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Selling Stories OR You Can't Own This

CULTURAL PROPERTY AS A FORM OF COLLATERAL IN A SECURED TRANSACTION UNDER THE MODEL TRIBAL SECURED TRANSACTIONS ACT

Grant Christensen[†]

“Within 10 tribal business days after receiving a signed demand by the debtor, a secured party having control of an investment account shall send to the investment intermediary with which the investment account is maintained a signed statement that releases the investment intermediary from any further obligation to comply with instructions originated by the secured party.”¹

I. TRIBES ARE DIFFERENT: AN INTRODUCTION

The world of finance is littered with a panoply of obscure, even obtuse, verbiage.² While understanding the complexities

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¹ MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-205(b) (2005), available at http://www.uniformlaws.org/shared/docs/mtsta/mtsta_aug05_final.pdf.

² Anthony J. Luppino, *Minding More Than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations* 30 W. NEW ENG. L. REV. 151, 161 n.29 (2007) (noting that the language of finance is so complex that it ought to be treated at times as a foreign language. “English-speaking members of a particular profession may in fact communicate more clearly with non-

and nuances of finance is not essential for a large swathe of the American populace, governments have an obligation to both create and wade through the morass of financial gobbledygook in order to protect consumers while simultaneously encouraging and promoting economic development.³ Tribal governments are no different from their state or federal sisters, and are regular players in finance⁴ as well as regulators of complex corporations and financial industries.⁵ However, given the smaller populations⁶ and more limited resources of many tribes⁷ compared with state and federal governments, which are supported by considerably larger tax bases, there exists an ever-present need for working groups and collaborative efforts to educate lawyers, judges, and tribal leaders about financial regulation⁸ in Indian Country.⁹ For

English-speaking members of their profession from other cultures than they do with English-speaking persons who are not part of the profession”).

³ In fact, in pursuit of this goal the government—inadvertently or intentionally—creates much of the confusing and arcane language upon which finance is based. See Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125, 168 (2005) (“[T]he technicalities of the trade finance business link group members in a common, arcane language that transcends nationality but is also relatively inaccessible to outsiders . . . reinforc[ing] the insularity and club-like nature of the group itself.”).

⁴ Tribes are active participants in the bond market. See H. FABIAN RAMIREZ ET AL., FITCH RATINGS: PUBLIC FINANCE, TRIBAL GOVERNMENTS IN THE BOND MARKET (2004), available at <http://www.nafoa.org/pdf/BondMarkets.pdf>. For a comprehensive discussion of how finance impacts tribes in the same way as states, see generally TOWNSEND HYATT ET AL., AN INTRODUCTION TO INDIAN TRIBAL FINANCE (2005), available at <http://www.orrick.com/Events-and-Publications/Documents/246.pdf>.

⁵ For a discussion of the multi-billion dollar scale of some tribal financial enterprises such as casinos, see Steven Andrew Light & Kathryn R. L. Rand, *The Hand That’s Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 DRAKE L. REV. 413, 435-36 (2009).

⁶ Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL’Y 357, 366-67 (2006) (describing the difficulty of tribes enacting comprehensive legislative reform based upon their smaller size than communities facing similar challenges).

⁷ Joanna M. Wagner, *Improving Native American Access to Federal Funding for Economic Development Through Partnerships with Rural Communities*, 32 AM. INDIAN L. REV. 525 (2007-2008) (“Indian communities have things to gain from their non-Indian neighbors. For instance, tribal resources tend to be more limited than state resources; by pooling their resources and information with other communities, tribes can maximize their own resources and limit their expenses.”).

⁸ Indian Country is a legal term of art codified at 18 U.S.C. § 1151 (2011) and defining the scope of tribal jurisdiction. For a more thorough discussion of Indian Country, see *infra* note 18.

⁹ NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, IMPLEMENTATION GUIDE AND COMMENTARY TO THE MODEL TRIBAL SECURED TRANSACTION ACT 11 (2005) (“The National Conference of Commissioners on Uniform State Laws ([NCCUSL]) and the Federal Reserve Bank of Minneapolis was developed for three purposes: (1) to assist tribal legislatures in their review, adaptation and enactment of the Act; (2) to facilitate the use and understanding of the Act by tribal judges, legal counsel and individuals promoting business development in Indian Country; and (3) to assist non-tribal lenders and businesses in understanding the similarities and differences between the Act and corresponding provisions of the Uniform Commercial Code.”).

tribes, the lack of resources and the constraint of economies of scale make it more difficult but ever more imperative to get legislation relating to business and finance accurately implemented and enforced to encourage economic development.¹⁰ The exegesis of this article focuses on the peculiar needs that Indian tribes have in adopting and implementing tribal law related to secured transactions, and explicitly, a review of the applicability of the Model Tribal Secured Transactions Act¹¹ followed by a note of caution regarding the scope of its implementation related to both tribal cultural property and the core of tribal identity.

This caution is particularly warranted given the unparalleled role that cultural property plays in tribal life.¹² As tribal finance develops in both breadth and complexity, the various forms of property that inevitably undergird finance become increasingly intertwined with tribal law at the heart of disputes in tribal courts.¹³ No longer will arguments about the ownership of real or cultural property be solely among tribal members, as non-Indian parties are increasingly asserting ownership interests.¹⁴ Cultural property is inherently, often incalculably, valuable.¹⁵ As tribal finance develops, it needs to account for the protection of sacred places, objects, and other

¹⁰ For a sense of the scope of the importance of finance to tribal communities, consider the extensive set of federal programs that encourage tribal finance as a form of economic development. *See, e.g.*, Snyder Act, 25 U.S.C. § 13; 25 U.S.C. § 470 (describing loan programs authorized by the Indian Reorganization Act of 1934); Oklahoma Indian Welfare Act, 25 U.S.C. §§ 506-10; Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631; Indian Finance Act, 25 U.S.C. §§ 1451-53 (2012).

¹¹ MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-205(b) (2005), *available at* http://www.uniformlaws.org/shared/docs/mtsta/mtsta_aug05_final.pdf.

¹² For a thorough treatment of the importance of tribal cultural property to tribal life, identity, and even survival, see Rebecca Tsosie, *Native Nations and Museums: Developing an Institutional Framework for Cultural Sovereignty*, 45 TULSA L. REV. 3, 8-10 (2009). For an excellent discussion of tribal identity as group identity see Melissa L. Tatum, *Group Identity: Changing the Outsider's Perspective*, 10 GEO. MASON U. C.R. L.J. 357 (2000).

¹³ For an excellent discussion of tribal courts and tribal court civil jurisdiction, see generally Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779 (2014).

¹⁴ Some of these disputes have already reached the United States Supreme Court. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle, 554 U.S. 316 (2008) (determining the extent of tribal regulatory jurisdiction to extend to the sale of land within the outer bounds of an Indian reservation by a non-Indian owned bank to a non-Indian).

¹⁵ Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1037-40 (1992-1993). For example, the Ahayu:da carved by the Bear clan of Zuni Pueblo (a federally recognized Indian tribe located in New Mexico) have a market value based on their rarity and the monetary value that collectors of art place on the pieces constructed. But such "market value" ignores the significance of the items to both the artist who created it and the greater value the Ahayu:da have in the preservation of Zuni Pueblo culture. The "true value" of these cultural objects is indeed incalculable. *Id.*

forms of cultural property and preemptively create regulations that ensure their protection.¹⁶

One of the many mantras of Indian law is that “tribes are different.”¹⁷ In “Indian Country”¹⁸ a child can have three legal parents,¹⁹ endangered species can be hunted subject to potential treaty rights and even international recognition of the right of cultural subsistence,²⁰ casinos can be built in states that would otherwise prohibit casino gaming,²¹ a tribal government may establish religion²² or abandon a republican form of government

¹⁶ *Id.* at 1045 (“[I]f cultural property is destroyed the source nations or peoples, as well as the world heritage at large, are divested of valuable objects. Destruction makes any question of allocation moot. Deterioration, vandalism, and accidental damage also diminish the nation’s and the world’s cultural resources.”).

¹⁷ Virtually everything written on Indian law demonstrates how it operates differently. For a comprehensive discussion of the differences, see FELIX COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (LexisNexis 2012) (1941) [hereinafter COHEN’S HANDBOOK]; see also Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009); Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579 (2008).

¹⁸ Indian Country is a legal term of art defined at 18 U.S.C. § 1151 (2011). It sets the metes and bounds of Indian regulatory and adjudicatory authority by broadly defining on which lands federal and tribal governments, as opposed to states, are presumptively assumed to have jurisdiction. Accordingly, in the context of the Model Tribal Secured Transactions Act, each tribe only has authority to enforce the tribal Article 9 over persons and property located within Indian Country.

¹⁹ Indian children are unique in that not only their two legally recognized parents but also their tribe may enter the courtroom and assert parental rights over the children. Indian Child Welfare Act, 25 U.S.C. § 1911 (2012). For examples of a tribe exercising these rights, see *In re A.J.S.*, 204 P.3d 543 (Kan. 2009); Phillip A.C. v. Cent. Council of the Tlingit & Haida Tribes of Alaska, 149 P.3d 51 (Nev. 2006). For a discussion of the unique states of tribes regarding Indian children under ICWA, see Heather Kendall-Miller, *State of Alaska v. Native Village of Tanana: Enhancing Tribal Power by Affirming Concurrent Tribal Jurisdiction to Initiate ICWA-Defined Child Custody Proceedings, Both Inside and Outside of Indian Country*, 28 ALASKA L. REV. 217 (2011).

²⁰ Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 230 (2000-2001) (making an analogy between Alaska Natives whaling under a cultural subsistence quota and the exercise by the Makah of a similar right: “[t]he bowhead situation, then, is precedent for the United States supporting American Indians in protecting cultural rights and in reviving cultural traditions even when they include the controversial issue of whaling an endangered species”); see also *United States v. Dion*, 476 U.S. 734 (1986) (holding that while the Eagle Protection Act has explicitly abrogated the treaty guaranteed right of Indians to hunt bald or golden eagles, the Endangered Species Act may not be sufficiently clear in its language to abrogate other treaty guaranteed rights to take endangered species); Conrad A. Fjetland, *The Endangered Species Act and Indian Treaty Rights: A Fresh Look*, 13 TUL. ENVTL. L.J. 45 (1999).

²¹ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (“This case also involves a state burden on tribal Indians in the context of their dealings with non-Indians since the question is whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservations . . . We conclude that . . . [s]tate regulation would impermissibly infringe on tribal government.”).

²² *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959) (holding that the First Amendment’s prohibition on the establishment of religion does not apply in Indian Country).

in favor of a monarchy or competing government structure,²³ there is no right to a grand jury,²⁴ and the tribe can prohibit the ownership or sale of arms.²⁵ In light of these differences it ought to surprise no one that tribes are highly resistant to simply adopting wholesale the laws, financial or otherwise, that are in use by municipal, state, or local governments. The Uniform Commercial Code, which has been widely adopted with minimal local variants by the states,²⁶ simply does not protect or contemplate the unique status and needs of tribal governments or the more complex senses of collective and community ownership of property that often

The First Amendment applies only to Congress. It limits the powers of Congress to interfere with religious freedom or religious worship. It is made applicable to the States only by the Fourteenth Amendment . . . But . . . Indian tribes are not states. They have a status higher than that of states . . . The Constitution is, of course, the supreme law of the land, but it is nonetheless a part of the laws of the United States.

Id.; Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D. N.M. 1954) (holding that an Indian tribe could refuse burial rights to Protestant individuals because they were not Catholic without offending the Constitutional rights of the individual or the Constitution's prohibition on the establishment of religion); see also Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 396 (2012).

²³ Jacobson v. Forest Cnty. Potawatomi Cmty., 389 F. Supp. 994 (E.D. Wis. 1974) ("The Indian Civil Rights Act contains no requirement that tribes have a republican form of government. Congress realized that the leadership of some tribes rests entirely in the hands of a nonelected group of elders. Meanwhile, first amendment protections were incorporated in the Indian Civil Rights Act in order to make tribal government and culture responsive and open to change from within." (first internal citation omitted) (citing Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1363 (1969)).

²⁴ United States v. Wheeler, 435 U.S. 313, 329 (1978) ("The case . . . depends upon whether the powers of local government exercised by the [tribe] are Federal powers created by and springing from the Constitution of the United States . . . or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of this Court have long since answered the former question in the negative." (quoting Talton v. Mayes, 163 U.S. 376 (1896))). Congress has subsequently used its plenary power to extend parts of the Bill of Rights to tribes under the Indian Civil Rights Act (25 U.S.C. § 1301 et seq.), the right to a grand jury isn't one of them. Compare 25 U.S.C. § 1302(1) (2000) with U.S. CONST. amend. V.

²⁵ For a thorough discussion of the limitations on the right to bear arms in Indian Country, see Professor Angela Riley's remarkable survey of both history and law of the interplay between the Second Amendment and Indians. Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675 (2012).

²⁶ NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, IMPLEMENTATION GUIDE, *supra* note 9, at 13-14. ("Every state as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands, have adopted the UCC, although most have modified the various articles in some National respects to accommodate issues and needs specific to their respective business, legal and cultural environments."); Stephen Ian McIntosh, Note, *Priority Contests Under Article 9 of the Uniform Commercial Code: A Purposive Interpretation of a Statutory Puzzle*, 72 VA. L. REV. 1155, 1156 (1986) (noting that all common law states have adopted the Uniform Commercial Code).

permeate indigenous legal thought.²⁷ Accordingly, with the tacit approval of both tribal and federal governments, the National Conference of Commissioners on Uniform State Laws²⁸ has actively worked to produce a model commercial code for tribes and has recently published the final version of Article 9: Secured Transactions, referred to hereafter as the Model Tribal Secured Transaction Act, the Model Act, or the MTA.

