Historical Perspectives*, in *AMERICAN INDIAN ECONOMIC DEVELOPMENT*, *supra* note 5, at 303 (“It is equally clear that no outsiders, whether white or Indians, are in a position to dictate or even to suggest to the people of Pine Ridge the lines along which their society should develop. To do so is both a moral wrong and a tactical error.”).

12. See, e.g., Nicholas C. Peroff, *Policy Research in Indian Affairs: Old Problems and a New Perspective*, in *NATIVE AMERICANS AND PUBLIC POLICY* 265, 265–66 (Fremont J. Lyden & Lyman H. Legters eds., 1992) (“Racism is a significant factor in non-Indian perceptions of Indians, and vice versa. When Indians do research in Indian policy, many non-Indians automatically assume that their work and any policy recommendations they might make are self-serving and, therefore, not to be taken seriously. . . . Conversely, many Indians hold the view that non-Indians simply cannot understand Indian affairs or make any meaningful statements about Indian policy because they are not Indians. This view is also rooted in racial prejudice.”).

13. Such a perspective is that which is criticized by Lowell John Bean:

The failures of American Indians to fully exploit the economic resources of their lands is sometimes blamed on social pathologies and disorganization. Lack of management training, education, capital, and access to markets are other reasons that have been given for Indian “backwardness.” Another point of view suggests that the organization and management that have been imposed on Indians by the dominant white culture may be the main cause of Indian problems.

The field described by the intersection of economics and Native law is largely an open one, without sufficient numbers of scholars to fill it. Finding “space beyond tokenism for Native American scholarship and discourse” is a goal hindered by this absence of interested scholars.<sup>14</sup> Furthermore, Native scholarship has tended to emphasize a rights based approach, which looks at problems from a historical perspective, focusing on the care owed to tribes by the U.S. government and on the means by which tribes might gain the maximum degree of self-determination.<sup>15</sup> Although most scholars do or would acknowledge the relationship that exists between economic development and self-determination,<sup>16</sup> economic

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But these theories do not explain Indian problems, because they are based on the premise that failure exists. The reputed “failures” may actually be successful adaptive strategies—strategies that have enabled a subordinate population to maintain its local power, autonomy, ethnic boundaries, and traditional value system, while surrounded by threatening and conflicting views.

Lowell John Bean, *Morongo Indian Reservation: A Century of Adaptive Strategies*, in AMERICAN INDIAN ECONOMIC DEVELOPMENT, *supra* note 5, at 202.

14. Annette M. Jaimes, *Preface* to THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE ix (Annette M. Jaimes ed., 1992).

15. The lack of Native economic approaches or scholarship is discussed by Harvard trained Native economist Ronald Trosper who identifies several related reasons I have not noted in the text. Trosper, *supra* note 9, at 199–200 (“The economic history of American Indian communities remains largely untouched by scholars, in spite of the fact that so much of the motivation behind European expansion was economic. I see several reasons for this. First, the negative effects of transferring land from Indians to non-Indians is obvious and might be considered the whole story. Second, the political aspects of Indian-European relations grab much more attention. I want to explore a third reason: the difficulties economic analysis presents for noneconomists.”).

16. For example, there is arguably a split in emphasis between U.S. government economic focus and tribal self-determination focus:

Because of Indian poverty, the attention of national decision-makers has focused on economic development. Simultaneously, Indian tribes are demanding the right to self-determination. These two policies, promoting economic development and promoting self-determination, can conflict. Although poor, Indian tribes will not sacrifice some goals for increases in money income . . . for Indians, and for others also, maximum economic growth may not be the primary goal. How can one deal with this?

As an economist advising a tribal government, I have been forced to consider the importance of ‘noneconomic’ goals.

Ronald L. Trosper, *Multicriterion Decision Making in a Tribal Context*, 16 POL’Y STUD. J. 826 (1988) *reprinted in* NATIVE AMERICANS AND PUBLIC POLICY, *supra* note 12, at 223.

Lack of on-reservation tribal economic opportunities has been linked by some authors with loss of tribal identity and pressure to assimilate:

With little or no on-reservation economic activity, many Indians will be drawn into the off-reservation labor force and be prone to the assimilative forces of the surrounding society. Within some range of economic development on the reservation, cultural self-determination will be enhanced by enabling individuals to remain within Indian social networks and affording them a choice of activities, without assimilative pressures.

development usually receives scant attention. Thus, questions of tribal jurisdiction, tribal taxing power as a right of sovereignty, and historical trust obligations are the focus of most articles. This Essay is not meant as a criticism of this focus; instead, it is merely an observation that there is space for a law and economics based approach, and that at the moment my work in this field is not likely to distract attention from Native voices.<sup>17</sup> As was true when Imre Sutton wrote a guide to the literature of Indian land tenure in 1975, it is still apparent that “few interpreters have been urged to pull together the . . . data that would permit them to see land tenure as a critical economic institution that directly influences the lifestyles of the tribes and individual Indians.”<sup>18</sup>

As a brief but required note in any writing about Native issues, this Essay will use a number of similar words—“Native,” “Native American,” “Indian,” Anglo-designated tribal names (such as “Navajo”), and self-referential tribal names (such as “Diné”). This is not meant to confuse the reader; each label is accepted within the Native community, and depending on the occasion, more or less appropriate.

There is a tendency within economics not to acknowledge perspective—to pretend as if each theory is both complete in itself and a “true” description of the world. Yet theory originates from different perspectives. Smith looked at English industrialization and saw division of labor and economic progress.<sup>19</sup> Marx observed the same and saw inevitable conflict arising out of capitalist accumulation.<sup>20</sup> Locke’s view of “the wild Indian” led him to describe the basis of

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Thomas R. McGuire, *Federal Indian Policy: A Framework for Evaluation*, in NATIVE AMERICAN RESURGENCE AND RENEWAL, *supra* note 4, at 9, 33.

Viewed slightly differently, a self-determination focus can ultimately pay economic dividends by allowing better tribal economic planning: “One of the advantages likely to result from the trend toward greater tribal independence is found in the diversity [of plans] . . . [and in] the ability of the tribal officials to individualize the plans to fit reservation needs.” David L. Vinje, *Cultural Values and Economic Development on Reservations*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY, 155, 171 (Vine Deloria, Jr. ed., 1985).

17. The focus on Indian economic development for example was urged by the then head of the Harvard Project on American Indian Economic Development before the Senate Committee on Indian Affairs. Andrew J. Lee, Statement Before the Senate Comm. on Indian Affairs 2 (July 18, 2001), *available at* [http://www.ksg.harvard.edu/hpaied/res\\_main.htm](http://www.ksg.harvard.edu/hpaied/res_main.htm) (“While all important matters [protecting sovereignty and challenging public misperceptions], I would like to suggest that the most ambitious challenge facing Indian Country can be posed in a single question: How can Indian tribes build and sustain healthy, prosperous nations?”). This is not to deny that such a focus might be misdirected. *See* Bean, *supra* note 13, at 202 (“Advocates [for Indian economic advancement] may also be caught between opposing values—their own and those of their clients.”).

18. IMRE SUTTON, INDIAN LAND TENURE: BIBLIOGRAPHICAL ESSAYS AND A GUIDE TO THE LITERATURE 178 (1975).

19. *See, e.g.*, ADAM SMITH, THE WEALTH OF NATIONS (Bantam Classics 2003) (1776).

20. *See, e.g.*, KARL MARX & FREDERICK ENGLES, THE COMMUNIST MANIFESTO (Bookmark Publications 2003) (1867); KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY (Penguin Books 1992) (1859).

individual ownership as arising out of labor being applied to land.<sup>21</sup> In *Citizen and Subject*, Mahmood Mamdani argues that African Studies needs to go beyond a “history by analogy,” which he describes as the analysis of African society and development in terms of the theories developed to describe other societies (primarily European).<sup>22</sup> The loss of specificity that Mamdani describes results from the imposition of theories derived from foreign perspectives upon groups that have their own unique historical and cultural experiences. In order to get away from the bias towards a particular foreign vantage point, this Essay begins with an analysis of reservation economies and then considers theories in light of reservation experiences, rather than the reverse order—enunciating a theory and molding the facts to fit that theory—which is the norm of economic scholarship.

## I. TRIBAL SITUATION

### A. Demographic

Reservations across the United States form what remains of the Indian land base after 500 years of sometimes gradual, sometimes rapid, land capture by non-Indians. Although there are some exceptions to the rule, Indians were generally left only with land not desired by whites when each reservation was established<sup>23</sup>: “[T]he Indian has always and everywhere been compelled to surrender every desirable place he has occupied to the white man.”<sup>24</sup> Ironically, “having slaughtered the native population as a means to expropriate its land base,”<sup>25</sup> it has been discovered that many tribes now control substantial mineral resources on land originally deemed unacceptable, due to either its remoteness or its limited farming capacity, for Anglo settlement.

The Navajo Nation is the largest Indian reservation. Stretching across Northern Arizona, Northwestern New Mexico, and into Utah, it is roughly the size of West Virginia. The Navajos were among the last tribes to sign a treaty with the U.S. government before Washington ceased negotiating treaties.<sup>26</sup> “The treaty

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21. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 111 (Ian Shapiro ed., Yale Univ. Press 2003) (1690). See also JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 13 (1993) (discussing Robert A. Williams’s scholarship on Locke’s views of Indians and quoting Locke’s statement of the “labor theory of property”).

22. MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM 9–11 (1996).

23. ROBERT A. TRENNERT, JR., ALTERNATIVE TO EXTINCTION: FEDERAL INDIAN POLICY AND THE BEGINNINGS OF THE RESERVATION SYSTEM 1846–1851, at 194 (1975) (noting that reservations were meant to separate Indians from whites and were “not solely an attempt to locate the American native on the most undesirable lands and leave him to rot there.”).

24. Editorial, *The Wards of the Nation*, N.Y. TIMES, May 31, 1875, reprinted in A RACE AT BAY: NEW YORK TIMES EDITORIALS ON “THE INDIAN PROBLEM,” 1860–1900, at 33 (Robert G. Hays ed., 1997).

25. Ward Churchill, *American Indian Lands: The Native Ethic amid Resource Development*, in NATIVE AMERICAN RESURGENCE AND RENEWAL, *supra* note 4, at 205, 205.

26. The Navajo Treaty was concluded in 1868. Washington declared in 1871 that all treaty making was to stop and the United States would use legislation to deal with

provided an initial land base . . . [that] would be more than quadrupled over the next seventy years” through later land grants and purchases.<sup>27</sup> The Navajo Nation experiences seasonal change to a greater extent than Phoenix or Tucson, and occasionally even snow falls. However, this high desert supports only limited vegetation. For the 180,462 people living within its borders,<sup>28</sup> the defining natural characteristic of the land, broken in spots by wooded mesas, is expansive desert. Many non-Navajos experience the Navajo reservation only as a by-product of trips to one of three nearby tourist attractions: (1) the Grand Canyon, just West of the reservation; (2) Monument Valley, within the Nation near the Arizona/Utah border; or (3) Canyon de Chelly, in the center of Navajoland. For someone living near the center of the reservation, until recently, it took a three hour drive to visit a mall or a movie theater, and a six to eight hour drive in different directions to travel to a major airport (either Phoenix, Albuquerque, Denver, or Las Vegas).

### *B. Economic*

Most reservations are areas of relative poverty.<sup>29</sup> A Brookings Institution book, in somewhat offensive terminology, stated that an “Indian reservation can be characterized as an open-air slum. It has a feeling of emptiness and isolation.”<sup>30</sup> Despite this broad statement, some see the expansive landscape as uplifting.<sup>31</sup> Nevertheless, the extent of the poverty, in the midst of the U.S. economy, can be startling for people first visiting a reservation. Nixon, in his noteworthy 1970 Indian policy speech to Congress, began by stating:

The first Americans—the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom.<sup>32</sup>

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treaties from then on. Indian Land Tenure Found., *History of Allotment*, at <http://www.indianlandtenure.org/ILTFallotment/intro/intro1.htm> (last visited July 6, 2004).

27. Peter Iverson, *Introduction* to FOR OUR NAVAJO PEOPLE: DINÉ LETTERS, SPEECHES & PETITIONS 1900–1960, at 3 (Peter Iverson ed., 2002).

28. SUPPORT SERVICE DEP’T, DIV. OF ECON. DEV., THE NAVAJO NATION, DATA FROM CENSUS 2000 1, (extracted by Trib Choudhary, on file with the author and available from the Navajo Nation).

29. I choose to describe it as relative poverty because though on every measure used by the U.S. government for the poverty of U.S. citizens Natives are poor, by other standards Natives do enjoy certain advantages. This point was brought home to me by my father-in-law, who—looking at reservation poverty from the perspective of someone from El Salvador—is not very sympathetic to the hardships of reservation economies.

30. SORKIN, *supra* note 7, at 1.

31. See generally IAN FRAZIER, ON THE REZ (2000) (providing a description of Indian life that goes beyond simply seeing reservations as slums).

32. President Richard M. Nixon, Message to Congress on Indian Affairs (July 8, 1970), reprinted in ALVIN M. JOSEPHY, JR., RED POWER: THE AMERICAN INDIANS’ FIGHT FOR FREEDOM 225 (1971). See also Sam Stanley, *Introduction* to AMERICAN INDIAN ECONOMIC DEVELOPMENT, *supra* note 5, at 1, 2 (“[I]f measured by the criteria for twentieth century economic development, most Indian tribes fall far short of the mark. How is it that a self-reliant, completely competent group of tribal people cannot get above the generally acknowledged poverty level of the United States?”).

In this regard, things have not changed much since Nixon's era.<sup>33</sup> The 1971 Brookings' description of "striking" numbers of people on reservations being unemployed holds true for many tribes.<sup>34</sup> I am not convinced that belaboring the differences in relative hardships between minority groups is a worthwhile exercise, but it is undoubtedly true that many reservation Natives are quite poor. While the academic debate rages concerning the causes, economic and/or social, of African-American centers of poverty,<sup>35</sup> in contrast, most Native-American literature treats the forces behind Indian poverty as important, but as an aside from the larger discussion of the historical wrongs suffered or the unique nature of Indian sovereignty rights.<sup>36</sup>

The Navajo Nation is a relatively poor section of the U.S. the Table below provides a comparison with the general U.S. economy along several lines.

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33. Robert N. Wells, Jr., *Resilience and Revitalization: Native Americans Enter the 21st Century*, in NATIVE AMERICAN RESURGENCE AND RENEWAL, *supra* note 4, at 1, 1 ("By every social indicator, Native Americans are our most disadvantaged minority group. They are also our fastest growing population, with a 38 percent increase in ten years.").

34. SORKIN, *supra* note 7, at 2.

35. The evolution of William Julius Wilson's ideas that comes across from his *The Declining Significance of Race*, *The Truly Disadvantaged* and *When Work Disappears* provides a valuable starting point on this literature. Thomas Sowell's *Ethnic America* and Dinesh D'Souza's *The End of Racism* are good introductions to the conservative perspective on race and economic growth.

36. This focus on the unique rights of Natives leads to the frequent repetition of the fact that "No other minority group in America can claim the sovereign legal and political status traditionally occupied by American Indians." C. Matthew Snipp, *The Changing Political and Economic Status of the American Indians: From Captive Nations to Internal Colonies*, in NATIVE AMERICAN RESURGENCE AND RENEWAL, *supra* note 4, at 371, 371.

TABLE

	Navajo Nation	United States	Notes
Percent of individuals below poverty line	42 <sup>37</sup>	12.4 <sup>38</sup>	2000 Census figures
Percent in labor force of those $\geq$ 16 years old	33.5 <sup>39</sup>	63.9 <sup>40</sup>	2000 Census figures
Percent unemployed	43.65 <sup>41</sup>	4.00 <sup>42</sup>	1999 figures <sup>43</sup>
Percent unemployed reservation Navajos	53.88 <sup>44</sup>	N/A	1999 figures that exclude non-Navajos working on the reservation
Per capita income	\$7,269 <sup>45</sup>	\$21,587 <sup>46</sup>	2000 Census figures

The table shows that a greater fraction of people on the reservation than in the general U.S. economy live in poverty as defined by the U.S. Census. Consequently, whether in the form of a surplus food program that distributes non-perishable food, welfare payments, or any number of income subsidy programs, many Navajos rely heavily on government support.

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37. DATA FROM CENSUS 2000, *supra* note 28, at 1.

38. U.S. DEP'T. OF COMMERCE, CENSUS 2000, POVERTY PROFILE U.S. 3, available at <http://censtats.census.gov/data/US/01000.pdf>.

39. DATA FROM CENSUS 2000, *supra* note 28, at 36.

40. CENSUS 2000, *supra* note 38, at 3.

41. TRIB CHOUDHARY, DIV. OF ECON. DEV., NAVAJO NATION COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGY 2000–2001, at 80 Table No. 15 (on file with the author, available from the Navajo Nation.).

42. *Id.*

43. Note: The Navajo Nation's combination of lack of formal job opportunities and active informal economy means that putting a number on the percent unemployed involves even more arbitrary decisions on who to count and who not to count than it does in the general U.S. population. Consequently, the figures for percent unemployed on the Navajo Nation can vary dramatically, even when analyzed by the same person.

44. CHOUDHARY, *supra* note 41, at 10.

45. CENSUS 2000, *supra* note 38, at 1.

46. *Id.* at 3.

In class terms, the Navajo economy is perhaps most accurately divided into two categories: the lower class consisting of all those without formal sector jobs and the upper class consisting of all those with such jobs. The Navajo Nation has been described as “a mixture of advanced capitalism and a traditional kinship economy.”<sup>47</sup> Within the formal sector there are, of course, divisions: retail service sector jobs at the bottom; tribal and government employees together with teachers making up the middle; and extractive industrial workers (mostly miners) and the few formal sector entrepreneurs at the top. However, a teacher’s salary is enough to make one’s income stand out relative to the rest of the population.<sup>48</sup> Notably, about sixty-seven percent of all Navajo employees “directly or indirectly[[receive] their paychecks from one or another kind of government.”<sup>49</sup> For Native Americans, including the Diné, often government is the “only reliable source of employment opportunity” for “reservation-based, employed Indians.”<sup>50</sup> The bottom group’s numbers are subject to debate, as many people are involved in types of economic activity that are not counted by the Census and are not tied to regular paychecks. Thus, the Navajo Nation can confidently claim that due to the “strong underground economy,” the “actual unemployment rate is overstated.”<sup>51</sup>

Indeed, the informal economy is the most visible, and probably the most important, element of the reservation economy, pervading every aspect of society.<sup>52</sup> When my car broke down in Connecticut, my father towed it back to the reservation because our local mechanic, Jimmy Joe, works for approximately forty dollars per day—roughly the cost of a half-hour of a mechanic’s time off-reservation. Jimmy Joe lives in a traditional hogan and works right out of its door. His shop consists of a simple hole in the ground so he can stand under automobiles. If you give him enough time, he can figure out just about any engine. And his income is never reported. When my step-mother’s cousin-sister<sup>53</sup> finishes

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47. FRANCISCONI, *supra* note 7, at 3. *See also* PHILIP RENO, MOTHER EARTH, FATHER SKY, AND ECONOMIC DEVELOPMENT: NAVAJO RESOURCES AND THEIR USE 2 (1981) (“With poor nations, Indians share the problems arising from a ‘dual economy.’”).

48. As an illustrative but not extraordinary example, my Navajo step-mother is a teacher at a Bureau of Indian Affairs school and as such she makes more than any other of her ten siblings and, as will be discussed in the social section, is responsible for providing a great deal of support to her extended family which relies on her formal sector salary to support more traditional, informal, activities.

49. CHOUDHARY, *supra* note 41, at 10.

50. Miriam R. Jorgensen, *Taking up the Challenge: Fundamental Principles of Economic Development in Indian Country*, in AMERICAN INDIAN STUDIES: AN INTERDISCIPLINARY APPROACH TO CONTEMPORARY ISSUES, 121, 125 (Dane Morrison ed., 1997) (stating that in 1990, across U.S. reservations, almost fifty percent of Indians relied on government employment).

51. CHOUDHARY, *supra* note 41, at 11..

52. The presence of a strong informal economy does not mean that there are not costs to a informal structure as opposed to formal business. *See* JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 157 (Penguin Books 2002) (2002) (“While the flea markets that were established everywhere throughout the country as workers tried to get cash to buy the bare necessities of life gave a semblance of entrepreneurial activity, they masked huge inefficiencies.”).

53. The importance of extended families for Diné has led to the necessity for additional descriptive terms for relations not given identifiers off-reservation. E-mail from

a Navajo rug, she drives over to our house confident of a sale. In return for the rugs, my father pays her and recently built her a new loom. These relationship-based markets are at the heart of the sale of more complex goods within the informal economy. The non-relationship-based informal economy, however, is also visible in the many undocumented market stalls located in the larger reservation cities or on the side of the more traveled roads. Whether you want new Nike sneakers, the latest Rez Girl t-shirt, jewelry, or just some frybread, you can find it through the informal economy.

