Federal Diversity Jurisdiction and American Indian Tribal Corporations

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INTRODUCTION

American Indian tribes often have multiple legal identities. First and foremost they are "domestic dependent nations" with their own constitutions and governing bodies.[1] But many Indian tribes also have a number of separate corporate identities. There are three ways for an Indian tribe to form corporations that are distinct from the domestic dependent nation, or constitutional tribe. First, the tribe can follow the procedures for forming a corporation under state law, just like any non-Indian entity.[2] Second, the tribe can receive a federal charter under § 17 of the Indian Reorganization Act of 1934.[3] The corporate charter does not displace the tribe's governing body. Rather the § 17 tribal corporation exists as a separate legal entity alongside the constitutional tribe, which is often organized under § 16 of the Indian Reorganization Act.[4] Third, tribal governments can allow for the formation of corporations under tribal law. They can enact their own business codes that authorize the formation of corporations, or they can charter corporations directly through their legislative bodies.[5]

This Comment examines how federal courts determine the state citizenship of tribal corporations when deciding whether they can exercise diversity jurisdiction. It is well established that the Indian tribe itself—the constitutional tribe—is a "stateless entity" that is never subject to federal diversity jurisdiction.[6] A federal court cannot hear a

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1 *Cherokee Nation v Georgia*, 30 US 1, 17 (1831).

2 See Karen J. Atkinson and Kathleen M. Nilles, *Tribal Business Structure Handbook* IV-1 (Office of Indian Energy & Economic Development 2008), online at http://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf (visited Nov 24, 2012).

3 Pub L No 73-383, ch 576, 48 Stat 984, codified as amended at 25 USC § 461 et seq.

4 Indian Reorganization Act § 16, 48 Stat at 987, codified as amended at 25 USC § 476.

5 See, for example, *Comprehensive Code of Justice of the Assiniboine and Sioux Tribes of the Fort Peck Reservation* title XXIV, ch 11, online at http://indianlaw.mt.gov/content/fortpeck/codes/titleXXIV (visited Nov 24, 2012).

6 See, for example, *Miccosukee Tribe of Indians of Florida v Kraus–Anderson Construction Co*, 607 F3d 1268, 1276 (11th Cir 2010); *American Vantage Cos v Table Mountain Ranche-*

case in which an Indian tribe is a party unless there is another basis for subject matter jurisdiction, such as federal question jurisdiction.[7] The rules that pertain to tribal *corporations*, however, remain unsettled. Courts have not adopted a comprehensive or uniform approach to determining when, if ever, they can exercise diversity jurisdiction over cases involving tribal corporations. Yet the rule that a court selects can have a profound impact on the likelihood that a tribal corporation will be susceptible to diversity jurisdiction.

The statutory source of diversity jurisdiction is 28 USC § 1332, which authorizes federal courts to exercise jurisdiction over cases between "citizens of different States" if the amount in controversy exceeds $75,000.[8] According to § 1332(c)(1), a corporation is "deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business."[9] This provision plainly applies to corporations that were incorporated by a US or foreign state. But it is unclear whether § 1332(c)(1) can be used to determine the state citizenship of a § 17 tribal corporation, since it owes its existence to a federal charter rather than to an act or acknowledgment of any state. And corporations formed under tribal law pose a different, and more unusual, challenge. They are created by tribal sovereigns, which are neither foreign countries nor part of the federal government or any state government.[10]

This Comment has four parts. Part I outlines the two types of business organizations that are only available to Indian tribes: the corporation formed under tribal law and the federally chartered § 17 corporation.[11] It also describes the distinction between the constitutional tribe and the "corporate tribe," which often affects whether a court can exercise diversity jurisdiction. Part II identifies five ways of determining the state citizenship of corporations formed under tribal law

ria, 292 F3d 1091, 1095 (9th Cir 2002); *Ninigret Development Corp v Narragansett Indian Wetuomuck Housing Authority*, 207 F3d 21, 27 (1st Cir 2000); *Standing Rock Sioux Indian Tribe v Dorgan*, 505 F2d 1135, 1140 (8th Cir 1974); *Oneida Indian Nation v County of Oneida*, 464 F2d 916, 923 (2d Cir 1972), revd on other grounds, 414 US 661 (1974). There seem to be only two reported district court decisions that have held that Indian tribes are citizens of a state for diversity purposes. See *Tribal Smokeshop, Inc v Alabama–Coushatta Tribes of Texas*, 72 F Supp 2d 717, 718 n 1 (ED Tex 1999); *Warn v Eastern Band of Cherokee Indians*, 858 F Supp 524, 526 (WD NC 1994).

