VI

Tribal Self-Government

INDIAN TRIBES WERE SOVEREIGN NATIONS centuries before Europeans arrived on this continent, and they continue to exercise the powers of a sovereign government. Indian tribes, the Supreme Court has recognized, "exercise inherent sovereign authority over their members and territories."[1]

The Supreme Court discussed the inherent right of tribal sovereignty in 1832 in *Worcester v. Georgia*.[2] The issue in *Worcester* was whether the state of Georgia could impose its laws on the Cherokee Indian Reservation, located within the state. In holding that Georgia could not extend its laws to the reservation, the Court stated:

> Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States . . . Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil from time immemorial . . . The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and the citizens of Georgia, have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.[3]

The *Worcester* doctrine of inherent tribal sovereignty has undergone some modification over the years, but its basic premises remain the same.

Indian tribes have the *inherent* right of self-government. Congress has the supreme authority to limit or abolish tribal powers, but the powers that tribes possess are not delegations of authority from the United States; rather, tribes possess them as a consequence of their historic status as independent nations, and the United States supports the exercise of these powers.[4] As President Bill Clinton stated in an executive order in 2000, "Indian tribes exercise inherent sovereign powers over their members and territory . . . The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."[5]

In December 2010, President Barack Obama signed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[6] More than 140 nations have pledged to support the UNDRIP. The Declaration, discussed in more detail in Chapter XIII, recognizes that indigenous peoples around the world have a right to political and cultural autonomy. The Declaration rests on the principle, which the United States supports, that strengthening the political, cultural, and economic independence of native communities is beneficial both for these communities and for the nation states in which they live.[7] Thus, the concept of inherent tribal sovereignty is consistent not only with federal law but also with international law. The international community is dedicated, just as the United States is dedicated, to improving and supporting improved relations between all nations and their indigenous populations.

A. THE SOURCE AND LIMITS OF TRIBAL POWER

What is the Source of Tribal Power?

The source of an Indian tribe's power is its people. Indian tribes have the inherent right to govern themselves, a right they have possessed "from time immemorial."[8] As a federal appellate court stated in 2002: "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate. [Indian tribes are] qualified to exercise powers of self-government . . . by reason of their original tribal sovereignty."[9]

What are the Limits of Tribal Power?

The Supreme Court has consistently held that although Indian tribes have inherent sovereign powers, "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[10] If it wanted to, Congress could abolish all tribal governments and all Indian reservations. This principle of law—called the "plenary power doctrine"—is

ultimately based, as explained in the previous chapter, on the superior military power of the federal government.

The plenary power doctrine has been extensively criticized on both legal and moral grounds.[11] Critics assert that Indian tribes are as sovereign today as they were prior to the arrival of Europeans, and that the United States has no right to limit their powers.[12] Scholars of history report that none of the authors of the Constitution envisioned that the federal government would claim to possess plenary power over Indian tribes. On the contrary, "the Founders wished to safeguard Indian sovereignty."[13] The Founders recognized that Indian tribes were independent nations, which explains why the United States entered into treaties with them, just as the United States did with other independent nations. These critics point out, as discussed in Chapter V, Section A, that there is nothing in the Constitution that confers federal power over Indians, or even implies that those who wrote the Constitution considered Indian tribes as subject to federal authority. Only decades later did Congress assert, and the Supreme Court approve, plenary power over Indians.

Indian tribes, the Supreme Court has stated, have two types of limitations on their governmental powers: *express* and *implied*. Congress has expressly prohibited tribes from exercising certain powers, such as selling tribal land without the federal government's permission.[14] These express limitations are discussed in Chapter V. In addition to these express limits, "Indian tribes have lost many of the attributes of sovereignty" by implication, the Supreme Court has held, due to their "dependent status," that is, by virtue of their "incorporation into the United States."[15] Once the territory of the United States surrounded Indian tribes, tribal powers were necessarily diminished so that they would not "conflict with the interests of the overriding sovereignty."[16] For instance, Indian tribes may no longer declare war on a foreign government or exercise certain powers over non-Indians (as discussed later in this chapter); tribes have impliedly lost those powers, the Supreme Court has stated, due to their subordinate position as "conquered" nations under the control of the federal government.[17] However, those powers not expressly extinguished by Congress or lost by implication—and there are many of them—remain within the tribe's sovereign authority to exercise.

Indian tribes occupy a unique position in U.S. society. No other political entity possesses the same status. The Supreme Court has described Indian tribes as "quasi-sovereign" and "semi-independent,"[18] possessing "attributes of sovereignty over both their members and their territory," while also subject to the plenary power of Congress.[19]

The recent assertion of hunting, fishing, and water rights by certain tribes, as well as the success of some tribes that have lucrative gaming casinos, has

prompted many non-Indians to urge Congress to dilute tribal rights even further. Whether Congress will bow to this pressure remains to be seen. For the past several decades, as explained in Chapter I, Congress has acted under the assumption that it is in the best interests of Indian tribes and the United States to promote tribal self-government and enhance tribal economic opportunities.

Are Tribal Powers Limited by the U.S. Constitution?

No. The Supreme Court held more than a century ago that the Constitution does not limit (or even apply to) the exercise of tribal powers.[20] The right of Indian tribes to self-government predates the Constitution, and nothing in the Constitution requires Indian tribes to conform their powers to its provisions. Tribal governments thus may enact laws that would violate the Constitution if enacted by the federal or state governments.[21]

B. THE SCOPE OF TRIBAL POWERS

Tribal governments have the same powers as the federal and state governments to regulate their internal affairs, with a few exceptions. The remainder of this chapter examines the eight most important areas of tribal authority: (1) the right to form a government, (2) the right to determine tribal membership, (3) the right to regulate tribal land, (4) the right to regulate individually owned land, (5) the right to exercise criminal jurisdiction, (6) the right to exercise civil jurisdiction, (7) the right to regulate domestic relations, and (8) the right to engage in and regulate commerce and trade.

1. The Right to Form a Government

Does an Indian Tribe have the Right to Form a Government?

Yes. The right to form a government is the first element of sovereignty, and Indian tribes have this right as part of their sovereign powers.[22]

Historical accounts indicate that some European settlers mistakenly believed that Indian tribes lacked formal governments. In truth, as Vine Deloria, Jr., has explained, tribal governments were both complex and well-organized "but they differed so radically from the forms used by the Europeans that few non-Indian observers could understand them," and Europeans were "blinded" by their prejudices.[23] Indian tribes "had highly complicated forms of government" long before the arrival of Europeans.[24] The League of the Iroquois, a confederation of six powerful Indian tribes in the Northeast, had a written constitution prior to the fifteenth century. Indeed, aspects of the Iroquois Constitution—including

such democratic concepts as initiative, referendum, and the right to vote—appear to have "provided a model for the framing of the United States Constitution."[25]

The right to form a government includes the right to establish the qualifications for tribal office, to determine how tribal officials are chosen, and to define their powers. A tribe can require that candidates for tribal office be enrolled in the tribe and speak the tribe's language,[26] and the tribe can disqualify for office persons with felony convictions or those who engaged in misconduct during a prior term in office.[27] Also, each tribe has the power to determine who may vote in tribal elections.[28] As with all other tribal powers, a tribe's ability to form and operate a government is subject to the plenary authority of Congress,[29] but Congress has rarely interfered with this aspect of tribal sovereignty.[30]

What Types of Governments do Indian Tribes Have?