### C. Social

There is no single description of the social rules, family life, or culture that defines every Indian community, or even members of the same tribe. “Individual tribes show incredible differences[,]” Vine Deloria, Jr., observes.<sup>54</sup> Similarly, Charles Wilkinson notes, “[t]he sheer number of tribes—well over 500 by any count—invites chaos” into attempts to generalize.<sup>55</sup> Nevertheless, much of the Native scholarship (non-Indian and Indian alike) of everyone from anthropologists to lawyers to economists focuses on trying to identify shared social characteristics.<sup>56</sup> Thus, popular culture holds that Indians love the Earth, are not driven by the profit motive, are present-time-oriented,<sup>57</sup> have a deep respect for elders, etc. When I answer questions about where I am from, it is surprising how often I am asked, “do they live in teepees?” or “they drink a lot, don’t they?” Often the central defining thought regarding Indian society is that the Indians were all killed off sometime in the past (probably prior to Tonto or the 1990s romanticism of all things Indian).<sup>58</sup> Because of the sheer number of different tribes and cultures, it is very important to steer clear of clichéd views of Indians and to avoid any description that falsely claims to encapsulate them as a people.

Even within the same tribe, there is not an unqualified set of values that holds true for all tribal members. Generational differences, varying exposure to off-reservation experiences, and multiple personal definitions of community create a virtual minefield for attempts to summarize reservation social life and values. In the same family group there might be a grandparent (or great-grandparent) who was a code talker in WWII and now herds sheep; a parent who was forced to

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Zelma King, Diné College Navajo Language Instructor (June 13, 2004) (on file with author).

54. DELORIA, *supra* note 11, at 21.

55. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 7 (1987).

56. *See, e.g.*, Ruffing, *supra* note 5, at 56 (describing a study of Southwestern tribal characteristics as including “a preference for the group versus the individual, and [sic] emphasis on the present versus the future, a respect for age versus youth, a preference for cooperation versus competition, a choice of nonmaterial versus material goals, a desire to share versus a desire to accumulate wealth”).

57. *See, e.g.*, EDWARD T. HALL, *WEST OF THE THIRTIES: DISCOVERIES AMONG THE NAVAJO AND HOPI* 133 (1994) (explaining “the very real Navajo psychology of time, the importance of the present in their lives”); SORKIN, *supra* note 7, at 95 (“Anthropologists argue that Indians generally have an orientation to the present and not to the future.”).

58. As Jorgensen noted of the mid to late 1990s, “American Indians have become fashionable.” Jorgensen, *supra* note 50, at 128.

attend Bureau of Indian Affairs (BIA) schools off the reservation, has a college education, and works in a professional job; another of the same generation who left the reservation entirely; a child who attends an elite university; and another child working alongside his or her grandparent taking the sheep to winter camp. From these diverse experiences, many different values are ingrained. Yet at a minimum, it is important to sketch the critical social values that affect economic life for at least one tribe, though the characteristics are shared by some other tribes.

Traditionally, Diné life is organized around a matrilineal extended family. “[F]or the majority of Diné, kinship has remained central to economic survival,” both for those living on their traditional grounds and those not living there.<sup>59</sup> Especially away from reservation cities, families are organized in “camps” consisting of several generations related to the head matriarch.<sup>60</sup> Clustered housing—mobile homes, hogans, and/or frame built houses and sheds—ensures that the size of families working, eating, and sharing resources are much larger than those typically found off-reservation. Those family members living apart from their extended family often return during weekends or end up helping out the extended family in a variety of ways: buying the new family truck, helping out with grocery shopping, or taking in the children of relatives when the family determines that children need a different environment. Indeed, it is the degree of support that most surprises non-Navajos who often are more accustomed to nuclear family arrangements. As countless Navajo scholars note, the close kinship ties lessen the effects of reservation poverty by ensuring that those who have resources—monetary or of other types—help out those who do not.<sup>61</sup> Arguably, such mutual assistance is the most important tribal institution related to land.

In times of need, an individual Diné can rely upon assistance from a broad group, and in times of plenty that same person can reliably predict that he or she will be called upon to help out less fortunate family members. As a consequence, distribution of income is actually less pronounced than if the sole criterion was the jobs held by family members. Scarce income or resources can support larger numbers of people, and homelessness is virtually non-existent.<sup>62</sup> Yet

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59. FRANCISCONI, *supra* note 7, at 122.

60. *See, e.g.*, Ruffing, *supra* note 5, at 59 (“The most important social unit of Navajo society, the residence group, is an extended family composed of several households that live in close proximity, share certain basic resources in common, and are usually organized around a matrifocal head.”).

61. *See, e.g.*, Reno, *supra* note 47, at 12 (“Navajo kinship ties, beginning with nuclear and extended family and continuing outward through kinship networks. Mutual aid and reciprocity characterize economic relationships with this network.”); *see also* RICHARD FEINBERG, SOCIAL CHANGE IN A NAVAJO COMMUNITY 17 (1978) (“One point which should emerge . . . is that there are many different groups upon whom an individual may call for support and assistance.”); FRANCISCONI, *supra* note 7, at 122 (“Through kin networks for sharing, although poverty is great, the living standards for most poor Diné have been higher than official statistics would indicate.”).

62. The same generally holds for many tribes. *See* Albert L. Wahrheftig, *Making Do with the Dark Meat: A Report on the Cherokee Indians in Oklahoma*, in AMERICAN INDIAN ECONOMIC DEVELOPMENT, *supra* note 5, at 409, 455 (“Cherokees get by on so little, I am convinced, because at least the system of primary relationships among kin in their

the flip-side<sup>63</sup> of kinship ties is found in the burden such ties place on those who otherwise might have a chance of lifting themselves into a middle class lifestyle: “[B]ecause of the reality of extended kinship ties, an individual finds that any money which he accumulates is not his own. The moral system of kin relationship demands that an individual share with his relatives or be branded as a sell-out to the white man’s way.”<sup>64</sup>

The demands of family members on talented Indians has been likened to “the famous Indian crab story—a bitter anecdote in which crabs at the bottom of a pail pull down one that is about to escape.”<sup>65</sup> The pulling down can be in the form of a resentment of material success when that success is not paired with increased support to the extended family, or in family demands that limit the ability of individuals to obtain their goals.<sup>66</sup> It is impossible to definitively state whether this strong kinship support is an overall economic positive or negative, for such judgment ultimately comes down to balancing equity, efficiency, and culture, and the tools for such balancing are not well developed within the study of economics. Nevertheless, the extended family social system is a crucial element for understanding Diné life and hence for framing policy recommendations or analysis.

#### ***D. Legal Political***

Indian governments possess semi-sovereign powers that cannot be appropriately likened to the powers of either state governments (such as Arizona or Connecticut) or foreign nations. In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), influential Supreme Court Justice John Marshall described tribes as “domestic dependent nations,” a description seeking to encapsulate the complex relationship between these sovereign entities and the overarching sovereign, the United States.<sup>67</sup> In a passage identified by Williams, Wilkinson, and Getches as being

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settlements is still intact . . . . So long as these person-to-person relationships do not break down, the Cherokees are not so poor as they might be.

In the old Cherokee nation, lands were communally owned; today Cherokee settlements still function as though this were the case, even though the United States has since allotted Cherokee lands to individual Cherokees, and relatives sometimes quarrel bitterly over inheritance. Even so, no Cherokee will deny another a place to live.”)

63. This ‘flip side’ is also noted by Francisconi in a passage strikingly similar to the connection between homelessness and sharing which I describe in this and the previous sentence. The similarity was unintentional and discovered after my rough draft was written. FRANCISCONI, *supra* note 7, at 147 (“Because of kinship, there is . . . little or no homelessness among the Diné on the reservation. On the other side of the story, kinship often acts as a disincentive to wage employment because of the obligation to share.”).

64. De Mallie, *supra* note 11, at 298. Similarly, Francisconi quotes an unidentified Diné interviewee as saying, “everytime we get ahead somebody needs a loan.” FRANCISCONI, *supra* note 7, at 88.

65. Cohen, *supra* note 4, at 348.

66. See FEINBERG, *supra* note 61, at 72 (“Emphasis is placed by the Navajo upon material wealth, but this is only approved when coupled with the utmost generosity. One of the things that most impressed me about the Navajos I actually met, despite their dire poverty by white American standards, was their phenomenal generosity and hospitality.”).

67. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

“without question, the single most influential passage ever written by an Indian law scholar,”<sup>68</sup> Felix Cohen wrote of sovereignty:

From the earliest years of the Republic the Indian tribes have been recognized as “distinct, independent, and political communities,” and, as such, qualified to exercise powers of self-government, not by any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty.<sup>69</sup>

A long line of U.S. Supreme Court precedent holds that by virtue of the discovery doctrine—a doctrine providing that European powers encountering “savage” lands have the right to establish their laws over the people and their land<sup>70</sup>—tribal sovereignty can be abrogated through the unilateral plenary power of Congress. However, in the absence of clear congressional assertion of U.S. authority over an element of sovereignty that would otherwise belong with a tribe, tribes retain control over that element and all other non-asserted sovereign power. Thus, the United States has long recognized, at least theoretically, the inherent sovereignty of Indian tribes.

As *domestic dependent nations*, tribal control over reservation land is subject to duplicative, and at times overriding, control of the same lands by the United States government. The BIA within the Department of the Interior is tasked with most of the oversight, program responsibility, and welfare responsibilities that the U.S. government has for tribal members and tribal lands. Reservation “land is held in trust for the tribe jointly by the Tribal Government and the U.S. Department of Interior,” meaning that tribal land is inalienable<sup>71</sup> and presently requires both tribal and BIA approval for permission to use or develop it.<sup>72</sup> Part of the explanation for the land’s status as trust land can be found in the cyclical nature of federal Indian policy. From the arrival of settlers to present day,<sup>73</sup> tribes have faced pressure from outside interests to give up their land, or have had their land taken. Initially, land was taken through Indian wars or treaties in which tribes gave up a portion of their land for guarantees of protection for their remaining land. Since the Civil War, express U.S. policy rhetorically has aimed to help Indians, but in practice has succeeded in removing even more land from tribal control.

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68. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 201 (West Publ’g Co. 4th ed. 1998).

69. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 123 (1941).

70. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 308–17 (1990).

71. Of the inalienability of land, Stanley notes, “[t]he right to dispose freely of land, except to the United States, became the first sovereign power removed from Indian tribes by judicial opinion.” Stanley, *supra* note 8, at 589.

72. FRANCISCONI, *supra* note 7, at 91.

73. The Mary and Carrie Dann case of U.S. government land seizure from two Western Shoshone ranchers, reported on by Amnesty International and the Inter-American Commission on Human Rights, is a powerful reminder of the continuing taking of land. See Indian Law Resource Center Project, *available at* [http://www.indianlaw.org/western\\_shoshone\\_page.html](http://www.indianlaw.org/western_shoshone_page.html).

*1. Allotment*

Allotment of tribal lands from 1887 to 1934 conferred ownership of private farming plots on individual tribal members, but it shrunk the tribal landholdings “from 138 million to 52 million acres” and left most tribes and tribal members worse off.<sup>74</sup> Rhetorically, allotment attempted to foster economic activity on reservations by allowing competent Indians the chance to become the epitome of idealized U.S. labor—the family farmer. The government recognized that some Indians would not make use of their land in this way, but even for them, the U.S. justified allotment on the premise that the ability to lease the land to white farmers, who were more familiar with farming and had greater access to capital, would improve the situation on reservations by providing needed income to tribal members.<sup>75</sup> Behind the allotment policy, three related factors drove the push towards individual ownership for tribal members: a normative belief in Locke’s view of the relationship between land and labor; a desire to solve the “Indian problem” by ridding Indians of their tribal affiliations; and pressure from non-Indians to “free-up” tribal land for white ranchers, farmers, and mining interests.<sup>76</sup>

John Locke’s idea that the right to property is derived from labor applied to land provided a justification for the taking of Indian land.<sup>77</sup> White Americans believed that Indians did not properly utilize land—by which they meant Indians did not farm the land:

The progressive doctrine of self-support became a tool to justify dispossession. In an age obsessed with economic and industrial progress, policymakers and administrators concluded that the Indians had to use their land according to white standards of productivity or surrender it.<sup>78</sup>

Theorizing that Indians still lived in his idealized state of nature, Locke felt that “the things of nature removed from their natural state by human effort become an individual’s property by virtue of combining labor with those natural goods.”<sup>79</sup> Robert A. Williams, Jr., who has written extensively on the theoretical and colonial roots of federal Indian policy, writes: “Locke’s discourse thus legitimated the appropriation of the American wilderness as a right, and even as an imperative, under natural law.”<sup>80</sup> Under the Dawes Act, the legislation enabling allotment, tribal lands were divided among tribal members with the stated intention of changing control of the land from tribal, or common, ownership to the “better”

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74. WILKINSON, *supra* note 55, at 8–9.

75. John H. Leavitt, Note, *Hodel v. Irving: The Supreme Court’s Emerging Takings Analysis—A Question of How Many Pumpkin Seeds Per Acre*, 18 ENVTL. L. 597, 611 (1988).

76. See discussion developed in the following three paragraphs.

77. WILLIAMS, JR., *supra* note 70, at 247.

78. JANET A. MCDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN 1887–1934*, at 124 (1991).

79. WILLIAMS, JR., *supra* note 70, at 247.

80. *Id.* at 248.

system of individual ownership.<sup>81</sup> The U.S. government furthered Locke's theory of natural law during allotment both by hiring white farmers to demonstrate farming techniques for tribal members and by irrigating vast sections of tribal land.

The division of reservations into fee simple plots was intended not only to make sure more of the tribal land was "worked" through agricultural production, but also to assimilate Indians into mainstream America. Deloria captured the related nature of these two ideas, noting that "[p]ractically all subsequent legislation [to the Act of 1819 granting the U.S. President the powers to 'civilize' tribes] has revolved around the Congressional desire to make Indians into white farmers."<sup>82</sup> The Commissioner of Indian Affairs from 1897 to 1904, William Jones believed:

[T]he allotment system was the "solution of the Indian problem" . . . . By establishing individual homesteads it fostered in the Indian a regard for family, he reasoned, and by making each allottee a citizen it sought to replace tribal allegiance with allegiance to the federal government.<sup>83</sup>

President Theodore Roosevelt was even more explicit when he said that allotment was "a mighty pulverizing engine to break up the tribal mass."<sup>84</sup> Indians who passed competency hearings, with an education and a percentage of non-Indian blood as evidence of competency, were supposed to be "given complete control of their property . . . so that they could shape their own destinies."<sup>85</sup> Often Indians received both citizenship and their allotment in the same act. Even where the policy was clearly causing hardship (often Indians who had gotten land quickly

81. See Trosper, *supra* note 9, at 209 ("Open-access resources become more interesting—and more difficult to describe—when one considers the (apparently) different attitudes towards private property that existed in Indian and non-Indian societies. In the frontier setting, Indian leaders claimed that all property was owned by the nation rather than by individuals. This claim made it possible to limit the cession of land by individual Indians to Europeans. It also, however, distorted the perception of Indian property rights systems. Indians, holding their land "in common," were seen to regulate it with a system less desirable than the European private property system. As the European ideology took hold, it allowed the allotment policy to be justified as benefiting Indians, when in fact it did not.")

82. DELORIA, *supra* note 11, at 45. See, e.g., *id.* at 46 ("The basic idea of the Allotment Act was to make the Indian conform to the social and economic structure of rural America by vesting him with private property."). See also Vine Deloria, Jr., *The Lummi Indian Community: The Fishermen of the Pacific Northwest*, in AMERICAN INDIAN ECONOMIC DEVELOPMENT, *supra* note 5, at 87, 88 ("Adjustments of property and property rights were seen by government officials as motivating factors in changing Indians from a savage and unhappy state to an economic status that exemplified, in the philosophy of white American society, the progressive refinement of civilization."); Raymond Cross, *Tribes as Rich Nations*, 79 OR. L. REV. 893, 908 (2000) ("The avowed goal of Indian allotment was the destruction of both tribes and tribalism.")

83. MCDONNELL, *supra* note 78, at 6.

84. President Theodore Roosevelt, First Annual Message (Dec. 3, 1901) reprinted in 15 MESSAGES & PAPERS OF THE PRESIDENTS 6672 (1901), available at [http://www.digitalhistory.uh.edu/native\\_voices/voices\\_display.cfm?id=92](http://www.digitalhistory.uh.edu/native_voices/voices_display.cfm?id=92) (last visited July 6, 2004).

85. MCDONNELL, *supra* note 78, at 104.

sold it to white land speculators and became worse off than before allotment), the policy was pushed as a sort of “tough love,” forcing Indians to become industrious and more assimilated.

Allotment’s final motivating factor, and the one that, judging *ex post*, was of the greatest importance, was the demands of non-Indians to have reservation access. “As a practical matter, the only goal that allotment achieved was that it transferred millions of acres of Indian lands to non-Indians.”<sup>86</sup> The Dawes Act at first allotted land, but it did not allow alienation of the land by the allottee Indian until a twenty-five year period had passed from the allotment so that the Indian would have an opportunity to learn how to farm before deciding whether or not to sell.<sup>87</sup> Modifications to the Dawes Act that lessened the time required before land could be sold or encumbered<sup>88</sup> or that allowed the sale of land to help the infirm,<sup>89</sup> however, allowed greater access by non-Indians to allotted land. Responding to pressure from white ranchers and farmers to open up more land,<sup>90</sup> Indian Affairs officials expanded the definitions of who could sell land and often allowed premature sales in contravention of their duties to look over the land for the twenty-five year period.<sup>91</sup> In addition, the Act contained a provision that made the underlying desire to give the land to non-Indians much more apparent: after all of the Indians on a particular reservation had been allotted their due number of acres, the “surplus” land became available for public purchase.<sup>92</sup> By disposing of land identified as surplus, the tribes affected by the surplus land determination suffered a U.S. government violation of the treaty terms related to the size of the reservation that those tribes had negotiated for with the United States.<sup>93</sup> Tribes promised a set amount of acreage found themselves dispossessed of their land. Thus, through direct and indirect means, the allotment policy pushed Indian land into white hands.

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86. Cross, *supra* note 82, at 912.

87. An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations (Dawes Act), ch. 119, § 5, 24 Stat. 388, 389 (1887), *available at* <http://www.csusm.edu/nadp/a1887.htm>.

88. An Act to Amend Section Six of an Act Approved February Eighth, Eighteen Hundred and Eighty-Seven (Burke Act), ch. 2348, 34 Stat. 182–83 (1906), *available at* <http://www.csusm.edu/nadp/a1906.htm>.

89. An Act to Provide for Determining the Heirs of Deceased Indians, for the Disposition and Sale of Allotments of Deceased Indians, for the Leasing of Allotments, and for Other Purposes, ch. 431, 36 Stat. 855–63 (1910), *available at* <http://www.csusm.edu/nadp/a1910.htm>.

90. Deloria notes that “[b]ecause the Indians did not ‘use’ their lands, argued many land promoters, the lands should be taken away and given to people who knew what to do with them.” DELORIA, *supra* note 11, at 10.

91. MCDONNELL, *supra* note 78, at 5 (“The maladministration of Indian lands by federal officials was a major factor contributing to the disintegration of the Indian estate.”).

92. Dawes Act § 5.

93. The power of Congress to abrogate treaties by selling land as a by-product of allotment was affirmed by the U.S. Supreme Court in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (justifying the Congressional right to violate treaty terms as being part of plenary power over Indians).

## 2. Policy Shifts

While Native American history post-“discovery” can be defined primarily in terms of land and population loss at the hands of the growing non-Indian population and government, allotment is particularly important when thinking about present possibilities for economic growth involving tribal land. Although debate exists on how the historical treatment of tribes should be understood, generally “commentators liken the federal-Indian relationship to a pendulum that has shifted back and forth between attempts to annihilate tribes during certain periods of time and attempts to support tribal self-government and autonomy at other times.”<sup>94</sup> The “cyclic” nature of Indian policy, oscillating between assimilation and separation as the solution to the “Indian problem,”<sup>95</sup> has led to swings between supporting at least some version of a tribal land base (treaty-based reservations, the Indian New Deal and IRA status, and the post-Nixon self-determination period) and attempting to seize tribal land (the Indian wars, removal, allotment, and termination). At times separatism and isolation coexist: reservations as the mass policy tool, separating Indians from Anglos, was first advocated in 1848 even though the then-Commissioner of Indian Affairs, William Medill, believed in “assimilation as the ultimate solution to the Indian problem.”<sup>96</sup> Yet of these periods, the allotment era, at least in theory, was most directly aimed at bettering the living conditions of tribal members by altering the reservation land rights regime. Allotment granted tribal members full individual ownership rights over property based on assumptions that “equated private land ownership with enterprise and achievement.”<sup>97</sup> Ultimately, economic self-sufficiency and a higher quality of life for tribal allottees failed to materialize. Instead, from the economic standpoint of tribes and individual tribal members, the policy was a failure—it did not increase the welfare of tribes, and only a few individual tribal members benefited.<sup>98</sup>

Even though the Navajo Nation did not suffer through allotment, the effects of allotment still pervade the present tribal-United States relationship. At the time when allotment was being considered for the Navajo reservation, the then-Commissioner of Indian Affairs, Cato Sells, “refused to break up the large reservations in the arid Southwest because tribes such as the Navajo had to live communally to survive.”<sup>99</sup> It is ironic that at the same time that the allotment policy was proceeding under assumptions regarding the inherent benefits of private ownership, the Commissioner of Indian Affairs recognized the possibility that tribes could benefit from communal land rights. The sheer size of the Navajo

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94. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIANS AND TRIBAL RIGHTS* 4 (3d ed. 2002).

95. WILKINSON, *supra* note 55, at 13. The changing power of reformers advocating assimilationist and self-determination perspectives has meant that “[r]esulting U.S. policy has been inconsistent and, in turn, relatively ineffective at improving Natives’ welfare.” Jorgensen, *supra* note 50, at 124.

