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INTEGRATING AMERICAN INDIAN LAW INTO THE COMMERCIAL LAW AND BANKRUPTCY CURRICULUM

Jack F. Williams*

I. INTRODUCTION

Indian tribes have experienced a resurgence of commercial activity both on and off Indian country.¹ Tribal leaders have identified commercial and economic development as a top priority because it provides revenue and jobs for tribal governments and members.² For example, gaming revenues in 1997 exceeded over \$6.4 billion,³ with revenues increasing at a continual rate. In 1999, revenues had increased to \$9.6 billion.⁴ The revenues from gaming have been used to foster other businesses both on and off tribal lands. Additionally, the management of natural resources, tourism, manufacturing, and the like, are producing revenues and providing jobs for members of the tribes.⁵

Consistent with this revitalization of commercial activity, President Clinton signed into law the Indian Tribal Economic Development and

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1. See U.S. Census Bureau, *Characteristics of American Indians by Tribe and Language*, § 2, G-1 to G-5 (1994) (listing 541 American Indian tribes, bands, and clans from which it drew the 1990 census of population information).

2. See Telephone interviews with several members and former members of the Choctaw Nation of Oklahoma Tribal Council, Jack F. Williams, Prof. Ga. St. U. College of L. (July 2001) (notes on file with author); U.S. Census Bureau, *Statistical Abstract of the United States* 18 (1994) (indicating the American Indian population in the United States was 1,796,000 in 1990).

3. See David B. Jordan, *Federal Indian Law: Tribal Sovereign Immunity: Why Oklahoma Businesses Should Revamp Legal Relationships with Indian Tribes After Kiowa Tribe v. Manufacturing Technologies, Inc.*, 52 Okla. L. Rev. 489 (1999).

4. See National Indian Gaming Association, *NIGA Home Page*, <<http://www.indiangaming.org/library>> (accessed Nov. 15, 2001). Indian Gaming has generated over 200,000 jobs. *Id.*

5. See generally *American Indians and Alaska Natives: 1997 Economic Census* (U.S. Dept. of Commerce 2001); Kate Spilde, *The Economic Development Journey of Indian Nations*, <<http://www.indiangaming.org/library/newsletters/index.html>> (accessed Nov. 15, 2001).

Contract Encouragement Act ("ITEDCEA").⁶ The purpose of the ITEDCEA is to foster outside investment in Indian country by relaxing certain historical safeguards enjoyed by tribes as beneficiaries of the trustee relationship with the federal government.⁷ The ITEDCEA has already had an impact on economic activity with several tribes.⁸ Increased economic activities have forged new commercial relationships between tribes and non-Indian entities.⁹ These commercial relationships pose fascinating legal and policy issues.

The rejuvenated commercial activity of the tribes suggests a need to carefully re-think the idea of Indian law integration in the current law school curriculum. Professor Cynthia Ford offers a unique approach for the integration of Indian law into a traditional civil procedure class.¹⁰ Since the beginning of my law-teaching career, I have sought the same for commercial law and bankruptcy classes, which seems natural from where I sit. I have found several reasons for integrating Indian law in the commercial law curriculum.

First, a study of Indian commercial law in the traditional commercial law class provides a delightful portal into a better understanding of the Anglo-American commercial tradition. Second, a study of Indian commercial law in the traditional commercial law class exposes the student to domestic examples of contemporary comparative law, particularly in the area of sovereignty.¹¹ Third, a study of Indian commercial law in the traditional commercial law class reminds us of the role that custom and tradition play in Anglo commercial law. Fourth, a study of Indian commercial law in the traditional commercial law class illuminates larger underlying themes in the dance of commercial activity. Finally, a study of Indian commercial law in the traditional commercial law class helps to prevent the marginalization of a rich and vibrant body of law.

In this Essay, I develop each of these ideas with an eye toward easing the law teacher into the task of integrating Indian law into Contracts, UCC, Banking, Corporations, and Bankruptcy law classes. Before I begin my endeavor, however, I offer one simple promise. The commercial law or bankruptcy teacher that makes the effort to incorporate Indian law into the traditional commercial law curriculum

6. 25 U.S.C.A. § 81 (West 2001) (Indian Tribal Economic Development and Contract Encouragement Act of 2000); see Anna-Emily C. Gaupp, *The Indian Tribal Economic Development And Contracts Encouragement Act Of 2000: Smoke Signals Of A New Era In Federal Indian Policy?*, 33 Conn. L. Rev. 667 (2001).