Tribal governments vary. Differences exist in the structure of government, court systems, election procedures, requirements for membership, and rights afforded tribal members. Today, many tribes have the same three governmental branches ("separation of powers") as the federal and state governments: legislative (the tribal council), executive (the chairperson), and judicial (the tribal courts), although tribes are not required to separate the powers of government, and some tribes do not.[31] Most tribes elect their leaders by popular vote, but a few tribes determine their leaders by heredity. Most tribes have a centralized government, with the reigns of power resting in a tribal council and one chairperson. Some tribes, though, have other systems. For example, the Hopi Tribe in Arizona is a union of nine self-governing villages, with each village deciding for itself how it shall be organized,[32] while the Saint Regis Mohawk Tribe in New York is governed by three tribal council chiefs, with one chief elected each year for a three-year term.[33]

The nature of tribal government was dramatically altered by the Indian Reorganization Act of 1934 (IRA)[34] and by similar laws passed in 1936 applicable to tribes in Alaska and Oklahoma.[35] As explained in Chapter I, the IRA was intended to put an end to the destructive policies of the General Allotment Act of 1887 (GAA) and help revitalize tribal governments by providing a mechanism by which Indian tribes could modernize their governmental structure.

Immediately following passage of the IRA, the Secretary of the Interior drafted a model constitution containing provisions the Secretary believed would assist tribes in operating an effective government. The model was circulated to Indian tribes, and federal agents went to many reservations to promote its adoption.[36] As required by the IRA, elections were held on each reservation to determine whether the tribe wished to restructure its government pursuant

to the Act. To induce tribes to accept the IRA, Congress created a program under which millions of dollars of federal funds could be loaned to tribes that adopted IRA constitutions.[37] The IRA was accepted by approximately 180 tribes and rejected by fewer than 90. However, the number of tribes that actually agreed to accept the IRA is controversial because it has been reported that tribal members who failed to vote were counted by federal officials as having voted in favor of the IRA.[38]

The IRA allowed each tribe to draft a constitution giving the tribe specific governmental powers. The Secretary of the Interior was directed by the Act to approve constitutions that created a tribal council possessing the authority to employ legal counsel; negotiate contracts with federal, state, and local governments; and prevent the disposition of tribal property without the tribe's permission.[39] In addition, the Secretary encouraged tribes to give their councils the power to borrow money and pledge tribal property as security for loans; to levy and collect taxes and issue licenses; to establish a tribal court system and enact a criminal code; to remove from the reservation nonmembers whose presence was injurious to the tribe; and to create subordinate tribal organizations for economic, educational, or other purposes.

In order to qualify as an IRA tribe, however, the tribe's constitution had to be approved by the Secretary of the Interior,[40] and the Secretary required each tribe to include a provision in its constitution that subjected every tribal law to secretarial approval before it could become effective.[41] This requirement prompted many tribes to reject the IRA. Although ineligible for IRA loans, non-IRA tribes were more autonomous because neither their constitutions nor their laws had to be submitted to the Secretary for approval. (The Secretary has since notified IRA tribes that they may amend their constitutions to delete the requirement of secretarial approval of their laws, and most tribes have done so.)[42]

The IRA helped rejuvenate tribes both politically and economically, and it was a vast improvement over the assimilationist policies of the GAA. The IRA "signaled an attitudinal change toward Indians and tribal governments" that sought to foster tribal self-determination.[43]

However, the IRA was enacted with little input from tribes and it did not seek to harmonize its provisions with tribal custom and tradition. IRA tribes suddenly had to adopt a form of government different from any they had experienced before, and many of these governments became vulnerable to a host of new problems. The requirement that tribal constitutions and laws had to be approved by the Secretary of the Interior was used by the Secretary "as a basis for maintaining control over tribal affairs."[44] Especially in the years immediately following passage of the IRA, many tribal governments were weak and their elected officials untrained and inexperienced, which lent itself to

bureaucratic domination by the Bureau of Indian Affairs.[45] Moreover, traditionalists often disagreed with policies enacted by these new governments, thus creating internal strife.[46] For some tribes, the IRA resulted "in the concentration of power [in the hands of a few tribal officials] that had not previously existed,"[47] and in the adoption of a government that ignored "the unique governing traditions and structures of the Indian nation."[48] On some reservations, there remains today a "crippling division and distrust of tribal government."[49]

This does not mean, of course, that federal officials should intervene in tribal government or that a "crisis" exists. As with other nations, Indian tribes have the right to experiment with different structures, policies, and laws and to fashion through trial and error the government that best suits their needs. After all, as first written, the U.S. Constitution legalized slavery and denied women the right to vote, and it took great struggles to change these policies. Tribal governments should be afforded similar latitude to make changes and adjustments on their own.[50]

Are Tribal Elections Subject to Federal Review?

Indian tribes have the inherent right to choose their leaders. Unless Congress has consented to intervention by federal officials, which has rarely occurred, tribes have the exclusive right to determine who may vote in tribal elections, who may run for tribal office, and how tribal elections will be administered.[51] "The right to conduct an election without federal interference is essential to the exercise of the [tribe's] right to self-government."[52]

There are only two situations in which federal officials may exert some control over tribal elections. Both were discussed in Chapter V, Section B(2), and are briefly summarized here. First, when disputes have arisen within a tribe as to which person or group won the tribal election, federal officials may recognize a temporary government until the tribe resolves the dispute under tribal law. This enables the federal government to carry out its government-to-government relations with the tribe until the tribe resolves the controversy.[53] However, neither federal officials nor federal courts may determine a tribe's permanent leaders or resolve other intratribal disputes concerning tribal government operations. As a federal appellate court stated in 2010: "Because tribal governance disputes are controlled by tribal law, they fall within the exclusive jurisdiction of tribal institutions, and the BIA's recognition of a member or a faction [as temporarily having governmental authority] is not binding on a tribe."[54]

Second, IRA tribes may amend their constitutions only by following an election process supervised by the Secretary of the Interior, and new tribes that form themselves under the IRA must follow the same process when adopting their first constitutions.[55] However, this secretarial power is limited. If the tribe

follows the federal amendment process correctly, the Secretary must accept the result unless the constitutional provision being adopted would authorize the tribe to engage in an activity prohibited by federal law.[56]

What Types of Court Systems do Tribes Have?