96. TRENNERT, *supra* note 23, at 31.

97. JAMES J. LOPACH ET AL., *TRIBAL GOVERNMENT TODAY: POLITICS ON MONTANA INDIAN RESERVATIONS* 17–18 (1998).

98. It did benefit white America.

99. MCDONNELL, *supra* note 78, at 8.

Nation's land relative to the land holdings of other tribes reflects the fact that the Diné were lucky not to be a part of the government's allotment policies. Yet within both U.S. and tribal leadership, the memory of such a dramatic decline in the amount of tribal land following the creation of private property holdings plays an important role in defining the range of property rights regimes considered acceptable today. Tribal members and leaders avoid doing anything that places the land in jeopardy or has the appearance of doing so. "[T]here is nothing more revered nor more loved by the Navajos than the land they call Dinetah," and out of justified fear, tribal leaders are reluctant to explore alternative land regimes.<sup>100</sup> Similarly, the oversight of reservation land, by both tribes and the federal government, tends to be highly bureaucratic with severe and time-consuming checks on any proposal to alter the rights over a piece of trust land.<sup>101</sup>

In order to secure the right to conduct formal business activity on trust land, a business or entrepreneur must go through a whole series of government hoops. Furthermore, the outcome of this process cannot be safely predicted in advance:

Land can be obtained for a business site through procedures prescribed by the Tribe and the BIA. An applicant for land on which to establish a business must first obtain the approval of the chapter grazing committee and the consent of the recognized user. These approvals obtained, he must work through a series of further approvals by BIA, PHS, and tribal offices, covering various aspects of environmental protection, business feasibility, legal compliance, and land use. The Advisory Committee of the Tribal Council gives the final tribal approval to these leases for land use; in addition, BIA approval is required on all land transactions.

This process is lengthy and the applicant is beset with delays and frustrations. The procedure is therefore an effective restraint on business development.<sup>102</sup>

It is difficult to precisely establish the number of steps required because multiple visits are often needed to the same office; indeed, one may have to return to an office even though that office had previously granted approval. The delays enable continual reexamination of proposals, and the resulting uncertainty of the final outcome besets the entire process.<sup>103</sup>

Crucially, it is not simply BIA procedures, but tribal ones as well that hinder tribal development:

[One] analysis of Navajo economy inferred that clumsy procedures for making tribal lands available under lease have served to discourage indigenous economic development on the reservation.

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100. RAYMOND FRIDAY LOCKE, *THE BOOK OF THE NAVAJO* 5 (1989).

101. RENO, *supra* note 47, at 17 ("United States trusteeship protected Navajo land from white appropriation, but also imposed bureaucratic barriers to resource development.")

102. *Id.* at 21.

103. For a lengthy treatment of this process citing twenty steps, the nature of use rights, and meaning of trust status, see FRANCISCONI, *supra* note 7, at 91-92.

All leasing, for example, is arranged between private parties and the Navajo Tribal Council, and considerable delays normally occur; even individual Navajos must themselves follow these procedures in order to lease tribal land for business ventures.<sup>104</sup>

Similarly, former Navajo Nation Chairman Peter MacDonald provides insight:

In the past, our system of families, clans, and tribal concerns required business owners to obtain from 50 to more than 125 separate permits before they could begin operating. This was so time-consuming that moments of opportunity would pass, and start-up capital would be depleted. By simplifying such procedures to approach the way they existed in American society at large, we would ensure faster, safer start-ups.<sup>105</sup>

Not surprisingly, the lengthy, labor intensive, and legalistic nature of obtaining permission to use land—caused by both tribes and the U.S. government—discourages<sup>106</sup> the establishment of all but the largest and least risky of businesses.

Formal business development in this constrained bureaucratic environment will only take place where the profits from such business activity are guaranteed or have a high enough profit margin. Not surprisingly, the largest scale businesses and the most profitable (aside from businesses relying upon reservation tax advantages or tribal sovereign status to offer goods not available off-reservation)<sup>107</sup> are the extractive industries found on many reservations. Thus “the

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104. SUTTON, *supra* note 18, at 83–84. See also FRANCISCONI, *supra* note 7, at 8 (“Because unemployment remains high and because of restrictions placed on local business by the tribal government, there are few opportunities for a Diné entrepreneur to develop an on-reservation business. Thus the informal economy has greatly expanded.”).

105. MACDONALD, *supra* note 3, at 270.

106. Whether such “discouragement” is active or merely the result of the process is subject to debate. In the tribal context, I argue, in Section III.B.1. (Navajo Interest Groups), that it is active on the part of certain tribal groups. Francisconi claims the opposite: “[t]he reality that the Navajo Government openly encourages Diné owned businesses is undermined by the fact that few have been successful.” FRANCISCONI, *supra* note 7, at 91. However, this very sentence’s internal contradiction illuminates the potential for active discouragement.

107. The importance of these businesses is not to be denied. For many tribes, particularly smaller ones near big cities, these businesses—most dramatically casinos—have changed areas of tribal poverty to areas of affluence, in general and for particular tribal members. Fred Ragsdale asks, “how will an economic base be built on a reservation? As has occurred, it will probably be through tax holidays, attractive land leases, bingo, horse racing, cheapened natural resources, and cheaper labor, all manipulations of government which shift existing resources but which fail to create new wealth.” Fred L. Ragsdale, Jr., *The Deception of Geography*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY, *supra* note 16, at 63, 79.

This sort of business is the type receiving the most off-reservation media and popular attention by those who feel tribal opportunities—casinos, untaxed cigarette and gas sales, etc.—not available to off-reservation businesses are unfair. As was noted by *National Geographic*, “Some powerful lawmakers, focused on casinos seem to think that every Indian in the country is getting rich—even the Oklahoma Cherokee, who earn just 3 percent of their income from bingo parlors and casinos, or the Hopi, who have shied away from

BIA has consistently favored one method of exploiting Navajo resources—leasing resources to non-Indians.<sup>108</sup> This statement, though written about the Navajos, is true across many reservations.<sup>109</sup> The complications in securing land use rights provide sound economic reasons for such a trend. For example, extraction leases are frequently long-term and involve substantial fixed costs, making the costs of the process for securing land rights relatively insignificant. For a tribe and tribal leaders, a large extraction lease can bring significant funds into the tribal government and provide needed employment (even where the royalties received are below market rates). For U.S. officials, the powerful companies that anticipate high returns for the use of tribal natural resources go to great lengths to ensure that the government caters to them with practices—campaign contributions and a swinging door between politics and business—that border on illegality.<sup>110</sup>

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gaming.” Joseph Bruchac, *Indian, Scenes from a Renaissance: Countering Centuries of Oppression and Neglect, American Indians Travel the Road to Renewal*, NAT’L GEOGRAPHIC, Sept. 2004, 76, 93. Yet, even the presence of such industries may reflect more about the U.S. role in limiting traditional industries than it does the unique opportunities available to tribal businesses:

A ‘rational’ reservation entrepreneur would tend to avoid investing in land, structures, minerals, or timber and concentrate on activities over which the federal government has a minimum of control. This may explain the prevalence and success of a number of ‘fugitive’ retail enterprises, such as discounting fireworks, liquor, and tobacco products on reservations today. These high-turnover, low entry-cost businesses depend on disputed forms of tax relief and may seem extremely competitive and risky, but they probably involve a great deal less capital risk than activities which depend on reservation real estate or fixed structures.

Russel Lawrence Barsh, *Indian Resources and the National Economy: Business Cycles and Policy Curves*, 16 POL’Y STUD. J. 799 (1988), reprinted in NATIVE AMERICANS AND PUBLIC POLICY, *supra* note 12, at 215–16. For more on Indian casinos, see Eve Darian-Smith, *New Capitalists: Law, Politics, and Identity Surrounding Casino Gaming on Native American Land* (2004) and W. Dale Mason, *Indian Gaming: Tribal Sovereignty and American Politics* (2000). Additionally, the Institute for the Study of Tribal Gaming Law and Policy, part of the University of North Dakota’s Northern Plains Indian Law Center, is a valuable source. Information is available at <http://www.law.und.nodak.edu/NPILC/tglpi.html>.

108. KATHLEEN P. CHAMBERLAIN, UNDER SACRED GROUND: A HISTORY OF NAVAJO OIL, 1922–1982, at 113 (2000) (quoting and expressing approval of Lorraine Turner Ruffing’s description of BIA policy). *See, e.g.*, Ruffing, *supra* note 5, at 31 (“Having ultimate control, the BIA has consistently favored one method of exploitation of Indian resources, and that is, to lease them to non-Indians. The BIA had chosen this option because they felt that Indians lacked the skill and capital to properly develop their resources.”).

109. As Trosper notes, generally “[n]eighboring non-Indians use Indian resources and pay below-market rates . . . .” Trosper, *supra* note 9, at 219.

110. This borderline illegality in obtaining favorable assistance with leasing tribal land from the U.S. government is very evident from the record of *Navajo Nation v. United States*. *See* Ezra Rosser, *The Trade-off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. (forthcoming Spring 2005). Such exceptionally favorable leases it has been argued are “tantamount to alienation, for little can be done until the lease runs its course.” SUTTON, *supra* note 18, at 133.

When considering tribal economic development in light of the possibilities contained in land regime changes, the focus properly should center upon entrepreneurial activity of a scale responsive to the changes in the underlying property regime. Thus, this land regime based discussion is primarily interested in commercial or light industrial development,<sup>111</sup> and is less concerned with the large extractive industries. The focus on economic development of the sort not found on reservations—commercial and non-resource-driven industrial—also reflects an awareness of the advantages associated with such development.<sup>112</sup> As Robert Miller notes in his article *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*:

Increasing the scope of business activity on reservations by diversifying tribal economies with a variety of private businesses will be a good step towards providing reliable economic growth in Indian country for tribal citizens. A diversified economy of small and large tribal and private businesses is more recession proof and will give needed economic stability to reservations.<sup>113</sup>

This lack of development diversity is primarily a result of uncertainty, costliness, and risk management problems associated with the current nature of trust land regulation and control. Uncertainty exists because entrepreneurs encounter a form of land ownership that is not in accord with the dominant, and thus more familiar, form of ownership found off-reservation. Such development is costly because of the inefficient and non-systematized bureaucracy—tribal and U.S.—that handles trust land. Finally, the current nature of tribal land regulation causes problems from a risk management perspective because of the non-alienability of trust land.

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111. See Ruffing, *supra* note 5, at 79 (“Creating entrepreneurs will be difficult, but there is room in the Navajo economy for their ventures, especially in the commercial sector. Still, a development strategy should not depend on them, even in the long run.”).

112. Commercial sector based development is not uniformly advocated as the priority for development, such for example was the perspective of the 1981 tribal planner for the Navajo Nation Division of Economic Development. See Al Henderson, *Introduction to RENO*, *supra* note 47, at xv (“The Navajo are undergoing ever more rapid change; their natural resource endowment holds the key to lead them out of poverty.”). However, the question here is whether economic development would most be aided by land regime changes in resource areas or in commercial/light-industrial ones.

113. Robert Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 832 (2001). See also Vicki Page, *Reservation Development in the United States: Peripherality in the Core*, in NATIVE AMERICAN RESURGENCE AND RENEWAL, *supra* note 4, at 354, 363 (“[B]y building a commercial infrastructure to keep more dollars circulating on the reservation, tribes could create a diversified and self-sufficient economy.”). The very influential Meriam Report also contains an indirect call for diversity—“enrichment”—of existing tribal enterprises through Indian art. INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 125 (1928) [The Meriam Report], available at [http://www.alaskool.org/native\\_ed/research\\_reports/Indian\\_Admin/Indian\\_Admin\\_Problms.html](http://www.alaskool.org/native_ed/research_reports/Indian_Admin/Indian_Admin_Problms.html). (“The survey staff has been impressed by the possibilities of the development of native Indian art and its application as an enrichment to our industry.”).

## II. NEO-CLASSICAL POSSIBILITIES

*It had been clear by the 1930s that the Navajo could no longer live by sheep alone.*<sup>114</sup>

Moving from the descriptive found in Part I, Part II explores the possibilities for land regime based economic development using a neo-classical economics perspective. This Part examines the benefits a neo-classical economist would find in a land market, or in the case of reservations, as close an approximation to a land market as is feasible. Part II.A begins by showing how tying user rights to individual plots of land can lead to growth, and demonstrates the form such clear user rights might take on reservations. Part II.B presents policies that, even in the context of non-alienability of land, could lead to increased land-backed lending for business and economic development. Finally, Part II.C analyzes the market's power to assure that land is held and used by the party who will make the most productive use of the land, and evaluates the reservation policies that might help ensure the existence of such an efficient market.

For a neo-classical economist,<sup>115</sup> creating working markets through land regime change is the means by which the land regime might enable or lead to economic growth. The neo-classical message might be summarized as “markets work.” From this point of view, the role of government and of legal systems is to

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114. RENO, *supra* note 47, at 29 (internal quotation omitted).

115. There is no single economist whose work defines neo-classical economics, nor is there a set of economists universally accepted as the developers and contributors to neo-classical economics. Rather, neo-classical economics is the economics taught in all American undergraduate economics programs and forms the core of most graduate programs as well. Most writing in economics—whether in the *Wall Street Journal*, *Newsweek*, or in academic journals—is in line with the neo-classical paradigm. Neo-classical assumptions therefore are rarely attributed, for the dominance of the theory means that the neo-classical assumptions are accepted, background assumptions for the scholar or journalist. Thus, the easiest way to understand neo-classical economics is to read any of a number of standard economics textbooks, for while individual authors may have their own take on particular points, neo-classical economics is at the heart of the overall text. *See generally*, e.g., KARL E. CASE & RAY C. FAIR, *PRINCIPLES OF ECONOMICS* (7th ed. 2004); PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* (18th ed. 2004). To some neo-classical economics represents a continuation of the work of “classical” economists Adam Smith, David Ricardo, and Irving Fisher. Others view neo-classical economics as walking along the path with regard to certain but not all elements, politics for example is marginalized, of the classical economists. William Jevons, Carl Menger, and Leon Walras are said to have been founders of neo-classical economics. Alfred Marshall's textbook in 1890 led to imperfect market work of Joan Robinson and Edward Chamberlain. Economists Pareto, Hicks, and Hayek helped developed general equilibrium theory. Finally, while the Frank H. Knight and the “Chicago School,” and more acutely Milton Friedman and the Monetarists, added slight variations and had different beliefs in some areas, their work also is reflective of the general neo-classical perspective. *See generally*, e.g., HARRY LANDRETH & DAVID C. COLANDER, *HISTORY OF ECONOMIC THOUGHT* (4th ed. 2002); LIONEL ROBBINS, *A HISTORY OF ECONOMIC THOUGHT: THE LSE LECTURES* (2000).

facilitate the workings of Smith's invisible hand.<sup>116</sup> Market allocation of rights encourages movement of property to those best able to make use of such resources; consequently, the economy expands. Neo-classical economists do not deny the possibility of market failures or even that there is a role for the state; rather, they simply make their primary focus the positive benefits of the market and the market's power to allow efficiency gains. Though acknowledging equity and justice arguments, the neo-classical approach ultimately responds to such arguments in a round-about fashion: efficiency gains indirectly lead to better distributions of property because efficiency gains create more property or income to be shared. To the neo-classical economist, what matters most is the size of the pie and not the relative sizes of each slice of pie. Such concerns are best dealt with, if at all, through tax redistribution policies.

Throughout U.S. colleges and universities, neo-classical economics is practically all that is taught in undergraduate courses, forming the basis of the majority of both public policy and popular prejudices regarding the ideal nature of the market. As Roberto M. Unger frequently points out, however, it is wrong to posit a singular notion of a market, for markets come in various forms.<sup>117</sup> In other words, when economists speak of the market as if there is a single form of a market, they are simplifying a multitude of complex relationships and institutions that are not uniform across space and time. Thus, to understand the neo-classical approach to reservation land economics, it is important to first describe the general framework within which the approach's idealized market is meant to operate.

The quintessential perfected neo-classical market is the stock market. Indeed, most thinking on the stock market begins with assumptions of perfect information, perfect pricing, and low transaction costs. If all of the assumptions are in fact accurate, investors cannot beat such a market. As *A Random Walk Down Wall Street* demonstrates, this perspective does have some merit.<sup>118</sup> This view of the stock market contains neither discussion of the many social, legal, and quasi-governmental rules that govern this perfected market, nor recognition of the dependency this and every other market has with these rules.<sup>119</sup> This is not to fault

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116. This point-of-view was championed by Reagan's leadership. "In his 1983 Statement on Indian Policy, President Reagan stated that the answer to the tribes' economic woes lay in the free market." Mark Allen, *Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self-Determination*, in *NATIVE AMERICAN RESURGENCE AND RENEWAL*, *supra* note 4, at 150, 169 (citing Statement by President Reagan, Indian Policy (Jan. 24, 1983)).

117. ROBERTO M. UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* (1998).

118. See generally BURTON G. MALKIEL, *A RANDOM WALK DOWN WALL STREET* (8th ed. 2003). However, the rules regarding who has access to IPO shares, the difficulties caused by insider trading and insider information—made popular by Charlie Sheen in the movie *Wall Street* and by Martha Stewart's ImClone stock sale—and the accounting scandals of the last few years show the counter-argument: that only on its surface is the stock market the perfected market.

119. Bruce Ackerman and Anne Alstott's *The Stakeholder Society* forcefully makes the point that an equitable right to accumulated resources that would allow everyone the ability to compete is required in order to justify and even perpetuate these rules. See generally BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999).

the neo-classical approach, for it is precisely by limiting its perspective to an idealized version of the market that the approach is able to generate its logically sound, often persuasive, models and related policy prescriptions.

A neo-classical economist looking at the current reservation land regime—non-alienable trust land with limited individual control subject to severe bureaucratic checks and costs—feels that he or she instinctively knows the roots of the economic development problem and the related solutions. Reservations have “no market for land,”<sup>120</sup> and thus development cannot take place. A market for land is important for business development because: it guarantees against risk by establishing clear user rights within the bounds of the property; it allows business development through capital loans guaranteed by the land; and it ensures land allocation to the best user by pushing land use to its most valuable/efficient use. Although other reasons could be added to this list, for empirical support the neo-classical economist can simply contrast reservation poverty and lack of development with the experiences found off-reservation, such as in the border towns. An unapologetic neo-classicist would state that by ensuring land was used productively and valued according to the possible profit, allotment was a good policy.

For neo-classical economists who accept that land will not be individually alienable, the solution to economic problems on reservations is to establish land regimes that, given this constraint, do the best job approximating a true market for land. Thus, neoclassical economists would recommend various mechanisms to compensate for the imperfections and complications caused by the trust land status in an effort to fulfill the three previously identified reasons why a market for land is important.

#### *A. Clear User Rights Related to Individual Plots of Land*

Land regimes that provide individuals full information in advance of development, and that ensure such rights are considered personal to the land user, enhance clear user rights. Property rights “help a man form those expectations which he can reasonably hold in his dealings with others.”<sup>121</sup> Given the non-alienability of land, the proposal does not necessarily have to include land ownership, but merely a more full delineation of land use rights and the protection of those rights. That reservation trust lands cannot be individually owned does not mean that lands do not have associated use rights, nor does it mean that tribes do not recognize priority in rights to claim the use of land.<sup>122</sup> Thus, a land regime that

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120. FRANCISCONI, *supra* note 7, at 92 (basing this conclusion on the description of this as an impediment to Navajo business growth in Daniel C. Shaffer, *Navajo Business Incubator Feasibility Study: Final Report* (1993)).

121. Harold Demsetz, *Toward a Theory of Property Rights*, AM. ECON. REV., May 1967, 347, 347.

122. See, e.g., Ruffing, *supra* note 5, at 16 (“Navajos believe that individuals do not ‘own’ land, they merely enjoy ‘use’ rights . . .”). An example of this on the Navajo Nation is provided through two illustrative anecdotes. The Red Valley/Cove area, where I am from, has been allocated funds to establish a new high school. Currently students after middle school are bussed an hour each way to attend the nearest, though distant, high school. Area residents applaud this new school as necessary for the community. However,

allows individuals the greatest scope of permissible activity within the land over which they enjoy a use right, or alternatively a very complete set of regulations stating in advance the land use rights associated with given plots of land, would aid in development.

Regulations that both limit and define use rights, for a neo-classical economist, *a priori* are not necessarily inferior to the expansion of user rights. The off-reservation bundle of property rights, even for land held in fee simple, sees the state controlling many of the sticks. Thus, plots often are zoned residential, commercial, or industrial; the state denies landowners the right to use land for certain activities and can even dictate less general parameters, such as the building set-back, the compliance with environmental, disability, safety, and other regulations; and finally, the state holds the ultimate power through compensable takings to determine use. Given the advantages possible through clustered, similar land uses, the full expansion of user rights over all land is not necessary in order to encourage a land market. It is important, however, that some subset of the land is available for licit economic activities. Thus, from a neo-classical perspective, zoning all of the land residential with variation only through permission from the tribal and U.S. governments would be sub-optimal because it would allow the substitution of political decisions for market allocation.<sup>123</sup>

On reservations, like in many developing countries, improving the availability of information regarding land use rights and creating a system for noting or recording such rights is a critical step in bringing the power of the market and capital to those who currently use the land but do not enjoy all of the benefits of their use right. Although Hernando De Soto's writings focus on areas in which the land is alienable, his enunciation of the benefits from titling the land holdings of the poor in third world countries is applicable in many respects to reservations and fits with the neo-classical response to reservation land regimes.<sup>124</sup> De Soto's analysis rests on the fact that land is not merely a piece of land but also a means of

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despite the fact that the area is incredibly isolated and scarcely populated, the work on the new school has not yet begun because every possible area of construction is claimed by one or another family as within their use right for sheep herding purposes. Even though the school would take up only a fraction of the land available for sheep herding, land which given the current small size of herds is in relative abundance, the local governing entity has been unable to muster the support needed to enable use of the allocated funds. On a smaller scale, my father and his Navajo wife similarly were affected by use right claims to unused lands when they fenced in a small area near their house for the raising of winter wheat for their horses. A distant relative who is loosely associated with the extended family claimed a use right for a five foot strip of land at the time enclosed by the fence, forcing the relocation of the fence to correspond with this use right claim. Ultimately it was determined that the cost of compliance with the relative's demand for land which five years later remains as unused as the neighboring acres for miles in every direction was lower than the social cost of continual strife in the family.