7 See 28 USC § 1331.

8 28 USC § 1332(a).

9 28 USC § 1332(c)(1).

10 See *Cherokee Nation*, 30 US at 16–18.

11 Corporations formed under state law will not be considered at length because they do not pose unique problems to determining their state citizenship under § 1332(c)(1). See note 16 and accompanying text.

that have been suggested in the existing case law. It proposes an alternative solution that analogizes corporations formed under tribal law to foreign corporations that have their principal place of business in a US state. Part III follows the same pattern. It begins by identifying three ways of determining the state citizenship of federally chartered § 17 corporations that have been suggested by the courts. It then proposes that § 17 corporations should be treated like other corporations chartered by the federal government that are not subject to a specific jurisdictional statute.

The rules that are most doctrinally sound also happen to increase the likelihood that federal courts will be able to exercise diversity jurisdiction over cases involving tribal corporations. Part IV argues that this outcome is desirable from a pragmatic perspective. Increasing the scope of diversity jurisdiction over cases involving tribal corporations can modestly further widely shared goals by permitting tribal corporations to more easily signal to non-Indian parties that they are susceptible to suit in a forum that non-Indians find convenient and reliable.

I. THE CORPORATE TRIBE

This Part begins by describing the distinctive features of corporations formed under state law, tribal law, and § 17 of the Indian Reorganization Act. It then explains the differences between the constitutional tribe—composed of the tribe's governing body and unincorporated businesses[12]—and the corporate tribe.

A. Distinguishing the Three Types of Tribal Corporations

Federally recognized Indian tribes can form corporations under state, tribal, or federal law. These options are not mutually exclusive—an Indian tribe may create corporations under state law, charter corporations under its own tribal business code, and receive a § 17 charter from the federal government.

12 Only corporations (and their equivalents) have a separate legal identity. If one starts a business, it is not a separate legal person unless one incorporates it. The same is true when an Indian tribe starts a business. Businesses that are operated by the tribe without being incorporated are generally considered part of the tribe itself because they do not have a separate corporate identity. See Atkinson and Nilles, *Tribal Business Structure Handbook* at I-5 (cited in note 2).

1. State-law corporations.

Tribes and their members may form ordinary state-law corporations, though this option is often disadvantageous relative to the federal and tribal alternatives. While tribes themselves do not pay federal income tax, a corporation formed under state law is subject to both state and federal taxes, even if it is wholly owned by a tribe.[13] Also, some courts have refused to extend tribal sovereign immunity to corporations formed under state law.[14] This option appears to be used most frequently in joint ventures with non-Indians, who prefer the familiarity of a well-established body of corporate laws.[15] Corporations formed under state law are not considered at length here because they do not pose any unusual challenges to federal diversity jurisdiction. The courts do not peer behind the veil to see who owns the shares of a corporation when determining its state citizenship under § 1332(c)(1);[16] courts treat corporations owned by Indian tribes the same way they treat any other state-law corporation.

2. Corporations formed under tribal law.

As sovereign entities, Indian tribes can enact their own business codes that authorize the formation of corporations. These statutes often closely resemble their state counterparts in providing for the essential components of the corporate form, such as centralized management, limited liability, and the issuance of shares.[17] The

13 See Rev Rul 67-284, 1967-2 Cumulative Bull 55 ("Income tax statutes do not tax Indian tribes."); Rev Rul 94-16, 1994-1 Cumulative Bull 19 ("[A] corporation organized by an Indian tribe under state law is subject to federal income tax."). Conversely, the Internal Revenue Service (IRS) has ruled that § 17 corporations are tax-exempt. See Rev Rul 81-295, 1981-2 Cumulative Bull 15 ("The federally chartered Indian tribal corporation shares the same tax status as the Indian tribe."). The IRS has not yet issued guidance on whether corporations formed under tribal law are tax-exempt. See *Tribal Business Structures: A Guidebook on Different Structures for Tribal Business Entities* 13 (Michigan Economic Development Corp Sept 14, 2011), online at http://www.michiganadvantage.org/cm/Files/Tribal_Business_Development/Tribal%20Business%20Structures%20Guidebook.pdf (visited Nov 24, 2012).