7. See 25 U.S.C.A. § 81 (West 2001).

8. See generally Spilde, *supra* n. 5.

9. *Id.*

10. See Cynthia Ford, *Integrating Indian Law into a Traditional Civil Procedure Course*, 46 Syracuse L. Rev. 1243 (1996).

11. See *id.* at 1243-45 (Professor Ford cites this purpose as an example for integration of Indian law in the civil procedure course.).

will find the effort rewarding, enriching, and inspiring. It will open new worlds for students. With this promise made, I begin the task of fulfilling it by exposing a few basic themes relevant to our situation in contemporary American Indian law.

II. INDIAN TRIBES AND INDIAN LAW

A. *Indian Tribes*

To understand the modern Indian tribe in the context of contemporary federal Indian law and policy, one generally begins with the Indian Reorganization Act of 1934 ("IRA").¹² However, tribal history, custom, and tradition—both pre- and post-Columbian—are extremely important currents in the understanding of the tribe.¹³ Many scholars lose these important cultural aspects because the history of Indians is taken in large part from the perspectives of non-Indians.¹⁴ In fact, the literature often depicts tribes as some sort of confederation. This is simply not true.¹⁵ For example, the Choctaw Nation of Oklahoma, the tribe in which I grew up in southeastern Oklahoma, has little in common with many of the Northeastern tribes that I have studied. The Choctaw Nation's language, music, legends, way of life—are all very different.¹⁶ Thus, any universal "Indian history, custom, or tradition" is generally seriously misleading.

Regardless of this deficiency, "The IRA was," as Professor Felix Cohen observed, "intended to provide a mechanism for the tribe as a governmental unit to interact with and adapt to a modern society, rather than to force the assimilation of individual Indians."¹⁷ Through the IRA, the federal government authorized each reservation to establish its own western-style form of government with its own constitution.

In particular, section 16 allows a tribe to put a proposed constitution to a vote.¹⁸ If adopted by the tribal members, and approved

12. 25 U.S.C. §§ 461-479 (1934) (known as the Indian Reorganization Act).

13. See *Handbook of North American Indians* vol. 4, 324-429 (William C. Sturtevant ed., U.S. Govt. 1988) (I strongly recommend this series to those students with a serious interest in Indian studies.).

14. A popular historical account that backed the trend identified in Dee Brown's, *Bury My Heart at Wounded Knee*, (Holt, Reinhart, & Winston 1970) (developing the federal policy of systematic destruction of the American Indians during the second half of the nineteenth century).

15. A copy of the linguistic map is on file with the author and will be made available to those interested. (A fascinating way by which to expose the diversity and variety of Indian tribes in the United States is to isolate the linguistic roots of the tribes by common language stock.).

16. Like many tribes, the Choctaw Nation maintains an excellent and informative website. See e.g. Choctaw Nation Web site <<http://www.choctawnation.com>> (accessed Oct. 13, 2001); Jesse O. McKee & Jon A. Schlenker, *The Choctaw* (Jackson U. Press 1980).

17. Felix S. Cohen, *Handbook of Federal Indian Law* 147 (Michie Co. 1982).

18. 25 U.S.C. §§ 461-479 (1934).

by the Secretary of Interior, the new constitution governs the tribe's formal structure.¹⁹

Many tribes followed the example of the United States Constitution. Typically, under the IRA, a tribe was organized with a chief, president, governor, or primary leader—the leader of the executive branch. The tribal council performed traditional legislative-like functions. And, the third branch, or the judiciary, was typically a formal or informal tribal court system with both lawyer and non-lawyer judges. Increasingly, as Justice Marshall observed: "Tribal Courts play a vital role in tribal self-government . . . and the Federal Government has encouraged their development."²⁰

Presently, there are over 150 separate tribal court systems across the United States.²¹ These tribal courts typically exercise "extensive criminal and civil jurisdiction."²² Cases are decided and law is made in these tribal courts but not the law we commonly refer to as Indian law. These tribal courts render judgments that are enforceable on, and in most instances, off Indian country.²³

B. Indian Country

Transactions affecting Indian country illustrate many of the issues discussed in this Essay. "Indian country" is a defined term in federal Indian law. "Indian country" means:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . .
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.²⁴

As used in the statute defining "Indian country," the term "dependent Indian communities" refers to "Indian lands that are neither reservations nor allotments," and that "have been set aside by the federal government for use of Indians as Indian lands," and are "under federal superintendence."²⁵

19. *Id.*

20. *Iowa Mutual Ins. v. LaPlante*, 480 U.S. 9, 14-15 (1987).