123. The substitution of political for market decisions both misdirects the use of land and causes costly delays in obtaining land use permissions. *See* Section I.D.2. *infra* (discussing the effect of United States and tribal red tape).

124. *See generally* HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (Black Swan 2001) (2000).

leveraging capital; titled land allows land and resources tied to land to be transformed, through lending markets, into working capital. He writes:

Any asset whose economic and social aspects are not fixed in a formal property system is extremely hard to move in the market . . . . Without such a system, any trade of an asset, say a piece of real estate, requires an enormous effort just to determine the basics of the transaction . . . . This is why the sale or lease of a house may involve lengthy and cumbersome procedures of approval involving all the neighbors.<sup>125</sup>

While use rights differ from the rights held when property is alienable by individuals, the idea holds true in the use context. Even where the tribe injects itself into the market in the form of a tribal enterprise and preempts local use rights, the necessity to conduct on-site investigations (for lack of tribal cataloging of use rights) into which families presently hold such use rights delays development and increases transaction costs. When the actors are not tribal governments, the lack of accessible information on use rights in the form of a land use registration system prevents Pareto-efficient trading of use rights between neighbors.<sup>126</sup>

For some tribes, making land use rights personal rights or property of individuals or families imposes cultural values more strongly than does a mere land registration scheme. For other tribes, the communal ownership of the land through the tribe is already tempered by strong support and defense of individual use rights.<sup>127</sup> By their very nature, except in limited circumstances, use rights signify a lower degree of ownership over the property bundle of sticks. Thus, the neo-classical goal of creating a land market is furthered by strengthening land use rights that are personal to the holder. Neo-classical economists would hope that

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125. *Id.* at 45.

126. There are countless imaginable circumstances in which neighbors might be willing to trade their use rights over land. Currently, even neighbors—those in the best position to know the ownership of the land around them—might be prevented from such bargaining because neither party would have knowledge of the true lines between them, a situation which would invite dispute. This point is alluded to be Demsetz who notes that property rights “help a man form those expectations which he can reasonably hold in his dealings with others.” Demsetz, *supra* note 121, at 347. Furthermore, if the land involved was not simply along a shared line but instead was a trade involving for example summer grazing land removed from the extended family complex, the parties could not be assured that the other was not holding use rights disputed by other neighbors. The advantage of formal property over informal, and of under documented, property appears throughout De Soto’s work. *See, e.g.,* DE SOTO, *supra* note 124, at 228 (“[F]ormal property was not simply an instrument for appropriation but also the means to motivate people to create real usable value . . . it is the mechanisms contained in the property system itself that give assets and the labour invested in them the form required to create capital.”).

127. Most popular images of Indians focus on shared land ownership and use; however, counter-examples exist. According to Demsetz, Eleanor Leacock’s memoir *The Montagnes “Hunting Territory” and the Fur Trade* documented that: “Indians of the Labrador Peninsula had a long-established tradition of property in land. This finding was at odds with what was known about the Indians of the American Southwest.” Demsetz, *supra* note 121, at 351.

individuals could control these uses such that they would have the right to transfer (and hence sell) either the land that they held the right to or, if the right could be decoupled from the land, the right.<sup>128</sup> While the stereotype of Indians (a stereotype based on a degree of truth for some tribes) is that they do not place a price on land because it is thought to not belong to anyone,<sup>129</sup> in fact, for many individual tribal members, the use right of “their” land is of extreme importance. In a take-off of Jeff Foxworthy’s *You Might Be A Redneck* joke series, a Native version conveys the personal nature of ownership of land use rights when it states “You Might Be From the Rez If . . . ‘You are having a never ending land dispute with your relatives.’”<sup>130</sup> However, it is important to keep in mind that making land use rights overly personal is problematic, as the degree of “ownership” approaches the boundary defined by the non-alienability constraint.

### ***B. Lending Associated with Land for Development and Business Capital***

The non-alienation constraint prevents off-reservation banks and lending institutions from using land as collateral on loans. Consequently, this important connection between land and development is foreclosed for reservations. The danger that non-payment would lead to tribal land loss through standard mortgage foreclosure prevents capital from reaching tribal members or entrepreneurs. The neo-classical solution to this challenge is to use other resources to serve as replacement collateral and act as substitute guarantees.

There are a multitude of forms of non-land loan guarantees that can help make tribal land functionally close to off-reservation land, which under conventional analysis will enable development by expanding the power of the “land market.” One such example would be that federal funds could be earmarked for direct loans to tribes, with the U.S. government acting as the lending agency because of the impossibility of securing private loans. In order to leverage the private lending market, the U.S. could alternatively act as a guarantee agency, backing private loans to tribal members for on-reservation land development with a federal guarantee. Or a tribe with sufficient resources could pledge those resources for the same purposes. For either the tribal governments or the U.S. government, pledges do not necessarily have to take the form of cash guarantees, for private lenders can use alternative items of value to secure the loans. On the Navajo Nation, for example, development loans were made available to the tribe in return for pledging future income from coal mining as collateral. The nature of the

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128. For example, if a family had a use right for three houses on their land but only needed two houses and another family had the same use right but their extended family required four houses, the larger family might be able to purchase from the first family the right for a house. This would allow semi-planned development while allowing flexibility. The decoupling of right from the property is being undertaken off-reservation in the form of tradable development and density allowances.

129. See, e.g., MCDONNELL, *supra* note 78, at 124 (“The Indians had no concept of permanent ownership and title to land and did not place the same importance on money, hard work, and self-support as did Secretary Lane and other whites.”).

130. Shi Dineh.com, the Internet’s Navajo Resource, at <http://www.shidineh.com/jokes.html>.

resource could be even less tied to “normal” liquid assets, provided that the banks felt they had the power to secure asset liquidity.

The lending currently tied by custom to off-reservation land might, in the case of trust land development, be tied to non-land values resulting from the proposed project. There is an argument to be made that the prevalence of off-reservation use of land as collateral is in part a feature of ease and familiarity and not a reflection of true risk assessment. A bank making a loan to an off-reservation business might use land as collateral simply out of habit and not because the bank believed that other assets could not secure their loan. This habit is aided by the administrative ease of such loans because of the developed land registration system, allowing banks to readily record their interest in the land during the term of the loan. On-reservation lending thus might be possible if bank officers are encouraged to think more creatively about sources of collateral.<sup>131</sup> That sort of creativity applied to the business development context might take the form of securing the loans against future profits, or in the case of a franchise operation, against the right to operate the franchise. This solution would tie loans to the land development, to the “development” as opposed to the “land,” and as such is a feasible source of collateral.

Linking resource-backed guarantees directly to land would make them a right owned by the person or family having a plot’s use right. Even the portion of total alternative resources (funds or other sources) available as replacement guarantees could be tied to the nature of the land being developed. Through property assessments, the guarantee could be calibrated to the “value” of the land, pretending for the purposes of the assessment that the land was alienable. The advantage of such a linking is that it might provide bankers with rights in a familiar format. Furthermore, linking would help in the event that tribes—as individual tribes or as a consortium of tribes—succeeded in creating a tribal lending institution with the power to transfer property among tribal members. For tribes with a large enough population and high enough effective demand, a tribal lending institution with such devolved government power would be in a position to make loans in much the same fashion as off-reservation banks do with fee simple land.

For many tribes, such expansive powers in the hands of a banking institution, even a tribal banking institution, would be antithetical to other values such as the tracing of use rights to a family’s ancestral use of the same land. As Demsetz notes, “account [must] be taken of a community’s preferences for private ownership.”<sup>132</sup> This means that for some tribes, such powers would be appropriate and would aid development, while for others these powers would not be appropriate. Even within the same tribe, one can make an argument that a tribal bank should have devolved ability to tie lending to land for some areas of the reservation but not for others. On the Navajo Nation, such banking could be beneficial in areas of the expanding cities where wage labor is the norm. Simultaneously, rural areas where the work is more traditional and centered on

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131. As an example, my father’s home construction loan, because it was for a house on trust land, was secured through a second mortgage on his vehicle.

132. Demsetz, *supra* note 121, at 350.

land-based production, a system where a tribal bank makes land-tied lending decisions, might be more of a negative than a positive. The power of tribal banks to foreclose against tribal members should not be created lightly; yet, for segments of the upper and middle classes, this power would have the benefit of allowing increased capital to be available to everyone from homebuilders to entrepreneurs.

*C. Market for Land Allows the Invisible Hand to Guide Efficient Use of Land*

When land is inalienable and use rights are determined only through tribal and U.S. government action, individuals lose the power to make use of land in a manner incrementally more valuable or that produces greater benefits than the use characteristics of the present occupier. In housing literature, this concept is referred to as the “ground rent” or “rent-gap.”<sup>133</sup> Ground rent helps explain, for example, why central business districts are rarely a patchwork of office buildings, single family homes, and farms.<sup>134</sup> As cities develop, the value of each square foot of ground space increases to reflect the highest use value for that space. Hypothetically, a farm growing corn might have a net present value (NPV) of ten dollars per square yard if the land continues to be used for corn production. The same square yard might have a NPV of twenty-five dollars if subdivided into residential lots, a NPV of thirty-five dollars if developed as a factory, and a NPV of forty-five dollars as a commercial shopping area. Consequently, except in the minority of cases where the landowner is not a profit maximizer, the land will eventually be sold and become a commercial shopping area—the very activity that generates the most “value,” understood in neo-classical efficiency terms. The city might continue to grow, and the area of the farm might become valuable as a center for companies, in which case the NPV of the land as office space might exceed that of the land as a commercial zone, causing the land (barring government interference) to once again change to the highest use value function. This is Smith’s “invisible hand” in action in the land market.<sup>135</sup>

For neo-classical economists, achieving the market based allocation efficiency when constrained by the non-alienation rule is difficult. Simply relying on tribal governments to allocate efficiently misses the point of the power of the invisible hand, namely that the market is *the* most efficient mechanism for allocating land use. Although the all-knowing, benevolent dictator is found in theoretical writings, as a practical matter these efficiency gains only come about through market forces. Therefore, the best solution suggested by neo-classical economics is to create a true market for reservation land. The non-alienation rule means that the tribe or tribal members cannot alienate land from the tribe; however, a market could be created for land—or termed differently, for land use rights—that could only be bought and sold to and from tribal members. To some extent this already exists on some reservations and in some reservation cities. For example, on the Navajo Nation it is possible to buy a used modular home attached

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133. See, e.g., Neil Smith, *Gentrification and the Rent Gap*, 77 ANNALS ASS'N OF AM. GEOGRAPHERS 462 (1987) (discussing various ways of understanding “rent-gap”).

134. Counter-examples do exist: Anchorage has a small garden a few blocks from oil company skyscrapers and Denver has working farms within its recently completed beltway sprawl.

135. See SMITH, *supra* note 19.

to land in the subdivision across from the government offices. The neo-classical economist would seek to extend the market for land between tribal members as far as possible, because for him or her, deviation from this market approach is liable to create inefficiencies in terms of land use patterns that do not accord with the highest value use.

Because neo-classical economics is the dominant economic theory in the U.S., it is not surprising that many of the pushes to improve tribal economic development involving the land regime are based on possibilities flowing from neo-classical thinking. Vine Deloria notes that “[a]mong the more surprising elements of Indian land tenure is the aspect of continual experimentation with property rights which has been visited upon the individual tribes by Congressional fiat.”<sup>136</sup> This experimentation with property rights, or land regimes, is most evident in the major policies such as allotment and termination. However, on a smaller scale, since the U.S. government first recognized its trust responsibility owed to tribes, it has attempted to use changes—small and large—in the Native land regime to meet U.S. and, to some extent tribal, development goals.

While researching this Essay, it was amazing to see the number of ways ideas—primarily neo-classical ideas—had already been introduced through legislation relying upon this perspective for its anticipated benefit. Yet too often such legislation and programs had little lasting effect on reservation development. There have been numerous attempts to deal with the crippling and costly bureaucracy related to land use permission. In 2002, for example, the U.S. government finally allocated funds to begin the Indian Land Title Report Commission’s examination into the status of Indian Land Title and the BIA’s handling of requests for development permission.<sup>137</sup> In addition, start-up funding programs had been tried for agricultural and retail operations.<sup>138</sup> Dating back as far as the early 1900s, there have been an almost endless series of programs attempting to deal with the lending problems caused by the non-alienable nature of trust land.<sup>139</sup> Tribes have engaged in programs of industrial subsidies and recruiting of the sort counties and states use to compete with other counties or states, with some programs specially targeted to deal with the problems of trust land status.<sup>140</sup> Advocates have pushed for tax-based “subsidies to induce more

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136. SUTTON, *supra* note 18, at 1 (quoting Vine Deloria, *Introduction to KIRKE KICKINGBIRD & KAREN DUCHENEAX, ONE HUNDRED MILLION ACRES*).

137. Russell Sossamon, *Improving Housing Opportunities for Native Americans*, Hearing Before the Subcomm. on Housing and Community Opportunity of the House Fin. Servs. Comm., Subcomm. on Hous. & Cmty. Opportunity 11 (May 3, 2004), available at <http://financialservices.house.gov/media/pdf/050304rs.pdf>.

138. Jorgensen, *supra* note 50, at 124.

139. President Nixon’s 1970 Message to Congress, for example, advocated increasing the revolving loan fund by three times and approval of \$200 million in loan guarantees for “Indian economic projects.” Nixon, *supra* note 32, at 23–25.

140. See SORKIN, *supra* note 7, at 94 (“Indian tribes offer several kinds of assistance to potential manufacturers. Tribal land is provided for industrial sites, and in many cases plants are built to employer specifications by the tribe at no cost to the firms. In such cases, the building and grounds are leased to the company by the tribe, since Indian trust property cannot be sold to a non-Indian.”).

non-Indians to locate plants on the reservations.”<sup>141</sup> Although pocket-vetoed by President Reagan just before he left office, an Indian Development Bank—modeled on the often-accused stalwart symbol of global economic orthodoxy, the World Bank—was even proposed.<sup>142</sup>

Despite largely following the direction indicated by neo-classical economics, these government initiatives have not led to the economic growth predicted by neo-classical theory.<sup>143</sup> One possible explanation frequently referenced in government and tribal documents is the under-funding of these programs. The funds for loan guarantees or direct business development loans, for example, have been available only at a fraction of the tribal demand.<sup>144</sup> Consequently, neo-classicists can argue that their suggestions have not succeeded because they have never been whole-heartedly attempted, or attempted only in a meaningless manner. This under-funding problem calls into question the degree to which the federal government is truly committed to reservation economic development. As will be discussed in the NIE section, there are reasons why the U.S. government might favor underdevelopment of commercial and non-extractive industry on reservations.

Should neo-classical economists be able to so easily brush aside criticism of the lack of success of its programs? Another explanation for the failure of these programs is that while the suggestions might flow naturally from neo-classical models, those models do not reflect the reality of the reservation economies. Neo-classical models start with the individual utility function and from that generate increasingly complex descriptions of the world. The problem for neo-classical

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141. SORKIN, *supra* note 7, at 100 (describing a proposal by Herbert E. Striner submitted to Congress in 1968). *See also* Sol Tax & Sam Stanley, *Indian Identity and Economic Development*, in JOSEPHY, JR., *supra* note 32, at 215–16 (“[W]e wish to go on record supporting proposed legislation which would provide tax incentives to industry locating on Indian reservations. An exemption of industry from federal taxation for a period of years would provide much needed inducement to industry to come to Indian reservations. With regard to helping individual Indians into business for themselves, programs providing the necessary capital through loans at low interest rates and continuing technical assistance are essential to success.”).

142. Cohen, *supra* note 4, at 352.

143. In an article entitled, *Taking up the Challenge: Fundamental Principles of Economic Development in Indian Country*, Miriam R. Jorgensen writes of policy attempts: “[A] large majority were U.S. government-inspired . . . . Almost all efforts posted poor track records.” Jorgensen, *supra* note 50, at 125.

144. *See* McGuire, *supra* note 16, at 19 (“One legislative vehicle for promoting the survival and well-being of Native Americans was the Indian Financing Act of 1974. The Act endeavored to stimulate economic activity within the existing constraints on property ownership. Reservation lands, held in trust by the federal government, generally cannot be offered as collateral to potential investors. While necessary to preserve remaining lands in Indian ownership, the restriction serves to dampen outside economic aid. The Financing Act authorized the Secretary of the Interior to make federal loans to tribes or individual Indians for economic development, as well as guarantee the loans of private investors.

The Act was meant to underscore the intent of the government that economic development should not be pursued at the expense of Indian ownership of resources. *In practice, however, the legislation did little to achieve substantial progress in raising standards of living. It has never been adequately funded.*”(emphasis added)).

economics is that the assumptions underlying these models might not hold true for the majority of reservations with regard to both the nature of tribal economies and the personal tribal member motivations at the core of their utility functions. “Indians are suspicious of development projects which ignore the existing system of social relationships and ideas about land use.”<sup>145</sup>

The cultural argument is dangerous because one does not want to rest a rejection of neo-classical economics on the thin line that “they [the Indians] are different from everyone else.” After all, as discussed in Part I, the defining characteristic of Indians might be the diversity of tribes, values, and experiences. However, the ineffectiveness of neo-classical economics might not be limited to tribal economies. Rather, it might be that while the neo-classical approach is good at describing and even predicting outcomes given the shared set of assumptions upon which it is based, the approach’s performance is much worse when attempting to analogize from idealized markets to situations that contain less of the shared institutions and norms.<sup>146</sup> In this way, the weakness is not based on a difference in people but rather in the model’s inability to create substitutable institutions, or in the limits of growth based on institutions whose worth is found only in their being approximations for more ideal rules or institutions. Given unalterable constraints that from the onset prevent the realization of the model’s idealized market, hard-headed pursuit of this impossible idea makes less sense for reservations than it does off-reservation land. Finally, assuming that markets work—arguably the starting perspective of neo-classical economics—is the wrong place to begin when trying to think of alternative land regimes and their possibilities for encouraging growth, which brings us to the next economic perspective.

### III. NEW INSTITUTIONAL ECONOMICS

*Through the lens of political economy, a society’s socio-economic performance appears to depend intimately on its social and political institutions (or, more colloquially, on that society’s “rules of the game”). Boldly stated, positive socio-economic progress can occur only in the presence of a policy infrastructure which supports and promotes development in a virtuous cycle. Institutions are the key to generating appropriate, long-term development success. Consequently, if a tribe’s present institutions are incapable of performing the task, institutional reform should be the first focus of development.*<sup>147</sup>

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*We owe the Indian justice! Let us grant that, and permit him to work out his own political and social salvation.*<sup>148</sup>

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145. Stanley, *supra* note 32, at 6.

146. See *infra* Sections I.C, I.D (presenting the institutions and norms on reservations).

147. Jorgensen, *supra* note 50, at 132 (citing Douglass North).

148. Editorial, *A New Way with the Indian*, N.Y. TIMES, Jan. 26, 1870, reprinted in A RACE AT BAY, *supra* note 24, at 31.

Part III uses the framework found in New Institutional Economics to generate policy alternatives and possibilities for reservation land regimes that could lead to economic development. This section uses the three major branches of New Institutional Economics to explore what the theory can add to the discussion of reservation economic development. Part III.A considers the possibilities for lowering transaction costs associated with land use, specifically focusing on search and information costs (III.A.1), bargaining and decision costs (III.A.2), and policing and enforcement costs (III.A.3). Using the Navajo Nation's interest groups as the example, Part III.B examines how managing divergent interest groups can help improve reservation economic development. Finally, Part III.C considers how the New Institutional Economics focus on communal objectives and social capital can aid tribal leaders and scholars interested in reservation land regimes.

Stagnated tribal land development can be attacked using the tools of New Institutional Economics (NIE). Douglass North's declaration that "institutions matter" whenever there are transaction costs redirects attention from the largely imagined neo-classical markets to their inefficient real world counterparts.<sup>149</sup> Most NIE scholars generally follow North, making his definition a good starting point for understanding "institutions" in NIE:

Institutions are the rules of the game of a society, or, more formally, are the humanly devised constraints that structure human interaction. They are composed of formal rules (statute law, common law, regulations), informal constraints (conventions, norms of behaviour, and self-imposed codes of conduct), and the enforcement characteristics of both.<sup>150</sup>

A platonic form for what institutional analysis should be does not exist. Institutional analysis has been applied to matters as small and particular as waiting in line for gas<sup>151</sup> and the responsibilities of individual family members to the family<sup>152</sup> to concepts as large as the decline of a state's public officials<sup>153</sup> and African structural adjustment.<sup>154</sup> The all-encompassing nature of institutional analysis—moving from individuals to states as institutions—makes it both ideally suited to tribes whose formal rules are not as established as the surrounding U.S. society and problematic for defining the correct NIE response to the tribal situation. While NIE is critical of particular institutional arrangements that add

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149. Douglass C. North, *The New Institutional Economics and Third World Development*, in *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT* 18 (John Harriss et al. eds., 1995).