14 See, for example, *Johnson v Harrah's Kansas Casino Corp*, 2006 WL 463138, *10 (D Kan); *Dixon v Picopa Construction Co*, 772 P2d 1104, 1111 (Ariz 1989). See also Atkinson and Nilles, *Tribal Business Structure Handbook* at IV-4 (cited in note 2). But see *In the Matter of Ransom v St. Regis Mohawk Education and Community Fund, Inc*, 658 NE2d 991, 993 (NY 1995).

15 See, for example, Atkinson and Nilles, *Tribal Business Structure Handbook* at VI-5 (cited in note 2).

16 See *CCC Information Services, Inc v American Salvage Pool Association*, 230 F3d 342, 346 (7th Cir 2000) ("[F]or diversity purposes, the relevant citizenship is that of the corporation rather than the shareholders.").

17 See, for example, *Winnebago Tribe of Nebraska Tribal Code* title 11, online at http://www.winnebagotribe.com/images/tribal_court/tribal%20code%2006-09-11/2011%20TITLE%2011%20Business%20Corporations.pdf (visited Nov 24, 2012).

tribe's legislative body can also enact legislation that directly creates a corporation that is wholly owned by the tribe.[18] Corporations formed under tribal law may be shielded by the tribe's sovereign immunity, though this typically involves a fact-intensive inquiry into the connections between the corporation and the constitutional tribe.[19]

An increasing number of tribes have chartered their own corporations in recent years, and some have developed expansive operations.[20] For example, Ho-Chunk, Inc, which was formed under the business code of the Winnebago Tribe of Nebraska, has 1,400 employees and earns more than $185 million in annual revenue.[21] It has twenty-four subsidiaries, including a government-contracting business that provides information technology services to the US military overseas.[22]

3. Federally chartered § 17 corporations.

Tribes can form a federally chartered corporation under § 17 of the Indian Reorganization Act.[23] The governing bodies of many tribes were formed under § 16 of the Act, which permits a federally recognized tribe to "organize for its common welfare" by petitioning the Department of the Interior for approval of its constitution and bylaws.[24] Meanwhile, § 17 authorizes the Department of the Interior to "issue a charter of incorporation . . . [that] may convey to the incorporated tribe the power to . . . own, hold, manage, operate, and dispose of property of every description . . . and such further powers as may be incidental to the conduct of corporate business."[25] The § 17 charter must be ratified by the tribe's governing body.[26] Even after ratification, the § 17 corporation is a membership corporation that must remain wholly owned by the tribe.[27]

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18 See Atkinson and Nilles, *Tribal Business Structure Handbook* at III-1 (cited in note 2).

19 See id at III-4 to -5.

20 See, for example, id at III-2.

21 See *Ho-Chunk, Inc.: Annual Report 2010* 6, online at http://www.hochunkinc.com/images/ANNUAL-2010.pdf (visited Nov 24, 2012).

22 See id at 8.

23 Tribes located in Oklahoma were not covered by the Indian Reorganization Act, but they can receive the equivalent of a § 17 charter under § 3 of the Oklahoma Indian Welfare Act, Pub L No 74-816, ch 831, 49 Stat 1967, 1967 (1936), codified at 25 USC § 503.

24 Indian Reorganization Act § 16, 48 Stat at 987, codified as amended at 25 USC § 476(a).

25 Indian Reorganization Act § 17, 48 Stat at 988, codified as amended at 25 USC § 477.

26 Indian Reorganization Act § 17, 48 Stat at 988, codified as amended at 25 USC § 477.

27 See *Tribal Business Structures* at 9 (cited in note 13).

The Senate committee report indicates that § 16 was intended to promote the "stabilization of tribal governmental organization," while the separate § 17 entity was designed to encourage the "modernization of tribal economic activities through the corporate structure."[28] The purpose clauses of many early § 17 charters similarly provide that the corporation exists to "further the economic development" of the tribe.[29]

By 1940, 149 of the 226 eligible tribes had adopted a § 17 charter.[30] The Indian Reorganization Act was amended in 1990 to allow tribes to incorporate under § 17 even if they had organized their governing body under their own tribal code rather than under § 16 of the Indian Reorganization Act.[31] Some tribes have stopped using § 17 corporations[32] while other tribes have organized much of their economic activity through their § 17 corporations or have used them as holding companies that control various operating subsidiaries formed under tribal law.[33] Several tribes have recently amended their § 17 charters to enable new ventures[34] or have considered adopting a § 17 charter for the first time.[35]