With 566 federally recognized tribes²⁹ controlling tens of millions of acres of real property in the United States³⁰ and billions of dollars in assets,³¹ the widespread consideration, adoption, and implementation of the Model Act cannot come quickly enough. While a handful of tribes have already adopted it in whole or in part,³² hundreds more will consider whether to adopt and how to implement the Model Tribal Secured Transactions Act in the coming years—and tribal judges will be forced to provide an interpretation of the act shortly thereafter.³³

²⁷ NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, IMPLEMENTATION GUIDE, *supra* note 9, at 15 ("The third objective was to create a model tribal commercial law that readily accommodates differing approaches to various issues and situations addressed by the Act, recognizing that the legal, business and cultural environments of tribes differ from region to region and from tribe to tribe.").

²⁸ The National Conference of Commissioners on Uniform State Laws has been working to standardize laws among the states (and tribes) of the United States since 1892. For more information about the National Conference, see U. L. COMMISSION, <http://www.uniformlaws.org/> (last visited Mar. 20, 2015).

²⁹ The U.S. Department of the Interior is required by Congress to annually publish in the Federal Register a list of tribes entitled to receive benefits and services from the Bureau of Indian Affairs. This annual publication serves as a list of all federally recognized Indian tribes. The BIA's most recent list was published in 2014 and contained 566 federally recognized tribes. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748 (Jan. 29, 2014), available at <http://www.bia.gov/cs/groups/public/documents/text/idc006989.pdf>. The United States has formally recognized a 567th tribe (The Pamunkey Indian Tribe) on July 2nd, 2015. The formal recognition was published in the federal registrar here: <http://www.gpo.gov/fdsys/pkg/FR-2015-07-08/pdf/2015-16711.pdf>.

³⁰ The U.S. Department of Interior manages about 56 million acres of land for Indian Tribes. Tribes own in fee additional lands over which tribal law may be properly asserted. Jeffrey Crockett, *The Department of Interior's Final Rule Allots American Indians More Freedom to Lease Land for Residential, Commercial, and Renewable Energy Development in Order to Improve American Indians' Economic Condition*, 2 U. BALT. J. LAND & DEV. 157, 157 (2013).

³¹ Marcia A. Zug, *Dangerous Gamble: Child Support, Casino Dividends, and the Fate of the Indian Family*, 36 WM. MITCHELL L. REV. 738, 786 n.265 (2010) (noting that tribal casino revenue alone exceeded \$26 billion annually and is growing rapidly).

³² The Crow Nation was the first to adopt the MTA in 2006. Several scores of tribes have adopted it since. See *Crow Nation is First to Adopt Model Secured Transactions Code*, FED. RESERVE BANK OF MINNEAPOLIS (July 1, 2006), https://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=2264&; Crow/Apsaalooke Tribal Secured Transactions Act, CLB06-01 (2006), available at <http://sos.mt.gov/Business/UCCTribalNations/Crow/assets/pdfs/CrowAct.pdf>, for the actual language the Crow adopted.

³³ *Crow Nation is First to Adopt Model Secured Transactions Code*, *supra* note 32; Crow/Apsaalooke Tribal Secured Transactions Act, *supra* note 32. As tribes

As with any model code, tribal governments need to be certain they understand what they are enacting into law, and tribal judges need to consider the structures and rules created by the act as they relate to and are set against tribal culture and custom when making enforcement decisions. The following article attempts to make those decisions a little easier.

This article addresses just one part of one facet of tribal concerns relating to the implementation of enforceable financial regulations: the appropriateness of registering a security interest in tribal cultural property. Part II explains why secured transactions in Indian Country present unique questions of both “property” and “ownership” to challenge the traditional way finance has approached individual debt and community economic development. Part III builds on this understanding to introduce the Model Tribal Secured Transaction Act and urges the NCCUSL to amend the model act to explicitly include a default rule excluding cultural property from the category of property against which a security interest may be vested. For tribes that have already adopted the act, this article encourages immediate amendment. If the NCCUSL refuses to amend the model act, then this article cautions all tribes considering its adoption to think critically about the potential impact it may have on the protection of cultural property and accordingly consider amending the act prior to adoption. For tribes that wish to deviate from such an absolute categorization, Part IV will suggest that only a deliberative and democratic process relying on broad community support should overcome the presumption against vesting a security interest in tribal cultural property. Part V will briefly provide evidence of the cautionary tale of what could happen if tribes are not careful with protecting their cultural property, and finally Part VI will offer a succinct conclusion.

continue to adopt the MTA and security agreements are made under them, litigation will commence when breach occurs. Questions of the interpretation and application of the Model Act do not end with decisions in tribal court. Decisions of tribal courts are ultimately appealable to the United States District Court in which the tribe is located, but only after the parties develop a factual record in tribal court and exhaust tribal remedies. *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856-57 (“We believe that examination should be conducted in the first instance in the Tribal Court itself . . . Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.”).

II. PROPERTY AS A BUNDLE OF STICKS: WHY SECURED TRANSACTIONS NEED TO WORK DIFFERENTLY IN INDIAN COUNTRY

For those without legal training, the concept of property often appears simplistic to the point of abstraction. Americans may distinguish between real and personal property,³⁴ and amongst personal property may even contemplate a difference between tangible and intangible property,³⁵ but for each type of property the common misperception of property ownership is that it is absolute. In other words, the owner of a thing is its absolute owner and has complete control over its use including the right to alienate or sell and the right to exclude others. In legal terms, it is as if most people believe that ownership exists only in terms of the fee simple absolute.³⁶ In reality, American common law treats each “property” as composed of a virtually endless “bundle of sticks” such as the right to live upon, to build upon, to cross, to fish from, to use, to extract or excavate, to fly over, etc.³⁷ American law students uniformly spend part of their first year parsing these ownership interests to understand for each “property” who owns what interest.

A secured transaction works by perfecting a security interest in a piece or parcel of property—essentially altering the ownership of the various bundles of sticks for the duration of the security agreement. Complicated enough at the best of times, the unique nature of tribally owned property inserts the ownership

³⁴ “Real property” constitutes land and the encumbrances attached to it (“Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land”), while “personal property” is “[a]ny movable or intangible thing that is subject to ownership and not classified as real property.” *Property*, BLACK’S LAW DICTIONARY 1412 (10th ed. 2014).

³⁵ “Tangible personal property” is that which is physical and can be touched—like a car or a can of soup. Intangible personal property is ephemeral—like a copyright or trademark from intellectual property or goodwill in the context of business. “Corporeal personal property of any kind; personal property that can be seen, weighed, measured, felt, touched, or in any other way perceived by the senses, examples being furniture, cooking utensils, and books.” *Id.*

³⁶ “Fee simple” is a concept of land ownership which gives the landowner complete control over the ownership, sale, and transferability of real property. *Id.* at 733 (“An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs.”).

³⁷ For a thorough discussion and critique of this bundle of sticks analogy, see Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 878-79 (2013) (“The first contribution of the bundle of rights image was that it brought analytical clarity to the concept of property. It made clear that property is not a monolithic aggregate of powers but a set of distinct entitlements . . . the elementary rights of property are the right to possess, use, and transfer; the right to have law protect both the fact of one’s possession and the physical condition of the thing; and the powers of appointment and liens.”).

interest of the federal government,³⁸ a sovereign and therefore preferential creditor,³⁹ into many secured transactions in Indian Country. This section explores the nuances of those interactions to demonstrate how any law governing the ownership or transfer of property in Indian Country needs to account for interests not present in other transactions by first briefly introducing the concept of a secured transaction and then articulating why the law surrounding such transactions is more complicated in Indian Country.

A. *The Basics of a Secured Transaction*

In its simplest form, a secured transaction takes place when a contract is made “between a secured party⁴⁰ and a debtor⁴¹ that creates a security interest in the debtor’s designated property in favor of the secured party.”⁴²

³⁸ The federal government has an interest whenever tribal land is at issue, as it has a fee interest in most real property in Indian Country. Essentially, land cannot be encumbered without the approval of the federal government. The origin of this doctrine comes from the Supreme Court in *Johnson v. M’Intosh*, 21 U.S. 543, 574 (1823) (“[T]heir rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”). This interest of the United States has manifested itself in many ways in American law, and was codified by the Nonintercourse Act, 25 U.S.C. § 177 (2012) (“No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.”).

³⁹ A preferential creditor is one who takes first when the assets pledged cannot cover the full liabilities owed by the debtor or secured by an asset. For a discussion of the problems surrounding and defining the scope of secured creditors, as well as authority that the government often holds a priority position, see generally Jacob S. Ziegel, *Preferences and Priorities in Insolvency Law: Is There a Solution?*, 39 ST. LOUIS U. L.J. 793 (1995).

⁴⁰ The “Secured Party” is the party to whom a security interest in collateral is given under the terms of a security agreement.” Often thought of as the creditor (the one who extends money), “[t]he term includes a cosignor and a buyer of accounts, chattel paper, payment intangibles or promissory notes.” NAT’L CONFERENCE OF COMM’S ON UNIF. STATE LAWS, IMPLEMENTATION GUIDE, *supra* note 9, at 21.

⁴¹ “A debtor is typically the party that provides the collateral. The term includes any party with an ownership or other non-lien interest in the collateral, such as a joint tenant, or subsequent transferee of the collateral or of an interest in the collateral. The debtor may or may not be the borrower[, as a] debtor includes a consignee as well as a seller of accounts, chattel paper, payment of intangibles or promissory notes.” *Id.* at 21-22. There are two other classes of persons who may have an interest in a secured transaction but do not immediately benefit from the perfecting of the security interest or the loan of immediate financial assistance. An “obligor” or “secondary obligor” may allow their property to be used as collateral by the debtor. Their status is also defined and obligations spelled out in this section of the Model Act. *Id.* at 22.

⁴² *Id.* at 23. MTA § 9-106 contains a complete list of common definitions used in the Act; the Commentary adds some additional information to the terms for clarity and for general reference.

A couple examples will help a secured transactions neophyte grasp the basics of the interests involved. A executes a security agreement to borrow \$100,000 from B to finance the purchase of greenacre. A is the debtor, having incurred a \$100,000 obligation under the terms of the security agreement. B is the secured party, sometimes referred to as the secured creditor. B will perfect a security interest in greenacre under the security agreement. If A fails to pay B under the terms of the agreement, then B can have greenacre sold to obtain the balance A owes B on the security agreement.⁴³

If the value of the secured property exceeds the balance on the security agreement, the secured party is entitled to the amount owed by the debtor under the security agreement, and any excess value that is realized from the sale is returned to the debtor. In the event that the value of the secured property is less than the balance owed under the security agreement at the time the secured party enforces its rights, the secured party can still force the sale of the property with a perfected security interest. The entire amount is kept by the secured party and credited against what the debtor owes the secured party under the security agreement. The secured party is still entitled to collect the remaining balance from the debtor, but that obligation becomes unsecured.

Secured transactions extend beyond the realm of financing the purchase of real or personal property. For example: A owns a fee simple interest in greenacre. A executes a security agreement that perfects a security interest in greenacre in exchange for borrowing \$100,000 from B to pay for law school. If A fails to pay B under the terms of the agreement, then B can have greenacre sold to obtain the balance A owes B on the security agreement even though the money borrowed was earmarked to pay for law school instead of the purchase of real property.⁴⁴

The property subject to a secured transaction does not have to be land or a vehicle. A security agreement can be perfected in any kind of property that has and is likely to retain value, including artwork, insurance, intellectual property, stock, antiquities, natural resources, jewelry, and more. If the obligations under the security agreement aren't met, the property

⁴³ The enforcement of a security agreement is provided for in every jurisdiction, but the method by which a secured party enforces their agreement varies from one jurisdiction to another. The right to seize, sell, and/or repossess property is defined by the local law of a jurisdiction. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 254 (1971).

⁴⁴ *See id.*

that is secured is transferred from its original owner to the secured party. Movie rights, publication rights, and religious artifacts have all been used as collateral in secured transactions. The danger in Indian Country is that some critically important piece of cultural property might be used and then called away, lost to the tribe forever.

If the security agreement is not vested in any specific property, but is instead secured by all of the general personal property (real and tangible) of the debtor, the danger of the loss of cultural property is magnified. A tribal member who cannot pay his or her obligations under the agreement will likely have few tangible personal property assets of value. Artifacts or other cultural property that have been inherited or part of the debtor's family for generations may be among the most valuable items remaining and thus the property most likely to be lost upon default.

This is not to imply that a tribe should ban all such transactions out of a misplaced fear of losing vitally important cultural property. On the contrary, secured transactions have a myriad of uses. For example, a secured transaction enables a party with an idea for a new business or a project that will yield an economic dividend, but without sufficient capital, to secure financing for the business or project on better terms than an ordinary bank loan. By pledging property against the loan (and thus vesting a security interest in the property subject to a security agreement) the secured party has minimized the risk of losing its core capital by allowing the seizure of the property if the debtor is unable to meet its obligations under the agreement. Accordingly, many projects that would otherwise be impossible to finance—either because the risk involved would make the interest rate required to finance the project usurious or because financing cannot be found at any rate of interest—can proceed using financing in the form of a secured transaction.

B. How Indian Country Complicates Secured Transactions

At first glance it may appear that secured transactions in Indian Country would proceed exactly as they would in any other jurisdiction of the United States—with state law prescribing the process for perfecting a security interest and the consequences of default for both the debtor and creditor.⁴⁵ However, that

⁴⁵ As previously discussed, the Uniform Commercial Code has been widely adopted with minimal changes and so this process for both the securitization of rights

understanding discounts the realities of Indian law and the unique relationship Indian tribes possess in the United States.