Indian tribes had their own systems for resolving disputes and maintaining law and order centuries before Europeans arrived in North America. These differed greatly from European systems. For instance, tribes handled misbehavior of tribal members primarily through public scorn, the loss of tribal privileges, or the payment of restitution to an injured party rather than by imprisonment. Banishment was usually reserved as the extreme punishment, although on occasion a serious offense might be avenged by the injured party's family.[57]

As discussed in Chapter I, by the late nineteenth century federal officials had embarked on a mission to disrupt, if not destroy, tribal governments and to force Indians to assimilate into Anglo-American society. As part of this effort, the federal government sought to impose "white man's law" on Indian reservations. This included the creation of a Court of Indian Offenses on most reservations. These courts were often administered by the tribes but were always under the control of federal agents. The rules and procedures governing these courts were issued by the Secretary of the Interior and published in the Code of Federal Regulations (CFR). These courts, which became known as "CFR courts," tended to be informal, combining Indian custom with western law. Their main function was to provide Indians with a way to prosecute crimes and resolve disputes in a manner acceptable to federal officials.[58]

The IRA of 1934 authorized IRA tribes to establish their own courts and to enact law-and-order codes, subject to the approval of the Secretary of the Interior. The courts created in this fashion are known as "tribal courts." Today, most non-IRA tribes have similar courts, also called "tribal courts." Thus, the vast majority of tribes now have tribal courts, although some tribes still have CFR courts, and some tribes (especially some of the Pueblos in New Mexico) still have "traditional" courts, which rely primarily on the tribe's traditional methods of resolving disputes and enforcing tribal law.[59]

Although tribal courts employ procedures very similar to those employed in state and federal courts, tribal tradition often plays an important role in deciding cases in tribal courts. For instance, when Navajo courts award damages to an injured party, they may consider "a relationship value," paying the injured party "enough so that there are no hard feelings." In other words, an effort is made consistent with Navajo cultural values to restore a good relationship between the litigants and not, as in Anglo-American courts, merely award compensation.[60] Similarly, courts of the Saginaw Chippewa Tribe of Michigan

are expected to decide controversies in accordance with that tribe's "cultural norms of integrity," one of which fosters "mutual respect."[61] In a 2005 case, the court of appeals for the Cheyenne River Sioux Tribe of South Dakota criticized the manner in which tribal officials had evicted a tribal member from his tribal housing assignment on the grounds that their actions were inconsistent with "basic Lakota concepts of respect and fairness" as well as violating principles of law.[62] Similarly, the appellate court for the Little River Band of Ottawa Indians in Wisconsin has held that controversies should be resolved consistent with "tribal customs and traditions."[63] Some tribal courts are authorized to convene a panel of elders to decide whether a particular dispute could be resolved through tribal custom and tradition.[64]

Tribal courts "play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development."[65] Tribes are free to fashion their own court systems, except to the extent prohibited by the Indian Civil Rights Act, as discussed in Chapter XIV. Tribal courts vary as a result of such factors as the size of tribes, their wealth, the importance of traditions, and the needs of the community. Many tribes have multileveled, sophisticated judicial systems, with traffic courts, separate courts for criminal cases, and trial and appellate courts.[66] The courts of the Navajo Nation process over forty-five thousand cases a year and publish decisions in an official reporter.

Each tribe sets its own eligibility requirements for judges, which vary from tribe to tribe. Some tribes require that judges be tribal members, and some require that they be state-licensed attorneys. Some tribes elect their judges, while on other reservations they are appointed by the tribal council.[67] Each tribe also determines who may appear as an attorney or counselor in tribal court,[68] and some tribes, such as the Navajo Nation and the Oglala Sioux Tribe, have their own bar examinations that lawyers must pass before practicing in tribal court.

Few tribes have the means to fund their court systems adequately. Congress has not provided sufficient funding for this purpose, resulting in backlogs in deciding cases, deteriorating courtrooms, inability to fully train court staff, and inadequate salaries to judges and other court officials, all of which undermine the judicial system and hamper its proper functioning.

An important decision that tribes need to make is whether to have an independent judiciary possessing the power of judicial review, that is, a judicial branch of government separate from the legislative and executive branches that possesses the authority to declare invalid actions taken by the other two branches. Not long after the United States gained its independence from Great Britain, the Supreme Court declared in *Marbury v. Madison* (1803)[69] that federal courts have the authority to exercise the power of judicial review, even though that power is not expressly conferred in the Constitution. Some tribal constitutions

expressly confer the power of judicial review on their courts. For instance, the Constitution of the Rosebud Sioux Tribe of South Dakota was recently amended so as to confer on tribal courts "the power to review and overturn tribal legislative and executive actions for violations of this Constitution or of the Federal Indian Civil Rights Act of 1968."[70] Where such express authorization is lacking, some tribal courts, citing *Marbury v. Madison*, have held that the power of judicial review is presumed.[71] On other reservations, however, courts lack the power of judicial review,[72] and tribal judges have been fired and replaced for issuing decisions with which the tribal council disagreed.[73] A survey conducted by the American Indian Law Center in 2000 found that most tribal courts were independent branches of tribal government authorized to exercise the power of judicial review.[74]

Must a Tribe have an Appellate Court?

No. Many tribes have an appellate court, but there is no federal law that requires a tribe to create one. On some reservations, the tribal council serves as the appellate court. Some tribes have joined together to create an intertribal appellate court. In Nevada, an Intertribal Court of Appeals was created by more than twenty tribes to hear appeals arising from tribal courts on those reservations.

2. The Right to Determine Tribal Membership

Does a Tribe have the Right to Determine Who Qualifies for Membership in the Tribe?

Yes. Indian tribes have the inherent authority to determine the qualifications for tribal membership. If tribes lost this power, they could not control their future. The Supreme Court has recognized that the right of each tribe "to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."[75]

Tribal authority to determine membership includes the power to take membership away from ("disenroll") a person.[76] It also includes the right to adopt persons into the tribe and determine which benefits of membership they will have.[77]

What Restrictions has Congress Placed on Tribal Membership Determinations?

Congress has the authority to limit tribal sovereignty over membership determinations,[78] but unless Congress acts, each tribe enjoys the exclusive right to determine tribal membership for tribal purposes.[79] Congress has not limited tribes in their enrollment decisions, although the Cherokee Tribe of Oklahoma

was threatened with restrictive legislation a few years ago after it disenrolled certain tribal members.[80]

What are the Qualifications for Tribal Membership?

Tribes usually base eligibility for membership on lineal descent from a tribal member, often requiring that the applicant possess a minimum fraction ("quantum") of tribal blood. The most common blood quantum requirement is one-fourth. Some tribes require as little as one-thirty-second degree of tribal blood. Other tribes, such as the Mohegan Tribe of Connecticut, simply require evidence of lineage to someone whose name appears on the tribe's original membership roll, created when the tribe became federally recognized. The Constitution of the White Mountain Apache Tribe in Arizona requires applicants for membership to be at least one-half Indian and at least one-quarter White Mountain Apache.

The increase in mixed marriages has caused many tribes to reduce their blood quantum for membership.[81] In recent years, partly as a result of liberalized membership criteria and partly as a result of the financial benefits of belonging to a tribe that operates a successful gambling casino, some tribes have experienced an increased interest in tribal enrollment. The Sault Ste. Marie Tribe of Chippewa Indians, which has a successful casino and reduced its blood quantum for membership, saw its enrollment surge from thirteen hundred members in 1975 to twenty-two thousand in 1995.[82] In an apparent effort to limit the number of new members, the Confederated Tribes of the Grand Ronde Community of Oregon recently amended its constitution to make it more difficult to qualify for membership by requiring applicants to show, in addition to the requisite blood quantum, that at the time of their birth at least one of their parents was already an enrolled member of the tribe.[83]

Due to intermarriage, maintaining a high blood quantum requirement could pose problems for a tribe in maintaining membership. However, reducing a tribe's eligibility requirement is often controversial. Supporters of a high blood quantum requirement often argue that reducing the standard for membership risks losing tribal traditions and customs.[84]

Tribes often have qualifications for membership apart from blood quantum. Some tribes require residence on the reservation for a certain length of time or residence at the time of application. Several tribes in New Mexico are patrilineal, allowing only offspring of male tribal members to enroll (and thus denying membership to a person whose father has no tribal blood even if the mother is a full-blooded member).[85] The Oneida Nation of New York has a matrilineal system, and persons qualify for membership only if they have at least one-quarter tribal blood from their maternal side.[86]

May Persons Denied Tribal Membership, or Disenrolled from Membership, Challenge the Tribe's Decision in Court?