21. Ford, *supra* n. 10, at 1247.

22. *Id.*; Symposium, *Indian Tribal Courts and Justice*, 79 *Judicature* 107 (1995).

23. See Robert Laurence, *The Role, If Any, For the Federal Courts in the Cross-Boundary Enforcement of Federal, State and Tribal Money Judgments*, 35 *Tulsa L.J.* 1 (1999) (Professor Robert Laurence has written extensively on the subject of the enforcement of tribal court judgments both on and off Indian country.).

24. 18 U.S.C. § 1151(a)-(c) (1948).

25. *Alaska v. Native Village of Venetic Tribal Govt.*, 118 S. Ct. 948, 950 (1998).

Tribal courts articulate tribal values. They can act to preserve tribal culture and customs. Tribal values are affirmed not only in decisions about such issues as children, contract disputes, and sentencing, but also in the process by which the decisions are made, the way disputes are resolved, and the manner in which justice is done.³³

Thus, to gain a deeper appreciation of tribal law, one must begin with tradition, and the great transmitters of tradition are tribal courts.

However, one cannot ignore federal Indian law, which permeates commercial activity with Indian tribes in the United States. This body of federal Indian law has also influenced the development of tribal law.³⁴ Of course, this development is understandable and quite consistent with the Indian philosophy, for it is a foolish people that do not learn from its neighbors.

III. THE NATURE OF THE PARTIES

A. Tribal Corporations

In commercial law, it is easy to take for granted the capacity and status of parties to an agreement. In my Commercial Paper and Payment Systems class, I discuss the special status of Indian tribes as parties to contracts. I provide an example where a non-Indian party is negotiating with a tribe in its governmental capacity. I then follow-up that example with a scenario in which a tribe and a tribal member are negotiating with a non-Indian in a purely private commercial law matter. (The models also work well in the Article 9 class.)

In either example, the question "who are the parties?" is significant. An obvious question is whether one is dealing with an Indian tribe. Presently, there are tribes recognized by the federal government, tribes not recognized by the federal government but recognized by a state government, and tribes recognized by neither the federal or state government.³⁵ "Federal recognition may arise from treaties, statutes, or executive and administrative orders."³⁶

Once a tribe has been identified, familiarity with its tribal structure is important. A lawyer must review the tribe's constitution, relevant codes, ordinances, and unwritten customs.³⁷ These relevant legal documents may usually be obtained from the tribe or the local Bureau of

33. Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 *Judicature* 113, 114 (1995).

34. See Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 *Judicature* 110, 112 (1995).

35. Canby, *supra* n. 28, at 3-6. There are presently 561 federally-recognized Indian tribes. See National Indian Gaming Association, *supra* n. 4.

36. Ohre, *supra* n. 26, at 55.

37. See *id.* at 55-56.

In summary, the term “Indian country” means “the territory where Indians are governed primarily by tribal and federal rather than state law.”²⁶ Transactions that occur within Indian country or that affect Indian country generate the types of issues worthy of discussion in the commercial law school curriculum.

C. *Indian Law*

American Indian law is a generic term that encompasses two different legal traditions. The first type of Indian law defines the relationship between the conqueror (the federal and state governments) and the conquered (the Indian tribes).²⁷ For example, Judge William Canby, Jr., a well-respected Indian law scholar, defines federal Indian law as that body of law that deals with the “status of the Indian tribes and their special relationship to the federal government, with all the attendant consequences for the tribes and their members, the states and their citizens, and the federal government.”²⁸

Conspicuously absent is any active role of the tribe in developing the law. In a similar vein, Professor Robert Yazzie has observed that:

[Indian law] is a law for Indians, intended to control them, and not a law of Indians . . . you see that (1) it is not written or made by Indians; (2) it does not speak to tribal legal traditions; and, (3) it advocates barriers to tribal governments and traditional ways.²⁹

In my commercial law classes, I focus largely on the other legal tradition, or tribal law, to highlight and contrast themes that we may take for granted in American commercial jurisprudence. Indian tribal law is a holistic blend of custom, traditions, and practices learned through the transmission of an oral tradition, legend, and folklore.³⁰ Tribal law is wonderfully harmonic, a poetic blend of the importance of every individual to the tribe and the tribe to every individual. To those ends, tribal law customarily seeks to build trust and to promote resolution and healing.³¹ Tribal courts, unconstrained by strict rules of evidence, tend to review the issues before it in their entirety, taking time to identify and probe all contributing factors.³² Tribal courts also play a significant role in the transmission and development of tribal law.