The reality in Indian Country is almost infinitely more complicated. First, secured transactions involving real property often require the direct participation of the United States because it is the sovereign that controls the fee title interest of much of the land base in Indian Country.⁴⁶ Second, aside from fee ownership, Congress has enacted unique rules for the potential alienation of lands in Indian Country.⁴⁷ Third, if tribally owned property is at issue and if the tribe or one of its entities is a party to the security agreement, the secured party or parties must obtain a waiver of sovereign immunity in order to make the security agreement enforceable.⁴⁸ Finally, while choice of law questions have been made largely irrelevant⁴⁹ by the adoption of Article 9 of the Uniform Commercial Code,⁵⁰ the discrepancies between the Model Act and U.C.C. Article 9 will require courts to determine *when* each applies. In other words, because the MTA and the U.C.C. Article 9 are not identical, it needs to be clear to both the secured party and the debtor which law governs their security agreement at the time of its creation. This certainty will enable all parties, as well as courts should the agreement find itself in the middle of litigation, to clearly understand the mutual intent of the parties at the time of the agreements and accordingly give each party the benefit of its bargain.

and forced sale or transfer of ownership that occurs on default is now highly standardized throughout the United States.

⁴⁶ *Johnson v. McIntosh*, 21 U.S. 543, 568-69, 587-88 (1823) (clarifying that upon “discovery” by the U.S. Government, tribes lost a fee simple interest in land and retained only “Indian title” which includes the right to use, occupy, and cross the land but not the right to alienate it). For a critique of “discovery” and the western bias it implicates, see ROBERT A. WILLIAMS, JR., *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION* (2012).

⁴⁷ A number of congressionally enacted statutes complicate the vesting of a security interest in real property in Indian Country. For examples, see 25 U.S.C. §§ 81, 85, 86 (2012) (detailing contracts with Indian tribes or Indians).

⁴⁸ When the security agreement is with a tribe, or with an entity entitled to assert tribal sovereign immunity, the security agreement may be unenforceable because any suit to enforce it would essentially be nonjusticiable. *See Kiowa Tribe of Okla. v. Mfg. Tech. Inc.*, 523 U.S. 751, 760 (1998) (“Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.”).

⁴⁹ While the choice of law question may be theoretically interesting, when all states have adopted an identical law it doesn’t matter which state’s law is used for all practical purposes.

⁵⁰ U.C.C. art. 9. Choice of law is discussed specifically in §§ 9-301 to 9-307.

1. Indian Title

To say that the ownership of land in Indian Country is complicated is an understatement on the scale of equating the Grand Canyon to a hole in the ground. Land can be held in trust by the federal government⁵¹ or owned in fee⁵² by the tribe itself, by a tribal member, by a non-member Indian, or by a non-Indian. It can be subject to fractionation⁵³ with hundreds of partial owners. The zoning of land becomes even more complicated. For example, the Supreme Court has instructed that while it is sometimes proper for Indian tribal governments to possess the authority to zone non-Indian owned fee land on the reservation,⁵⁴ other times it is the state that has the sole authority to zone even tribally owned land within the outer boundaries of the reservation.⁵⁵

⁵¹ See *Johnson v. M'Intosh*, 21 U. S. at 543. Chief Justice Marshall recognized that while Indian tribes were the “rightful occupants of the soil, with a legal as well as just claim to retain possession of it,” the United States owned the “ultimate title” of the land. *Id.* at 574, 592, 603. When tribes negotiate and sign a treaty with the United States that gives up the tribe’s interest in real property, the United States takes full ownership of the land unless the treaty reserves or protects the interest of any other land owner.

By the treaties concluded between the United States and the Indian nations, . . . the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title . . . Their cession of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity. They ceded to the United States this very property . . . and the attempt now made, is to set up their title against that of the United States . . . the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States.

Id. at 593-94, 604-05.

⁵² The Dawes Act allotted millions of acres of land in Indian Country to individual Indians and opened up remaining lands to non-Indian settlement in an ill-devised attempt to assimilate Indians with non-Indian American society and culture. As a result, the legacy of allotment has clouded the ownership of millions of acres in Indian Country by dividing it among ever more parties.

⁵³ *Babbitt v. Youpee*, 519 U.S. 234, 236-37 (1997); *Hodel v. Irving*, 481 U.S. 704, 706-07 (1987). For a complete discussion of the problems posed by the fractionation of land interests in Indian Country, see Anthony J. Franken, *Dealing with the Whip End of Someone Else’s Crazy: Individual-Based Approaches to Indian Land Fractionation*, 57 S.D. L. REV. 345 (2012); Chris Schwab, Case Note, *Constitutional Law—Fifth Amendment Just Compensation Clause—Escheat of Trust Lands*, 65 TENN. L. REV. 805 (1998).

⁵⁴ *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989) (“Since the tribes’ protectable interest is one arising under federal law, the Supremacy Clause requires state and local governments, including Yakima County zoning authorities, to recognize and respect that interest in the course of their activities.”).

⁵⁵ *Id.* at 430 (“The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land. The inquiry thus becomes whether, and to what extent, the tribe has a protectable interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected.”).

Much of the land in Indian Country is held in trust by the United States on behalf of the tribes.⁵⁶ Due to the unique history of Indian law, courts have concluded that upon contact with European colonizers, tribes retained their “Indian title” to the land but lost the right to alienate their lands to anyone but the colonizing sovereign.⁵⁷ By holding the land in trust for the benefit of tribes, the United States federal government has a property right in the land—the sole right to acquire it.⁵⁸

The complexities of this land ownership mean that in the vast majority of instances involving a security agreement where a security interest is vested in real property, the United States is also an interested party to the contract.⁵⁹ Without the approval of the federal government, the security interest cannot be perfected;⁶⁰ accordingly, creditors are unwilling to help invest in Indian Country.⁶¹ Any secured transaction using real property in Indian

⁵⁶ More than 56 million acres of land are held in trust by the United States on behalf of Indian tribes. *Frequently Asked Questions*, BUREAU OF INDIAN AFFAIRS (Feb. 13, 2015, 2:55 PM), <http://www.bia.gov/FAQs/index.htm>. An additional 44 million are set aside for the benefit of Alaskan tribes. See Elizaveta Barrett Ristroph, *Traditional Cultural Districts: An Opportunity for Alaska Tribes to Protect Subsistence Rights and Traditional Lands*, 31 ALASKA L. REV. 211, 212 (2014) (noting that the Alaska Native Claims Settlement Act (ANSCA) has set aside approximately 44 million acres of land to be divided among Alaska Native Corporations (the entities in charge of managing land for indigenous Alaska communities)).

⁵⁷ See 25 U.S.C. § 177; see also *United States ex. rel. Hualpai Indians v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345 (1941) (“[T]he policy of the Federal Government from the beginning [was] to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.” (quoting *Cramer v. United States*, 261 U.S. 219 (1923))).

⁵⁸ See *Johnson v. McIntosh*, 21 U.S. 543 (1823).

⁵⁹ For a discussion of the problems this creates and a strong argument for tribes recapturing the absolute rights over land lost in prior centuries, see David D. Haddock and Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 185 (2004) (“Insofar as there is good reason to think that many tribes were disadvantaged when they involuntarily yielded sovereignty to the United States, it is plausible that they would be advantaged if they recaptured it. State governments rarely provide anything in exchange for the limited sovereignty they acquire over the tribes, so it is similarly plausible that the tribes would be advantaged if they recaptured sovereignty from the states. But voluntary non-fraudulent agreements are mutually beneficial *ex ante*.”).

⁶⁰ Indian lands cannot be alienated without the consent of the Secretary of the Interior. See 25 U.S.C. § 177 (2012).

⁶¹ This conclusion follows from the premises established earlier. Without a waiver of sovereign immunity and the explicit right to recapture the loaned value through the seizure and sale of property, the risk to a lender would be so large that either the interest rate required to lend to the party would be usurious or the secured party would become unwilling to lend at any rate of return. Accordingly, this significantly limits the forms of economic development in Indian Country to either projects run by the tribe or projects funded entirely in cash. Because this subset of projects is considerably less than the larger set of all projects that are economically feasible on the reservation if the parties had access to finance, tribal economic development suffers by definition. Because tribal governments have an incentive to promote economic growth, and stand to gain concomitantly from the jobs and tax revenue such growth generates, all parties have an

Country thus requires more expensive and more time-intensive due diligence on behalf of both parties. Note, as the next section will discuss, it is not impossible to vest a security interest in real property held in trust by the federal government for the benefit of tribes—it simply becomes more difficult.⁶²

The complications of using real property as a security interest in order to complete a secured transaction make it ever more likely that tribal members and even tribes themselves will be tempted to use personal property as security for a loan or other valuable consideration. Section III anticipates this instinct and encourages tribes to take proactive measures to protect those forms of tangible and intangible personal property that are most important for tribal identity.⁶³

2. Congressional Hurdles to Perfecting Secured Transactions

As discussed above, the federal government holds most real property in Indian Country in trust for the benefit of Indian tribes.⁶⁴ It makes no difference whether the land was purchased by the United States for the tribe or was purchased by the tribe and taken into trust by the federal government.⁶⁵ Once the United States holds the land in trust for the benefit of tribes, a bevy of restrictions on its alienation, use, and encumbrance are attached to the land,⁶⁶ but the land is also removed from the administrative

incentive to work out the legal difficulties that stand in the way to the promotion of secured transactions.

⁶² Indian Nonintercourse Act, 25 U.S.C. § 177. Where the federal government retains a fee interest in Indian lands any encumbrance upon those lands requires the additional approval of the federal government. “Our Government has ever claimed the right, and from a very early period its settled policy has been, to regulate and control the alienation or other disposition by Indians, and especially by Indian nations or tribes, of their lands.” Lease of Indian Lands for Grazing Purposes, 18 Op. Atty Gen. 235, 236 (1885); see *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 906 (9th Cir. 2014) (reaffirming the broad scope of § 177, the validity of the attorney general opinion, and that the Indian Nonintercourse Act “applies to conveyances of less than complete divestment.”).

⁶³ For a discussion of the role that tribal cultural property can play in creating identity, see *infra* Part V, and Rebecca Tsosie, *Native Nations and Museums: Developing an Institutional Framework for Cultural Sovereignty*, 45 TULSA L. REV. 3 (2009).

⁶⁴ See *supra* note 51. See Chief Justice Marshall’s opinion in *Johnson v. M’Intosh* and the nature of federal land ownership stemming from the original European claims to title of lands in the newly discovered Americas. *Johnson v. M’Intosh*, 21 U.S. 543, 574-87 (1823).

⁶⁵ *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938).

⁶⁶ *Id.*

or regulatory control of the state, including the state's ability to levy property, extraction, excise, and sales taxes.⁶⁷

In recognition of the federal government's special interest, Congress has long made it federal policy that Indian lands cannot be easily divested or encumbered.⁶⁸ Congress has consistently reaffirmed its intent to maintain this restraint on alienation.⁶⁹ Most recently in 2000, Congress strengthened these protections by passing legislation that voids any contract that "encumbers Indian lands for a period of seven or more years" without meeting a list of additional criteria and receiving approval from the Secretary of the Interior.⁷⁰

⁶⁷ *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392 (1976) ("Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community." (alteration in original) (citing *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 613-14 (1943) (Murphy, J., dissenting))).

⁶⁸ The Indian Nonintercourse Act, 25 U.S.C. § 177. The Act expressly forbids the "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians" without the explicit approval of the Secretary of Interior. *See supra* note 62.

⁶⁹ 18 U.S.C. § 1162 (2011) ("Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States."). This was also enacted as Public Law 83-280, Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (commonly referred to in Indian law circles in its abbreviated form as PL-280). PL-280 granted states jurisdiction over certain lands in Indian Country but expressly preserved the federal restraint on the alienation of title of any of these Indian lands. *Id.*

⁷⁰ 25 U.S.C. § 81 (2012). For an example of how complex the approval process is, consider the five factors the Secretary of Interior must take into account before approving a contract with an Indian tribe for the provision of outside legal services:

The following factors are to be considered in determining whether funds should be paid to provide private legal representation for a tribe.

- (a) The merits of the legal position which the tribe asserts. Greater weight will be given to those cases where the tribe's legal argument is deemed particularly meritorious than to those cases where the tribe's position, although not entirely without merit, may be relatively weak;
- (b) The ability of the tribe to pay all or a part of its legal expenses out of its own funds. A review of the tribe's financial resources under this subsection will include an examination of the tribe's total expenditures to determine whether its expenditures for other purposes comport with the asserted importance of the case for which it seeks funds;
- (c) Whether the question the tribe seeks to litigate is being litigated in another case by another tribe;
- (d) Whether, as a matter of strategy, the issues the tribe seeks to litigate could be more satisfactorily resolved in another forum, in a different factual context, or a different time; and
- (e) Whether the issue should be litigated at all in preference to a legislative or other solution.

Congress's restriction on the sale of tribal land may even extend beyond land held in trust.⁷¹ Congress continues to pass legislation stating,⁷² and the Justice Department regularly argues,⁷³ that the Nonintercourse Act, which prohibits the alienation of Indian lands, applies whenever a tribe purchases real property, even if the federal government has not taken the land into trust. Their position has not always been adopted by the courts.⁷⁴

Due to the vested interests of the United States in Indian lands, there are significant barriers to using real property as security in a secured transaction. While the security agreement may be able to proceed with the consent of the Secretary of Interior, all parties need to ensure the agreement is enforceable if breach occurs.⁷⁵

3. Tribal Sovereign Immunity

A security agreement is essentially a contract between parties—the creditor receiving a security interest in property in exchange for the debtor receiving monetary remuneration or other consideration.⁷⁶ Each party to the agreement expects the other will honor their commitment.⁷⁷ Because of this expectation,

25 C.F.R. § 89.42 (2014).

⁷¹ COHEN'S HANDBOOK, *supra* note 17, § 15.06 (providing a comprehensive discussion of the federal rules regarding alienation of land).