Unless the tribe provides a remedy, tribal membership decisions are immune from challenge in court, even if it appears that a person was denied membership or disenrolled in violation of tribal law. Congress has not authorized federal courts to intervene in tribal enrollment disputes.[87] As one federal court stated in dismissing a lawsuit challenging a denial of tribal membership, a tribe's ability to determine its membership "lies at the very core of tribal self-determination; indeed, there is perhaps no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribe's membership determinations."[88] Federal courts have no authority (they "lack jurisdiction") to hear these cases, no matter how strong the claim on the merits.[89] Courts have created only one exception to this rule. If a tribe, in addition to disenrolling a member, also banishes that person from the reservation, then this loss of freedom allows a federal court to review the decision under authority granted by Congress in the Indian Civil Rights Act.[90]

Challenges to tribal enrollment decisions often may not be heard in tribal court, either. A tribal court can only hear those cases that the tribe's legislature has authorized it to hear. Many tribal legislatures have not authorized their courts to hear lawsuits filed against the tribe or its officials, including suits challenging enrollment decisions,[91] although some have.[92] Also, no remedy is available through the Department of the Interior's grievance process, administered by the Interior Board of Indian Appeals. An Interior Department regulation precludes the board from adjudicating tribal enrollment disputes unless expressly authorized to do so by Congress or by the Secretary or Assistant Secretary of the Interior, and the board has not been granted any general reviewing authority regarding tribal enrollment determinations.[93]

In recent years, thousands of tribal members have been disenrolled from their tribes, usually from those with profitable casinos whose remaining members would then receive a larger share of the profits. Some of these people had been members of the tribe for many years, and so had their parents. The Pechanga Tribe in California, for instance, disenrolled more than three thousand people—nearly a fourth of its membership—soon after opening its casino.[94] A federal appellate court recently expressed sympathy for those ousted from the Pechanga Tribe, but held that the tribe's decision was not reviewable by federal courts.[95] Another California tribe, the Redding Rancheria, disenrolled a former chairman of the tribe and more than forty members of his extended family soon after that tribe opened a casino.[96] Many disenrolled tribal members have claimed that they were expelled from the tribe in retaliation for supporting a candidate who lost the election or for challenging a decision made by tribal leaders.[97]

Such practices, although within the sovereign power of these tribes, fosters suspicion and conflict within the tribe along with unfavorable public opinion.[98] A noted Indian-owned newspaper, *Indian Country Today*, recently stated that Indian tribes "should reconsider decisions to remove members from the tribal rolls, and that as a long-term strategy, tribes should be attempting to increase, rather than decrease, their membership."[99]

May a Person become a Member of Two Indian Tribes?

Indians who have bloodlines from two tribes may qualify for membership in both. Some tribes, though, require as a condition of eligibility, that an applicant for membership who is enrolled in another tribe agree to withdraw that membership after admission into the new tribe.

3. The Right to Regulate Tribal Land

At least three types of land may exist on an Indian reservation: (1) land owned by the federal government for the benefit of the tribe or a tribal member (*trust* land), (2) land owned privately by the tribe or by a member (*fee* or *deeded* land), and (3) fee land owned by nonmembers. As explained in Chapter II, all land within the boundaries of an Indian reservation is Indian country, including fee land owned by nonmembers. However, as discussed below, Indian tribes have more authority to regulate Indian land than land owned by nonmembers.

Does an Indian Tribe have the Right to Regulate its Property?

In *Merrion v. Jicarilla Apache Tribe* (1982),[100] the Supreme Court confirmed that Indian tribes have the right to regulate tribal land as "a fundamental attribute of [their] sovereignty . . . unless divested of [that power] by federal law or necessary implication of their dependent status."[101] In *Merrion*, the Court upheld the right of an Indian tribe to tax the value of oil and gas removed from tribal trust lands by a non-Indian company operating under a contract with the tribe. The power to tax activities occurring on tribal land, the Court explained, is derived from the tribe's right "to tribal self-government and territorial management."[102]

Indian tribes have the inherent right to regulate hunting and fishing on tribal land;[103] to regulate the use and quality of water on tribal land;[104] to eject trespassers from tribal land;[105] to tax Indians and non-Indians who use tribal land for farming, grazing, or other purposes under contracts with the tribe or tribal members;[106] and to regulate commercial activities on tribal land.[107] In addition, as part of its sovereign powers, an Indian tribe may take private land for tribal use provided that adequate compensation is paid to the owner (the power of eminent domain),[108] require non-Indians who wish to engage in

commerce on the reservation with the tribe and its members to purchase a tribal business license,[109] and require that tribal members who own automobiles on the reservation register them with the tribe and display a tribal license plate.[110]

Merrion dealt with tribal taxation of non-Indians on *Indian* land, but the sweeping language used by the Court regarding the tribe's right of "self-government and territorial management" suggested that tribes also could tax non-Indians on *non-Indian* land within the reservation. However, in 2001, the Supreme Court decided a case, discussed below, that limited the ability of tribes to regulate the conduct of non-Indians on non-Indian land.

In what Ways has Congress Expressly Restricted the Right of Tribes to Regulate their Property?

Congress has restricted the ability of Indian tribes to sell their own *fee* land by requiring federal consent to any such sale. Even greater restrictions have been placed on the tribe's ability to sell, use, or lease *trust* land (which is owned by the federal government). These restrictions, discussed in Chapter V, Section B(5), have been extensively criticized due to the manner and extent to which they encroach on tribal self-determination.[111] However, as a result of the doctrine of trust responsibility discussed in Chapter III, federal officials must administer tribal land in the tribe's best interests and normally must follow the tribe's recommendations on its use. Thus, in most instances, the "determination of the use of its own land is peculiarly the province of the tribe involved."[112]

In addition to the restrictions just mentioned, a few laws limit tribal powers to engage in certain activities on the reservation, such as the Indian Gaming Regulatory Act of 1988 (discussed in Chapter XVI), which restricts tribal authority to engage in gambling on the reservation. Other laws confirm or enhance tribal powers, such as the Clean Water Act (discussed in Chapter XII), which authorizes Indian tribes to regulate certain activities of persons outside the reservation who are polluting water flowing to the reservation.[113]

What Kinds of Property can Tribes Own?

Indian tribes can own the same kinds of property that non-Indians can own, both real and personal. Real property consists of land and items attached to or found within the land, such as buildings, timber, and minerals. Personal property consists of all other kinds of property, such as automobiles, furniture, clothing, cattle, bank accounts, and other movable property.