26. Mark D. Ohre, *When the Location is Tribal*, Bus. L. Today 55, 58 (Mar./Apr. 2001).

27. See Thomas Sowell, *Conquests and Cultures* ch. 5, 249 (Basic Books 1998) (fascinating historical and comparative account of conquest).

28. William C. Canby, *American Indian Law in a Nutshell* 1-8 (2d ed., West 1988).

29. Robert Yazzie, *Law School as a Journey*, 46 Ark. L. Rev. 271, 271-72 (1993).

30. See Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 *Judicature* 126, 126 (1995); Charles Alexander Eastman, *The Soul of the Indian* 91, 99-100 (U. Neb. Press 1980) (originally published 1911); George E. Lankford, *Native American Legends* (Aug. House Publishers 1987).

31. See Melton, *supra* n. 30, at 129.

32. *Id.*

Indian Affairs office.³⁸ If the transaction is important, a tribal legal expert should be retained and consulted.

It is now increasingly more common to negotiate with tribes that have incorporated a particular business endeavor. There are three possible forms of corporations that the tribe may embrace.³⁹ First, the Indian entity may be a federally chartered corporation under section 17 of the IRA.⁴⁰ The corporate charter is obtained from the Secretary of the Interior.⁴¹ Under section 17 of the IRA, the tribal corporation becomes a separate legal entity from the tribe itself.⁴² The tribal corporation has the typical powers to contract, to pledge assets, and to sue and be sued.⁴³ However, the tribal corporation may assert sovereign immunity unless waived by the tribe.⁴⁴ Second, a tribe may form a corporation under a tribe's corporate law.⁴⁵ Several tribes have developed their own corporate law structure, while others have borrowed heavily from the Model Business Corporation Act. Third, a tribe may form a corporation under state law.⁴⁶

B. Tribal Sovereignty

An understanding of American Indian law (as well as American Indians themselves) must begin with a working knowledge of tribal sovereignty.⁴⁷ In *Johnson v. M'Intosh*,⁴⁸ the Court held that a tribe had no power to grant lands to any entity other than the federal government.⁴⁹ Chief Justice John Marshall observed:

The rights of the original inhabitants were in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil . . . but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.⁵⁰

In *Cherokee Nation v. Georgia*,⁵¹ the Court held that an Indian tribe was not a "foreign state" for purposes of Article III original Supreme

38. *Id.*

39. *Id.*

40. 25 U.S.C. § 477 (1934).

41. *See id.*

42. *See id.*

43. *See id.*

44. Ohre, *supra* n. 26, at 55-56.

45. *Id.*

46. *Id.*

47. *See Canby, supra* n. 28, at 66-83.

48. 21 U.S. 543 (1823).

49. *See id.*

50. *Id.* at 574.

51. 30 U.S. 1 (1831).

Court jurisdiction.⁵² Again, Chief Justice Marshall observed: "So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society separated from others. Capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful."⁵³

In *Worcester v. Georgia*,⁵⁴ Chief Justice Marshall further observed: "Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . ."⁵⁵ But this notion of independence for tribes is a half-truth.⁵⁶ Tribal sovereignty has historically been tempered by a trust relationship between the tribes and the federal government. The federal government has long regarded tribes as beyond the purview of state control, yet well within the plenary control of the federal government.⁵⁷

The most common manifestation of tribal sovereignty in the commercial context is the doctrine of sovereign immunity.⁵⁸ The notion that "the king could do no wrong" was extended to protect Indian tribes as sovereigns. Historically, the doctrine shielded tribes from suits in federal and state courts.⁵⁹ More recently, the Supreme Court, in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,⁶⁰ held that absent an express waiver by the tribes or Congress, Indian tribes are immune from suit in federal and state courts for activities of both a commercial or governmental nature, which arise either on or off Indian country.⁶¹ Thus, the *Kiowa Tribe* decision reaffirmed the principle that Indian tribes "enjoy immunity from suit [in federal and state court] without regard to the subject matter of the suit or where the tribe's conduct took place."⁶²

In addition, sovereignty discussions permit a law professor to develop the themes of efficiency and fairness. Some have argued that a strong sovereignty concept is actually counter-productive to the tribe's best interest. The argument states that to the extent tribal litigation

52. *See id.*

53. *Id.* at 16.