⁷² *Id.* § 15.06 n.63 (citing Pub. L. No. 108-204, 118 Stat. 546 (2004) (“authorizing the sale of non-trust land by Shakopee Mdewakanton Sioux Community”); Pub. L. No. 101-630, 104 Stat. 4531 (1990) (authorizing the Rumsey Indian Rancheria to sell land acquired a year before)).

⁷³ *Id.* (citing the Brief of the United States as Amicus Curiae, *Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998)).

⁷⁴ *Id.* § 15.06 n.64 (citing *Lummi Indian Tribe v. Whatcom Cnty.*, 5 F.3d 1355, 1357-59 (9th Cir. 1993); *Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W.2d 685, 696 (N.D. 2002); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996)).

⁷⁵ For a discussion of the importance of secured transactions to both secured parties and debtors, tribes and lenders, see *supra*, note 61 and accompanying text.

⁷⁶ Bruce A. Campbell, *Contracts Jurisprudence and Article Nine of the Uniform Commercial Code: The Allowable Scope of Future Advance and All Obligations Clauses in Commercial Security Agreements*, 37 HASTINGS L.J. 1007, 1014-15 (1986) (“First, and above all, Article Nine is a paean to freedom of contract, private property, and free enterprise. Abolishing old legal restrictions based on the type of collateral and the form of the security instrument, the Code allows the debtor and creditor, in a single agreement, to secure all the debtor’s legally enforceable obligations to the creditor with virtually all of the debtor’s present and future assets.”).

⁷⁷ *Id.* at 1015 (citing U.C.C. §§ 9-301-318). The primary secured creditor has always been able to easily monitor whether the debtor is meeting the repayment schedule (are they receiving repayment from the debtor according to the schedule and terms spelled out in the agreement?). Article 9 makes it substantially easier than early laws dealing with secured transactions for the primary secured creditor to also be

often not enough attention is paid to the consequences of breach. All parties to the security agreement should be aware of the role that sovereign immunity may play in the potential enforcement of this bargained-for exchange.⁷⁸

Indian tribes have been self-governing and independent since long before European powers extended their hegemony over the Americas.⁷⁹ As a legacy of this independence, American courts have long recognized that tribal governments have inherent powers of sovereignty, and retain the full rights of sovereignty that have not been expressly removed by treaty or statute or have not been implicitly divested as inconsistent with the status of Indian tribes in modern America.⁸⁰ This sovereignty includes the ability to assert the justiciability defense of sovereign immunity in order to prevent a court from considering the merits of a claim for breach or issuing a judgment to enforce the security agreement.⁸¹

The common law notion of sovereign immunity, which is connected to the ancient premise that one cannot sue the king,⁸² extends to tribes because that sovereignty has never been

certain that the value of his secured interest is preserved by moving the focus from the debtor's overall credit worthiness to only the value and title of the property in which the security interest is vested.

⁷⁸ *Kiowa Tribe of Okla. v. Mfg. Tech. Inc.*, 523 U.S. 751, 760 (1998) (“Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.”); *see also* *Michigan v. Bay Mills Indian Cmty.*, No. 12-515, slip op. at 18-19 (U.S. May 27, 2014), available at http://www.supremecourt.gov/opinions/13pdf/12-515_jq2i.pdf (“All that we said in *Kiowa* applies today, with yet one more thing: Congress has now reflected on *Kiowa* and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity. Following *Kiowa*, Congress considered several bills to substantially modify tribal immunity in the commercial context But instead of adopting those reversals of *Kiowa*, Congress chose to enact a far more modest alternative requiring tribes either to disclose or to waive their immunity in contracts needing the Secretary of the Interior’s approval.”).

⁷⁹ *Bay Mills Indian Cmty.*, concurring slip op. at 2 (Sotomayor, J., concurring) (“Long before the formation of the United States, Tribes ‘were self-governing sovereign political communities.’” (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978))); *see also* STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 72-76 (1988).

⁸⁰ *Bay Mills Indian Cmty.*, slip op. at 5 (majority opinion) (“[Tribes] remain ‘separate sovereigns pre-existing the Constitution.’ Thus, unless and ‘until Congress acts, the tribes retain’ their historic sovereign authority.” (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), and *Wheeler*, 435 U.S. at 323)).

⁸¹ For the specific application of tribal sovereignty immunity to commercial contracts ordinary governed by the Uniform Commercial Code, *see Kiowa Tribe*, 523 U.S. 751.

⁸² *Alden v. Maine*, 527 U.S. 706, 715 (1999) (“When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts. . . . [T]he law ascribes to the king the attribute of sovereignty, or pre-eminence Hence it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power.”) (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* *234-35 (1765)).

divested by treaty or statute, nor is it inconsistent with the modern status of tribes as nations capable of maintaining formal diplomatic relations with the United States.⁸³ That sovereignty is manifest by a “government-to-government relationship”⁸⁴ between tribal nations and the United States which, in some ways, is superior to the sovereignty maintained by the sister states of the union. Because tribes have not been ratified by the Constitution, Constitutional requirements like Equal Protection and Due Process, which have long ago been extended to limit the actions of states, are inapplicable upon Indian tribes unless Congress explicitly extends them into Indian Country.⁸⁵

If tribes utilized sovereign immunity in a manner identical to states, parties entering a security agreement in Indian Country would not raise special concerns regarding the potential enforceability of the security arrangement.⁸⁶ This is true because most states do not have a legally enforceable interest in most property subject to a secured transaction and because states have enacted limited waivers of their immunity to promote economic activity.⁸⁷ However, while the several states have expressly waived sovereign immunity by statute⁸⁸—thus ensuring that parties that contract with them can recover at law if the state breaches its obligations—tribal governments understandably have been less willing to issue blanket waivers of their rights as a sovereign. This reticence is not unexpected; centuries of duplicitous dealings by the federal government against tribes have warranted the caution with which most tribes proceed.⁸⁹

⁸³ Tribes possess “inherent powers of a limited sovereignty which has never been extinguished.” *Wheeler*, 435 U.S. at 322 (quoting COHEN’S HANDBOOK, *supra* note 17, § 122).

⁸⁴ *United States v. Zepeda*, 738 F.3d 201, 210 (9th Cir. 2013) (“Federal recognition of an Indian tribe is a formal political act that ‘permanently establishes a government-to-government relationship between the United States and the recognized tribe as a domestic dependent nation.’” (quoting H.R. Rep. 103-781, at 2 (1994) (internal quotation marks omitted))). Congress has codified this relationship among other recognition of the inherent sovereignty of tribes at 25 U.S.C. § 3601 (2012).

⁸⁵ For an example based on an Equal Protection claim where the Supreme Court held that the only way to enforce a violation was by habeas petition, and therefore if the plaintiff was not physically confined, no remedy was available, even if she had an otherwise valid complaint under the Equal Protection Clause, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

⁸⁶ Some states have waived their sovereign immunity involving the breach of a contract with private citizens willfully, others have been induced to do so by the federal government. Michael T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)*, 29 HASTINGS CONST. L.Q. 439, 481-82 (2002).

⁸⁷ *Id.*

⁸⁸ *See id.* at 498.

⁸⁹ *See generally* N. BRUCE DUTHU, *AMERICAN INDIANS AND THE LAW* (2008).

Absent a waiver of sovereign immunity,⁹⁰ if an entity capable of asserting sovereign immunity is a party to the security agreement, the agreement will only be truly enforceable in court (whether federal, tribal or state) with the expressed consent of the sovereign entity.⁹¹ While courts acknowledge that tribal sovereign immunity may complicate both the enforcement of agreements and the expectation of the parties, who are often unaware that sovereign immunity is a potential defense to enforcement, the Supreme Court correctly continues to reaffirm that protecting sovereignty is more important than giving each party to an agreement the benefit of their bargain.⁹² The issue of sovereign immunity becomes ever more complicated in Indian Country because not only could there be sovereign interests from both federal and tribal governments that would require a waiver, but certain types of tribal corporations can similarly assert the tribe's immunity.

Congress passed the Indian Reorganization Act of 1934 (IRA)⁹³ after the federal government commissioned the Meriam Report,⁹⁴ an influential Congressional report documenting widespread poverty and administrative mismanagement in Indian Country. The IRA was intended to correct some of the identified injustices that tribes had been forced to accept under previous iterations of federal Indian policy by encouraging tribes to play a more proactive role in their daily governance.⁹⁵ Under the IRA,

⁹⁰ The Supreme Court recently reaffirmed the power of tribes to waive sovereign immunity and the lack of judicial alternatives for enforcement of agreements by private parties when such a waiver is absent. *Michigan v. Bay Mills Indian Cmty.*, No. 12-515, slip op. at 1 (U.S. May 27, 2014), available at http://www.supremecourt.gov/opinions/13pdf/12-515_jq2i.pdf ("Congress has not abrogated tribal sovereign immunity from a State's suit to enjoin gaming off a reservation or other Indian lands. And we decline to revisit our prior decisions holding that, absent such an abrogation (or a waiver), Indian tribes have immunity even when a suit arises from off-reservation commercial activity.").

⁹¹ *Id.* at 5-6.

⁹² *Id.* In addition to the Supreme Court's discussion in *Bay Mills*, see also *Kiowa Tribe of Okla. v. Mfg. Tech. Inc.*, 523 U.S. 751, 760 (1998) (articulating clearly that sovereign immunity is an affirmative defense to litigation unless it has been explicitly waived).

⁹³ 25 U.S.C. § 461-79 (2012). Sometimes referred to as the Wheeler-Howard Act, it was enacted June 18, 1934.

⁹⁴ LEWIS MERIAM ET AL., INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928). For a discussion of the report's importance to federal Indian law, see generally Christopher A. Karns, Note, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation: State Taxation as a Means of Diminishing the Tribal Land Base*, 42 AM. U. L. REV. 1213, 1234-35 (1992); Michael C. Walch, Note, *Terminating The Indian Termination Policy*, 35 STAN. L. REV. 1181, 1199 (1983).

⁹⁵ Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 787 (2006) ("In some respects, tribal self-determination as an affirmative federal policy began in the 1930s during the New Deal era under the legal

tribes were permitted to organize and adopt tribal constitutions to assist with their governance.⁹⁶

Section 17 of the IRA went further.⁹⁷ It explicitly authorized the Secretary of Interior to issue tribal corporate charters.⁹⁸ The corporations thus created were empowered to hold land, including lands restricted from resale, and to conduct business for the benefit of the tribe.⁹⁹ A tribal corporation chartered under Section 17 must be wholly owned by the tribe itself.¹⁰⁰ These corporations do not have an active role in the tribe's governance, but by virtue of their ownership structure have been able to exercise a tribe's sovereign immunity in certain cases.¹⁰¹

The IRA goes even further in protecting the assets of these corporations.¹⁰² A tribe maintains control over an IRA corporation's assets unless the tribal government intentionally and explicitly transfers their control directly to the corporation.¹⁰³ Even when contractual language exists permitting the IRA corporation to "sue and be sued,"¹⁰⁴ courts have held that only assets specifically pledged or assigned are eligible to satisfy a judgment, and that the general assets of the corporation cannot be reached.¹⁰⁵ This is a unique relationship found almost

auspices of the Indian Reorganization Act (IRA). The IRA preserved, empowered and transformed modern tribal governments.”)

⁹⁶ 25 U.S.C. § 476(a) (granting a tribe “the right to organize for its common welfare, and [] adopt an appropriate constitution and bylaws”); 25 U.S.C. § 476(e) (“In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council . . . rights and powers.”).

⁹⁷ *Id.* § 477 (“The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property.”).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 26 C.F.R. § 301.7701-3 (2012) (laying out the tax benefits to single member ownership).

¹⁰¹ For example, a Section 17 corporation can acquire an interest in allotments and other lands where the United States is the ultimate fee title owner. *See* 25 U.S.C. § 476(e). Both tribal and potentially federal claims to sovereign immunity may apply to any party attempting to alienate that land from the Section 17 corporation. The federal government requires that any contract or other agreement which may alienate land held by the United States in trust for an Indian tribe be approved separately by the Secretary of Interior. *See id.* § 81.

¹⁰² COHEN'S HANDBOOK, *supra* note 17, at § 4.04[3][a][ii].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Atkinson v. Haldane*, 569 P.2d 151, 175 (Alaska 1977); *Dixon v. Picopa Construction Co.*, 772 P.2d 1104, 1109 (Ariz. 1989); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 657 (Ariz. 1971).

exclusively in the context of IRA tribes, where what looks in almost every regard as a private, for-profit entity is in fact a direct agent of the authority of the tribal government capable of asserting that government's immunity.

Accordingly, if a tribal corporation chartered under Section 17 of the IRA is a party to a security agreement, the property in which the security interest is to be perfected needs to be pledged in advance of whatever security it might require.¹⁰⁶ This can take several forms, including transferring the assets to a non-IRA entity or establishing an escrow account to hold the property until the security agreement has been completed.¹⁰⁷ The overarching takeaway from this discussion is that secured transactions are bound to work differently in Indian Country because property ownership works differently in Indian Country. As a consequence, the Model Tribal Secured Transactions Act is an excellent starting point for both potential non-Indian secured parties and tribal debtors to agree to terms that would enhance and promote economic activity in Indian Country.