In addition, Indian tribes can have two property interests in land that non-Indians do not have: *trust* land and *Indian title* land. Tribal trust land is land that

has been set aside for the exclusive use and benefit of a tribe but is owned by the United States. The tribe may use, lease, mortgage, or sell the tribe's interests in this land only if the federal government consents.[114]

Indian title land is land that has always been a part of a tribe's ancestral homelands. A tribe has the right to continue living on this land until Congress removes its right to do so. This right of continued occupancy, known as Indian title, is discussed in Chapter II, Section D.

How have Indian Tribes Obtained their Interests in Land?

There are many ways in which Indian tribes have obtained interests in land, including by treaty, federal statute, executive order, purchase by the tribe, purchase by the federal government, donation, action of a foreign nation, and aboriginal possession. Initially, the most common way by which the federal government set aside land for Indian tribes was by treaty. However, Congress passed a law in 1871 that prohibited the federal government from entering into any additional treaties with Indian tribes.[115] After 1871, the most common way by which Indian tribes were assigned land was by executive order, that is, through a proclamation issued by the president of the United States (although many of these proclamations were later confirmed by statute). These "executive order" reservations are as valid as those created by Congress through treaties or statutes.[116] In 1919, Congress passed a law prohibiting the president from creating any additional Indian reservations, and only Congress can create a reservation today.[117] Of the nearly 56 million acres of land now in tribal possession, about 20 million were set aside by treaty and 23 million by executive order, with the rest created mostly by federal statute.[118]

The Secretary of the Interior is authorized by Congress to purchase land for tribes with federal funds appropriated for that purpose.[119] Some reservations have been created, and many have been expanded, through these purchases. The Secretary is also authorized by federal law to take land that a tribe has acquired in fee status and convert that land into trust status, whether the land is located on[120] or off[121] the reservation ("land into trust"). This authority—and the controversy the exercise of it has spawned—is discussed in Chapter V, Section B(5). Many tribes, especially those with profitable casinos, have purchased land worth millions of dollars and added it to their existing reservations through this process. For instance, the Klamath Tribe of Oregon, with some financial assistance from the federal government, recently purchased ninety thousand acres of land that had been removed from the reservation by the federal government forty years earlier during the termination era.[122] The Winnebago Tribe of Nebraska has added more than seven hundred acres to its reservation in eastern Nebraska.[123]

Before the United States became a nation, many Indian tribes received land grants from the foreign countries occupying North America, including Spain, Mexico, France, and Great Britain, and some of these interests were later ratified by the United States.[124] The Pueblos of New Mexico hold the most significant of these grants, which they received from Spain and Mexico, as discussed in Chapter XV, Section B.

As just mentioned, Indian tribes also have an interest in land known as *Indian title.* This is a possessory interest that allows tribes to live on their ancestral lands until such time as Congress decides to terminate the tribe's right of continued occupancy.

What are the Advantages and Disadvantages of having Tribal Land in Trust Status?

The greatest disadvantage of having tribal land in trust status is that the tribe lacks full control over it because the federal government owns it. Everything a tribe may want to do with trust property—sell, lease, mortgage, or develop it—requires federal approval, a constant source of aggravation to many tribes.[125]

The advantages, however, outweigh the disadvantages in most instances. Because it is owned by the federal government, trust land is immune from state tax and zoning laws,[126] and it may not be seized under the state's power of eminent domain[127] or lost through adverse possession.[128] In addition, trust land normally qualifies as Indian country, and the state therefore lacks general criminal and civil jurisdiction over Indian activities occurring on trust land.[129] These advantages are so great that, when a tribe purchases private land, it usually asks the Secretary of the Interior to transfer it into trust status, a conversion authorized by federal law.[130]

If a Tribe Sells or Leases Tribal Land in Violation of Federal Restrictions, is the Transfer Valid?

No. One of the first laws passed by Congress, the Indian Nonintercourse Act of 1790 (INA),[131] requires the federal government to approve the transfer of any interest in tribal land, whether trust or non-trust. Without that approval, the transfer is void and the agreement can be rescinded at any time by the United States,[132] by the tribe,[133] or by any tribal member whose rights are affected.[134] In one case, an interest in tribal land that a railroad purchased a century earlier was rescinded because Congress had not consented to the transfer.[135]

The INA was intended to give the federal government control over the sale of Indian land and to protect tribes from unscrupulous land grabbers.[136] During the past forty years, tribes in several states, including Maine, Massachusetts,

Connecticut, Rhode Island, and New York, filed suit in an effort to recover land they claimed had been taken from them without the federal government's consent, thus casting doubt on the legality of these transfers and the ownership of millions of acres of land.[137] In 1980, rather than allow lawsuits filed by two tribes in Maine to proceed further, Congress entered into settlements with them. Under the terms of the settlement, the tribes relinquished their claims to vast portions of the state of Maine in exchange for $81.5 million, which allowed the tribes to purchase 305,000 acres of land in the state.[138] Congress has reached compromises concerning other land claims, as well.[139]

Although the INA was passed in 1790 requiring the consent of the federal government for any sale in tribal land, it was not until 1966 that Congress passed a statute allowing Indian tribes to bring suit in federal court to protect their rights under the INA.[140] Thus, tribes whose lands had been taken in violation of the INA were unable to bring suit prior to that time unless they obtained specific statutory authority from Congress. Yet recent court decisions essentially punish Indian tribes for having failed to file suit prior to 1966 to regain possession of their lands. In *City of Sherrill v. Oneida Indian Nation of New York* (2005),[141] the Supreme Court held that when the Oneida Indian Nation of New York purchased land in 1997 and 1998 that had been removed from the tribe two centuries earlier in violation of the INA, the tribe did not have an automatic right to reassert its sovereign powers over that land, free of state control. Given this passage of time, it would be too "disruptive," the Court said, to allow the tribe to reassert its sovereign authority.[142] Citing *Sherrill*, a federal appellate court ruled in 2005 that the Cayuga Indian Nation of New York, whose lands had been taken nearly two hundred years earlier in violation of the INA, could neither recover those lands nor obtain compensation for the loss of its property, due to the disruptive nature of those remedies.[143] In 2010, the court extended that same rationale to land claims filed by the Oneidas,[144] thus preventing both tribes not only from recovering their confiscated lands but also from receiving compensation for the lands that had been taken.

The only thing tribes can do in this circumstance, assuming they can afford it, is to purchase the land that has been illegally seized and then request the Secretary of the Interior to convert that land into trust status, at which time that territory will once again become part of the reservation and subject to the tribe's governmental authority.[145] This is exactly what the Oneidas did after losing *Sherrill*: they had the Secretary accept into trust status the thirteen thousand acres of land they had recently purchased within the Oneida Reservation—land that had been removed decades earlier from tribal control in violation of the INA.[146]

What is Communal Property?

Few Indian tribes, if any, believed in individual ownership of land. Any land controlled by the tribe belonged to the entire community. This concept of land ownership, known as communal property, was a guiding principle of Indian life: land could not be privately owned, which meant that members of the community had to work together to harvest what they could from it. Anglo-American values, in contrast, tend to glorify the private ownership of property and the accumulation of individual wealth.