54. 31 U.S. 515 (1832).

55. *Id.* at 559.

56. Canby, *supra* n. 28, at 69-79.

57. *See id.* at 68-83.

58. *See generally* Pommersheim, *supra* n 34; Lynn H. Slade & Walter E. Stern, *Environmental Regulations on Indian Lands: A Question of Jurisdiction*, 12 Complete Law. 24 (1995).

59. *See id.*

60. 523 U.S. 751 (1998).

61. *Id.*

62. Ryan T. Koczara, *American Indian Law—Sovereign Immunity—Indian Tribes Enjoy Sovereign Immunity From Suits on Contracts, Whether Those Contracts Involve Governmental or Commercial Activities and Whether They were Made on or off a Reservation: Kiowa Tribe v. Manufacturing Technologies, Inc.*, 118 S. Ct. 1700 (1998), 76 U. Det. Mercy. L. Rev. 927, 927 (1999).

increases risk, that risk increases costs of financing, goods, services, etc. These arguments miss the mark, however. American Indian existence depends entirely on sovereignty status. "Sovereignty is critical to tribal integrity and dignity."⁶³ Convenient attempts to circumvent sovereignty simply reduce the separate nations status of Indian tribes.

Some have argued that a sovereignty concept is unfair.⁶⁴ Applying the doctrine to off-reservation Indian commercial activity is problematic. First, parties may not know that they are dealing with a tribe, particularly if the tribe is operating through a tribal corporation.⁶⁵ Second, those that are harmed by tribal activity may also be barred from bringing suit against the tribe in federal and state courts.⁶⁶

Clearly, after *Kiowa Tribe*, one must consider carefully the permutations of tribal sovereign immunity. Before contracting with an Indian tribe or Indian entity, one may seek an express waiver of immunity by an authorized representative of the tribe.⁶⁷ Of course, the tribe may reject the notion, forcing any potential dispute into a tribal resolution process. That is simply the way of sovereigns.

IV. INTEGRATION OF BASIC INDIAN LAW INTO COMMERCIAL LAW

A. Increasing Understanding of Anglo-American Commercial Tradition

A study of Indian commercial law in the traditional commercial law class provides a delightful portal into a better understanding of the Anglo-American commercial tradition. For example, the ITEDCEA sought to "clarify which agreements with Indian tribes require federal approval, to specify the criteria for approval of those agreements, and to provide that those agreements covered by the Act include a provision either disclosing or addressing tribal immunity from suit."⁶⁸ Historically, any agreement between a tribal and non-tribal party "relative to their lands" had to be approved by the federal government before it became valid and enforceable.⁶⁹ The 2000 version of section 81 decreased the

63. Charles R. Zeh & Treva J. Hearne, *Development Considerations on Indian Lands*, 13 Nat. Resources & Env. 350, 350 (1998).

64. See generally Brian C. Lake, *The Ultimate Sovereign Immunity of Indian Tribal Business Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1996 Colum. Bus. L. Rev. 87, 88, 116-117 (1996); Amelia A. Fogelman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver of Tribal Business*, 79 Va. L. Rev. 1345, 1361 (1993); John F. Petoskey, *Doing Business with Michigan Indian Tribes*, 76 Mich. B.J. 440, 442 (1997).

65. *Id.*

66. See *Generally Kiowa Tribe*, 523 U.S. 751.

67. See David M. LaSpaluto, *A 'Strikingly Anomalous,' 'Anachronistic Fiction': Off-Reservation Sovereign Immunity for Indian Tribal Commercial Enterprises*, 36 S.D. L. Rev. 743, 759-60 (1999) (for a discussion of waivers in this context).

68. S. Rpt. 106-150, pt. 1 (Sept. 8, 1999).

69. See 25 U.S.C. § 81 (1872).

scope of that section. Thus, presently the section covers contracts that “encumber Indian lands for a period of 7 or more years”⁷⁰

The 2000 version of section 81 poses an interesting issue in commercial law: whether, under Article 9 of the UCC, a mortgage, deed of trust, or deed to secure debt in real property or fixture filings requires federal approval as a precondition to validity and enforceability?⁷¹ The repercussions of the answer extend beyond federal and state commercial law when one of the parties seeks relief under the United States Bankruptcy Code. The interplay between federal, state, and tribal law allows a teacher to develop the concept of an encumbrance on property. Exposing the legal fictions that generally cloud our traditional understanding of encumbrances, this portal into Anglo-American law makes the unpacking of the basic concept of a lien a fascinating intellectual journey. In a bankruptcy course, the understanding of an encumbrance goes a long way in a more sophisticated understanding of the role of the bankruptcy trustee under section 544(a) of the Bankruptcy Code.⁷²