4. Choice of Law

Just because a secured transaction involves an Indian individual or business, property located on a reservation, or an Indian tribe that has adopted the Model Tribal Secured Transaction Act, does *not* mean that the law governing the transaction is automatically the Model Act. The question of choice of law,¹⁰⁸ which underlies any question in which the laws of potentially more than one sovereign are interested,¹⁰⁹ is as relevant

¹⁰⁶ David B. Jordan, *Federal Indian Law: Tribal Sovereign Immunity: Why Oklahoma Businesses Should Revamp Legal Relationships with Indian Tribes After Kiowa Tribe of Oklahoma v. Manufacturing. Technologies, Inc.*, 52 OKLA. L. REV. 489, 512 (1999).

¹⁰⁷ *Id.*

¹⁰⁸ Most Americans, and unfortunately even many young lawyers, assume that when you are in front of a court that it will automatically apply its own law. The reality is considerably more complex. Each state, most frequently as a matter of common law, has implemented a methodology for selecting which law applies in any given dispute. Different methodologies yield different answers. For example, a question of contract validity may be determined by the law of the place of the contract's creation while a dispute involving performance may be governed by the law of the state where the contract was designed to be performed. Thus, a Massachusetts court may apply Maine law. Indian tribes complicate these choice of law questions even further. For a thorough discussion of the current choice of law rules for each jurisdiction, as well as a concise explanation of the perils and pitfalls of conflict of laws generally, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217 (2013).

¹⁰⁹ *Id.* This should be self-evident. For example, if only one state is involved there would be no conflict of law question. Thus, if a Minnesota plaintiff brings suit against a Minnesota defendant in a Minnesota court for an intentional tort that

to litigation involving Indian tribes as to any other set of domestic or foreign parties.¹¹⁰ However, the unique status of Indians as “domestic dependent nations” with a sovereignty “co-equal to that of states” raises some additional unique considerations.¹¹¹ This section briefly describes *when* the Model Tribal Secured Transactions Act governs a dispute involving a security agreement where the debtor, secured party, or property with a perfected security interest exists within an Indian tribe’s jurisdiction. The easiest situation involves when the parties explicitly agree via contract to apply the Model Act. Absent that choice of law clause, when security agreements are silent regarding choice of law, tribal courts are likely to apply the Act in most instances while state and federal forums will be slightly more equivocal.

The following discussion is naturally limited by the proper assertion of jurisdiction over both the subject matter and the defendant.¹¹² The Model Act deals with a secured transaction that manifests itself in a contractual context via the security agreement and does not itself inherently raise a federal question,¹¹³ suggesting that the proper venue for these disputes is in either tribal or state

occurred entirely in Minnesota, there is no question that Minnesota law applies and thus no conflict of law.

¹¹⁰ Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627 (2006) (“[T]he Supreme Court, acting under the assumption that state and tribal forums will each apply their own law, has devoted considerable attention to developing rules that determine whether a case involving tribal contacts should be heard in tribal court or state court.”).

¹¹¹ Early in its jurisprudence, the United States Supreme Court determined that Indian tribes were “states” but not “foreign states” and so occupied a heretofore unknown status of “domestic dependent nations.” As a result of their status, the federal government owes to tribes an obligation to hold and maintain tribal property. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.

Id. at 2 (headnote). This idea was most recently reaffirmed by the U.S. Supreme Court in *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 n.3 (2003).

¹¹² A judge does not reach the merits of a case without the proper power over both the subject matter and the defendant. While the defendant has an obligation to raise the issue that a court may lack personal jurisdiction, the Court itself has an affirmative duty to ensure that it has the proper authority to hear the subject matter of the case. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). The importance of jurisdiction is reaffirmed often by the Supreme Court. *See e.g., Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009).

¹¹³ *Mottley*, 211 U.S. at 152-54. *Mottley* makes clear that questions of contract law arise under state not federal law and accordingly do not qualify for federal question jurisdiction under 28 U.S.C. § 1331 (2012).

court.¹¹⁴ As the ensuing discussion will suggest, a given forum's laws have a tremendous bearing on whether a court will apply the Model Tribal Secured Transactions Act and should therefore be considered prior to commencing litigation. As a general practice note, it is better for all parties to be aware at the time of entering into the security agreement what law will govern a dispute under the agreement.¹¹⁵ Accordingly, all lawyers are encouraged to utilize a "choice of law clause" to avoid both uncertainty and the problems described in subsections B and C.

a. The Choice of Law Clause

Until comparatively recently, American courts were sharply divided over the enforceability of a choice of law or choice of forum clause that specified a foreign court or foreign law.¹¹⁶ While the Supreme Court has guaranteed to Indians the right to "make their own laws and be governed by them,"¹¹⁷ often tribal courts or the selection of tribal law have been deemed sufficiently foreign to allow states to refuse to enforce the contractually agreed upon terms mutually ratifying the choice of a tribal court or tribal law.¹¹⁸

Jackie Gardina highlights¹¹⁹ just one example from New Mexico. In *Wacondo v. Concha*,¹²⁰ tribal members from Zia Pueblo

¹¹⁴ There are several ways in which a dispute which raises a question of state or tribal instead of federal law can nonetheless be heard in federal court. The most common of these is predicated upon diversity jurisdiction, which requires that no plaintiff be from the same state as any defendant and that the amount in controversy exceed a dollar amount set by statute, currently \$75,000. 28 U.S.C. § 1332.

¹¹⁵ For an excellent discussion of the potential pitfalls that may occur when all parties to an agreement are unaware of what law may govern, see generally Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2403-05 (1998).

¹¹⁶ *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court."). The Supreme Court just reaffirmed the enforceability of forum selection clauses during its 2013-2014 sitting. See *Atl. Marine Constr. Co. v. U.S. Dist. Ct. W. Dist. Tex.*, No. 12-929, slip op. at 1 (U.S. Dec. 3, 2013), available at http://www.supremecourt.gov/opinions/13pdf/12-929_olq2.pdf ("[A] forum-selection clause may be enforced by a motion to transfer under § 1404(a) which provides that '[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.'" (internal citation omitted)).

¹¹⁷ *Williams v. Lee*, 358 U.S. 217, 220 (1959).

¹¹⁸ *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 841, 844 (N.J. Super. Ct. Law Div. 1999) (denying the applicability of a choice of law clause in a contract with a tribal casino operation).

¹¹⁹ Jackie Gardina, *Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts*, 35 AM. INDIAN L. REV. 1 (2010-2011).

and Jemez Pueblo brought suit against a member of Taos Pueblo for a shooting that occurred in Jemez Pueblo.¹²¹ The New Mexico court concluded that there was no barrier to applying New Mexico law.¹²² If state courts remain similarly cavalier regarding the Model Tribal Secured Transactions Act, then it will remain of limited practical use because a party who wants to take advantage of the U.C.C. instead of the MTA will simply seek to enforce their rights in state court, undercutting both the intent of the parties and the enforceability of the model code. Such “forum shopping” would also jeopardize a tribe’s ability to protect its cultural property through laws like the MTA because there is no concordant limitation on vesting a security interest in tribal cultural property under most state or federal laws. Accordingly, both the tribal law and the general practice of resolving conflict of laws between tribal and state courts need to recognize the overriding importance of the protection of tribal cultural property. As Professor Christine Zuni Cruz notes:

The process of incorporating customary law into a formal legal system will not be easy and will take the work of the judiciary, the litigants, and the tribe. If an active approach is not taken to support customary law, customary law will give way to other influences, such as state and federal law devoid of indigenous thought.¹²³

The stakes for tribal choice of law are high. Ignoring tribal law in this way raises barriers to the development of a comprehensive tribal law based on the customary legal principles unique to each tribe, and deprives all parties from incorporating indigenous thought into the broader panoply of American law.¹²⁴ Inversely, the widespread adoption of forum selection and choice of law clauses that bind all parties to an agreement and explicitly rely upon tribal forums and tribal law to resolve disputes will help considerably advance the legitimacy of indigenous legal thought. Such widespread adoption of blended western/indigenous legal principles, like the Model Tribal Secured Transaction Act, will enshrine uniform tribal laws within the larger commercial and legal context, creating a new space for the protection of tribal

¹²⁰ 873 P.2d 276 (N.M. Ct. App. 1994).

¹²¹ *Id.* at 277.

¹²² *Id.* at 277-78.

¹²³ Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL’Y 17, 27 (1997) (now Christine Zuni Cruz) (“Participation and interest of judges in incorporating customary law is critical. If there is no interest or if there is resistance on the part of the judiciary, incorporation of customary law and development of an indigenous body of law unique to a particular tribe will be minimal.”).

¹²⁴ *See, e.g., Wacondo*, 873 P.2d at 277-78.

peoples and property that practitioners from both communities can widely embrace.¹²⁵

To clarify these potential conflicts, the Supreme Court granted certiorari in *Bremen v. Zapata*.¹²⁶ In *Zapata*, an American corporation specializing in offshore oil and gas drilling contracted with a German company to tow one of its rigs from coastal Louisiana to a new location in Italy's Adriatic Sea.¹²⁷ While the rig was being moved, a storm off the coast of Florida damaged it significantly enough that it was redirected to Tampa, Florida for repairs.¹²⁸ While the original contract agreement specified that "[a]ny dispute arising must be treated before the London Court of Justice,"¹²⁹ the Middle District of Florida,¹³⁰ the Fifth Circuit Court of Appeals,¹³¹ and then the entire Fifth Circuit *en banc*¹³² refused to enforce the choice of forum clause.

The U.S. Supreme Court reversed.¹³³ It recognized that while "foreign businessmen prefer, as do we, to have disputes resolved in their own courts, [] if that choice is not available"¹³⁴ then limiting the forum for disputes to one mutually agreed upon by the parties does not work an injustice.¹³⁵ The Court was influenced in part by the fact that the London Court of Justice was generally perceived to be a fair tribunal with an expertise in maritime law.¹³⁶ It further recognized a number of limited exceptions where enforcing the mutually agreed upon terms of a

¹²⁵ See, e.g., *id.*

¹²⁶ *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972).

¹²⁷ *Id.*

¹²⁸ *Id.* at 3.

¹²⁹ *Id.* at 2.

¹³⁰ *In re Unterweser Reederei*, 296 F. Supp. 733 (M.D. Fla. 1969).

¹³¹ *In re Unterweser Reederei*, 428 F.2d 888, 895 (5th Cir. 1970) ("The district court was entitled to consider that remanding *Zapata* to a foreign forum, with no practical contact with the controversy, could raise a bar to recovery by a United States citizen which its own convenient courts would not countenance.")

¹³² *In re Unterweser Reederei*, 446 F.2d 907, 908 (5th Cir. 1971) (the Fifth Circuit, *en banc*, upheld the decision of the Fifth Circuit panel over a strong dissent by 6 of the court's 15 members).

¹³³ *Bremen*, 407 U.S. at 8-9 ("We hold, with the six dissenting members of the Court of Appeals, that far too little weight and effect were given to the forum clause in resolving this controversy.")

¹³⁴ *Id.* at 11-12.

¹³⁵ *Id.* at 17-18 ("Whatever 'inconvenience' *Zapata* would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.")

¹³⁶ *Id.* at 11-12 ("Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation.")

contract may prove problematic: fraud,¹³⁷ undue influence,¹³⁸ and unequal bargaining power.¹³⁹

The logic of *Zapata* has since been applied to contractual choice of law and choice of forum clauses in Indian Country.¹⁴⁰ Therefore, the easiest way to ensure whether U.C.C. § 9 or the Model Tribal Secured Transaction Act will govern any given security agreement would be to clearly choose the law and the forum in the agreement itself.

However, as in many other areas of law, all parties should be aware of the other relevant tribal laws and the public policy of the forum, which may be used under rare circumstances to frustrate a choice of law clause between contracting parties.¹⁴¹ Moreover, the parties should consider the exigencies involved with the enforcement of a judgment obtained under a security agreement in Indian Country.¹⁴² Remedies generally available in the state may be unavailable or significantly altered on the reservation.¹⁴³

b. In Front of a Tribal Court

If the security agreement is silent on choice of law, then the laws of the forum regarding choice of law govern both the

¹³⁷ *Id.* at 15 (“The correct approach would have been to enforce the forum clause specifically unless *Zapata* could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud.”).

¹³⁸ *Id.* at 12-14.

¹³⁹ *Id.* There was no unequal bargaining power on these facts because there were multiple companies bidding for the towage contract. *Id.* at 12 n.14.

¹⁴⁰ *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 32 F. Supp. 2d 497, 505 (D. R.I. 1999) (“Therefore, an American Indian court system that is different from the American federal model cannot cause avoidance of either an arbitration or forum selection agreement as unreasonable.”). *Ninigret* was later vacated and remanded for failure to exhaust tribal remedies, which has no bearing on the enforceability of a forum selection clause. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 35 (1st Cir. 2000).

¹⁴¹ *See Romano, supra* note 115, at 2407 (“The conventional conflicts-of-law objection to application of an internal-affairs-type doctrine to securities transactions, which is captured by the public policy exception to choice-of-law clause enforcement and to requirements that the chosen state have a reasonable connection to the transaction or the parties, is that the investor’s domiciliary state has a more important ‘interest’ in a securities dispute than the issuer’s domicile.”).

¹⁴² *See generally* *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) (allowing tribal law to limit the self-help remedies of car repossession on the Navajo Reservation). “[T]he Tribe has the ‘power to place conditions on entry, on continued presence, [and] on reservation conduct . . . [sic]Regulating the conduct of non-Indians repossessing automobiles on reservation land is a valid exercise of the Tribe’s power to exclude nonmembers from the reservation.” *Id.* at 594 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982)).

¹⁴³ *Id.*

procedural and substantive matters in front of the court.¹⁴⁴ While the Supremacy Clause ensures that neither states nor tribes may act contrary to federal law,¹⁴⁵ and the Commerce Clause explicitly allows Congress to enact laws designed to regulate commerce with Indian tribes,¹⁴⁶ there is no federal law regarding all of the nuances of a security agreement. Accordingly, tribal courts are free to use their own rules for determining the choice of law that governs civil disputes in tribal courts.