During the late nineteenth century, Congress devised a plan that it hoped would result in the assimilation of Indians into Anglo-American society. Congress realized that assimilation could succeed only if Indian communal property was destroyed and Indians learned to live and think like "Americans." The General Allotment Act of 1887 (GAA), discussed in Chapter I, was the vehicle by which Congress sought to achieve this goal. Under the GAA, tribal communal lands were divided into parcels ("allotments") and assigned to tribal members for their individual ownership while the tribe's "surplus" land was sold to non-Indians. Congress repealed the GAA in 1934, but by then two-thirds of all communal lands had passed from tribal ownership. The concept of communal property remains intact on many reservations where tribal lands still exist, but the presence of so many individually owned parcels of land has undermined the concept of communal property, a change many Indians deeply regret.

4. The Right to Regulate Individually Owned Land

Does the Tribe have the Right to Regulate Privately Owned Property within the Reservation?

Every government places restrictions on the use of private property within its borders in order to protect the safety and welfare of its citizens and resources. Indian tribes retain the inherent right to exercise this power unless Congress has limited that right or tribes have lost it by implication.[147]

Courts have upheld the right of Indian tribes to zone land, including land owned by a non-Indian when a significant tribal interest is at stake;[148] to determine who may inherit private property belonging to a deceased tribal member;[149] to take private land for a public use (the power of eminent domain);[150] and to impose health, safety, and employment regulations on, and to tax, businesses operating within the reservation, including in certain circumstances (as discussed below) businesses owned by non-Indians and located on non-Indian land within the reservation.[151]

Most Indian reservations were opened to settlement by non-Indians as a result of the General Allotment Act of 1887, and today these reservations are

"checkerboarded," with parcels of land owned by non-Indians scattered throughout the reservation. (On some reservations, more land is owned by non-Indians than by Indians.) In addition, Congress has given non-Indians various rights-of-way over tribal land, including rights-of-way to railroads (for laying tracks), to utilities (for running transmission lines), and to states (for building highways), although since 1948, a right-of-way over tribal land requires the consent of the tribe.[152]

The Supreme Court has held that when a non-Indian acquires a federal right to own or use land on an Indian reservation, the tribe may no longer "assert a landowner's right to occupy and exclude" the interest holder from that land,[153] unless the statute or agreement under which the interest in land was conveyed expressly reserves this power to the tribe. As a consequence of losing the greater right to occupy that land and exclude other persons from it, the Court has held that the tribe necessarily loses the lesser right to regulate activities occurring on that land. (The Supreme Court decisions establishing this principle are discussed in Chapter IX.)

Thus, Indian tribes do not have the same power to regulate activities occurring on land privately owned by non-Indians as it has for activities occurring on trust land. But every tribe retains the sovereign right, the Supreme Court has stated, to prohibit activities on privately owned land that imperil the "political integrity, the economic security, or the health or welfare of the tribe."[154]

5. The Right to Exercise Criminal Jurisdiction

Does an Indian Tribe have the Right to Exercise Criminal Jurisdiction over Tribal Members?

Yes. Indian tribes, like other nations, have the inherent right to maintain law and order. This includes the power to create a police force, establish courts and jails, and punish tribal members who violate tribal law.[155] A tribe's "right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions."[156]

Does a Tribe have the Right to Exercise Criminal Jurisdiction over Non-Indians?

No. In *Oliphant v. Suquamish Indian Tribe* (1978),[157] the Supreme Court held that non-Indians who violate tribal law are immune from prosecution in tribal court unless Congress has expressly conferred that power on the tribe (and Congress has not given any tribe this power). The Court's reasoning, and the difficulties this lack of authority is causing Indian tribes, are discussed in Chapter VIII.

Although Indian tribes lack the authority to prosecute non-Indians, tribes have the inherent power to exclude them from the reservation, to investigate criminal activity they appear to be engaging in within the reservation, and to detain them until appropriate authorities (state or federal, depending on the situation) take them into custody.[158] Tribes may also enter into agreements with state and federal law enforcement agencies so that tribal police will be cross-deputized, thereby allowing them to arrest non-Indians under state and federal law.

In 2002, a number of influential Indian leaders issued a paper entitled the "Tribal Governance and Economic Enhancement Initiative" ("Initiative").[159] The Initiative seeks passage of federal legislation that will reaffirm inherent tribal governance over all people and all places within Indian country, including the authority to levy taxes on non-Indians and to prosecute them for crimes. To allay fears that tribal governments would abuse their authority or discriminate against non-Indians, the Initiative proposes that persons significantly impacted by tribal powers would have the right to seek judicial review in federal court.

Does a Tribe have the Right to Criminally Prosecute Nonmember Indians?

Yes. Indians on a reservation other than their own ("nonmember" Indians) are subject to the tribe's criminal jurisdiction to the same extent as are tribal members. In *Duro v. Reina* (1990),[160] the Supreme Court held that a tribe may not prosecute nonmember Indians, but in response to *Duro*, Congress passed a law affirming the authority of Indian tribes to exercise this jurisdiction.[161] In 2004, in *United States v. Lara*,[162] the Supreme Court upheld the constitutionality of Congress's so-called "Duro fix," and it is now clear that Indian tribes may arrest and prosecute in tribal court nonmember Indians who violate tribal law.[163]

What Restrictions has Congress Placed on Tribal Law Enforcement?

As in all other areas of tribal power, Congress may limit tribal authority over law enforcement, and Congress has done so in several respects. The most far-reaching limitations are contained in the Indian Civil Rights Act of 1968,[164] discussed in Chapter XIV. This law limits the penalties that tribal courts can impose in criminal cases to one year of imprisonment and a $5,000 fine. However, if the defendant is represented by an attorney and the presiding judge is licensed to practice law, the penalties may increase to three years of imprisonment and $15,000 in fines. In addition, the ICRA requires that tribal courts extend almost all of the rights to criminal defendants who appear in their courts that the U.S. Constitution imposes on the state and federal courts in their prosecution of criminal defendants.

As explained in Chapter VIII, Congress has given state officials in some states and federal officials in the remaining states the authority to prosecute Indians who commit certain crimes in Indian country. The tribes, however, retain the right to prosecute these Indians for the same or related offenses.[165]

6. The Right to Exercise Civil Jurisdiction

Do Indian Tribes have the Right To Exercise Civil Jurisdiction over their Members on the Reservation?

Yes. Indian tribes have the inherent right to exercise civil jurisdiction over tribal members on the reservation. For instance, members who wish to get married, divorced, or adopt children on the reservation must comply with tribal law in doing so. Indian tribes may also subject members on the reservation to tribal taxation, such as income taxes and sales taxes. Indian tribes possess the right to tax as part of their inherent sovereign powers. "The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power . . . derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction."[166]

Tribes may establish courts to resolve civil disputes among tribal members, such as disputes arising from contracts or torts, as well as matters involving child custody.[167] Many tribes, either in their constitutions or in their laws, have authorized their courts to exercise broad civil jurisdiction. For instance, the Colville Confederated Tribes of Washington confers civil jurisdiction on its tribal courts to adjudicate "[a]ll causes of action, which involve either the Tribe, its officers, a member of the Tribe, a member of a federally recognized tribe, or any other matter that affects the interest or rights of the Tribe."[168] The Nez Perce Tribe of Idaho has a similar statute.[169]

Do Indian Tribes have the Right to Exercise Civil Jurisdiction over Nonmembers, Including the Right to Tax Them?