Another example I use is the bubbling conflict between the Alaska Native Claims Settlement Act (“ANCSA”)⁷³ and the United States Bankruptcy Code.⁷⁴ Professor Katherine Black and David Bundy carefully develop the interesting interplay between the two bodies of law as Alaska Natives engage in ever-increasing economic ventures with non-

70. 25 U.S.C.A. § 81 (West 2001). Section 81 states, in pertinent part:

(b) No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

(c) Subsection (b) shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.

(d) The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) if the Secretary (or a designee of the Secretary) determines that the agreement or contract-

(1) violates Federal law; or

(2) does not include a provision that—

(A) provides for remedies in the case of a breach of the agreement or contract;

(B) references a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe; or
(C) includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action).

Id.

71. See Anna-Emily C. Gaupp, *The Indian Tribal Economic Development and Contracts Encouragement Act of 2000: Smoke Signals of a New Era in Federal Indian Policy?*, 33 Conn. L. Rev. 667 (2001) (for an excellent discussion of these and other related topics).

72. See 11 U.S.C.A. § 544 (West 2001).

73. 43 U.S.C.A. §§ 1601-1629e (West 2001).

74. 11 U.S.C.A. §§ 101-1330 (West 2001).

Native parties.⁷⁵

The ANCSA extinguished aboriginal land claims and transferred land and cash to Native-owned corporations. Some of these corporations have experienced severe financial difficulty, necessitating their seeking relief under the United States Bankruptcy Code. Taking a Native-owned corporate entity through the bankruptcy process as a debtor poses fascinating eligibility, governance, property of the estate, bankruptcy taxation, and Chapter 11 reorganization issues. In particular, the absolute priority rule embodied in the Bankruptcy Code protects creditors at the expense of shareholders;⁷⁶ whereas, the ANCSA seeks to protect economic growth while protecting the lands and cultural values of the Natives. The interplay provides a fascinating vehicle to explore the absolute priority rule and the “best interests of the creditors” test.⁷⁷

One more example that I use that would apply in both an Article 9 or bankruptcy class is the situation where a non-Indian creditor seeks to repossess its collateral from an Indian debtor on tribal lands. Any attempt by the non-Indian creditor to repossess on Indian land without tribal court authority is a trespass under tribal law.⁷⁸ This is, of course, a real world problem that financial institutions must address on a regular basis.⁷⁹

B. Exposure to Domestic Examples of Contemporary Comparative Law

A study of Indian commercial law in the traditional commercial law class exposes the student to domestic examples of contemporary comparative law, particularly in the area of sovereignty and the judicial and adjudicatory process. Commercial law, for good or evil, is ensnared by alternative dispute resolution (“ADR”) models. In addition to the efficiencies embodied in ADR, traditional commercial actors like the certainty of skirting jury verdicts that ADR procedures provide.⁸⁰

I introduce ADR in the commercial context with a discussion on

75. Kathryn A. Black et al., *When Worlds Collide: Alaska Native Corporations and the Bankruptcy Code*, 6 Alaska L. Rev. 73 (1989).

76. See David Gray Carlson & Jack F. Williams, *The Truth About the New Value Exception to Bankruptcy's Absolute Priority Rule*, 21 Cardozo L. Rev. 1303 (2000). The absolute priority rule ensures that no junior creditor or equity holder will receive a distribution from the bankruptcy estate until all senior creditors have been paid their claims.

77. 11 U.S.C.A. § 1129(a)(7) (West 2001). The “best interest of the creditors” test ensures that only plans that pay out as much to an impaired creditor as that creditor would receive in a hypothetical chapter 7 liquidation may be confirmed.

78. Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 Willamette L. Rev. 841, 917-918 (1990).

79. See Robert Laurence, *The Off-reservation Garnishment of an On-Reservation Debt and Related Issues in the Cross-boundary Enforcement of Money Judgments*, 22 Am. Indian L. Rev. 355 (1998) (for a discussion of related debtor/creditor issues).