150. *Id.* at 23.

151. YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 21–32 (2d ed. 1997).

152. Robert A. Pollak, *A Transaction Cost Approach to Families and Households*, 23 *J. ECON. LITERATURE* 581 (1985).

153. Peter Lewis, *From Prebendalism to Predation: The Political Economy of Decline in Nigeria*, 34 *J. MOD. AFR. STUD.* 79 (1996).

154. Howard Stein, *Institutional Theories and Structural Adjustment in Africa*, in *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT*, *supra* note 149, at 18.

transaction costs or favor powerful groups, NIE argues that “[i]nstead of there being a single solution to a single problem . . . many solutions exist to cope with many different problems.”<sup>155</sup> The multi-dimensional nature of NIE analysis and the openness to alternative institutional arrangements distinguishes NIE from other economic models that stress a single vision of the right economic development path.<sup>156</sup> NIE can be described as “an approach,” not a model.<sup>157</sup>

“[C]urrent economic analysis is incapable of handling many of the problems to which it purports to give answers,” wrote Nobel laureate Ronald Coase, a point that goes towards explaining NIE’s goal of expanding beyond the limits of traditional economics.<sup>158</sup> Despite different descriptions of NIE’s relationship with neo-classical economics and earlier political economic traditions,<sup>159</sup> there is a shared sense that NIE “builds on, modifies, and extends neo-classical theory to permit it to come to grips and deal with an entire range of issues heretofore beyond its ken.”<sup>160</sup> Although NIE’s focus on imperfect markets

155. ELINOR OSTROM, GOVERNING THE COMMONS 14 (1990).

156. Mark J. Roe highlights the possibility of “[m]ultiple, equally efficient results might abound and path dependence—paths shaped by a nation’s political and cultural institutions, or chaotic chance events—could determine which among equally efficient end results we have . . . .” *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 646–47 (1996).

157. Pollak, *supra* note 152, at 584.

158. RONALD COASE, THE FIRM, THE MARKET, AND THE LAW 15 (1990) The fact that the NIE is “extremely broad in scope” means that it has allowed researchers to bring many more influences to the discussion of economic development. Justin Yifu Lin & Jeffrey B. Nugent, *Institutions and Economic Development*, in 3 HANDBOOK OF DEVELOPMENT ECONOMICS (Jere Behrman & T.N. Srinivasan eds., 1995). Ostrom feels that in order to “abstract from the richness of the empirical situation” in any one case, the *basic* strategy starts with an identification of the “physical, cultural, and institutional” setting of the topic being investigated. OSTROM, *supra* note 155, at 55. Similarly, North, in listing the “consequences of institutions for contemporary economic analysis,” begins by stating that “models are institution specific,” moves on to stress the importance of ideas and ideology, and ends with the “inextricably interlinked” nature of economy and polity. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 110–12 (1990).

159. Compare JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT 10 (1992) (“In some ways the contemporary discussion of institutional change is merely a continuation of the tradition represented here by Hume and Smith.”), with Robert H. Bates, *Social Dilemmas and Rational Individuals: An Assessment of the New Institutionalism*, in NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT, *supra* note 149, at 29 (“The study of the conduct of rational individuals under various forms of market failure quickly became a major branch of economics. And the new institutional economics represents an outgrowth of this research.”). See also Lin & Nugent, *supra* note 158, at 2305 (describing NIE as a “return to some themes of classical economics”); Pollak, *supra* note 152, at 583 (“In many respects the neoclassical and transaction cost approaches are complements rather than substitutes, addressing somewhat different issues and offering somewhat different ranges of admissible explanations.”); John Toye, *The New Institutional Economics and Its Implications for Development Theory*, in NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT, *supra* note 149, at 62 (“The NIE theory of development, as expounded by North, has a distinctly eighteenth century flavour.”).

160. North, *supra* note 149, at 17.

and inefficiency does invite analysis based on general “interventionist beliefs,”<sup>161</sup> the NIE extensions of economic theory do not necessarily amount to a blanket call for a greater role of government.

NIE expands “the menu of policy alternatives, offering positive guidelines for policy interventions overlooked by orthodox economists.”<sup>162</sup> This is particularly important for Native American groups who have for too long been told, through force or advice, that their cultural norms and rules are not the right ones to follow. For despite the U.S. central government’s belief that there is but one single path to development, “there cannot be *one* kind of development which suits every tribe.”<sup>163</sup> Robert A. Trenerg Jr.’s first paragraph of *Alternative to Extinction*, an exploration of the reservation system’s roots, contains the following noteworthy passage:

Those white officials who took it upon themselves to try to solve problems rising out of the confrontation between white and Indian looked at things from an ethnocentric point of view. This does not necessarily mean that their desire to help the Indian should be discredited. *Many simply accepted the superiority of Anglo-American institutions as a fact*; to them, as to most Americans, the question was one of “civilization over savagism.” There was no appreciation or even awareness that Indian culture had a value in itself. Accordingly, every legitimate Indian policy devised by this nation has had one goal—to help the Indian by acculturating him into the mainstream of American life.<sup>164</sup>

The primacy in neo-classical economics of a certain set of institutions, norms that above all enshrine the protection of private property, fits within Trenerg’s description of the superiority felt of certain non-Indian institutions. Yet as Stanley concludes in *American Indian Economic Development*, “[t]he diversity of Indian tribes cannot be ignored. This means that a single formula for development will not work.”<sup>165</sup>

The belief that existing social norms and institutions deserve primacy when considering development is a part of much Native scholarship. Although written prior to North’s formalization of NIE, Ruffing’s inclination is keeping with NIE lessons for tribes:

Until recently, development experts felt that traditional society was itself a barrier to development. The sooner traditional social structures and values could be transformed, the sooner development would occur. . . . [Yet] [o]ne can argue that a development strategy which minimizes social costs is a far more successful strategy than

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161. Bates, *supra* note 159, at 27.

162. *Id.* at 37. It does so by exploring the existence and nature of assumed background institutions that enable economic growth. See Stanley, *supra* note 8, at 586 (“Economic development is closely related to other forms of development and depends on existing institutions. Most of the time this is presupposed, but not recognized.”).

163. Jorgensen, *supra* note 50, at 129.

164. TRENNERT, *supra* note 23, at 1 (emphasis added).

165. Stanley, *supra* note 8, at 588.

one which requires cultural change as a precondition for economic development.<sup>166</sup>

So too is Trosper's discussion of Native American "institutional possibilities":

Neoclassical economists, with their predilection to assume that individual behavior will be governed only by simple views of the actions of others, fail to examine broader institutional possibilities. Some of these possibilities may be less expensive than the enforcement mechanisms needed for privatization, such as fences and title record-keeping.<sup>167</sup>

Similarly, Jorgenson hangs development hopes on self-defined, institution-led growth:

Two fundamental principles of American Indian economic development emerge from reflection on past failures and on the nature of earlier successes, and they structure a new way of thinking about development as a response to American Indian poverty . . . first, that development must be self-defined and, second, that the development of institutional capacity should precede other development efforts.<sup>168</sup>

For tribes seeking ways of bringing development to underdeveloped reservations, the NIE approach might offer more than that found in the dictates of neo-classical economics.

Institutional changes in tribal land regimes and land use policies can yield economic development gains. This is true despite the diversity of tribal government types and sheer number of tribes. NIE suggests that tribes would benefit by: lowering transaction costs, managing divergent power/interest groups, and effectively supporting tribal communal objectives and social capital. If done in conjunction, these efforts at institutional improvement could help tribes better make use of their land resources without necessarily jeopardizing their

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166. Ruffing, *supra* note 5, at 56. This bares a partial similarity to the gradualism of China's growth as described by Joseph Stiglitz in his bestseller, *Globalization and Its Discontents*. It also reflects the importance of cultural values in reinforcing top level institutional changes which are the focus of most development strategies. See Andrzej Rapaczynski, *The Roles of the State and the Market in Establishing Property Rights*, J. ECON. PERSPECTIVES, Spring 1996, at 87, 88 ("The notion that simply instituting an appropriate legal regime will establish a set of property rights that can undergird a modern economic system is deeply implausible, because most property rights can only be marginally enforced by the legal system."); see also DE SOTO, *supra* note 124, at 180 (quoting Rapaczynski).

167. Trosper, *supra* note 9, at 210.

168. Jorgensen, *supra* note 50, at 128. It should be noted that Jorgenson's very promising analysis at the beginning of her article unfortunately in her concluding suggestions loses its effect. She uses the momentum from the start of the article to propel her push in favor of judicial independence, a clichéd element of most standard attacks on tribal development and one which does not keep, for some tribes, with the notion of self-driven growth. While an Anglo living on the Navajo Nation might prefer, or even think judicial independence is better for growth, the advocacy of such as the main solution to growth is to deny the self-defined nature of tribal growth.

countervailing cultural values by turning to the market as the only solution.<sup>169</sup> By not prescribing institutional forms, tribes are better situated to determine, in line with their sovereign status, the particular nature of their land use that most fits with their history, their identity, and their “vision.”<sup>170</sup>

**A. Lowering Transaction Costs Associated with Land Use.**

*Supervision can tax selected reservations to the extent of discouraging them. Since nearly all transactions in the U.S. economy today are supervised (regulated) to some degree, moreover, it is also possible for the agency administering Indian resources to selectively lower relative transaction costs, thereby encouraging external investments in particular resources.*<sup>171</sup>

The role of institutions in lowering transaction costs is central to most NIE analyses and is the aspect of NIE most closely parallel to neo-classical economics. As the name *World Development Report 2002: Building Institutions for Markets* suggests, for academics and some organizations (including the World Bank), lowering transaction costs is primarily important for enabling markets.<sup>172</sup> Emphasis on the market to justify institutional development provides only a limited perspective on the potential gains from lowering transaction costs. Thus, although NIE lessons concerning lowering transaction costs duplicate some aspects of neo-classical economics, advantages of lowering transaction costs go beyond merely supporting a market.<sup>173</sup> Tribal governments dealing with high transaction costs in land dealings and land use changes can create markets; however, they can also, or alternatively, facilitate better government controlled economic development. Unlike the neo-classical market-influenced land allocation

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169. Market centered economics, as NIE makes clear, is not the only sort of economics that can be practiced; a fact which allows economists greater scope in designing policies which recognize cultural values. As Trosper notes:

Historians and anthropologists have complained about the application of “western bourgeois” economic theory to non-European cultures. As I understand them, these critics object to separating exchange of commodities from the institutions and values of society. They object to the conception of “economic man” as interested only in personal gain; generosity, a need for security, and concern for the environment are omitted in conventional analysis. They identify markets exclusively with capitalism. Finally, they object to assuming labor and land can be treated as commodities. That some economics are guilty of these errors does not mean that all are.

Trosper, *supra* note 9, at 200.

170. Jorgensen believes that answering the question, what is their tribal vision?, is the first question which tribes must address when thinking about development. Jorgensen *supra* note 50, at 129.

171. Barsh, *supra* note 107, at 197–98.

172. See generally THE WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS (2002).

173. This point is similar to Sen’s idea—looking the opposite way down the same path—that markets have intrinsic value in permitting the freedom to exchange that cannot be simply incorporated into understanding of societal economic benefit. AMARTYA SEN, DEVELOPMENT AS FREEDOM 25–30 (1999).

ideal, the NIE government-influenced land allocation method allows for market flexibility and permits tribes greater ability to chart the course most appropriate for them.

Ronald Coase, in his 1960 article, *The Problem of Social Cost*,<sup>174</sup> famously described a world without transaction costs. In such a world, initial allocation of rights does not affect final allocation because parties costlessly bargain, reaching the most efficient outcome. Coase's original example was in terms of a cattle-raiser and a crop farmer, but his result includes all rights save inalienable ones.<sup>175</sup> Labeled the *Coase Theorem*, this result resonates strongly with neo-classical assumptions and forms the basis for a large body of consequent policies. Yet when Coase republished in book form his most famous articles, he criticized analyses that latched too tightly onto "his" theorem:

It would not seem worthwhile to spend much time investigating the properties of such a world. What my argument does suggest is the need to introduce positive transaction costs explicitly into economic analysis so that we can study the world that exists.<sup>176</sup>

The "world that exists" is far more complicated than the frictionless neo-classical world; a reality that is very evident when one considers the prevalence of transaction costs. Coase, quoting Carl Dahlman's *The Problem of Externality*,<sup>177</sup> defines these costs as "search and information costs, bargaining and decision costs, policing and enforcement costs."<sup>178</sup> These three categories are useful for examining tribal land policies and relevant institutions.

#### 1. "Search and Information Costs"

Under the current division and overlap of BIA and tribal authority, obtaining land information is a time-consuming and costly process. The delay caused by the dual tribal and BIA roles means that for formal economic commercial development to take place, the entrepreneurs must anticipate profits to make up for these costs and must have substantial start-up resources. This is true whether the particular entrepreneurs are private capitalists, managers of tribal enterprises, or similar government officials. Thus, lowering these costs would benefit all tribes, regardless of their particular stance toward private property or private enterprise.

Effective tribal leadership and the ability to set tribal priorities requires Indian control over their greatest resource—their land. "The exercise of sovereignty (here the exercise of decision-making authority) is a necessary precursor to all effective development efforts."<sup>179</sup> Such a starting point echoes the neo-classical emphasis on facilitating the use of land, but rejects the idea that devolving control and authority over land rights or use rights from tribes to

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174. 3 J.L. & ECON. 1 (1960), *reprinted in* ECONOMICS OF THE ENVIRONMENT 23 (Robert N. Stavins ed., 4th ed. 2000).

175. *Id.*

176. COASE, *supra* note 158, at 15.

177. 22 J.L. & ECON. 148 (1979).

178. COASE, *supra* note 158, at 6 (quoting Dahlman).

179. Jorgensen, *supra* note 50, at 129.

individuals for use in a land market is the only route to economic growth. Regaining control of tribal land information from the BIA bureaucracy ensures that a single government, and the government with the most to gain, controls the information costs and time burdens.<sup>180</sup> With true tribal oversight of land, many opportunities for growth currently overlooked or discounted become possible. Tribes gain the power through their information systems to prioritize among the land development possibilities through their information systems. The power over land information costs historically has been one of the ways that the U.S. government has limited the available paths of tribal economic development.<sup>181</sup>

The U.S. government control of tribal land limits tribal autonomy by slowing down use of land and by directing the range of possible uses. The nature of BIA oversight defines the range:

Outright confiscation has given way to a system of routine economic supervision, purportedly protective, that favors certain patterns of resource exploitation. Supervisory administration of Indian resources involves federal review and approval of proposed transactions, such as sales and leases, often at several stages of the process. Each involves added costs (fees, forms, hearings, delays) and uncertainty.<sup>182</sup>

Thus, this oversight adds costs to land transactions and, critically, favors certain tribal land uses. “United States trusteeship as administered by the Bureau of Indian Affairs also acts as a constraint on development; red tape holds up economic development and sometimes frustrates it altogether,” yet the U.S. role also directs and limits the available growth alternatives.<sup>183</sup> *Red tape* is the most obvious added transaction cost; however, the ability to use federal review to direct growth can also be thought of as an extreme form of search and information costs. The BIA does not explicitly state that its policy is antagonistic to local commercial development,<sup>184</sup> however, by controlling land information, it has the power to unofficially narrow the type of development allowed. “Having ultimate control, the BIA has consistently favored one method of exploitation of Indian resources, and that is, to lease them to non-Indians,” Ruffing adds, “[T]he BIA had chosen this option because they felt that Indians lacked the skill and capital to properly

180. See, e.g., Miller, *supra* note 113, at 852 (noting in a section discussing the complications caused by different land trust issues and federal oversight that “[i]t is encouraging to see the United States taking positive steps to let Indian people and tribal governments take more control over their own destinies and more responsibility for their own economic futures. It only seems logical that the people who are suffering from the problems and who are closest to the situation would be the people most motivated to find and successfully implement the solutions”).

181. See discussion contained in the following paragraph.

182. Barsh, *supra* note 107, at 195.

183. RENO, *supra* note 47, at 8. See also *id.* at 215, (“*The Bureau of Indian Affairs itself has long recognized how its power to fix the term of Indian-lands leases, for example, can be used to encourage or discourage development.*” (emphasis added)).

184. Patricia Seed does make such a claim, by focusing on what is *allowed*: “Native profit-making activities in the United States are rarely, if ever, allowed to develop.” PATRICIA SEED, *AMERICAN PENTIMENTO: THE INVENTION OF INDIANS AND THE PURSUIT OF RICHES* 166 (2001).

develop their resources.”<sup>185</sup> Tribal economists must first acknowledge and then respond to the BIA’s guidance of land use patterns and the BIA’s ability to set the rules of land development.

What is the appropriate response to BIA control? The answer of course depends upon perspective. From the BIA/U.S. government perspective, tribes that attempt to wrest land control back from the BIA are overreaching their authority. The U.S. is the super-sovereign and legally has the ability to define the range of tribal authority. From a tribal perspective, any action of the BIA or U.S. government beyond those specifically removed from the power of tribes by congressional action can be considered overreaching. This overreaching denies tribes control over their resources, resulting in a significant “obstacle to [tribal] development.”<sup>186</sup> This perspective is but a subset of the view held by those who feel that Congress does not have the right to limit tribal sovereignty at all, for Congress’s power to do so is based only on the doctrine of discovery and the conquest myth.<sup>187</sup>

For many tribal leaders it is reassuring that “there is a growing tendency to bypass the Bureau when possible and to attempt to minimize its role on the reservation.”<sup>188</sup> Such a perspective, for example, is evident in Harvard’s Kennedy School 2003 decision to award “High Honors” as part of its Honoring Nations program to the Office of Support Services of the Confederated Salish and Kootenai Tribes. The citation for the award proclaims: “They have taken over, through contracting, compacting, self-funding, and the assertion of legal powers, virtually every governmental function affecting the reservation . . . . They proudly ‘just do it.’ They do it all.”<sup>189</sup> For those tribes able to, doing it all is applauded. Through incremental steps of institutional development, tribes can begin to reduce the BIA’s role, significantly lowering this form of transaction cost. “Today, we see Indian nations replacing the decision-making power of outsiders with tribal institutions of self-governance. These institutions not only get the job done, but do

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185. Ruffing, *supra* note 5, at 31.

186. *Id.* at 30.

187. See, e.g., Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115–16 (2002) (“The ultimate conclusion of this essay, nevertheless, is far more provocative in American constitutional terms. It is simply that there is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their [sic] consent manifested through treaty. Reduced to its starkest statement, this thesis means that, unlike the legal primacy the federal government enjoys over states by virtue of the Supremacy Clause of the United States, the federal government has no legitimate claim to legal supremacy over Indian tribes. Consequently, neither Congress nor the federal courts legitimately can unilaterally adopt binding legal principles for the tribes without their consent.”). See also Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189, 196 (2001) (highlighting that Felix Cohen’s Handbook relied upon the fact that a “long line of conquerors, including the federal government, had recognized tribal rights” and that “this recognition also entailed the subjection of tribal affairs to congressional control”).

188. De Mallie, *supra* note 11, at 239.

189. Harvard Project on Am. Indian Econ. Dev., Honoring Nations: 2003 Honoree, available at [http://www.ksg.harvard.edu/hpaied/hn\\_2003\\_TrustResourceManagement.htm](http://www.ksg.harvard.edu/hpaied/hn_2003_TrustResourceManagement.htm).

it better.”<sup>190</sup> Even minor symbolic changes, such as moving the BIA’s Navajo office from Window Rock (the Navajo Nation capital) to Gallup (a border town), indicate a growing allowance (from a U.S. perspective) or recognition of (from a tribal perspective) tribal governments’ growing independence. However, “[a]lthough the BIA is no longer the unquestioned master on reservations, it remains a pervasive presence in tribal affairs.”<sup>191</sup>

These tribal programs demonstrate two things: first, the shared need to lower land transaction costs by separating from BIA oversight and internalizing tribal control, and second, the fact that every tribe will follow its own path. This is not to say that even among the tribes who have done the most to lower these costs there is not space for improvement. Creating and/or strengthening land institutions would be facilitated if Congress enacted legislation allowing tribal take-over of land information when capable tribes desire to do so.<sup>192</sup> Determining which tribes are able to assume such responsibility is a complicated matter that itself requires negotiation among government, tribal, and supra-tribal entities. Should a tribe determine it does not want to, or is not in a position to, take over tasks from the BIA, tribes have a right to rely upon continued BIA oversight in accord with the U.S. trust responsibility. For example, the recommendation the Harvard project gave to the Yakama tribe was to not take over BIA control.<sup>193</sup> Supra-tribal entities, such as the National Congress of American Indians or a new Native institution tasked with land oversight across reservations, are perhaps the proper authorities to handle the decisions of whether particular tribes have the staff, experience, and resources necessary to organize their tribal land. Of course, tribal self-determination does mandate that tribes could unilaterally assume control, even where overarching Native institutions have feasibility concerns.<sup>194</sup>

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190. Lee, *supra* note 17, at 2.

191. Cohen, *supra* note 4, at 346.

192. Nixon, for example, advocated ninety-nine-year, long-term leases managed and approved by tribes without Congress’ ad hoc involvement in this process. Nixon, *supra* note 32, at 235.