The Model Tribal Secured Transactions Act was designed to recognize that tribal interests regarding secured transactions differ from those proposed in U.C.C. Article 9, and to assist tribes with the exercise of their sovereign rights over these kinds of transactions.¹⁴⁷ For tribal jurisdictions where the Model Act has become part of the tribal code, tribal courts will endeavor to adopt choice of law and conflict of law rules that permit them to apply the Model Act as often as possible.¹⁴⁸ Tribal courts are given considerable leeway to decide which laws apply within their jurisdiction. Accordingly, they will be loath to refuse to enforce the Model Act over all possible transactions within their remit because the Model Act represents the greatest possible compromise between indigenous legal thought and traditional western concepts of securitization and property rights.¹⁴⁹ Therefore, most legal

¹⁴⁴ See generally Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163 (2013).

¹⁴⁵ U.S. CONST. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

¹⁴⁶ U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

¹⁴⁷ NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, IMPLEMENTATION GUIDE, *supra* note 9, at 14-15 (“The Committee also recognized that many provisions of Article 9 were unlikely to be appropriate or relevant in Indian Country, at least in the near future, and if included would add unneeded complexity to a tribal secured transactions law.”).

¹⁴⁸ The Supreme Court has openly expressed its fear that tribal courts will too often seek to apply tribal law. Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intra-tribal Common Law*, 43 HOUS. L. REV. 701, 705, 709-11 (2006) (“Members of the Supreme Court appear to have assumed that tribal courts apply a tribal common law that is so far from Anglo-American common law as to be unrecognizable to non-Indians.”) (drawing support from dicta in *Nevada v. Hicks*, 533 U.S. 353, 374-75 (2001), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

¹⁴⁹ NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, IMPLEMENTATION GUIDE, *supra* note 9, at 14-15. Tribal courts, like their state and federal counterparts, are able to make determinations regarding which laws apply within their jurisdictional remit. In jurisdictions that have adopted the Model Act, it is likely that tribal courts will work to actively apply the Model Act (as opposed to U.C.C. Art. 9) to as many cases as possible

disputes involving secured transactions that end up before the tribal court of a tribe that has adopted the Model Act are exceedingly likely to see the act selected as the choice of law governing the dispute.

c. In Front of a State or Federal Court

Litigating a security agreement involving tribal or Indian-owned property creates the most uncertainty regarding choice of law when the forum is a state or federal court. Each state has its own choice of law rules,¹⁵⁰ and has been given wide latitude by the U.S. Supreme Court to adopt a method for resolving conflict of law questions,¹⁵¹ subject to virtually no qualification except the broad limits of the Due Process Clause.¹⁵² The results of the various methods of state choice of law rules are impossible to predict in the abstract, and will likely turn upon the facts of the dispute, the status of the parties, and the language of the security agreement.¹⁵³

For cases that get to federal court on the basis of diversity,¹⁵⁴ the Supreme Court has been consistently clear since *Erie*¹⁵⁵ that the federal court is to apply the substantive law

because it is both the law enacted by the legislative body to which the court is subject and because it advances indigenous thought relating to property and contract rights.

¹⁵⁰ Symeonides, *supra* note 108, at 279.

¹⁵¹ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981) (“It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court’s choice of its own substantive law in this case exceeded federal constitutional limitations.”).

¹⁵² *Id.* at 320. The modern Due Process Clause test to determine a Constitutional violation in the choice of law context requires a state have “a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair.” *Id.*

¹⁵³ *Id.* at 307-08.

¹⁵⁴ Federal courts are courts of limited jurisdiction, meaning they need permission in order to hear a case. The Constitution sets the baseline for this permission in Article III, § 2:

The judicial Power shall extend . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Congress has further limited the ability of federal courts to hear cases by statute. One of the more common ways federal courts obtain jurisdiction over a case is through diversity jurisdiction. 28 U.S.C. § 1332 gives federal courts jurisdiction to hear cases, even arising under only state law causes of action, when there is complete diversity of parties and the statutory threshold for the amount in controversy has been met.

¹⁵⁵ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

selected by the choice of law rules of the state in which the federal court sits.¹⁵⁶ *Erie* clarified,¹⁵⁷ and subsequent cases have confirmed,¹⁵⁸ that choice of law rules are substantive in nature. It follows that the same concerns about state court litigation are mirrored in federal court litigation premised on diversity.¹⁵⁹ When a party pursues litigation in state or federal court over a security agreement that is silent regarding choice of law, and when the tribal government with jurisdiction over the property at issue has adopted the Model Tribal Secured Transaction Act, that party risks that the forum may use the relevant choice of law rules to either apply the Model Act or U.C.C. Article 9. In other words, whether a state or federal court would apply tribal law might be decided by a state's choice of law rules. Because much of Indian law exists so the federal government can protect tribes from states, it would be preferable for the parties to agree to both a choice of law and a choice of forum clause in the security agreement properly specifying tribal courts and tribal law.

III. THE MODEL TRIBAL SECURED TRANSACTION ACT: THE NEED FOR A PRESUMPTION AGAINST PERFECTING A SECURITY INTEREST IN TRIBAL CULTURAL PROPERTY

The National Conference of Commissioners on Uniform State Laws (NCCUSL)¹⁶⁰ was created over 100 years ago to

¹⁵⁶ *Id.* at 79 (“The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else . . . ‘the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.’” (alterations in original) (quoting *Swift v. Tyson*, 41 U.S. 1 (1841))).

¹⁵⁷ *Id.* In *Erie*, the Supreme Court instructed federal courts in New York to apply New York's choice of law rules to determine which substantive law would govern the dispute. At the time, New York's choice of law rules for torts required the application of the law of the place of the injury. Because Tompkins was injured in western Pennsylvania, it was Pennsylvania substantive law that governed. Thus, even while Tompkins would have had a claim for negligence against the railroad under the substantive laws of New York, the New York federal court was obligated to apply Pennsylvania substantive law.

¹⁵⁸ *See, e.g.*, *Chambers v. NASCO Inc.*, 501 U.S. 32, 52 (1991) (upholding and reasserting *Erie*'s key principles: “discouragement of forum-shopping and avoidance of inequitable administration of the laws” (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965))).

¹⁵⁹ The headnote to *Erie* states: “A federal court exercising jurisdiction over such a case on the ground of diversity of citizenship, is not free to treat this question as one of so-called ‘general law,’ but must apply the state law as declared by the highest state court.” 304 U.S. at 64.

¹⁶⁰ For information on the creation, organization, structure, and purpose of the NCCUSL, see *About Us*, NCCUSL, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Mar. 21, 2015).

address issues unique to a federal system of government and specifically unique to the United States.¹⁶¹ Because the United States government is by Constitutional dictate a government of limited and enumerated powers,¹⁶² there exist issues of national significance where having a single standard law in all jurisdictions would greatly benefit both law and commerce but where the federal government is unable to act.¹⁶³ To fill this gap, the NCCUSL was created to propose standard laws that each state could independently enact, thus achieving legal uniformity within the American federalist system.¹⁶⁴

Tribal governments complicate this model.¹⁶⁵ Because they are independent sovereigns,¹⁶⁶ most state laws and regulations have no legal force inside the boundaries of the reservation (or more technically in “Indian Country”). The 567 federally recognized tribes¹⁶⁷ maintain governments that enact

¹⁶¹ Truman Carter & Fred H. Miller, *Uniform Laws and Tribal Legislation; One Tribe's Perspective*, 26 AM. INDIAN L. REV. 89, 89 (2001-2002).

¹⁶² U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¹⁶³ Carter & Miller, *supra* note 161, at 89 (“The federal Constitution reserves to the states ‘powers not delegated to the United States by the Constitution, nor prohibited by it to the states.’ Because of this limitation, nearly all private law—contracts, negotiable instruments, business organizations, marriage and divorce, for example—and most areas of criminal law, are left for definition and regulation by the legislatures and courts of the several states.” (quoting the Tenth Amendment)).

¹⁶⁴ *Id.* (“NCCUSL is an organization peculiar to the federal system of government, and is unique in American law. ‘American law’ of course actually consists of fifty separate, and potentially differing, bodies of state law, co-existing with, and overlaid by, federal law.”).

¹⁶⁵ *Id.* at 95-96 (“As a general rule, state civil laws do not apply to transactions arising in Indian country to which Indian tribes, tribal entities or tribal members are parties, except to the extent authorized by Congress. The result as a general starting point is that a tribe has the sovereign power to enact and enforce civil laws regulating the conduct of their members and of non-Indians who come upon tribal land. This authority includes the power to enforce contracts, even though entered into outside reservation boundaries, and even off-reservation non-Indian land may qualify as a ‘dependent Indian community and thus part of Indian Country.’”).

¹⁶⁶ See *Michigan v. Bay Mills Indian Cmty.*, No. 12-515, slip op. at 4-5 (U.S. May 27, 2014), available at http://www.supremecourt.gov/opinions/13pdf/12-515_jq2i.pdf; see also *Williams v. Lee*, 358 U.S. 217, 219 (1959) (“Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”).

¹⁶⁷ This article takes no position on the independent sovereignty of tribes that are recognized by the respective state in which the tribe owns real property or maintains a recognized government. The situation of state-recognized tribes is unique and the authority of the Uniform Commercial Code as enacted by each of the 50 states may or may not be binding upon each state-recognized tribe depending on their own arrangement of sovereignty that comes with state recognition. For a general discussion of the different status of state-recognized tribes, see Alexa Koenig & Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes Across the United States*, 48 SANTA CLARA L. REV. 79 (2008).

their own legislation, which may or may not be identical, or even similar, to the otherwise uniform laws proposed by the NCCUSL and enacted by the states. This creates the difficult situation where a lawyer, assuming that the uniform law applies everywhere in the United States, advises a client regarding a transaction involving Indian Country, only to later discover to the detriment of both the lawyer and the client, that the law is different on the reservation.

The Model Tribal Secured Transaction Act is NCCUSL's proposed solution for how secured transactions can work differently in Indian Country than in the ordinary state system.¹⁶⁸ It succeeds in striking a balance between two competing interests: consistency with the U.C.C. and the preservation of tribal sovereignty. The MTA must be close enough to U.C.C. Article 9 regarding secured transactions that banks and other lending institutions, businesses, and financial agents will find it comfortable to work with and use,¹⁶⁹ thus increasing the amount of leverage and financial activity on the reservation.¹⁷⁰ While at the same time, the MTA must also preserve tribal sovereignty and enact rules that not only accord with the customs, traditions, and legal histories of the diverse 567 federally recognized tribes,¹⁷¹ but also actively promote uniformity among the prospective adopters.¹⁷²

¹⁶⁸ See Model Tribal Secured Transactions Act, *supra* note 11.

¹⁶⁹ The drafters of the Model Act identified that if the Model Tribal Act differed in too many substantive ways from the Uniform Commercial Code, banks would be hesitant to use the act or conduct business in Indian Country due to the difference in law that would apply to their commercial transactions. Accordingly, the drafters followed the same structure and format of U.C.C. Art. 9 when drafting the Model Tribal Act, and wrote an explanatory guide "to assist non-tribal lenders and businesses in understanding the similarities and differences between the Act and corresponding provisions of the Uniform Commercial Code." NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, IMPLEMENTATION GUIDE, *supra* note 9, at 11.

¹⁷⁰ For a brief discussion of how the U.C.C. has helped streamline commercial transactions, see generally Charles W. Mooney, Jr., *Introduction to the Uniform Commercial Code Annual Survey* 38 BUS. LAW. 1107 (1983); see also Gidon Gottlieb, *Relationalism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567, 592 (1983) ("The interpretation of such collective juridical acts involves considerations that are primarily relational, thus permitting the groups regulated by the instrument to develop their relationship with a view to their shared purposes.").

¹⁷¹ Just like the Uniform Commercial Code, the Tribal Article 9 must try to balance the interests of different regions and cultures across the United States. Indian Country exists from Alaska to Maine, from Minnesota to Florida, in more than half of the 50 states. For a complete list of federally recognized tribes eligible to adopt the uniform act, see Indian Entities Recognized, *supra* note 29.

¹⁷² The Uniform Commercial Code is clear that among its primary purposes is to streamline commercial practice through uniform action. See U.C.C. § 1-103(a) ("The [Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to

Understandably, this creates an unenviable and Herculean challenge. In recognition of this, the Model Tribal Act advises tribes to think carefully about the choices they make when adopting the language of the act. The implementation guide accompanying the act reiterates this point: “The Act is intended to serve as a “template” or model law for tribes. A Tribe should carefully consider each provision of the Act, and modify or amend provisions as necessary to accommodate its specific business, legal and cultural environments.”¹⁷³ Mindful of this language, this article encourages tribes to explicitly include an exception for tribal cultural property. More forcefully, the article also encourages the drafters of the Model Tribal Secured Transactions Act and specifically the National Conference of Commissioners on Uniform State Laws to consider amending even the proposed model act to include a clear exemption for tribal cultural property. Effectively, this would make an exception for tribal cultural property an opt-out instead of an opt-in and would accordingly better protect tribal cultural property from accidental oversight or omission.

A. *The Model Act as Currently Written Risks the Loss of Invaluable Cultural Property*

The very nature of secured transactions means that the MTA, as written, risks the loss of invaluable cultural property. The MTA defines most of its key terms in section 9-106 and provides a list of transactions not subject to the MTA in section 9-111.¹⁷⁴ Neither section discusses cultural property. Because cultural property might be real or moveable, tangible or intangible, no part of the model unequivocally speaks to its appropriateness for use in a secured transaction. This presents a problem, as a tribe’s cultural property—often key to identity, collective memory, religious practice, and history—is among the most valuable forms of property any tribe owns.