80. See e.g. Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumers Protection and the Circumvention of the Judicial System*, 50 DePaul L. Rev. 1191 (2001).

tribal courts. In particular, I select commercial law cases decided by tribal courts and the common-sense remedies embraced by those courts.⁸¹ Notwithstanding the tremendous influence federal law has had on tribal courts, tribal courts have continued to cling to Indian social norms, both specific to the tribe and common to most tribes.⁸²

An understanding of the diversity of the law of Indians exposes yet another irony. When we address potential conflicts of law between tribal law, on the one hand, and federal or state law, on the other, increasingly, another conflict occurs—whether, for example, we apply Choctaw tribal law or Creek tribal law. We then delve into tribal choice of law customs in the context of commercial law.⁸³

C. *The Role of Custom and Tradition in Commercial Law*

A study of Indian commercial law in the traditional commercial law class reminds us of the role that custom and tradition play in Anglo-American commercial law. Again, the outstanding works of professor Robert Cooter and Wolfgang Fikentscher clearly fix the essential and integral role that custom and tradition play in the law of Indians. Particularly, the researchers documented the role judicial custom plays in Indian law.⁸⁴ What is meant by judicial custom is the body of custom that aids and channels the role played by tribal judicial officers or the process by which tribal judges hear and decide cases.

Earlier, Professor Karl Llewellyn and Adamson Hoebel had documented the role of custom among the law of the Cheyenne.⁸⁵ Their extensive discussion of the tribe's "trouble-cases" exposed the "living

81. A darling of a case, although not in the commercial law area, is *In re Marriage of Napper*, 19 Ind. L. Rep. 6078 (Yak. Tr. Ct. 1992), wherein the Yakima National Tribal Court recognized a traditional marriage ceremony even where it conflicted with the written tribal code.

82. See Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part I)*, 46 Am. J. Comp. L. 287 (1998), and *(Part II)*, 46 Am. J. Comp. L. 509 (1998) (for a fascinating account of tribal courts).

83. See e.g. *Walker v. Housing Auth., Sac and Fox Nation*, 5 Okla. Trib. 458 (1998) (extra-tribal common law not binding on tribal court reviewing contract dispute); *Muskogee (Creek) Nation ex rel. Beaver v. American Tobacco Co.*, 5 Okla. Trib. 401 (1998) (all contracts entered into with Tribe or tribal citizen within territorial jurisdiction construed as consent to tribal court jurisdiction); *Gibson v. Bolding*, 4 Okla. Trib. 479 (1995) (in a contract dispute, Kickapoo tribal court applies tribal choice of law provisions); *White v. Hill*, 4 Okla. Trib. 449 (1995) (developing tribal law on illegality of contracts); *Grothers v. Halliburton Oil Producing Co.*, 4 Okla. Trib. 232 (1995) (discussion of Muskogee/Creek law on liens and secured transactions); *Pawnee Tribe of Oklahoma v. Franseen*, 2 Okla. Trib. 291 (1991) (discussion of moral obligation of contract); *White v. Hill*, 4 Okla. Trib. 449 (1995) (Tribal Court has authority to distribute Indian country assets of failed business venture where all parties consent; tribal court admonishes owners of venture for poor business decisions); *Cole v. Kaw Housing Auth.*, 4 Okla. Trib. 281 (tribal court issues stay to prevent home repossession); *Kotch v. Absentee Shawnee Tribe*, 3 Okla. Trib. 184 (1993) (personal property repossessions).

84. Cooter & Fikentscher, *supra* n. 82, at 509-11.

85. See K. N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (U. of Okla. Press 1941).

law” of the Cheyenne. They observed that the law of the Cheyenne was part of the fabric of their society; the law remained in touch with the norms and values of the Cheyenne culture, “rather than a regime of letter or of rule or of form.”⁸⁶

Professor David Ray Papke sees many indications of Cheyenne influence in Article 2 of the UCC.⁸⁷ The master architect of this Article, Karl Llewellyn, embraced the “law-ways” of the Cheyenne, the relevance of social norms to the development of the law, and faith in the decisions of prior tribal judges in what became the jurisprudence of Article 2.⁸⁸

D. *Exposing Themes*

A study of Indian commercial law in the traditional commercial law class illuminates larger underlying themes in the dance of commercial activity. Tribal law views a promise as a moral obligation.⁸⁹ “Tribal people tend to form long-run relationships with trading partners. Long run relationships build trust and reliance among the parties.”⁹⁰ Mutual consent—not a bargained for exchange—is the theory that drives contract law among most of the tribes.⁹¹ There is no need for formal mechanisms like offer, acceptance, and consideration.⁹² In fact, the concept of consideration is generally unknown in tribal law.⁹³ Needless to say, tribal courts have little patience with technical defenses once a conclusion has been reached that mutual consent was present.⁹⁴ Moreover, it appears that specific performance, and not damages, is the preferred remedy.⁹⁵ Additionally, tribal courts seek to repair relationships even in the commercial context. Thus, it is not unusual to witness a tribal court order a party to apologize, to ask for forgiveness and to make restitution.⁹⁶

Common to most Indian tribes is the heartfelt belief that no individual, and by extension no commercial activity, is more important than the harmony of life.⁹⁷ Moreover, business is not divorced from social activity—“corporate activities necessarily must be a social

86. *Id.* at 323.