193. KAREN FILIPOVICH & BRIAN WEINBERGER, BUILDING EFFECTIVE LAND MANAGEMENT PROCESSES 59 (1998), available at [http://www.ksg.harvard.edu/hpaied/pubs/pub\\_056.htm](http://www.ksg.harvard.edu/hpaied/pubs/pub_056.htm) (“BIA is the major leasing agent for Tribal trust and Tribal allotment lands on the Yakama Reservation. It is often cited as being slow, unresponsive and insensitive to Tribal interests. However, the Yakama do not have anyone with the key skills necessary to run a leasing program now, nor do they have the key institutional elements in place. These factors make this alternative much less attractive in the near term.”).

194. The power of tribes to take control of service programs as included in President Nixon’s 1970 Message to Congress might allow such unilateral taking of power if land information systems are seen as service programs. Nixon, *supra* note 32, at 229 (“In my judgment, it should be up to the Indian tribe to determine whether it is willing and able to assume administrative responsibility for a service program which is presently administered by a Federal agency. To this end, I am proposing legislation which would empower a tribe or group of tribes or any other Indian community to take over the control or operation of Federally-funded and administered programs . . .”). Note: The U.S. trust responsibility to ensure no sales of tribal land would remain, but could be overseen through a higher level, non-bureaucratic system, such as would be the case through judicial enforcement.

Consolidating land information within tribal hands will likely lower transaction costs. However, tribes must themselves create institutional processes that are not overly time-consuming or costly for those considering business development.<sup>195</sup> Backlogs, loss of information, and inaccurate tracking of property characteristics are likely if land registration and record-keeping tribal institutions are hastily established and inadequately funded. Tribes whose land holdings are extensive will need to establish a system for individuals not only to establish new enterprises, but also to obtain living space in areas where their family did not traditionally reside. The capitalist solution is a land market with the information institutions being property listings and realtors. An internal tribal market is one possible solution; however, tribes could also establish within their information system a means of identifying available unused (or under-used) land. Such information would need to be coupled with a dispute arbitration/decision mechanism, but the tribe's particular efficient institutional arrangement does not have to be a land market. Finally, the information must be available to tribal members at low to zero cost. The highly legalistic—with requisite hiring of costly specialists and professionals—off-reservation land information system, most evident at the time of purchase or sale of property, is perhaps not the ideal that should be aimed for. Rather, tribes that feel land is not purely individual could set up virtual or paper catalogues of the land's attributes, its uses, and the land's interested parties.

## 2. “Bargaining and Decision Costs”

The multiple stages at which plans can be sidetracked—by neighbors who oppose the proposed development or by changes in the governing rules—can make the transaction costs at the bargaining and decision stage high, even prohibitively high. Creating institutional arrangements that minimize these costs, without sacrificing the ability of development detractors to raise their concerns, will benefit many tribes. Creating a space for entrepreneurial activity that is, and is perceived to be, conducive to long term planning without being overly fraught with complications must be a priority for many tribal land policies.

On the Navajo Nation for example, a major impediment to development is the on-going ability of local individuals or families to forestall changes in land use. All land regimes that value civic participation and justice will give individuals impacted by development an opportunity to voice both their grievances and any rights that they feel would be infringed upon by the change in land use. Yet such a land regime design can have important consequences on the total costs involved in deciding whether or not to proceed with a business opportunity. Land regimes that allow repetition of all local complaints at every stage of the development process, rather than making final decisions on such complaints at a specific designated point in the process, introduce uncertainty into every stage.

Bargaining and decision costs can be lowered through recording and making publicly available the claims that parties have, or believe they have, over

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195. See FRANCISCONI, *supra* note 7, at 93 (noting that the three year lease application process can mean that “[b]y the time the lease is approved, the market opportunity might no longer exist”).

land. Off-reservation, this typically consists of bank notices on land titles of mortgages pending or the occasional easement agreement. However, tribes could create systems that record more types of claims—winter sheep camps, shared fishing grounds, or just mutual parking areas—than are recognized off-reservation where the most valued stick in the bundle is the right to exclude. Such records would lower decision and bargaining costs by giving notice of potential complications to those wishing to develop the land. To encourage use of this type of system, and to provide added assurance to entrepreneurs, failure to report/register claims or uses could be presumptive evidence that such a claim should not block development. This would prevent individual tribal members from trying to block development plans in order to gain personally from the discovery—by either businesses or tribal enterprises—of new land value. For although it is important to recognize claims on land, and some tribes might favor societal sharing of gains derived from land,<sup>196</sup> it is also important to facilitate tribally desired economic opportunities. It is worth remembering that this recording system might not work for those tribes for whom it might be antithetical to cultural values emphasizing land use as subject to continual renegotiation between interested parties.<sup>197</sup>

Lack of stable tribal government, and the related inability to convincingly convey government commitment to land development ideas, also prevents land development. Fears—whether justified or not<sup>198</sup>—that entrepreneurs will lose the right to use land because of a temporary change in government policies play a major role inhibiting growth on many reservations:

Tribes with unclear “rules of the game”—which stem from frequent or abrupt turnovers in government, policies set on an ad hoc basis,

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196. The British government has on various occasions legislated a narrow version of the idea that society has a general right to gain from increased land value. Termed “betterment gain” by British academics, the basic notion behind the legislation is that individual lot owners who sell property that has become more valuable should not be the sole recipients of the gain from selling their property because behind the added value was general societal improvement and growth. Thus, not returning a portion, or all, of the excess value to society—through the government—would amount to granting landowners a windfall gain on every sale. See Donald G. Hagman, *Betterment for Worsenment: The English 1909 Act and Its Progeny*, in *WINDFALLS FOR WIPEOUTS: LAND CAPTURE AND COMPENSATION* 491, 491–516 (Donald G. Hagman & Dean J. Misczynski, eds., 1978); Deborah Rhoads, Comment, *Developer Exactions and Public Decision Making in the United States and England*, 11 *ARIZ. J. INT’L & COMP. L.* 469 (1994).

197. Nor should such renegotiation be criticized as inherently inefficient. For, tribal members whose value system is communal could rearrange property systems in accord with an individual member’s endowments or attributes which allow that individual to best make use of the resource. Such a value system will likely be coupled with norms of mutual assistance or even mutual accumulation of wealth.

198. See David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 *J. SMALL & EMERGING BUS. L.* 173, 191 (2004) (“Coupled with the natural bias of the media toward unusual outcomes and the natural bias of the courts toward unwanted outcomes, tribes appear more threatening to external investors than they are, meaning that the tribes must be careful to remain evenhanded in their dealings.”).

or from elected officials changing the rules to serve their own interests—have difficulty attracting investors to put their energy, time and capital into the tribal economy. The task, therefore, is to implement policies through a process that clearly defines the rights and responsibilities of all affected parties.<sup>199</sup>

Understandably, government reversal stories form the basis for a rich rumor mill. Defining the rules can reduce the fears frequently cited by businesses to explain their reluctance to do business on reservations. Although different for each reservation, tribes must confront both the unjustified and the justified beliefs that tribal governments can back out of their commitments or unilaterally make major changes to the rules that businesses are operating under.

Tribal government commitment to individual land development projects or individual businesses is counter-intuitively furthered by institutions that remove government from all but procedural rules. Although such a division is part of laissez-faire capitalism, when coupled with more involved government policies, it can support specific enterprises or industries, so long as politics is kept at a distance:

Investor confidence is boosted when they see that politicians will give policy guidance, but will not micro-manage development efforts. Investors are encouraged when they see that officials refrain from mixing politics with business. Finally, investors gain confidence when they see that politicians' electoral cycles are not allowed to disrupt bureaucratic procedures.<sup>200</sup>

Critically, tribes subject to frequent and dramatic political changes should separate government economic planning from politics. Tribal enterprises, for example, “insulated from political interference” are much more successful than those subject to tribal president or council involvement.<sup>201</sup> Promises made—to provide infrastructure, underwrite business plans, et cetera—by tribal governments could be secured by having a semi-independent agency take charge of tribal oversight of economic development requiring tribal guarantee of previous tribal commitments. This would serve as a foil against a new tribal leader's post-election plans to undo commitments of previous administrations and help bring added stability to the business environment.<sup>202</sup>

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199. Lee, *supra* note 17, at 5–6. See also Haddock & Miller, *supra* note 198, at 202–03 (stating problems “can arise when a tribal council changes its mind and works against the interests of investors that an earlier tribal council had worked to attract to the reservation. These situations create a perception of uncertainty in dealing with some tribes and thus raise the costs and the risks of doing business with those tribes. A generalized perception that this is a common problem in Indian country obviously rebounds to the detriment of all tribes”).

200. Jorgensen, *supra* note 50, at 135.

201. Lee, *supra* note 17, at 7.

202. It is worth recalling that tribal elected leaders are not alone in seeking to undo prior administration commitments. George Bush proved adept in doing this with signed international treaties after taking over from Clinton.

### 3. Policing and Enforcement Costs

The final category on Coase's list of transaction costs describes the costs resulting from the failure of parties to adhere to their negotiated role or from the need to ensure compliance. In the land context, this category is dominated by the requirements of the mortgage market and the difficulties of obtaining mortgages for trust land. However, this cost aspect, and the possible solutions—primarily government-funded guarantees to offset the lack of guarantee provided by the land—have been discussed in the neo-classical section. Consequently, this section focuses on other policing and enforcement costs: registering land rights and defending rights contained in the initial land development agreement.

The recording mechanism noted in the bargaining and decision costs section also lowers policing and enforcement costs. For many entrepreneurs, their (or their lawyer's) discomfort with tribal procedure and tribal law leads to a desire to register rights both through tribal government mechanisms and with state or U.S. authorities. Such dual registration is implicitly a part of the overlapping authority of tribes and the BIA. Yet alternative systems could be established. Tribes and states could together establish preferred recording mechanisms for use before tribal and state agencies or courts. For example, through memoranda of agreement providing for information sharing and institutionalizing shared processes, the Swinomish Indian Tribal Community and the local county government created a "predictable land use process."<sup>203</sup> Tribes would need to ensure such coordination with state or national governments did not functionally limit tribal sovereignty. These discomfort costs—similar to the costs felt when traveling overseas and using a different currency—could be lessened by normalizing procedures, either across reservations or geographically between tribes and states.

Enforcement of land agreements or rights to land requires an ability to access and make use of government agencies, officials, and court systems. The rights connected with land can be quite diverse. For example, the tribal water company might have an implicit duty to extend a water line; the public works department might have promised, as part of the initial business development, that it would pave the road to the lot; or the prior land owner might have agreed to remove an old junked automobile. The list of possible rights is quite long and, in the event of an infringement on rights, individual businesses need to have a mechanism to restore their land rights to the conditions they had expected. The topic of how to create responsive agencies and strong, efficient tribal justice systems is clearly beyond the scope of this Essay. The debate centers primarily on the importance of an independent judicial system for economic growth,<sup>204</sup> but because of the breadth of this topic, it is only noted here.

Policing and enforcement costs in land development are both sizable and the most subject to changes coming out of U.S. alteration in the status of tribal

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203. Lee, *supra* note 17, at 6.

204. Lee notes that evidence of a five percent drop in unemployment with an independent court system "suggests that of the quickest ways to reduce unemployment on reservations is to establish a strong, genuinely independent judiciary." *Id.*

sovereignty. While tribal governments have yet to fully test their powers to reduce the BIA's oversight of land uses, tribal courts have gone further in asserting their authority. Not surprisingly, the U.S. government, in response, has struggled more to impose limits on tribal judicial power than to defend the BIA's power to oversee land proposals, a power that is currently less disputed. These policing and enforcement costs are thus arguably the most challenging and most ready for reduction.

### *B. Managing Divergent Power/Interest Groups*

If NIE's transaction cost approach attempts to determine "what" can be improved in the land regime, the conflicts between different groups in institutional alignment can be thought to address "how." While some NIE scholars primarily view institutions as a means of enabling better transaction cost solutions, others emphasize the competing interests that shape institutions. By examining tribal interests, one can explore the limitations, challenges, and opportunities for institutional improvement to the tribal land regime.

"If institutions affect the distribution of benefits in social life, then we should expect strategic actors to seek those institutional rules that give them the greatest share of those benefits."<sup>205</sup> Such is the thesis of Jack Knight's *Institutions and Social Conflict*, a rejection of the idea that institutions are value-neutral transaction cost lowering mechanisms designed to solve social coordination problems. Knight instead sees institutions as reflecting group dynamics, the interests of powerful groups shaping the form of institutional change, resulting in rules and norms that favor those groups. "The possibility of conflict between individual and collective interests is, contrary to North and the other transaction-costs theorists, much more widespread than are instances of state involvement."<sup>206</sup> The centrality of conflict between competing groups in social institutional form and construction leads Knight's analysis to highlight both the incremental nature of social change and the inefficiency of resulting institutions.

The interest group/conflict approach to institutions runs counter to the transaction cost and collective action arms of NIE. Knight's summary of these opposing perspectives is worth quoting at length:

[L]et me suggest a way of categorizing contemporary theories of social institutions, according to two criteria: (1) the institutional effects invoked to explain maintenance and stability and (2) the mechanism for institutional change. First, institutional maintenance and stability are explained in contemporary accounts by their ability to produce collective goods or benefits for the relevant group or community. The collective benefits may be efficiency (in regard to allocation or employment of resources), social optimality (in regard to the maximization of social benefits), minimization of transaction costs, stability, or the satisfaction of some other functional need. Here we can distinguish "naïve" and "sophisticated" variants of this collective-benefits explanation. The naïve variant assumes that

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205. KNIGHT, *supra* note 159, at 123.

206. *Id.* at 33.

social institutions produce efficient or socially optimal outcomes. The sophisticated variant allows for the possibility that suboptimal institutions may develop and persist, but it retains the conception of collective benefits and seeks to explain these inefficiencies in the context of failures or weaknesses within the community. However, in either variant the continued ability of an institution to provide one of these collective is invoked to explain its ongoing stability.<sup>207</sup>

For Knight, institutions often can be explained not with reference to improved collective benefits, but by focusing on the interests that benefit from specific institutional arrangements. Rather than being surprised by suboptimal institutional forms, Knight predicts their existence by virtue of the power of groups to determine institutional structure and change.

Knight's ideas can be framed in neo-classical terms by focusing on the possibility of Pareto-efficient changes. Pareto's insight was that if there are two individuals (or groups) with a bundle of rights or set of goods, a change that bettered both individuals (or groups) without taking away any rights or goods from either should be preferred because both are better off in the end.<sup>208</sup> The Kaldor-Hicks criterion, also called "potential Pareto improvement," slightly modifies Pareto's original idea by saying that if the change resulted in "winners" and "losers," and the gain to the "winners" was enough to pay the "losers" equal to the loss, then the change is welfare improving.<sup>209</sup> Significantly, this Kaldor-Hicks improvement is said to hold even where the "winners" do not actually pay off the "losers," so long as the winners could have done so.<sup>210</sup> Knight rejects both the Kaldor-Hicks criterion and the less controversial Pareto optimality by demonstrating that Pareto improvements to rights or goods can have negative consequences to specific groups by limiting the option sets available in subsequent time periods. (For example, imagine that you and I are partners and split our earnings, but that all splits must be Pareto-improving relative to previous time periods. If we are going to have one hundred dollars in period one and one hundred dollars in period two, it does not make sense for me to accept a period one split of \$99 to you and \$1 to me. In a single period game, such a split would be Pareto improving; \$1 is greater than \$0. In a two period game, such a split means at best I will receive a total of \$1.99 by the end of period two and you will receive \$198.01. Thus, it can be rational for me to reject splitting the \$100 in period one, to ensure my future option set.) In the real world, agri-industry might reject minor subsidies if those are part of a larger program gradually shifting agricultural resources to textiles.

Differences between individual tribal members or tribal groups can determine the rules and norms that govern the availability of gains to any particular group or individual. Each tribe has its own unique set of groups and divisions. These divisions are often quite contested, sometimes violently and

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207. *Id.* at 10.

208. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 16–17, 41 (4th ed. 2004); WALTER NICHOLSON, *MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS* 502–03 (7th ed. 1998).

209. COOTER & ULEN, *supra* note 208, at 48.

210. *Id.*

publicly. Bean notes that “[f]actions are usually named the villains in explaining why reservations do not progress,” and then calls such attention a “convenient scapegoat theory.”<sup>211</sup> However, conflicts within the Navajo Nation demonstrate how differences in group interests and power can hold back otherwise collectively advantageous land regime institutions, and how policies that acknowledge such forces can lead to better solutions.

### *1. Navajo Nation Interest Groups*

The Navajo Nation is highly divided between older traditionalists and younger modernists, a split acknowledged even by those seeking to reconcile this division at the tribal or personal level.<sup>212</sup> The categories “traditionalist” and “modernist” of course include variations and nuances, although this might be wrongly concealed by a generalized description of the countering viewpoints. Labeling the older grandparent generation as traditionalist and younger generations as modernist de-emphasizes counter-examples or matters of shared perspective. Yet for all those qualifications, the division between traditionalist and modernist, and the power held by traditionalists, continues to shape the land regime institutions and economic development:

Reservations are similar to third world nations which face tremendous tasks of economic and political development. The fact that there is no Indian consensus, that reform-minded leaders must constantly do battle with those who are more strongly wedded to the past, makes the agenda of tribal governments as demanding as the challenges facing emerging countries.<sup>213</sup>

Though describing Montana reservations, the above also holds true for the Navajo Nation.

### *2. Traditionalist Perspective*

As noted in Section I.C., Diné culture is traditionally based around matriarchal extended families. The traditional matriarch controls land use and directs economic activity, deciding who does the sheep-herding, where farming takes place, and what other economic activities the family engages in.<sup>214</sup> This

211. Bean, *supra* note 13, at 204. *But see* De Mallie, *supra* note 11, at 297 (“[P]olitical quarrels are fierce, personal, and incessant on Pine Ridge today.”).

212. See Ruffing, *supra* note 5, at 49 (“[I]t is unfortunate that a dichotomy has occurred between the “modern elite” administrators and the people at the grass roots.”).

213. LOPACH ET AL., *supra* note 97, at 191. *See also* Karin Mika, *Private Dollars on the Reservation: Will Recent Native American Economic Development Amount to Cultural Assimilation?*, 25 N.M. L. REV. 23, 33 (1995) (“Conflicting goals and definitions of potential economic development have caused friction within the tribes, which has hindered any attempts to resolve these conflicts.”).

214. An 1893 *American Anthropologist* article, *The Navajo*, by A. M. Stephen, provides a catalog of the rights and powers of the matriarch that for many traditional families remains true today: “[T]he house and all of the domestic gear belong entirely to the wife . . . . The wife owns her own sheep and horses and marriage gives the husband no claim upon them . . . she has entire control of the house life.” 6 AM. ANTHROPOLOGIST 345, 354 (1893).

power is aided by cultural respect for the wisdom of the elderly that provides older women and men with an added degree of authority.<sup>215</sup> Even at times where there are real negative returns to raising sheep or other livestock, rural communities may measure individual family wealth by herd size.<sup>216</sup> Influential and powerful older community members come together in quasi-legislative, quasi-judicial bodies to regulate herd size and solve land disputes.<sup>217</sup> They also can be counted on to voice community reactions to Window Rock (Navajo Nation capital), directed policies that remove areas of the land from the control of local families or the local community.<sup>218</sup> The rules and norms of land use are therefore highly flexible and based upon a close social network within and between families. This allows community members, in return for a meal, to pitch in when a family needs to brand its livestock and for families to share the same grazing areas. It also creates uncertainty, delay, and opposition for non-traditional development, subject continually to a non-systemized and relationship based consideration and review process.

### 3. Modernist Perspective

Modernists long for economic growth and believe this growth is more likely on the Navajo Nation if the reservation is more hospitable to the forms of development they see off-reservation. The modernists are often younger, live in tribal urban areas, somewhat removed from their extended families, and have had more off-reservation experiences.<sup>219</sup> The term “modernist” is used for lack of a

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215. Among those participants in a study on what should be included in public education who felt the study of Navajo culture has a place in the curriculum, for example, respect for elders was highlighted—together with respect for traditions, Navajo history, and the proper way of addressing others—as being an important part of Navajo culture to convey to school children. Ann Batchelder, *Teaching Diné Language and Culture in Navajo Schools: Voices from the Community*, in LEARN IN BEAUTY: INDIGENOUS EDUCATION FOR A NEW CENTURY, 1, 3–4 (Jon Reyhner et al. eds., 2000).

216. See also Mary Shepardson & Blodwen Hammond, *Change and Persistence in an Isolated Navajo Community*, 66 AM. ANTHROPOLOGIST 1029, 1037 (1964) (“Although supplementary income is greater than income from traditional sources, there is no indication of a trend away from herding. More sheep, more land, and more water are highly valued goals.”).

217. See *supra* Section III.C.2.c.

218. WALTER HILLABRANT ET AL., OVERCOMING CHALLENGES TO BUSINESS AND ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 15 (2004), at <http://aspe.hhs.gov/hsp/wtw-grants-eval98/tribal-dev04/> (“An example of how traditionalist cultural values can affect [Business Development/Economic Development] was described by officials at Navajo Nation. Most of the land on their reservation suitable for commercial development has been assigned grazing permits held by individual tribal members. Sheep herding and animal husbandry are traditional Navajo occupations and are central to Navajo culture. Consequently, elected Navajo politicians are reluctant to force, through the exercise of eminent domain, a grazing permit holder to relinquish his or her permit for the sake of development—especially if the permit holder is a tribal elder. Informants said that many development projects have been scuttled because one or more grazing permit holders refused to approve the project.”).