Without an exclusion for cultural property, the tribal government, a tribal corporation, or an individual tribal member with the right to sell the property may use it in order to secure a loan or for other valuable consideration. By formalizing the

make uniform the law among the various jurisdictions.”). The Model Tribal Secured Transaction Act echoes this purpose in § 9-103: “This [act] must be liberally construed and applied to promote its underlying purposes and policies, which are the promotion of economic development and the continued expansion of commercial practices involving this [Tribe] [Nation].”

¹⁷³ NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, IMPLEMENTATION GUIDE, *supra* note 9, at 16.

¹⁷⁴ MODEL TRIBAL SECURED TRANSACTIONS ACT §§ 9-106, 9-111 (2005).

agreement using the cultural property as collateral, the owner of the cultural property is making a promise that if he or she fails to comply with the terms of the security agreement, the lender can take ownership of the cultural property in partial or full consideration for the failure of the debtor to repay on schedule. Whatever benefit the loan may bring to the tribe, tribal corporation, or individual tribal member, the potential loss of the cultural property ought to be considered. Each tribe is capable of making its own determination, but the decision to permit cultural property to be included among the classes of property eligible for a security interest should be taken only after a consultation with the entire tribal membership¹⁷⁵ to consider the potential implications of such a policy.¹⁷⁶

Not all cultural property is put at risk under the MTA as written. Even if the MTA is not rewritten to specifically exclude tribal cultural property, after the act has been adopted, some cultural property will be inappropriate as collateral in a secured transaction.¹⁷⁷ For example, the MTA recognizes that if property is not alienable—that is, if the owner of the property doesn't have the right to sell, gift, or otherwise dispose of the property—the act is inapplicable.¹⁷⁸ This protects some cultural artifacts. For example, under the Bald and Golden Eagle Protection Act¹⁷⁹ it is illegal for non-Indians to buy, sell, or possess either the feathers themselves or artifacts made with the feathers from bald and golden eagles. Accordingly, such cultural items cannot qualify as property in which a security interest may be vested for a non-

¹⁷⁵ See *infra* Part IV.

¹⁷⁶ See *infra* Part V.

¹⁷⁷ For an example of a limit on the vesting of a security interest in some real property see *supra* note 58. Discussing the Non-Intercourse Act and its restrictions on the ability of a tribe to transfer the title to some lands, largely located on Indian reservations, that are held in trust by the United States on behalf of Indian tribes. For a discussion on a limit imposed by Congressional statute on certain forms of tangible personal property see The Bald and Golden Eagle Protection Act, *infra* note 179.

¹⁷⁸ MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-104 (“This [act] does not apply to any property interest that is subject to federal restrictions regarding sale, transfer, or encumbrance.”).

¹⁷⁹ 16 U.S.C. § 668 (2012). The act provides both criminal and civil penalties for:

[W]hoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as [hereinafter] provided [], shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this [Act], shall be fined not more than \$5,000 or imprisoned not more than one year or both.

Indian. The changes proposed here would prevent a tribal or individual member from vesting in such items a security interest even when the party extending the financing would qualify for ownership (i.e. was an Indian). There are several defenses for such a limitation including a concern that richer tribes could seek to accumulate or expropriate the cultural property of poorer ones. In deference to tribal sovereignty, a tribal government could always opt to permit using cultural property as security between its own members, but at the risk of starting down a rather slippery slope. Accordingly, a bright-line rule is preferable.

Out of an abundance of caution, and because most tribal cultural property is not protected like eagle feathers are protected, the Model Tribal Secured Transactions Act should be changed to explicitly exclude such property from among the types of property subject to a security interest. The implementation guide should thus be revised to alert tribes to this change, and give them the option of amending the model act to allow a security interest to be perfected in cultural property. This arrangement has the benefit of protecting more tribal cultural property while not infringing upon a tribe's sovereignty. Instead, it asks the tribe to make a conscious choice as to whether it wants to expand the property against which a security interest may be perfected with the knowledge that the consequences of doing so include the loss of tribal cultural property.

Tribal members, lawyers, and leaders should think critically about the classes of property they want to be subject to a security interest, and adopt or amend the act accordingly. This implicitly recognizes that there are thus two different sets of tribal populations that need to take slightly varied approaches to adopting the exclusion of tribal cultural property: tribes that have already adopted the MTA without the exclusion and tribes that are considering its adoption. Regardless of the approach, advocates seeking the exclusion of tribal property in the MTA will find the original drafters of the Model Act are not opposed to the change, and may even tacitly support it.¹⁸⁰

¹⁸⁰ NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, IMPLEMENTATION GUIDE, *supra* note 9, at 19.

B. Excluding Tribal Cultural Property from the Classes of Property in which a Security Interest May be Properly Vested is Consistent with the Intent Behind the Model Act

Creating a default rule is not contrary to the principles expressed in the Model Act. In fact, in its Implementation Guide, the drafters even explicitly suggest that tribes take action to protect certain kinds of tribal property based upon tribal custom and tradition:

Example:

Tribe has a custom that prohibits the transference of certain religious artifacts or sacred objects for monetary or business purposes. In such a case, the Tribe should consider adding a provision to the Act that prohibits the creation of a security interest in those types of religious artifacts or sacred items.

Example:

Tribe upholds the custom of give-aways on certain important events in which Tribal members give away items of personal property. If property that might be given away is made collateral subject to a security interest, the security agreement should provide that the donees take the property free of the security interests and, if necessary, afford some other type of protection for the secured party for the loss of the collateral.¹⁸¹

Neither the implementation guide nor the act itself provide any insight as to why the drafters decided to omit cultural property from among the Excluded Transactions spelled out in § 9-111. However, the implementation guide cautions tribes that certain parts of the act might unintentionally conflict with a tribe's culture or traditions.¹⁸²

Since the drafters clearly contemplated the role tribal property might play in a secured transaction, the most likely explanation for the omission of cultural property from the Act itself is that the fewer deviations the Act has from the Uniform Commercial Code, the more likely it is to be accepted by non-tribal parties. This concern has merit: if the MTA is perceived to be too different in form or function from the UCC, critical parties including banks and other lenders who make secured loans and

¹⁸¹ *Id.*

¹⁸² *Id.* (“The Committee recommends that in adopting, interpreting and applying the Act, due consideration be given to those customs and traditions. Where and to the extent a provision in the Act conflicts or is inconsistent with a tribal custom or tradition, an enacting Tribe should consider whether the custom or tradition will take precedence over conflicting rights and priorities established by the Act.”).

therefore are critically important to the MTA's ability to drive economic growth and development in Indian Country, may insist on the use of state law. Such insistence would indeed undermine the MTA by making it irrelevant.

Cognizant of these concerns, this Article does not lightly suggest a change in the MTA text. In fact, it limits itself to a single textual change that would exclude a small number of transactions with major importance to the tribes themselves. The drafting committee itself contemplated that tribes might want to exclude cultural property.¹⁸³ In order to protect such important possessions, the default rule ought to be that cultural property is excluded, and tribes during implementation can have a tribal-wide discussion among the membership as to whether there are good reasons for risking the loss of cultural property.

IV. OVERCOMING THE PRESUMPTION: A DEMOCRATIC EXERCISE

With this article I do not presume to know that vesting a security interest in cultural property subject to a valid security agreement is always inappropriate. Certainly, the debtor in the secured transaction will either obtain complete ownership of, or retain ownership of the property against which a security interest is vested if the debtor complies with the terms of the agreement and satisfactorily completes the schedule of payments.¹⁸⁴ While the explanation in Part III provides a reasonable basis for tribes to adopt a default rule excluding cultural or religious property from the classes of property in which it is proper to vest a security interest, each tribe must decide for itself whether it wants to delimit any class of property under the MTA, considering its own tradition, needs, community expectations, history, and identity.¹⁸⁵

¹⁸³ *Id.*

¹⁸⁴ Upon completing the repayment schedule, the security interest that was perfected against the property is removed. As the lender has been repaid according to the terms of the agreement, the lender no longer has a valid claim to the title which was secured as collateral in order to facilitate the original security agreement.

¹⁸⁵ The only persons who ultimately should decide the action a tribe ought to take are members of the tribe itself. Legal scholarship in the area of Indian law should focus on providing ideas and guidance, suggestions and justifications for the actions taken by tribal governments and tribal members. This article intends to add to that discussion and add concerns that tribes should think critically about before taking action, but nothing herein is intended to prevent a tribe which thoroughly considers the consequences from allowing the perfection of a security interest in tribal cultural property. For a discussion of the role of legal scholarship in Indian lawmaking, see generally *Symposium Materials Presented at the University of California at Berkeley*

With that deference to the tribe in mind,¹⁸⁶ this section argues that if a tribal government does not want to exempt cultural or religious property from the class of property in which it is proper to vest a security interest, then the tribal government should do so only with the express consent of a majority of its membership determined by a formal vote. This should not be difficult and presents no legal problems.¹⁸⁷ It is common to survey opinion in Indian Country, as tribes regularly conduct surveys of their membership through a variety of forms including town hall meetings and tribal-wide elections.¹⁸⁸ With very small tribes, it may be possible to meet this democratic requirement by resorting to a town hall or other similar tribal event where all enrolled members are eligible to speak and decisions are made by either the mutual consent of the membership or a vote with the majority of the members affirming.¹⁸⁹ Alternatively, larger tribes would need to submit the question regarding the proper role of cultural or religious property as security against a loan to the broader membership during a tribal election.¹⁹⁰ In lieu of a formal election, some other binding consultation process of the membership would be proper.¹⁹¹

Law School on Sept. 27-28, 2012: Conference Transcript: Heeding Frickey's Call: Doing Justice in Indian Country, 37 AM. INDIAN L. REV. 347 (2012-2013).

¹⁸⁶ See *id.*

¹⁸⁷ Tribal referendums or other democratic surveys of tribal membership, whether binding or merely advisory, are a common tool of building governmental legitimacy in Indian Country. Raymond Cross, *Development's Victim or its Beneficiary?: The Impact of Oil and Gas Development on the Fort Berthold Indian Reservation*, 87 N.D. L. REV. 535, 564 n.107 (2011) (citing CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 280-81 (2005)). For a specific example of tribal referendums to permit or authorize business activity undertaken with or on behalf of the tribe, see *City of New York v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-3966 (CBA), 2009 U.S. Dist. LEXIS 76306, at *10 (E.D.N.Y. Aug. 25, 2009) (citing to the affidavit of Professor John A. Strong who explained "that traditional law was codified into 'a system of regulation and community participation' including licensing procedures and the requirement of Tribal referendum to authorize business activity.").

¹⁸⁸ For a discussion of the different forms tribal governments, see MELISSA L. TATUM ET AL., STRUCTURING SOVEREIGNTY: CONSTITUTIONS OF NATIVE NATIONS (2014); see also SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS (1989).

¹⁸⁹ For an extreme example, the Augustine Band of Cahuilla Indians at one time had only a single surviving member and even today membership is comprised of children from a single family. AUGUSTINE BAND OF CAHUILLA INDIANS, <http://www.augustinetribes.org/> (last visited Apr. 25, 2015). Similarly, many of the more than 200 federally recognized tribes in Alaska are small, consisting of several families or bands. For these groups, consultation may not require a formal election, but instead might be premised upon a well-informed dialogue among all enrolled adult members.

¹⁹⁰ See TATUM ET AL., *supra* note 188.

¹⁹¹ With 567 federally recognized tribes, it is impossible to discuss here the myriad of possibilities that exists for consulting with a tribe's membership. As most tribes regularly hold elections, and tribes with Constitutions under the IRA already have a process in place not only for the election of officers but a means to amend their tribal Constitutions, the process of consultation is neither onerous nor novel. However,

The benefits of using the electoral process to adopt or reject exceptions to the MTA are twofold. First, by virtue of a vote, there would be a learning and debating process about secured transactions more generally, which will not only create a better informed electorate but also ensure that the language chosen in the tribal adoption of the MTA reflects the community's understanding of what property is and what it should be used for. Second, by essentially requiring an opt in instead of an opt out, the default rule is more in line with federal policy on the protection of sacred objects, funerary remains, dreams, names, and stories.¹⁹²

V. NATIVE STORIES, NATIVE PLACES, AND NATIVE PEOPLE

It is vitally important that tribes consider the potential implications of permitting a security interest to be perfected in cultural property. While there may be economic benefits of immediate benefit and concern to the tribe, the risk of the loss of the property should not be understated. This section will only briefly describe the possible loss of cultural property of invaluable importance to a tribe's sense of place, identity, culture, history, and religion. It is because of these risks that the sections above argue forcefully that the default rule in the Model Tribal Secured Transactions Act ought to exclude cultural property. However, recognizing that tribes are sovereign entities,¹⁹³ each has a right to permit the perfection of a security interest in cultural property, provided they are fully informed about the potential consequences.

The scope of cultural property for any given tribe is defined by the tribe itself¹⁹⁴ and may far exceed conventional notions of what constitutes property¹⁹⁵ or even the definition of

for tribes seeking to adopt the MTA and allow cultural property to be used as security against a loan or other consideration, any form of binding consultation that both informs the membership of the consequences of the rules and permits them to participate in the decision making process should meet this criteria.

¹⁹² See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE (2003); see also MELISSA L. TATUM & JILL KAPPUS SHAW, LAW, CULTURE & ENVIRONMENT (2014).

¹⁹³ Michigan v. Bay Mills Indian Cmty., No. 12-515, slip op. at 4-5 (U.S. May 27, 2014), available at http://www.supremecourt.gov/opinions/13pdf/12-515_jq2i.pdf.