The charters granted by the Department of the Interior in the 1930s and 1940s are substantially similar to one another. They include language authorizing the § 17 corporation to engage in any lawful business, own property, exist in perpetuity, and appoint officers and directors.[36] They also typically contain "sue and be sued"

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28 *Atkinson v Haldane*, 569 P2d 151, 172 (Alaska 1977), citing *Authorizing Indians to Form Business Councils, Corporations, and for Other Purposes*, S Rep No 73-1080, 73d Cong 2d Sess 1 (1934).

29 See, for example, *Corporate Charter of the Saginaw Chippewa Indian Tribe of the Isabella Reservation of Michigan* § 1 (Department of the Interior (DOI) 1938).

30 See Greg Overstreet, *Re-empowering the Native American: A Conservative Proposal to Restore Tribal Sovereignty and Self-Reliance to Federal Indian Policy*, 14 Hamline J Pub L & Pol 1, 15 n 91 (1993), citing DOI, *Annual Report of the Secretary of the Interior for the Fiscal Year Ending June 30 1940* 364 (GPO 1940).

31 Section 3(c), Pub L No 101-301, 104 Stat 206, 207 (1990), codified in relevant part at 25 USC § 477.

32 See *Doing Business in Indian Country* (Dorsey & Whitney July 28, 2004), online at http://www.dorsey.com/Doing-Business-In-Indian-Country-07-28-2004 (visited Nov 24, 2012).

33 An example is S&K Technologies, Inc, which is the § 17 corporation of the Salish and Kootenai Tribe of the Flathead Reservation in Montana. It owns several subsidiaries that operate businesses in a number of different industries. See *S&K Technologies, Inc.: A Family of Salish & Kootenai Tribally Owned Businesses*, online at http://www.sktcorp.com (visited Nov 24, 2012).

34 See, for example, *Kwahn Corporation Federal Charter* (Pit River Tribe 2010), online at http://pitrivertribe.org/law/ordinances/11-kwahn-corp-charter (visited Nov 24, 2012).

35 See, for example, George Patton, Letter to the Editor, *Section 17 Federal Corporate Charter: Setting the Record Straight* (Lakota Country Times Nov 6, 2008), online at http://www.lakotacountrytimes.com/news/2008-11-06/opinion/014.html (visited Nov 24, 2012).

36 See, for example, *Corporate Charter of the Gila River Pima-Maricopa Indian Community* § 5 (DOI 1938).

clauses that purport to waive the tribe's sovereign immunity.[37] This is consistent with one commentator's conclusion, based on the Indian Reorganization Act's legislative history, that "[s]ection 17 was added because of congressional concern that non-Indians would not do business with tribal governments that are immune from suit" either generally or under particular circumstances.[38] Yet some recently amended charters contain much more limited waivers of sovereign immunity.[39]

B. Distinguishing the Constitutional Tribe from the Corporate Tribe

The first task for a court confronted with a potential diversity case involving an Indian entity is to determine whether the Indian entity is the constitutional tribe or a separate tribal corporation. More specifically, the sole question is whether the entity is separately incorporated under federal, state, or tribal law. The courts have rigidly adhered to the formal distinction between tribal corporations and unincorporated entities that are part of the constitutional tribe.[40]

In other words, the distinction between the constitutional tribe and the corporate tribe is driven by whether the entity is separately incorporated, not by the types of activities that the entity is engaged in. A classic for-profit business like a casino or ski resort may be directly controlled by the tribe's governing body, rather than operated through a corporation.[41] The courts consider these businesses part of the constitutional tribe, along with the tribal government. Conversely, an entity like a housing authority that looks more like a government agency may be separately incorporated.[42] These corporations have a legal identity independent of the constitutional tribe, even though they are involved in providing government services.

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37 See, for example, id at § 5(i).

38 William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz L Rev 169, 175 (1994), citing *Readjustment of Indian Affairs, Hearings on HR 7902 before the House Committee on Indian Affairs*, 73d Cong, 2d Sess 90–100 (1934) and S Rep No 73-1080, 73d Cong, 2d Sess at 1 (cited in note 28).