219. See Mark Schoepfle et al., *Navajo Attitudes Towards Development and Change: A Unified Ethnographic and Survey Approach to an Understanding of Their*

more suitable word, for this group in general does not rebel against the traditional ways of life in favor of off-reservation conveniences and values. Rather, modernists primarily emphasize enabling individual tribal members or households to close the income gap separating the Diné from the general U.S. population. Modernists are more likely to find value in the rule of written law with the consequent ability to form *ex ante* expectations of the success of different proposals.<sup>220</sup> They are frustrated by lost development “opportunities,” which had promised job growth, and while often valuing their parents’ (or grandparents’) traditional herding life, they do not desire or seek such a life for themselves.<sup>221</sup> Not surprisingly, tribal government bureaucrats often fall in this category,<sup>222</sup> as do many of the formal sector employees. Yet defining the range of the category is difficult because the lack of employment opportunities in general means that many who identify with this perspective might nevertheless be unemployed or employed in traditional activities. Finally, the outlook and place in society of individual “modernists” varies considerably—from some teenage gang members to well educated middle level tribal employees. But all modernists believe that the current land control system needs to be reevaluated and that economic development projects need to be helped, not hindered, by tribal institutions.

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*Future*, 86 AM. ANTHROPOLOGIST 885, 899 (1984) (demonstrating “a greater willingness of young, educated people without grazing permits to forego kinship and live among strangers”). Unlike the perspective found in some scholarship, modernists do not view their hopes as being for the “transformation of an unsuccessful separatist economy into one more modern and mainstream,” for generally they do not hold such negative views of the existing economy. Mika, *supra* note 213, at 23 (describing the effect that an amusement park would have on the Viejas band of Mission Indians).

220. Professor Joseph P. Kalt, in an appearance before the U.S. Senate Committee on Indian Affairs, highlighted the importance of formalized rules for providing the possibility of justified expectations: “The point is not to build up some complicated set of bureaucratic offices or elaborate staff, but to establish rules that consistently govern the way tribal affairs are handled . . . .” Joseph P. Kalt, Statement Before the Senate Comm. on Indian Affairs 6 (Sep. 17, 1996), available at [http://www.ksg.harvard.edu/hpaied/pubs/pub\\_146.htm](http://www.ksg.harvard.edu/hpaied/pubs/pub_146.htm).

221. Dealing with these feelings in a constructive way requires creativity and reliance on extended family members. An ethnographic study’s discussion concluded “that more educated Navajos are more likely to migrate to border towns, live in nuclear family households, and do without livestock. However, the study supports evidence that they have attempted to keep their herds intact, apparently by leaving them in the care of other family members.” Mark Schoepfle et al., *Navajo Attitudes Towards Development and Change: A Unified Ethnographic and Survey Approach to an Understanding of Their Future*, 86 AM. ANTHROPOLOGIST 885, 901 (1984).

222. David L. Vinje’s study of tribes, not specifically the Navajo tribe, *Cultural Values and Economic Development on Reservations*, came to the noteworthy conclusion that the three tribal development plans that he studied “appear to view new economic activity as culturally neutral.” Vinje, *supra* note 16, at 168. Such a perspective among government planners does not demonstrate that the tribe as a whole feels the same, though it does go towards showing the modernist stance of tribal government employees.

#### 4. *Division Between the Perspectives*

Dividing these roughly-described groups are language, life experience, goals, and power. In rural areas, the Diné language is often the only language of the grandparent generation and frequently is the first language of their grandchildren. In urban areas, English has a stronger presence. While Navajo clerks in rural trading posts will often address a fellow Navajo in Diné by default, the assumed common language is English in the commercial centers of Kayenta, Chinle, Window Rock, Tuba City, and Shiprock. It would be incorrect to claim that traditionalists have not had interaction with the off-reservation world: many served in World War II, went to some type of off-reservation schooling, and/or will make frequent trips to border towns with their families to go shopping. Yet it is fair to say that in general, modernists experience or have experienced a higher level of contact with off-reservation life. Partly this is due to higher university attendance or time employed in off-reservation jobs, but it is also simply a reflection of the ever-increasing prevalence and power of American mass media.<sup>223</sup>

The group goals and power can be similarly divided. The name traditionalist suggests, wrongly, a desire to return to a static version of past lifestyles. Traditionalists would welcome higher returns for their sheep or their crafts, but they place a higher value than modernists do on the collective rather than atomized individual. Reservation modernists, like the traditionalists, value the Navajo culture, but they have a greater affinity for economic development and formal employment. Many modernists, even highly educated ones, will make life choices based on a close attachment to the reservation, even where such choices result in a much lower income.<sup>224</sup> In addition, the utility of traditionalists is raised when they have working automobiles, or grandchildren going to college on the East Coast. “Is it true that traditional values are inconsistent with economic development?” asks Trosper, who continues, “[i]n some tribes, increases in income may strengthen traditional systems, while in others they may weaken.”<sup>225</sup> Thus, the division is largely one of what they see as the best path—and not of whether they aim to raise total income—for the Diné people. Their ability to control tribal institutions directly relates to their respective power. Traditionalists have managed

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223. For example: growing up, many Navajo middle and high schoolers I knew felt an allegiance with popular portrayals of the experiences and hardships of Los Angeles gangs—the bloods and the crips—despite few of them having ever traveled to California.

224. The challenge of such life choices is described in the first paragraph of the forward to a 1970s Brookings Institution study, *American Indians and Federal Aid*, reads:

Of all nonwhite ethnic groups, American Indians are in the least favorable economic position. Living on a reservation that is far removed from the mainstream of American life, the Indian is often torn between a desire to remain on the reservation, preserving his tribal culture despite limited economic opportunity, and a desire to break away for a chance at greater economic benefits in an alien environment.

Kermit Gordon, *Foreword* to SORKIN, *supra* note 7, at vii, vii. Many reservation Natives have “an emotional and symbolic attachment to the reservation as homeland” which brings them back to the reservation even when offered better jobs off-reservation. LOPACH ET AL., *supra* note 97, at 188.

225. Trosper, *supra* note 9, at 218.

to block or slowdown the forces of non-traditional development of which they disapprove.<sup>226</sup> Inability to reach a consensus in favor of development at local and national levels of the tribe has led to the disintegration of many entrepreneurial plans, both those spearheaded by tribal members and those of non-Indians. Land changes continue to find themselves bogged down by the voices of the traditional families and even limited traditional land uses can thwart not only business but also public service development.

#### 5. *Resolving These Perspectives*

Understanding the power differences between these groups requires thinking about traditionalists and modernists in terms of their relative location in time. For societies that give added respect to older generations, the eldest generation's disproportionate (to the total tribal population) power reflects cultural values that are ongoing and arguably associated with long-term cultural survival.<sup>227</sup> Gradual adjustment to changed values might ensure a measured incorporation of external pressures and a continual space for distinguishable tribal characteristics:

An unyielding adherence to traditional values, even when neighboring peoples seemed to offer other and more "rational" ones, is precisely what enabled the Navajos to retain their social and cultural integrity through four centuries of environmental and political transformations, and apparently it is still doing so today.<sup>228</sup>

However, overly deferential treatment of the ideas of a single generation can create missed opportunities, which in subsequent periods limit the available options for those now in power but no longer with the same capacity as they would have had to mold their understanding of ideal tribal life.<sup>229</sup> This tension is perhaps most evident in the baby boomer generation.

Up until this point we have been essentially talking of old versus young—traditionalist versus modernist. Yet the group of middle-aged Navajos arguably is

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226. This disapproval is based on the convergence of a number of factors: The apprehension of Indians concerning industrial development on their lands thus encompasses many concerns—environmental issues, the influx into and takeover of their economies by non-Indians, and a lack of tribal control over development, in addition to potentially devastating effects on their traditional cultures and ways of life.

Page, *supra* note 113, at 363.

227. See Bean, *supra* note 13, at 202 (previously quoted); *id.* at 207 ("Lack of futuristic orientation clearly stems from a cautiousness traditional to these people, whose philosophies emphasized the negative possibilities of an erratic universe. Traditional views have been even more strongly reinforced by the last 100 years of experience with whites, as each generation of promises appears to be unfulfilled and the privileges of wardship have been threatened over and over again.")

228. Ruffing, *supra* note 5, at 76.

229. For a well written and interesting example of this problem in the environmental economics context, see Benjamin Groom et al., *Discounting the Future: The Long and the Short of It*, in ENVIRONMENTAL AND RESOURCE ECONOMICS (forthcoming 2005).

in a position to either bridge the gap between traditionalists and modernists,<sup>230</sup> or to merely minimize the power of the traditionalists. The government and business leaders in this talented group are now at or reaching the age where they will be near the pinnacle of their governing power:

[A] new generation of Indian leadership, on and off the reservation, has emerged: better educated, assertive, entrepreneurial, and schooled in dealing with the larger white society. It is increasingly determined to find Indian solutions to Indian problems.<sup>231</sup>

For many of this generation, the perspectives of both the traditionalists and the modernists resonate with their own ideals. They contribute, financially and in time, to their parent's extended family while working in more formal jobs. They see value in collective practices, while hoping their children live a better material life than they did. Out of these complex, interlinked values, either institutions that allow for the coexistence of the traditional and the modernist or institutions that push the tribe away from traditional economics and land oversight is likely to emerge.<sup>232</sup>

Knight's analysis relies upon conflict between those that have something to gain from the current institutional framework and those that have something to gain from a different set of rules or norms. Implicitly, this amounts to a powerful group with present control over resources and land versus an emerging group. The current choices of traditionalists could be viewed in Knight's terms: traditionalists shape institutions and gains from development in ways which mainly take into account their understanding of Navajo life, even where this understanding and their choices conflict with the modernist perspective. Yet the fact that this power must locate itself within generational life spans means that Knight's analysis of institutional change might fail because of its inability to address situations of a power vacuum coupled with shared, and not divergent, values. Arguably, this is the position the Navajo Nation will find itself in when the grandparent generation removes itself—by death and infirmity—from public life. As Underhill's history of the Navajo stated even prior to the Y generation, the Diné “are pushing and being pushed into the modern world. Most of them want the change.”<sup>233</sup>

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230. The “gap” does not necessarily exist, at least according to some theories and research related to Navajo healing practices. Thomas J. Csordas, an anthropologist, has “challenged the notion of a dichotomy between traditional and modern, as tradition is actively used in an ongoing struggle for self-identification at individual and social levels among the Navajo (and other Native Americans) today.” Susan L. Johnston, *Native American Traditional and Alternative Medicine*, 583 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 202 (2002) (summarizing Thomas J. Csordas, *Ritual Healing and the Politics of Identity in Contemporary Navajo Society*, 26 AM. ETHNOLOGIST 3 (1999)).

231. Wells, Jr., *supra* note 33, at 8.

232. *But cf.*, Ruffing, *supra* note 5, at 77 (“The assumption that Navajos want a traditional life-style and an adequate standard of living is probably true. However, if they are faced with a choice as they were in 1955 and 1971 and are today, they will choose those economic pursuits which do not disrupt traditional life-styles even though it means a lower material standard of living.”).

233. RUTH UNDERHILL, *THE NAVAJOS* 261 (1983).

At this point, a brief detour is required to address the Anglo readers who might still have a lingering fondness for Indians as teepee-dwelling, nature-loving, never changing romantic symbols forever to be contrasted with the “modern” world and “modern” desires.<sup>234</sup> Eminent Indian law scholar Charles Wilkinson emphasizes the tribal right, even imperative, to change:

The tribes have repeatedly raised arguments that implicitly rest upon a tribal right to change, to evolve from the kinds of legal institutions and societies that existed in aboriginal times or when the treaties or treaty substitutes were negotiated.<sup>235</sup>

Wilkinson’s point, that Indians are still Indians without feathers in their hair or when desiring amenities or development, strikes against the desire to see Indians as museum pieces. Indians are expected to fit within a static, non-changing, form:

The clearest evidence of nineteenth- and twentieth-century U.S. citizens’ ongoing emotional investment in these colonial fictions has appeared in their reactions to natives who have transgressed the moral boundary laid down by colonists. When natives have acted as users of the land, profit seekers, and farmers—the identities that citizens believed were theirs alone—U.S. citizens have traditionally reacted, and continue to respond, with rage and violence.<sup>236</sup>

Yet many tribes have never fulfilled a singular definition of tribal culture or values. Tribes have long histories of changing when they encounter new technologies or cultures. For example, Navajo culture adapted when it encountered successive groups: Pueblos, Spanish, Mexicans, and lastly Anglo-Americans.<sup>237</sup> This continues to be true today: “All students of the Navajo agree that they are a pragmatic people, ready to set aside most if not all of their own social rules when these interfere with the proper harmony of living.”<sup>238</sup> Wilkinson adds, “[A] right to change in Indian law is consistent with the acceptance by social scientists of the precept that all cultures change and that cultural evolution is both inevitable and healthy.”<sup>239</sup> Thus, a modernist perspective is not antagonistic or any less “Indian” than a traditional preference.<sup>240</sup> Tribes have the “historic task of creating workable

234. There is the need to address not simply Anglo readers, but some scholars who also view Indians as having only a single historical moment from which change is not allowed. See Mika, *supra* note 213, at 31–32 (“In recent years, there has been increased development on reservation lands, and this development has occurred due primarily to both economic and cultural compromise with the world outside the reservation.”).

235. WILKINSON, *supra* note 55, at 68.

236. SEED, *supra* note 184, at 169.

237. PARMAN, *supra* note 2, at 4. See also RENO, *supra* note 47, at 16 (“Until Fort Sumner, Navajo history had been a continuous process of adaptation of technology . . . .”); LOCKE, *supra* note 100, at 423 (“The Navajo were never a people to overlook a new—if better—way of gaining property.”).

238. William Y. Adams, *Navajo Social Organization*, 73 AM. ANTHROPOLOGIST 273 (1971).

239. WILKINSON, *supra* note 55, at 73.

240. Vicki Page describes this relationship as potential antagonistic but ultimately resolvable through the type of development. See Page, *supra* note 113, at 364–65. (“[T]he

islands of Indianness within the larger society,” as Wilkinson’s last sentence in *American Indians, Time, and the Law* notes, and only tribes have the right to define Indianness.<sup>241</sup>

#### 6. *Constructing a Changed Property Rights Regime*

In *Contracting for Property Rights*, Gary Libecap describes how homogeneous interests, shared information, and cooperation can lead to a “relatively smooth process of institutional change” of property rights regimes.<sup>242</sup> The first of his four investigations presents the ability of the U.S. gold rush miners to quickly establish social institutional rules (later codified into formal law) covering claim rights—including such complicated rights as those concerning the subterranean path of mineral veins across lot boundaries.<sup>243</sup> The miners individually anticipated that the gold strikes would lead to potential wealth if they collectively could prevent claim jumping or other actions that would reduce real rewards. Relative imbalances between the power of individual miners were reduced because land hoarding was not allowed: the rules required land use—active prospecting—in order to maintain ownership.

Diné living on the reservation when the grandparent generation’s power dies away will find themselves poised to change the land rights institutions governing tribal land use and development. After first defining “contracting” as “efforts by individuals to assign or to modify property rights,”<sup>244</sup> Libecap identifies three factors that motivate contracts to change property rights: shifts in relative prices; changes in production and enforcement technology; and shifts in preferences and other political parameters.<sup>245</sup> For each of these motivations, a

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larger issue of an inherent contradiction in the development process, and the cultural dilemma that developing reservations, as well as Third World nations, face. That is, it seems impossible to maintain simultaneously both traditional Indian cultures and values and to develop economically. In order for Indians to remain culturally distinct, they must acquire the power and modern business skills necessary to control their building industries. In order to acquire this power and skill, however, they must acculturate (i.e., lose their cultural distinctiveness). Is there a solution to this dilemma, short of a “world socialist revolution”?; *id.* at 366-67 (“Some of the most recent and innovative strategies for reservation development oriented toward self-determination include (1) turning to small businesses for employment, rather than to large corporations; (2) persuading Indian businesspersons to build privately owned reservation enterprises instead of relying on government-funded, make-work jobs; (3) renegotiating natural resource contracts for higher royalty payments; (4) instituting gambling . . . as short-term money-making projects; and (5) . . . organic foods. Strategies such as these indicate that perhaps Indian ethnicity may not need to be forfeited for economic survival.”).

241. WILKINSON, *supra* note 55, at 122. *Cf.*, SEN, *supra* note 173, at 31 (“If a traditional way of life has to be sacrificed to escape grinding poverty or minuscule longevity . . . then it is the people directly involved must have the opportunity to participate in deciding what should be chosen.”). In the interest of full disclosure, in my decided prioritizing of reservation Navajos and other tribal members over non-reservation Indians, I too have been guilty of a related singular, imposed, perspective on who are “real” Indians.

242. GARY D. LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* 50 (1989).

243. *Id.* at 29–50.

244. *Id.* at 4.

245. *Id.* at 16.

strong case can be made that in the land context these factors already exist on the Navajo Nation. To the extent that the traditionalists have succeeded in preventing changes, there is arguably a build up of pressure that, with the generation's passing, will release.

Without belaboring the point, it is worthwhile to briefly examine the Navajo Nation's relation with Libecap's motivating factors one at a time. Libecap believes that shifts in relative prices motivate contracts to change property rights. The introduction of formal sector jobs has meant that the returns to family agricultural and livestock efforts have lowered relatively. In absolute terms, the return for these efforts across the U.S. has declined for small stock or land holders as the mass production of food at home and abroad has led to falling food prices.

Second, Libecap also believes that changes in production and enforcement technology are a motivating factor. Changed land production technology should not be highlighted as a major factor where the majority of the land continues to support livestock and limited farming of the sort—limited capital, high labor—that it has for generations. However, the enforcement technology available to central tribal governments has made new mechanisms for tribal land control that previously were not practical. Whether in the form of increased tribal comfort with written documents, codification of rules, or increased tribal autonomy from U.S. oversight, tribes are increasingly in a position to enforce tribal land policies.

Third, Libecap focuses on the importance of shifts in preferences and other political parameters. The increased exposure to non-Indian, off-reservation lifestyles has undeniably led to an emphasis on material goods and economic growth. "The pressure for development coming from within tribal societies is far greater than anything coming from without."<sup>246</sup> This has been coupled with a lessening for some Diné of the importance of the extended family's land holdings and land based economic activities. Politically, the self-determination era has brought with it increased tribal ability to function as a sovereign entity and in principle—though not yet in practice—has restored the Navajo Nation government's right to regulate the tribe's land holdings.

Given the current power of the traditionalists, it is unfair to say that the Navajo Nation is "primed" for a land regime change. However, given the changes in these factors, I believe that as generational shifts occur, the Navajo Nation will be ready to explore such land institution changes.

Any Native American activist or Indian law scholar ought to be hearing alarm bells ringing after reading the above description of a wholesale change of tribal land rights regimes. Functionally, such a change could be read as a complete rejection of customary land rights and practices and as a preference to imagine the land regime as operating in virgin territory. The miners, after all, were operating in a space without a long history of social ties and expectations related to land rights

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246. Cohen, *supra* note 4, at 343 (quoting A. David Lester, then Executive Director for the Council of Energy Resource Tribes).

and uses,<sup>247</sup> a situation decidedly different from the tribal experience. The description of the non-grandparent generation as whole-heartedly prepared to set aside the development resistance of the traditionalists will strike many readers as not in line with their understanding of tribal politics and culture. While I recognize such a criticism, overall, the motivating factors for change do powerfully exist and land institutions are likely to alter as a result.<sup>248</sup>

Most institutional change is accompanied by opposition—whether expressed in the political process or not; however, Diné opposition is likely to be less staunch. This opposition is likely to be more extensive where the changes are believed not to take into account historical practices. De Soto describes the danger of experts and governments pretending to operate in virgin territory, or in his words, in a property vacuum:

The problem is that when governments set out to ensure the property rights of poor people, they behave as if they were traveling to a place where there is a property vacuum, as if they were landing on the moon. They presume that all they have to do is fill this vacuum with mandatory law. In most cases, however, there is no vacuum. People already hold a huge amount of property through extralegal arrangements. While the assets of the poor may be outside the official law, their rights to those assets are nevertheless governed by social contracts of their own making. And when mandatory law does not square with these extralegal conventions, the parties to those conventions will resent and reject the intrusion.<sup>249</sup>

Whether in the form of customary usage, traditional rights, or historical norms, policy proposals that do not take into account relevant tribal practices will make less headway. As my prior work demonstrates,<sup>250</sup> I afford a high regard to

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247. Putting aside of course the Indian land rights system concerning the land then being used by the encroaching miners, as Libecap does in his telling of the history of these miners.

248. To emphasize, this is my personal belief and many on the Navajo Nation no doubt would strongly disagree with my conclusion. That being said, there does seem to be a recognition that the land institutions need to not stand in the way of development that helps future generations of Navajo. The Navajo Nation Division of Natural Resource's Vision Statement accords with my judgment of where the Navajo Nation is moving:

A fundamental requirement to improving quality of life and positively participating in the building of a nation is access to land. People, Communities, and Businesses need to be able to have access to land and the process and procedure must be one that is not overly restrictive, but still allows the government to record title and monitor improvements and future development. The nation is in need of updated policies and procedures that will assist with land use planning both at the regional and local areas.

Vision Statement of the Navajo Nation Division of Natural Resources, at <http://www.dnr.navajo.org/DNR/VISION.htm>.