¹⁹⁴ Sarah Harding, *Value, Obligation and Cultural Heritage* 31 ARIZ. ST. L.J. 291, 303 (1999) (“[C]ultural heritage is defined as an individual or group creation of either a tangible or intangible good which, by virtue of the creation process, customary use, historical event, or simply geographic proximity, becomes an important expression of human or cultural life.”).

¹⁹⁵ *Id.* at 303 (examples of tribal property may include “songs, dances, stories, remedies, textile designs, sacred objects, drawings, works of art, sculpture and architectural structures.”); see generally COHEN'S HANDBOOK, *supra* note 17, at § 20.01[1] (noting that cultural property may include funerary objects, masks, totem poles, or even such amorphous rights as access to a sacred site).

property under international law.¹⁹⁶ Maintaining an ownership interest in this property is often vital to protecting and preserving a tribe's identity as a people, including their way of life and their customs and traditions.¹⁹⁷ Professor Tsosie has perhaps gone furthest in documenting, discussing, and articulating the importance of cultural property to tribes, including: the benefits that protection, preservation, and display of tribal culture can have on a tribe's identity;¹⁹⁸ the importance of creating a broader human rights framework to protect tribal cultural property;¹⁹⁹ and

¹⁹⁶ Cultural property protected under international law may include monuments of architecture, art or history, archeological sites, buildings or structures of historic or artistic interest, as well as scientific or important collections of books or archives or of reproductions of such property. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231, available at <http://unesdoc.unesco.org/images/0013/001333/133378mo.pdf>.

¹⁹⁷ Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 300 (2002) ("Cultural resources, both tangible and intangible, are of critical importance to Native peoples, because Native culture is essential to the survival of Indian Nations as distinctive cultural and political groups.").

¹⁹⁸ Rebecca Tsosie, *Native Nations and Museums*, *supra* note 12 (extensively discussing the role cultural property plays in tribal identity and the difficulty tribes have in protecting and reasserting rights to cultural property). "However, is a Renoir painting stolen from the home of a wealthy collector in the same category as a sacred mask or medicine bundle 'plundered' from the Native American caretaker? Is this the acquisition of stolen property or is it 'anthropology?'" *Id.* at 9; see also Rebecca Tsosie, *Introduction: Symposium on Cultural Sovereignty*, 34 ARIZ. ST. L.J. 1 (2002) (generally sharing the perspectives of native peoples on the link between control of culture and a self-awareness or empowerment that comes with being able to preserve and direct cultural development among traditional communities).

¹⁹⁹ Rebecca Tsosie, *NAGPRA and the Problem of "Culturally Unidentifiable" Remains: The Argument for a Human Rights Framework*, 44 ARIZ. ST. L.J. 809, 818 (2012). For example, without a clearly established group identity in part created through reference to cultural property, it becomes impossible for tribes to continue to reassert their rights under NAGPRA:

If the group lacks identity as a "federally recognized Indian tribe or Native Hawaiian organization," the group does not have a legal right to repatriation, although the group may obtain affiliated ancestral remains as a "moral" accommodation, assuming that a legitimate claimant tribe can be found to make the claim on its behalf and assuming that the museum or agency cares to honor the request.

Id.; see also Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133 (2012) (discussing the unique difficulty faced by tribes to achieve "justice" and protect "identity" through a protection of cultural property). "Hermeneutical injustice is what occurs with many Native American claims to protect aspects of their cultural identity from harms that are not recognized standard categories of law. In particular, there is currently not a recognized category within American law to redress cultural harm." *Id.* at 1158.

the danger that losing control over some forms of property can have on individual tribal members and greater tribal identity.²⁰⁰

One of Tsosie's conclusions is that ownership and preservation of tribal property and cultural resources strengthens identity and helps each tribe tell its own unique story.²⁰¹ Professor Melissa Tatum adds that cultural resources help tribes tell stories of differentiation and thereby help secure a unique identity.²⁰² Together, Professors Tsosie and Tatum have identified a series of risks to tribal identity, and ultimately even tribal existence, that are premised on a tribe's ability to successfully preserve tribal culture. Essentially, their work centers on the premise that without the preservation and celebration of an identity that makes each tribe unique, several dangers exist that threaten the core of tribal identity. First, all Indian tribes might begin to be grouped together and dealt with as one homogenous and identifiable group as opposed to a celebration of the cultural richness that makes each tribe unique.²⁰³ Second, the homogenous group of "Indians" then begins to get absorbed or assimilated into the broader group of "Americans," altogether erasing Indian identity.²⁰⁴ This process would not be immediate, but would have to evolve over centuries, not unlike our existing Indian law policy.²⁰⁵

²⁰⁰ Rebecca Tsosie, *Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Cultural Harm*, 35 J.L. MED. & ETHICS 396 (2007) (discussing the link between genetics, biology, genomic research, culture, and identity).

²⁰¹ Tsosie, *NAGPRA*, *supra* note 199, at 814 ("[T]he construction of legal rights has a positive effect for those who are included as rights-holders, and, concomitantly, it has a negative effect for those who are excluded from that status. To the extent that a particular Native American 'identity' is necessary to achieve protection for the right to repatriation, this is obviously critically important to the ability of Native peoples to protect their cultural interests. The statutory terminology of what can be 'culturally affiliated' and to whom, is critically important, as is the corollary terminology of what is 'culturally unidentifiable.'").

²⁰² Tatum, *supra* note 12, at 383-87 (2000) (discussing how "sweeping generalizations" about groups can impact how those groups are viewed by others and specifically how a tribe's ability to differentiate itself is necessary to avoid all "Indians" from being grouped together in legal, ethnographic, archeological, and anthropological discussions).

²⁰³ *Id.*

²⁰⁴ Tsosie, *NAGPRA*, *supra* note 199, at 814.

²⁰⁵ Professor Robert Williams stands out among American Indian legal scholars for his careful analysis of the ebb and flow of American Indian policy from European "discovery" of the "new world" through 21st century jurisprudence. His scholarship traces the jurisprudence and various eras of federal policies involving Indians including conquest, termination, and assimilation. For an excellent discussion of this evolution, see ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. OF INT'L AND COMP. L. 51 (1991).

However, the strongest bulwark against homogeneity and assimilation is the preservation of unique tribal identities.

It is against this backdrop that the importance of preserving ownership rights in cultural property is set. By definition, allowing a security interest to be vested in tribal cultural property is rolling the dice on the tribe's ability to maintain ownership and control over the story of its identity.²⁰⁶ Each security agreement using tribal cultural property risks losing that property²⁰⁷ and diminishing the pool of tribal cultural resources.²⁰⁸ Such a diminution directly contradicts federal²⁰⁹ and international²¹⁰ policy regarding the protection and preservation of tribal cultural property and artifacts. Such potential losses,

²⁰⁶ See Tatum, *Group Identity*, *supra* note 12; Tsosie, *Reclaiming Native Stories*, *supra* note 197, at 300.

²⁰⁷ If a security interest has been perfected in a piece of cultural property and the debtor defaults on their obligations under a security agreement, then the lender has the ability to transfer ownership of the property in which the security interest has been perfected in consideration for the obligations under the security agreement. Accordingly, if a tribe, tribal member, or other tribal entity were to use tribal cultural property as the collateral upon which a security agreement is based with a non-Indian or non-tribal entity and the tribe/member/tribal entity were to subsequently default, the cultural property would no longer retain Indian ownership. For a brief discussion of that process, see Richard L. Barnes, *Distinguishing Sales and Leases: A Primer on the Scope and Purpose of UCC Article 2A*, 25 U. MEM. L. REV. 873, 874 (1995) ("How we view or characterize our commercial transactions depends largely on the purpose we are pursuing The right to repossess exists if there was a secured transaction and a default." (citing U.C.C. § 9-503 (1990))).

²⁰⁸ The amount of cultural property is finite, and property with a historical basis can only ever be depleted from among known stocks. Accordingly, each loss of a cultural property risks a devastating effect and each return of cultural property to tribal ownership is to be celebrated. For a general discussion of this principle couched in a discussion of The Native American Graves Protection and Repatriation Act, see Tsosie, *NAGPRA*, *supra* note 199.

²⁰⁹ For an example of a statutory right to the protection of cultural property, see the Archeological Resources Protection Act, 16 U.S.C. § 470aa-470mm (2012); Native American Graves Protection and Repatriation Act, 18 U.S.C. § 1170 (2011); 25 U.S.C. §§ 3001-13; and the Indian Arts and Crafts Enforcement Act, 25 U.S.C. §§ 305-305e. For an executive order directing federal agencies to protect and accommodate tribal cultural property, see Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (1996). For a discussion of tribal property ownership, see Joseph William Singer, *Sovereignty and Property*, 86 NW. U.L. REV. 1 (1991). For a discussion of the benefits and potential pitfalls of federal legal protection to tribal intangible property, see Tsosie, *Reclaiming Native Stories*, *supra* note 197, at 347-58.

²¹⁰ See Declaration on the Rights of Indigenous Peoples, art. 3, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); Convention, *supra* note 196. For a discussion of the international law regarding tribal property, see Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1025 (2009) ("This body of cultural property law is unique because it traverses not only the boundaries between properties—real, personal, and intellectual—but also the boundaries between international, domestic, and tribal law. Indeed, on September 13, 2007, after twenty-five years of negotiation, the United Nations adopted the Declaration on the Rights of Indigenous Peoples, which contains numerous provisions explicitly recognizing the collective property rights of indigenous peoples to both tangible and intangible resources." (internal footnotes omitted)).

repeated again and again over time, may have the cumulative effect of an early 20th century anthropologist's raid on a sacred site,²¹¹ and could result in the loss of cultural property which forms the linchpin of tribal identity.²¹²

In an effort to avoid the slippery slope and ensure that the cultural property slowly being clawed back and preserved in the 21st century remains under the thoughtful control of individual Indians and Indian tribal governments,²¹³ this article urges tribes that adopt the Model Tribal Secured Transaction Act to include an explicit protection for cultural property. Additionally, it urges the National Conference of Commissioners on Uniform State Laws to revise the MTA to adopt a bright-line protection for tribal cultural property.²¹⁴ Such a solution would by no means prevent a tribe from exercising its sovereign right to remove such a restriction, but it would ensure that the baseline for protection errs on the side of protecting tribal cultural property.²¹⁵

VI. CONCLUSION: START BY PROTECTING OURSELVES

Indian Country is just different. The title to property is more complicated, the issue of sovereignty is more nuanced, and the choice of law and choice of forum questions are more complex. Because the traditional U.C.C. Article 9 governing secured transactions is not designed to contemplate the existence of tribal sovereigns, the Model Tribal Secured Transactions Act was born.

This article has taken the position that the MTA is, overall, an excellent document. It fills a demonstrated niche in tribal codes and will promote economic growth by clarifying the process and rules for investing in Indian Country via secured transactions. But tribes need to be cautious when deciding to

²¹¹ For an excellent discussion of the effect upon tribes of the loss of cultural property, see Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35 (1992).

²¹² For a discussion of the role cultural property plays in creating tribal identity, see Tatum, *supra* note 12 and Tsosie, *supra* note 198.

²¹³ This article is limited to the Model Tribal Secured Transaction Act and accordingly governs only property subject to the authority and control of tribal governments. For a discussion of how broad tribal authority might extend, see Grant Christensen, *Creating Bright-Line Rules for Tribal Court Jurisdiction over Non-Indians: The Case of Trespass to Real Property*, 35 AM. INDIAN L. REV. 527 (2010-2011); see also Fletcher, *Unifying Theory*, *supra* note 13.

²¹⁴ For a thorough discussion of the need for a presumption against the inclusion of tribal cultural property as a security interest in a security agreement and the corresponding encouraging to tribes to adopt such a presumption in the absence of change to the MTA, see *supra* Part III.

²¹⁵ *Id.*

implement the MTA, particularly when they decide what classes of property ought to be eligible to vest within them a security interest. The drafters of the Model Act clearly identified many of the issues that might arise should cultural property be ultimately subject to a security agreement and the debtor defaults on their obligations. Unfortunately, the drafters allowed attempts at uniformity with the existing Uniform Commercial Code, a preference not to limit the types or kinds of property subject to a security agreement, and perhaps an under appreciation of the importance of cultural property to tribal identity to culminate in an opt in instead of an opt out default rule for protecting tribal cultural property.

The danger to tribes is not as well understood as it needs to be. If a tribe allows a historical, cultural, or religious artifact to be used as collateral in order to obtain a loan via a secured transaction, the tribe is taking a risk that they will be unable to pay their obligations and lose the right to that property. For many tribes, the consequences of losing that cultural property amount to a loss of identity. Accordingly, it follows that the MTA should be reconsidered to include, as a general rule, that property related to the history, culture, or identity of the tribe is not eligible to vest a security interest.

However, in light of the diversity of Indian Country, while all tribes should be encouraged to adopt this general proposition, no tribe is required to prohibit the vesting of a security interest in these kinds of religious or cultural property. Instead, tribal leaders who want to use identity or culturally indispensable property should be able to do so, but only after the consequences of doing so are explained to the entire membership of the tribe and a majority of the eligible membership consent.

Uniform and predictable rules governing the process, enforcement, and classes of property subject to a secured transaction involving Indian Country will undoubtedly increase the amount of economic development that occurs there. As investors, creditors, lenders, banks, entrepreneurs and tribes become more familiar with uniform rules for commercial relationships on reservations and upheld by tribal courts—ever more capital will flow through the open gates of the reservation. This opening up of tribal economies will reap great dividends, but tribal councilors, chairpersons, and business development directors need to take proactive steps to ensure that this growth does not risk the loss of the kinds of cultural property that help maintain the unique identity of many tribal communities.