39 See, for example, *Corporate Charter of the Gila River Pima-Maricopa Indian Community* at § 5(i) (cited in note 36).

40 See, for example, *American Vantage Cos v Table Mountain Rancheria*, 292 F3d 1091, 1099–1100 (9th Cir 2002); *Gaines v Ski Apache*, 8 F3d 726, 729–30 (10th Cir 1993).

41 See, for example, *American Vantage*, 292 F3d at 1093; *Gaines*, 8 F3d at 728.

42 See, for example, *Weeks Construction, Inc v Oglala Sioux Housing Authority*, 797 F2d 668, 670–71 (8th Cir 1986); *R.J. Williams Co v Fort Belknap Housing Authority*, 719 F2d 979, 982 (9th Cir 1983).

The distribution of entities between the constitutional tribe and the corporate tribe is solely a product of how each tribe chooses to manage its own affairs. Some tribes operate various unincorporated businesses under the constitutional tribe,[43] while others have formed dozens of separate corporations.[44] It is not always obvious whether the relevant Indian party is the constitutional tribe or a tribal corporation. For example, both the constitutional tribe and a corporation owned by the tribe might be involved in different portions of the same enterprise.[45] Or it might not be apparent from the available records whether the business was incorporated under tribal law or organized directly under the tribe's government.[46]

Several important consequences flow from the distinction between the constitutional tribe and the corporate tribe. The most frequently litigated issue is the effect of incorporation on tribal sovereign immunity. Tribes are shielded by sovereign immunity even when they participate in off-reservation commercial activities.[47] Sovereign immunity usually extends to federally chartered § 17 corporations and corporations formed under tribal law.[48] But while the tribe itself is unlikely to waive sovereign immunity, either generally or vis-à-vis a particular class of claimants, many tribal corporations' charters contain relatively unqualified language permitting them to "sue and be sued."[49]

The line between the constitutional tribe and the corporate tribe is also crucial for determining whether a federal court may exercise subject matter jurisdiction.[50] Almost all courts agree that the tribe itself

43 See, for example, *American Vantage*, 292 F3d at 1093; *Gaines*, 8 F3d at 728.

44 See Atkinson and Nilles, *Tribal Business Structure Handbook* at III-2 (cited in note 2).

45 See, for example, *S. Unique, Ltd v Gila River Pima-Maricopa Indian Community*, 674 P2d 1376, 1378–84 (Ariz App 1983).

46 See Brief of Appellee, *Auto–Owners Ins Co v Tribal Court of Spirit Lake Indian Reservation*, No 06-3562, *15 n 6 (8th Cir filed Jan 12, 2006) ("Auto–Owners Brief") (available on Lexis at 2007 US 8th Cir Briefs LEXIS 66).

47 See *Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc*, 523 US 751, 754–55 (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.").

48 See Part I.A.

49 See Vetter, 36 Ariz L Rev at 175 (cited in note 38). See, for example, *Corporate Charter of the Skokomish Indian Tribe of the Skokomish Indian Reservation, Washington* (DOI 1939).

50 Some courts will not consider whether they have subject matter jurisdiction if they conclude that the tribal corporation is shielded by sovereign immunity. For example, in 2009 the Sixth Circuit held that "if [the tribal corporation] enjoys tribal-sovereign immunity, we need not address the issues of diversity jurisdiction and federal-question jurisdiction." *Memphis Biofuels, LLC v Chickasaw Nations Industries, Inc*, 585 F3d 917, 919–20 (6th Cir 2009). On three occasions the Eighth Circuit has also evaluated tribal sovereign immunity before resolving a challenge to its subject matter jurisdiction. See *Hagen v Sisseton–Wahpeton Community College*, 205 F3d 1040, 1043–44 (8th Cir 2000); *Dillon v Yankton Sioux Tribe Housing Authority*,

is a "stateless entity" that always destroys diversity jurisdiction.[51] Indian tribes are not covered by any of the sources of diversity jurisdiction set forth in § 1332(a) because they are neither foreign states nor citizens of a US or foreign state.[52] Furthermore, the mere presence of a tribe as a party to the suit does not raise a federal question that would permit the court to assert jurisdiction under § 1331.[53] Thus, a federal court will not have subject matter jurisdiction solely because the parties are diverse if the Indian party is an unincorporated part of the constitutional tribe. The court may, however, be able to exercise diversity jurisdiction if the party to the suit is instead part of the corporate tribe. Parts II and III analyze how courts determine whether they can assert diversity jurisdiction in cases involving tribal corporations.