249. DE SOTO, *supra* note 124, at 180–81.

250. S. JAMES ANAYA & EZRA ROSSER, *INDIGENOUS JUSTICE SYSTEMS AND CUSTOMARY LAW IN THE UNITED STATES: BETWEEN COLONIZATION AND SELF-*

customary practices. However, in the context of Navajo land institutions, the standard calculation behind institutional instrumentalism and limited feasibility does not hold. Libecap summarizes the typical starting point for property rights institutional changes: “Attempts to reach a political consensus on changes in property rights involve negotiating side payments for influential parties by modifying the proposed rights structure.”<sup>251</sup> Or phrased slightly differently:

In bargaining over changes in property rights, disagreements can occur over the nature of either the aggregate benefits or the shares, but the heart of the contracting problem is devising politically acceptable allocation mechanisms to assign the gains from institutional change while maintaining its production advantages. Because property rights involve the assignment of exclusive decision making over valuable resources, some parties will be harmed by the new definition of wealth and political power. Compensating those potentially harmed in the proposed definition of rights and increasing the shares of influential parties may produce a political consensus for institutional change. Those share concessions, however, necessarily alter the nature of the property rights under consideration and the size of the aggregate gains that are possible.<sup>252</sup>

For the Navajo Nation, the compensation challenges, while present, are likely to be muted because the tribe controls a land mass the size of West Virginia. In addition, land regimes that better allow for commercial or light-industrial use would only alter the actual use of a small fraction of the total land area. Although some traditionalists will be found in the post-grandparent generation power circles, their small numbers and greater exposure to off-reservation ideas will likely enable them to see land development as more flexible than their predecessors. Finally, the fact that Diné see themselves as bound in a web of familial, clan, and tribal connections means that the problems caused by holdouts is likely to be lower. The same close social ties that define the present local leadership authority over land changes should translate into a greater flexibility when aggregate benefits from changes are more evident. This brings us to the third arm of New Institutional Economics.

### *C. Effectively Supporting Tribal Communal Objectives and Social Capital*

Exploring social capital’s capacity to resolve collective action problems is the final general approach through which NIE can expand tribal economic opportunities. The close social bonds of many tribes, given rules and norms supporting land use coordination, could better ensure that land is not over- or

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DETERMINATION (2004), *available at* <http://www.unhchr.ch/indigenous/bp7.doc> (on file with the author) (linking customary practices with current jurisprudence, even through such purely superficial means as identifying it as tribal customary or common law, can help build stronger tribal judicial institutions); Ezra Rosser, Presentation at the Fifteenth Navajo Studies Conference (Oct. 23, 2004) (describing the use of customary law in Navajo Tribal Courts) (on file with the author), *available at* [www.loyno.edu/~erosserr](http://www.loyno.edu/~erosserr).

251. LIBECAP, *supra* note 242, at 116.

252. *Id.* at 5.

under-utilized. What NIE allows for, and what neo-classical economics does not, is consideration of how institutions contribute to increasing or declining social cooperation and to lowering or raising the incidental societal costs of loss of communal orientation.

### *1. Social Capital*

Social capital can be thought of as the glue that holds individuals and groups together. Social capital is behind the trust inherent in every agreement and part of an act done without expectation of immediate repayment. In *Bowling Alone*, Robert Putnam differentiates between “bonding” and “bridging” social capital. “Bonding” he defines as that which brings closer those with deep social relations: family members, close co-workers, and friends. “Bridging” describes the relationships of good will, recognition, and even shared hopes between looser acquaintances. Bridging social capital expands the range of options available to individuals by expanding their awareness of opportunities and connections to people of different classes.

In land use, avoidance of unnecessary disputes and allowance for agreements between parties implicates both bonding and bridging capital. Bonding capital allows family members to negotiate and share use of family lands or rights to land. Bridging capital makes a member of a fraternal organization such as the Knights of Columbus or the Masons feel more comfortable negotiating a mortgage with a fellow member even when they are from different cities or lodges. Both types of social capital can benefit members of a community. In *Making Democracy Work*, Putnam highlights the differences between civic-minded Northern Italy and the feudal, untrusting Southern Italy.<sup>253</sup> Where an individual feels that community members will treat him or her well, by helping when he or she is in danger or lending a hand even though he or she is a stranger, that same individual will behave more altruistically towards other community members. Generalized good deeds are not guaranteed to be repaid by the previously unknown beneficiaries; however, strong community social capital can enable such generalized altruism by imparting the idea that good acts will on balance be returned from the community at large. For example, I am more willing to help Jose altruistically if I believe that at some point in the future, my community’s values will lead Bob to do the same for me.

### *2. Tribal Social Capital*

By directing attention to economically underutilized tribal social capital and the possible importance of beliefs in communal values, NIE permits consideration of land based growth alternatives foreclosed from consideration by other economic theories. While care must be taken to avoid romantic or derogatory cultural explanations, it is foolish to ignore social differences that could yield economic benefits for underprivileged tribes.<sup>254</sup> Some economic systems work best

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253. ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993).

254. Combining cultural strengths and self-governance has been identified as the key to tribal economic growth by members of the Harvard’s Kennedy School. See Lee,

when coupled with individualistic ideals, while other values or ideals might be better matched with alternative economic models that are more appropriate for the particular cultural norms. For many tribes, cultural values might allow for increased labor cooperation and collective use and care of resources.

“Indian societies may emphasize, instead [of the white American standards], communal property and communal objectives.”<sup>255</sup> Such communal property values are evident in the failures of allotment and in the often heated reaction generated by proposals for property privatization. Ruffing, for example, writes, “Navajo society is a traditional society whose social structure and values are communal rather than individualistic.”<sup>256</sup> And although Ruffing’s findings are somewhat skewed by the fact that her study took place only in Shonto, a particularly remote and traditional part of the reservation, the value difference appears to extend to many employed in the more modern occupations. Michael Joseph Francisconi wrote one of the very few economic histories of the Navajo Nation, a history of the informal economy written from an openly Marxist perspective. In *Kinship, Capitalism, Change: The Informal Economy of the Navajo, 1868–1995*, Francisconi claims that increased exposure to white America had, by the end of the nineteenth century, led to a Navajo “replacement of communal tenure by family tenure.”<sup>257</sup> The change recorded by Francisconi is part of a larger history of changes resulting from the external economic system, as David Vinje details:

Indian history, as well as the experience of many third world countries, raises questions regarding the cultural neutrality of any economic development process. . . . [some believe] that a relatively laissez faire approach to economic development is apt to be characterized by a breakdown of extended families as a creator of values, a diminution in the people’s sense of responsibility, and a depersonalization of the individual.<sup>258</sup>

Land use regimes in particular have the power to further diminish tribal sense of responsibility or to make use of the strong tribal identity and concern that persists:

It seems only a short step now to the issues of individual Indian land holdings—not so much a question of aboriginal practice as one of the acceptance and incorporation of private property into modern

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*supra* note 17, at 2 (“In its decade-and-a-half of research and fieldwork, the Harvard Project has come to a fundamental conclusion: Successful Indian nations assert the right to govern themselves and exercise that right effectively by building capable and culturally appropriate institutions of self-governance.”).

255. Bean, *supra* note 13, at 160.

256. Ruffing, *supra* note 5, at 56.

257. FRANCISCONI, *supra* note 7, at 48.

258. Vinje, *supra* note 16, at 168–69. *See also* FRANCISCONI, *supra* note 7, at 94 (“It is feared that too rapid growth in the private sector will undermine traditional Diné values such as the responsibility to clan members. Uncontrolled business, it is feared will lead to greed and the desire to accumulate.”). However, even such standard laissez faire approaches as division of communal land into private land does not always diminish actions based on feelings of responsibility towards other tribal members. *See Wahrheftig, supra* note 62, at 455.

Indian land use practice. One might ask: Does the holding of land as private property break up members of society in terms of the collective or group good?<sup>259</sup>

Arguably, in order to benefit from the tribal sense of collective identity, reservation land systems must be distinguishable from the off-reservation regimes.

### 3. Utilizing Social Capital

Communal values are crucial to avoid the stripping away of community land resources by individuals who see an opportunity to appropriate for themselves the returns from community property or resources. A standard perception of the history of private property might be as follows: (1) land was held in common and available for all to use; (2) individuals learned that this land could give rewards that they were able to take for themselves; (3) the commonly held land was destroyed by the overuse caused by the community members individually seeking their individual profit from the common land; and (4) as a solution, the community established private ownership, dividing the commons so that each community member would, by virtue of personal interests, take care of his or her land.<sup>260</sup> Trosper writes: "A great many economists believe that the resource can be preserved only by privatizing it. But in fact there are a variety of possible techniques to deal with open-access resource management."<sup>261</sup> The standard history dramatizes the potential instability of communal property systems and highlights the supposed superiority of private property regimes.

Hardin's 1968 environmental economics article, *The Tragedy of the Commons*, besides providing a popular label for the common land system's failings, rested on the assumption that a man is primarily motivated to "pursue his own best interest," where interest is limited to the profit motive.<sup>262</sup> This tragedy has been summarized as:

When things are left open to the public, they are thought to be wasted by overuse or underuse. No one wishes to invest in something that may be taken from him tomorrow, and no one knows whom to approach to make exchanges. All resort to snatching up what is available for "capture" today, leaving behind a wasteland.<sup>263</sup>

What is telling is the perspective behind these stories: the shared perspective that the tragedy is the land under- or over-use, not that individuals pay attention only to narrow self-interest. While law and economic approaches to regulation assume as a starting point the existence of free-riders and hold-outs, neo-classical economics goes even further by attributing high moral value to the pursuit of individual profit. Yet high levels of social capital can allow a community to escape this otherwise

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259. SUTTON, *supra* note 18, at 196.

260. See, e.g., KLAUS DEININGER, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION 18 (2003), available at [http://econ.worldbank.org/prt/land\\_policy/text-27809/](http://econ.worldbank.org/prt/land_policy/text-27809/).

261. Trosper, *supra* note 9, at 209.

262. Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968), reprinted in ECONOMICS OF THE ENVIRONMENT, *supra* note 174, at 13.

263. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 712 (1986).

prophetic tragedy of the commons. Strong social capital allows more effective institutional monitoring of compliance with shared use of common land. However, as is clear from the description of the communal values held by many tribes, escaping the tragedy of the commons can also occur through a heightened individual emphasis on community well-being.

Tribes have histories of both success and failure in managing common property resources in ways that minimize under- and over-use of those resources. Fikret Berkes' investigation of over-fishing of the Great Lakes revealed that non-Native fishermen follow a "fishing-up sequence," moving from the more profitable to increasingly less profitable fish as they over-fished first one and then another fish population.<sup>264</sup> Ultimately, the area would be abandoned by non-Native fishermen until, under tribal fishing practices, the fish population once again rose.<sup>265</sup> Multiple tribes hunted buffalo without destroying the free roaming herds. On the other hand, the Diné have repeatedly lowered their land's ability to support livestock by not keeping populations of sheep and mustangs in check.

The Navajo experiences with livestock reduction demonstrate both the difficulties when common resource solutions are imposed and the importance of social capital in land use contracting.<sup>266</sup> During the Great Depression, U.S. agents determined that overgrazing was destroying Navajo land. Navajo herds were culled and "[a]s a result of the [1934 and 1940 overgrazing dictated livestock] reduction program, the Navajos suffered a severe economic shock [caused by losing one-half of their stock]—and psychological shock as well."<sup>267</sup> Navajos went from a period of increasing prosperity to starvation conditions almost overnight. As a tribal council delegate noted in a 1940 letter to a Congressman, "[f]rom a tribe self-sufficient and self-supporting, the Bureau is forcing us to become dependent upon charity for our subsistence."<sup>268</sup> "To the Navajo, who have a deep emotional attachment to their sheep, this policy was little short of cold-blooded murder, and it was the most traumatic experience that many of them had ever suffered."<sup>269</sup> The livestock reduction took place after years of steadily increasing herd sizes but before the land itself had caused the numbers of surviving sheep to decline. The reduction therefore was, in the eyes of the Navajos who measured their wealth in sheep, at best overly preventive but mostly considered unnecessary. In the 1990s, the Navajo Nation's Department of Agriculture began making plans to once again deal with overgrazing across the reservation, overgrazing that was causing top-soil blow-off, desertification, and declining animal carrying capacity. Yet the tribal council shelved plans to round up mustangs—wild horses not

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264. Fikret Berkes, *The Common Property Resource Problem and the Creation of Limited Property Rights*, 13 HUMAN ECOLOGY 187, 204 (1985).

265. *Id.* at 206.

266. For Diné perspectives on livestock reduction through collected testimonials, see Ruth Roessel, *NAVAJO LIVESTOCK REDUCTION: A NATIONAL DISGRACE* (1974).

267. Ruffing, *supra* note 5, at 17.

268. Letter from Scott Preston, Navajo Council delegate, to Congressman John R. Murdock, (Feb. 14, 1940), in *FOR OUR NAVAJO PEOPLE*, *supra* note 27, at 22–23.

269. FEINBERG, *supra* note 61, at 17 ("The Navajos, embittered by the reduction program, became suspicious of all programs to improve their range.").

claimed by any families—because memories of the 1930s livestock reduction made such a mustang round-up politically infeasible.<sup>270</sup>

In the Diné struggles with overgrazing, the advantages of social cooperation among groups can be seen. Although not a perfect system, the local grazing committee's oversight of, and involvement in, private sheep, horse, and cattle raising stands in contrast with the near universal disregard of non-privately owned mustangs and dogs. Mentioned *supra* in Section I.D., local grazing committees are made up of local leaders tasked with implementing limits on the numbers of animals held by each extended family in their district. The limits, regulated by the Navajo Nation's central government, are in the form of "grazing permits" held by the extended family's matriarch. These permits are often the most valuable, financially and socially, item conveyed upon the death of the matriarch. Indeed, the chosen female recipient becomes the new *de facto* matriarch. The grazing committee annually inspects herd sizes, ensuring each family is within the prescribed limits. It is worth noting that grazing committee members are unpaid, except in the form of a meal from the family whose animals were branded. In this manner, the owned livestock is closely monitored, maintaining aggregate herd sizes (and hence economic use of the commons' plant resources) at agreed upon limits. However, unclaimed animals, namely wild mustangs, which perhaps should be considered "public property," are less closely monitored, and their population growth is threatening the common resources.<sup>271</sup> Yet the ability to locally curtail efforts to individually profit at expense of the commons demonstrates the ability to leverage social capital for better institutions.

A dynamic NIE approach seeks to open up the range of possible institutional forms perceived as available to govern land development and use. Although it seems far removed from the current system of very limited commercial and small industrial development rights, tribes can work towards using social capital to allow for land sharing among both agricultural families and even across land development types. Communal identity means that community betterment is felt to personally benefit community members. When an improvement is made to the local diner, even a small one such as adding a new photo of the most recent successful local high school team, diners feel a welfare gain. The neo-classical complaint addressed at reservations is that a land market does not exist, preventing land from realizing its highest value use; yet by strengthening communal feelings, tribes could enable a greater degree of land sharing.

The potential for land use sharing among communally minded tribal members is greatest for agricultural uses, but the land use sharing system could be formalized to include commercial or industrial developments requiring greater certainty. The "basic explanation" for the cross cultural prevalence of private ownership and not communal ownership, according to Demsetz, is the high

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270. Letter from Norma Cady, Planner for the Navajo Dept. of Agriculture, to Author (Sep. 20, 2004) (on file with author).

271. Monitoring of the commons is crucial for successful land institutions: "Unless the monitoring problem can be solved, credible commitments cannot be made." OSTROM, *supra* note 155, at 45.

negotiation cost of communal ownership.<sup>272</sup> Strong community social capital and norms of reciprocity of assistance allow for a greater degree of successful communal ownership,<sup>273</sup> doing so in part by lowering the negotiation costs normally associated with such an ownership form. Navajo families who cease using their winter sheep camp areas are implicitly allowing other families use of these lands:

[P]eople do not own their own land, but have rights to tribal property. The major objects of individual ownership are sheep, and in traditional times a Navajo could take his sheep to graze anywhere he wanted as long as he did not intrude upon land which was, at the time, being used by someone else.<sup>274</sup>

This implicit allowance is tempered by the fact that land use rights do lead to feelings that land ownership exists. For example, in a 1936 letter from John H. Lee to the Superintendent of the Soil Conservation Service, E. R. Fryer, Lee complains that a neighbor improperly moved his sheep camp “in too close to us,” having “never asked or got permission from the owners.”<sup>275</sup> Sharing, however, is in keeping with cultural values requiring use: “Traditionally, Navajo land tenure was based on use—a simple concept of usufructory rights in land and water.”<sup>276</sup> This might be thought of simply as a more rapid relation between adverse possession and rights of reversion. For commercial and industrial users, there must be a more formalized recording of sharing agreements.

Currently, land “sharing” is done only through the tribal government exercise of eminent domain, a practice that is less disputed and more welcome in the urban areas where formal sector jobs dominate and land is less a matter of familial livelihood. However, sharing arrangements that allow land to go to best users could aid tribal business development by significantly reducing the start-up costs of securing use rights from central government—BIA and tribal—entities. Helping tribal members see their individual land interests reinforced through actions based on communal identity requires institutional changes to make the land regime more similar to Northern than to Southern Italy. For Anglo readers whose land ideal is individual ownership with an emphasis on the right to exclude, it likely seems impossible to imagine the successful operation of societal land sharing.<sup>277</sup> Other uses of social capital perhaps, but not land!

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272. Demsetz, *supra* note 121, at 357.

273. A greater degree of communal ownership does not mean that it would necessarily be, or has ever been, a truly communal land ownership regime for tribes. For example, Melville J. Herskovits’s *Economic Anthropology*, suggested “that the Navajo concept of ‘inherited use ownership’ seemed a more appropriate identification than ‘communal ownership.’” SUTTON, *supra* note 18, at 26 (quoting Herskovits).

274. FEINBERG, *supra* note 61, at 62–63.

275. Letter from John H. Lee, to E.R. Fryer, Superintendent of the Soil Conservation Service (Oct. 11, 1936), in FOR OUR NAVAJO PEOPLE, *supra* note 27, at 11–12.

276. RENO, *supra* note 47, at 20 (internal quotation omitted).

277. The American focus on only a few of the rights related to land, to the exclusion of an acknowledgment of the interconnectedness of the rights and the relations between community landowners, is critiqued by Myrl Duncan who argues that there is a need to reconceive the property bundle of sticks. Duncan writes: “modern land ownership is

Yet let me suggest that this is a failure of imagination, brought on by a lack of appreciation for the mutual assistance and concern that exists in many tribes. Sharing will not work for all tribes, perhaps not even for most, but it is an option that should be considered. “[P]roperty is socially constructed,” and as such, its very nature reflects the culture it exists within.<sup>278</sup> For larger reservations, sharing might only be possible regionally or sub-regionally, where the social ties are stronger and based on more continual interactions. Yet communal feelings for many Native Americans extend to the entire tribe and even across tribes, a degree of social capital that should not be ignored simply for lack of appropriate off-reservation models.<sup>279</sup> To return full circle:

A central thrust of the old laws, shared both by the tribes and by the United States, was to create a measured separatism. That is, the reservation system was intended to establish homelands for the tribes, islands of tribalism largely free from interference by non-Indians or future state governments.<sup>280</sup>

*Measured separatism* allows tribes to develop their own course, an opportunity to positively use their community ties, cultural values, and unique vision.

### CONCLUSION

This Essay set out to broaden the range of policy options understood by tribes, academics, and consultants when considering changes to reservation land regimes. The dominant neo-classical economic model and the ascendant New Institutional Economics approaches are but two of a number of economic perspectives that can help bring economic growth to Native nations. Tribes that become familiar with economic theory will be better positioned to respond to Washington bureaucratic efforts to direct a single route of growth. No one solution exists for all of Native America, and tribal leaders have a responsibility to internally develop the skills to prioritize among competing policy regimes dealing with the tribes’ greatest asset.

Some expansion of commercial and light industrial development on Indian reservations is likely inevitable; what is at stake in the choices regarding the land regime is the shape of such expansion, its significance for each tribe, and the degree to which such growth benefits individual tribal members. As the t-shirt from the movie *Smoke Signals* declares, “It’s a good day to be Indigenous.” Similarly, the September 2004 National Geographic features Joseph Bruchac’s article, *Indian, Scenes from a Renaissance: Countering Centuries of Oppression and Neglect, American Indians Travel the Road to Renewal*. In it Bruchac writes

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rooted in interconnectedness as much as in individualism . . . rooted in a dynamic and integrated social and ecological community that changes over time.” *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 807 (2002).

278. DE SOTO, *supra* note 124, at 180 (citing Richard Posner, *Hegel and Employment at Will: A Comment*, 10 CARDOZO L. REV. 1625, (1989)).

279. See, e.g., Ruffing, *supra* note 5, at 51 (“[T]here is room for both tribal and entrepreneurial initiative in development. Tribal leaders should reconsider what is the proper scope for tribal and entrepreneurial action not from the point of view of how the dominant society functions, but from the point of view of the values of Navajo society.”).

280. WILKINSON, *supra* note 55, at 14.

of a “spirit of revival and hope,” which “may wind up transforming the lives” of Native Americans.<sup>281</sup> This revival extends to small-scale economic development—from improved tribal infrastructure to commercial centers locating themselves on tribal land instead of only in border towns. The fact of Indian revival is apparent; however, its direction, significance, or sustainability is less apparent. Likely, the land regime framework established by tribal leaders will play a key role in determining whether this renaissance is a dawn of a new paradigm of culturally appropriate, lasting economic advancement, or will be later viewed as a lost opportunity.

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281. Bruchac, *supra* note 107, at 86.