This subject is discussed in detail in Chapter IX, Section A, and is summarized here. Until fairly recently, Indian tribes were presumed to have broad civil jurisdiction over non-Indians on the reservation. In 1904, for instance, the Supreme Court held that an Indian tribe could assess a personal property tax on non-Indians on the value of their cattle grazing on reservation trust land leased from the tribe.[170] The Court rested its decision on the broad principle that Indian tribes, like other governments, have the inherent right to exclude nonmembers from their territory. Therefore, tribes may also set conditions upon which nonmembers may enter tribal land, such as a requirement that they pay certain taxes.

Similarly, in *Merrion v. Jicarilla Apache Tribe* (1982),[171] the Supreme Court upheld a tribal tax on the value of oil and gas produced by a non-Indian company on tribal trust land, stating in sweeping language that Indian tribes have the inherent right to manage their territory and the activities occurring on it. One year later, the Court stated that it is "well established" that Indian tribes have the power "to exclude nonmembers entirely or to condition their presence on the reservation."[172] This power, the Court reiterated in 1987, "is an important part of tribal sovereignty."[173] Relying on these Supreme Court decisions, other courts have held that tribes may collect a business license tax from a non-Indian engaged in trade on the reservation,[174] may tax non-Indians on the value of their leasehold interests in tribal lands,[175] and may collect a sales tax on sales made to non-Indians purchasing goods on tribal land.[176]

In the midst of these cases, all of which were favorable to Indian tribes, the Supreme Court also decided *Montana v. United States* (1981).[177] In *Montana*, the Court held that an Indian tribe was not permitted to regulate hunting activities conducted by a non-Indian on *non-Indian fee* land (land owned privately by a non-Indian) on the reservation, unless the tribe could prove either that (1) the non-Indian has entered into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or (2) the non-Indian is engaging in an activity that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[178] (These have become known as the two "*Montana* exceptions.")[179] The burden of proving the existence of an exception rests with the tribe,[180] and it is a difficult burden to meet.[181]

It was not until 2001 that the Supreme Court addressed the question of whether Indian tribes may tax the activities of non-Indians occurring on *non-Indian fee* land within the reservation. This question was answered in *Atkinson Trading Co. v. Shirley* (2001).[182] The issue in *Atkinson* was whether the Navajo Nation could require a non-Indian-owned hotel located on privately owned land within the reservation to pay a tribal hotel occupancy tax, similar to the type of tax that many state and local governments impose on hotels within their boundaries, which the hotel would collect from guests staying at the hotel. The Court held in *Atkinson* that, as a general rule, "Indian tribes lack civil authority over nonmembers on non-Indian fee land," including the right to tax them.[183] Tribal taxation of non-Indians on non-Indian fee land, the Court said, is permitted only where the tribe can prove the existence of a *Montana* exception.[184] In the absence of an exception, a tribe may only impose a tax on a non-Indian landowner in proportion to the services, such as police and fire protection, actually provided to the taxpayer.[185]

In recent years the Supreme Court has issued a series of decisions that substantially undercut tribal sovereignty and that are inconsistent with the Court's prior rulings.[186] One area in which the Court has radically changed its

perspective concerns the ability of tribes to exercise civil jurisdiction over non-Indians. In 1982 in *Merrion*, for example, the Court used expansive language to describe the scope of tribal powers over non-Indians, broadly declaring that each Indian tribe has the "general authority, as sovereign, to control economic activity within its jurisdiction" with respect to Indians and non-Indians alike.[187] Nineteen years later in *Atkinson*, however, the Court retreated from all language of that nature. Indeed, the Court stated in *Atkinson* that its holding in *Merrion* presented a "broader scope" of tribal authority than the Court now attributes to Indian tribes.[188] In *Atkinson*, the Court stated that the "general rule [is] that Indian tribes lack civil authority over nonmembers on non-Indian fee land."[189]

In *Nevada v. Hicks* (2001),[190] decided a few weeks after *Atkinson*, the Court went even further. The issue in *Hicks* was whether a tribal court could hear a civil rights lawsuit filed by a member of the tribe against state game wardens who had entered his home *on Indian trust land* and allegedly conducted an illegal search. The Court held that the tribal court lacked authority to subject non-Indians to tribal court process, marking the first time that the Court limited a tribe's ability to regulate the activities of non-Indians on *Indian* land.

In 2008, the Supreme Court summarized these recent decisions as standing for the principle that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders," explaining that tribal power over non-Indians is "presumptively invalid" without express congressional approval.[191] The Tribal Sovereignty Protection Initiative, discussed earlier, calls these recent decisions "judicial termination" and seeks legislation from Congress that recognizes that tribal governments may exercise broad civil and criminal jurisdiction over all persons on the reservation.[192]

Underlying these Supreme Court decisions, many believe, is a fear that non-Indians who may be sued in tribal court will not be treated fairly and will be subjected to very different legal standards than apply outside the reservation.[193] Yet studies show that tribal courts apply Anglo-American legal principles and reach fair and impartial results when deciding cases involving nonmembers.[194] In an effort to quell these concerns, the Initiative recommends that Congress pass legislation allowing non-Indians who lose cases in a tribal court to appeal those rulings to a federal court.[195]

7. The Right to Regulate Domestic Relations

Does a Tribe have the Right to Regulate the Domestic Relations of its Members?

Regulating domestic relations, which involve matters pertaining to home and family life such as marriage, divorce, adoptions, and child custody, is an integral aspect of sovereignty. The Supreme Court has confirmed that "unless

limited by treaty or statute, a tribe has the power . . . to regulate domestic relations among tribe members."[196] Many tribal courts resolve domestic issues on a daily basis, including granting divorces and resolving child custody matters.

Congress has the ability to limit these tribal powers, but unless it does, a tribe possesses not only the inherent, but the exclusive, right to regulate the domestic relations of its members on the reservation. *Fisher v. District Court*,[197] decided by the Supreme Court in 1976, illustrates this principle. In that case, a reservation Indian couple had been given foster custody of an Indian child by a tribal court. Wanting to adopt the child, the couple filed an adoption petition, not in tribal court, but in state court. The child's mother opposed the petition, but the state court granted the adoption. On appeal, the Supreme Court reversed the decision. The tribe had a vital interest in this matter because all parties to the adoption—the child, the mother, and the foster parents—were reservation Indians, and the tribe had authorized its own courts to hear these types of cases. Therefore, the Court said, the tribe's authority over this proceeding was exclusive, and the state lacked jurisdiction to intervene. It would seriously interfere with tribal self-government if states were allowed "to subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves."[198] The Indian Child Welfare Act of 1978, discussed in Chapter XVII, supports the inherent right of Indian tribes to determine the custody of their children.

If Indians are Married off the Reservation Under State Law, can they be Divorced in a Tribal Court?