II. THE STATE CITIZENSHIP OF CORPORATIONS FORMED UNDER TRIBAL LAW

The previous Part identified the three different types of tribal corporations and distinguished them from the constitutional tribe. Two types—those incorporated under tribal law and those chartered by the federal government as § 17 corporations—pose unusual challenges to a federal court deciding whether it can exercise diversity jurisdiction. In order to determine whether the parties are "citizens of different States,"[54] a court must define the state citizenship of the parties. The state citizenship of corporations is defined by § 1332(c)(1), which provides that a corporation "shall be deemed to be a citizen of

144 F3d 581, 584 (8th Cir 1998); *Weeks Construction*, 797 F2d at 670–72. But more recently, the Eighth Circuit resolved a challenge to its subject matter jurisdiction before considering the tribal entity's claim that it was immune. See *Auto–Owners Insurance Co v Tribal Court of Spirit Lake Indian Reservation*, 495 F3d 1017, 1024 (8th Cir 2007).

The First, Second, and Ninth Circuits also evaluate whether they may exercise subject matter jurisdiction before addressing the tribal corporation's immunity defense. See *Cook v Avi Casino Enterprises, Inc*, 548 F3d 718, 724 (9th Cir 2008); *Ninigret Development Corp v Narragansett Indian Wetuomuck Housing Authority*, 207 F3d 21, 28 (1st Cir 2000) ("[A]lthough tribal sovereign immunity is jurisdictional in nature, consideration of that issue always must await resolution of the antecedent issue of federal subject-matter jurisdiction."); *Romanella v Hayward*, 114 F3d 15, 16 (2d Cir 1997). These courts have neither expressly recognized this split nor discussed their decision to engage in "jurisdictional resequencing" at length. Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 Cornell L Rev 1, 89–92 (2001). The decision by some courts to dismiss cases on immunity grounds before examining whether they have subject matter jurisdiction has hindered the development of a comprehensive or uniform doctrine regarding when, if ever, tribal corporations are susceptible to diversity jurisdiction. See Peter B. Rutledge, *Decisional Sequencing*, 62 Ala L Rev 1, 24 (2010).

51 See note 6.

52 See *American Vantage*, 292 F3d at 1095–98.

53 See *Miccosukee Tribe of Indians of Florida v Kraus–Anderson Construction Co*, 607 F3d 1268, 1273 (11th Cir 2010).

54 28 USC § 1332(a)(1).

every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business."[55] The courts have split over both whether this provision applies to corporations formed under tribal law and whether it applies to federally chartered § 17 corporations. And, if it does apply, the courts are further split over how it ought to be interpreted. The circuit and district courts have proposed several different rules, though no single court has set out the full range of possibilities that have been suggested or adopted.

A principal source of confusion is that the courts do not always distinguish between corporations formed under tribal law and federally chartered § 17 corporations.[56] As explained in Part I.A, they are distinct entities created by different sovereigns. To avoid the same mistake, this Comment discusses separately the circuit splits regarding the state citizenship of these two types of tribal corporations. This Part describes the various methods that courts have suggested or adopted for defining the state citizenship of corporations formed under tribal law. It also proposes a solution that draws on the rule used to determine the state citizenship of foreign corporations that have their principal place of business in a US state. Part III then examines the distinct questions posed by federally chartered § 17 corporations.

A. Five Methods for Defining the State Citizenship of Corporations Formed under Tribal Law

This Section discusses the various ways that courts could determine the state citizenship of corporations formed under tribal law. The approaches adopted or suggested by the courts can be divided into five categories.

1. An indistinguishable part of the constitutional tribe.

For the purpose of determining its state citizenship, the tribal corporation could be considered indistinguishable from the constitutional tribe. Its presence in the suit would thus always deprive federal courts of diversity jurisdiction because the constitutional tribe is never susceptible to diversity jurisdiction.[57]

This approach was suggested, though arguably not adopted, by the Eighth Circuit in *Auto–Owners Ins Co v Tribal Court of Spirit*

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55 28 USC § 1332(c)(1).

56 See, for example *American Vantage Cos v Table Mountain Rancheria*, 292 F3d 1091, 1094 n 1 (9th Cir 2002); *Gaines v Ski Apache*, 8 F3d 726, 729 (10th Cir 1993).