87. See David Ray Papke, *How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code*, 47 *Buff. L. Rev.* 1457 (1999).

88. See *id.* at 1484-85.

89. See generally Melton, *supra* n. 30, at 127-29.

90. Cooter & Fikentscher (Part II), *supra* n. 82, at 547-48.

91. See *id.* at 548.

92. See *id.*

93. See *id.*

94. *Id.* at 549.

95. See Cooter & Fikentscher, *supra* n. 82, at 549.

96. See Melton, *supra* n. 30, at 127.

97. See Michael M. Pacheco, *Toward A Truer Sense of Sovereignty: Fiduciary Duty in Indian Corporations*, 39 *S.D. L. Rev.* 49, 59 (1994).

process."⁹⁸ "When a tribe undertakes a business enterprise, it usually acts on behalf of the entire tribal community."⁹⁹ Tribal law places emphasis on community, cooperation, and relatedness.¹⁰⁰

Tom Tso, Chief Justice of the Supreme Court of the Navajo Nation, observed:

Navajos have survived since before the time of Columbus as a separate and distinct people. What holds us together is a strong set of values and customs, not words on paper. I am speaking of a sense of community so strong that, before the federal government imposed its system on us, we had no need to lock up wrongdoers. If a person injured another or disrupted the peace of the community, he was talked to, and often ceremonies were performed to restore him to harmony with his world. There were usually no repeat offenders. Only those who have been subjected to a Navajo "talking" session can understand why this worked.¹⁰¹

E. Prevent Marginalization of Indian Commercial Law

A study of Indian commercial law in the traditional commercial law class helps to prevent the marginalization of a rich and vibrant body of law. My concern—actually my Uncle, a full-blood Choctaw, first voiced it to me—is that traditional American Indian law classes provide a convenient excuse to deposit the rich and vibrant body of tribal law in a place few students travel. Rather, it was my Uncle's (and remains my) goal to incorporate the genius of tribal law in the core law school curriculum. I use tribal law in virtually all the classes I teach—admiralty, bankruptcy, civil procedure, commercial law, professional responsibility, law and technology, and taxation. And, in each class, both the students that have voiced an opinion and I have found that the minimal investment in learning about the law of Indians generates far greater rewards.

V. CONCLUSION

I would like to close with two observations. First, one cannot underestimate the vast diversity among Indian tribes:

There is incredible diversity within and across tribes about all manner of issues, and tribes exist in quite diverse situations. Thus, it is a mistake to assume that there is one Indian perspective on a problem Fitting the actual condition of Indian groups into Anglo-American constructs may

98. *Id.* at 68.

99. *Id.* at 85.

100. Frank Pommersheim, *A Path Near The Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 *Gonz. L. Rev.* 393, 405 (1991-1992).

101. Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 *Ariz. L. Rev.* 225, 231 (1989).

often produce a distorted dialogue.¹⁰²

We must be cautious when referring to the law of Indians and ever mindful that there exist significant differences among the tribal law traditions of the Choctaw, the Pequot, the Cheyenne, and the Navajo, for example.

Second, increased commercial activity has come at a cost. All technologies do. Professor Frank Pommersheim captured the fear that many tribal elders have voiced when confronting the so-called benign technologies and constructs of Western Civilization. He posits that:

[I]t is the very presumption that disturbs many people in Indian country because it seems to mean a further walk down that non-Indian road that leads to assimilation and 'civilization.' In other words, to many Indians, it is cultural ruin.¹⁰³

Ironically, economic prosperity may lead to cultural ruin. It will turn to the new generation of Indian tribal leaders to accommodate the new prosperity, and, yet maintain the traditions and customs that make each tribe unique.

102. Philip Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137, 1230-31, 1230 n. 435 (1990).

103. Frank Pommersheim, *Economic Development in Indian Country: What are the Questions?*, 12 Am. Indian L. Rev. 195, 213 (1984).