Yes. As a general rule, a court can divorce couples who were married elsewhere, provided that the legislature has given the court this power. For instance, people married in Colorado can obtain a divorce in Nevada if they meet Nevada's requirements for divorce. Similarly, Indians married under state law can be divorced in a tribal court if they meet the tribe's requirements, and they can also be divorced according to tribal custom, provided that the tribe recognizes the continued validity of such divorces.[199]

8. The Right to Engage In and Regulate Commerce and Trade

Do Indian Tribes have the Right to Engage in Commerce and Trade?

Yes. An Indian tribe has the inherent right to engage in business activities in the tribe's own name[200] and to create and license corporations distinct from the tribe.[201] Many tribes own their own businesses, including craft industries; mining, fishing, and gambling operations; and ski resorts, motels, restaurants, supermarkets, and gas stations. Several years ago, the Rosebud Sioux Tribe of South Dakota constructed a wind turbine on the reservation, and today the

tribe sells electricity produced by the turbine to a utility company.[202] A number of tribes manufacture cigarettes on their reservations; the Squaxin Indian Tribe of Washington manufactures thousands of cigarettes a day, many of which are sold to other tribes for sale in tribal stores.[203]

Congress has passed a number of laws to assist tribes in their economic development. Tribes incorporated under the IRA can receive federal loans for business purposes.[204] The Buy-Indian Act[205] requires the Bureau of Indian Affairs (BIA) whenever practicable to employ Indian labor and purchase Indian products in fulfilling BIA contracts. The Indian Mineral Development Act of 1982[206] provides federal assistance to Indian tribes in developing and marketing mineral resources. The Indian Gaming Regulatory Act of 1988[207] promotes gaming on Indian lands.

In 2000, Congress passed the Indian Tribal Economic Development and Contract Encouragement Act,[208] which amended a law known as "Section 81." Prior to the 2000 amendment, Indians tribes were required to obtain approval from the Secretary of the Interior for any contract "relative to Indian lands," thus requiring secretarial approval for virtually every tribal business venture conducted on the reservation. In an effort to reduce such paternalistic oversight, the 2000 amendment requires secretarial approval only if the contract might encumber the land, that is, where the contract would provide the contracting party with a legally enforceable interest in the land itself, such as a lien or mortgage. Today, then, very few commercial contracts negotiated by tribes require secretarial consent, thus giving tribes more responsibility, freedom, and control.[209]

Many Indian reservations are located far from urban and industrial centers, have few marketable minerals or other natural resources, and are not located near transportation hubs or major highways. As a result, they often find it difficult to attract industry, resulting in severe unemployment and poverty on the reservation. Unemployment on many reservations exceeds 50 percent. The federal government should make a strenuous effort to improve economic conditions on these reservations, by providing, for example, tax incentives to businesses that move to such locations. Of course, each tribe must decide for itself whether to engage in commercial activities. Many tribal members oppose such things as gaming establishments or coal development for a variety of reasons. Yet these ventures produce jobs and income, creating a conflict for many tribes.[210]

Do Indian Tribes have the Right to Regulate the Commerce and Trade that Non-Indians Conduct on the Reservation?

Until fairly recently, it was presumed that Indian tribes had the inherent right to regulate all commercial activities on the reservation that impacted the tribe or tribal members. This presumption was reaffirmed as recently as 1982

in *Merrion*, which held, as mentioned earlier, that Indian tribes possess the "general authority, as sovereign, to control economic activity within its jurisdiction" with respect to Indians and non-Indians alike.[211]

In more recent years, however, the Supreme Court has severely undercut tribal jurisdiction over non-Indians, as illustrated by the *Atkinson* and *Hicks* cases. These Supreme Court decisions, said Jefferson Keel, president of the National Congress of American Indians, have "undermined tribal authority with devastating results for public safety, tax and revenue generation, and basic civil jurisdiction."[212] As a consequence of these recent rulings, the presumption today is that an Indian tribe may not regulate commercial activities of non-Indians unless the tribe can prove the presence of a *Montana* exception. Although this burden of proof is high, it is possible to meet it, as is discussed in Chapter IX.

At the same time that the Supreme Court has been eroding tribal authority, Congress has passed laws making it easier for tribes to engage in, and to regulate, business activities on the reservation. For example, Congress intentionally exempted Indian tribes from compliance with the Civil Rights Act of 1964 ("Title VII"),[213] thus allowing tribal corporations to give tribal members a preference over nonmembers in hiring and promotion.[214] Congress also has exempted Indian tribes from compliance with the Americans with Disabilities Act (ADA).[215] In addition, as explained earlier, the 2000 amendment to Section 81 allows tribes much greater discretion in negotiating commercial contracts.

Congress has passed a number of laws regulating commercial activity that do not expressly include Indians in their coverage, such as the Fair Labor Standards Act (FLSA),[216] the Age Discrimination in Employment Act (ADEA),[217] the Occupational Safety and Health Act (OSHA),[218] and the National Labor Relations Act (NLRA).[219] Some courts have held that Indian tribes are exempt from such laws of general applicability, concluding that the sovereign powers of an Indian tribe remain intact unless Congress expressly limits them.[220] Other courts have taken the opposite approach, holding that a law of general applicability applies to Indians unless the Indians can prove that its implementation would interfere with tribal governance[221] or violate a right conferred by a treaty,[222] or that evidence exists that Congress intended to exempt Indians from coverage.[223] These differing standards have resulted in seemingly inconsistent court decisions. For instance, one court held that the FLSA, which limits the number of hours that an employer may require an employee to work, was applicable to the operation of a tribal corporation,[224] whereas another court held that it was inapplicable to the operation of a tribal police department.[225] The same type of tribal enterprise that one court said must comply with OSHA[226] was exempted from compliance with OSHA by other courts.[227] In 2007, in a controversial and far-reaching decision, a federal appellate court ruled that

the Mashantucket Pequot's Foxwoods Casino is an "employer" under the NLRA and therefore was prohibited by the NLRA from interfering with a labor union's efforts to organize casino employees.[228] The tribe vowed to challenge this ruling, but ultimately agreed to a first-ever labor contract negotiated under tribal law that provides important protections to workers in exchange for a guarantee that workers will not strike the casino.[229]

Indian tribes are expressly authorized by federal statute to regulate the sale and use of alcoholic beverages in Indian country,[230] including (with certain exceptions) on land owned by non-Indians.[231] Violations of tribal liquor regulations can result in federal prosecution under these federal statutes.

Congress has given federal officials several responsibilities regarding reservation commerce, including the duty to require every person other than a full-blooded Indian to obtain a federal license to engage in commerce on the reservation.[232] These regulations do not limit tribal powers; they simply add a level of responsibility on federal officials to regulate aspects of a reservation's commerce and trade. For example, people who trade on an Indian reservation can be required to purchase both a federal and tribal trader's license. The duties of federal officials to regulate commerce and trade on the reservation are discussed in Chapter V, Section B(8).

9. Other Rights of Indian Tribes

Indian tribes have numerous rights in addition to those discussed in this chapter, and these are addressed elsewhere in this book. For instance, Chapter IV discusses Indian treaty rights. Tribal rights under the doctrine of trust responsibility are discussed in Chapter III. Chapter XI addresses hunting, fishing, trapping, and gathering rights, and Chapter XII discusses water rights. Last but not least, the right of tribes to file lawsuits to protect their rights is discussed in Chapter XVIII.