57 See note 6.

Lake Indian Reservation.[58] There, the court held that "no diversity jurisdiction exists as a basis for subject matter jurisdiction because Tate Topa—a sub-entity of the Spirit Lake Sioux Tribe—is considered a part of the Indian tribe."[59] It was never resolved whether Tate Topa, a school located on the tribe's reservation, was an incorporated "sub-entity" or an unincorporated agency affiliated with the tribe's governing body. In its brief, Auto–Owners urged the court to deny the motion to dismiss because the tribe had not responded to its requests to disclose whether Tate Topa was incorporated by the tribe.[60] The court presumably would have allowed limited discovery on this factual question if its decision turned on whether Tate Topa was incorporated. Yet the court decided to grant the motion to dismiss without allowing discovery on this point, which suggests that it would have considered Tate Topa part of the constitutional tribe even if it had been incorporated under tribal law. Based on this reasoning, it seems impossible for the tribe to create an entity under tribal law that is subject to federal diversity jurisdiction.[61]

2. Citizens of the state where the reservation is located.

A second approach was introduced by the Ninth Circuit in *Stock West, Inc v Confederated Tribes of the Colville Reservation*.[62] The court held that "for purposes of diversity jurisdiction, an Indian corporation is a citizen of the state in whose borders the reservation is located."[63] This rule is striking because it has no obvious foundation in the methods used to determine the state citizenship of other types of corporations.[64] It is possible that the court was simply being loose

58 495 F3d 1017 (8th Cir 2007).

59 Id at 1021.

60 See Auto–Owners Brief at *15 n 6 (cited in note 46).

61 The Eighth Circuit previously refused to exercise diversity jurisdiction over cases involving tribal corporations on the basis that it would unduly interfere with the tribal court's jurisdiction. See *Kishell v Turtle Mountain Housing Authority*, 816 F2d 1273, 1277 (8th Cir 1987); *Weeks Construction v Oglala Sioux Housing Authority*, 797 F2d 668, 673 (8th Cir 1986). But these concerns should be addressed as a matter of comity, rather than as a jurisdictional bar. The Supreme Court has held that in diversity cases a federal court must "stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *Iowa Mutual Ins Co v LaPlante*, 480 US 9, 16 (1987), quoting *National Farmers Union Ins Cos v Crow Tribe of Indians*, 471 US 845, 857 (1985). If the tribal court asserts jurisdiction over the case, the non-Indian plaintiff must exhaust its tribal remedies before it may return to federal court. *Iowa Mutual*, 480 US at 17. But the *Iowa Mutual* Court noted that "the exhaustion rule . . . [does] not deprive the federal courts of subject-matter jurisdiction" because "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite." Id at 16 n 8.

62 873 F2d 1221 (9th Cir 1989).

63 Id at 1226.

64 See Parts I.A.1, II.B, and III.A.3.

with its language.[65] Perhaps it meant that the corporation was a citizen of the state where it had its principal place of business and assumed that this was synonymous with where its reservation was located. But a tribal corporation's reservation might be located in one state and its principal place of business in another, or its reservation might span multiple states, or it might not have a reservation at all.[66] Yet, the test has the virtue of being a "simple way to resolve the question."[67] And it is arguably "no more fictional" than the other methods for determining state citizenship.[68]

3. Applying the "principal place of business" half of § 1332(c)(1).

The Ninth Circuit reversed course in 2008. In *Cook v Avi Casino Enterprises, Inc*,[69] the court observed that there was no authority for the test it previously articulated in *Stock West*.[70] The decision to discard *Stock West*, which had previously been reaffirmed by a different Ninth Circuit panel,[71] was likely driven by the facts of the case. Avi Casino was chartered by the Fort Mojave Indian Tribe, whose reservation encompasses portions of Arizona, California, and Nevada.[72] Following *Stock West*, Avi Casino would have been a citizen of all three states.[73]

After rejecting this possibility, the *Cook* court applied § 1332(c)(1).[74] When *Cook* was decided the statute provided that a corporation is "a citizen of any State *by* which it has been incorporated and of the State where it has its principal place of business."[75]

65 See Peter Nicolas, *American-Style Justice in No Man's Land*, 36 Ga L Rev 895, 947 n 348 (2002) ("There is good reason to believe that the *Stock West* court was not creating an alternative means of exercising jurisdiction over a corporation organized under tribal law but rather merely misstated existing law."). Professor Peter Nicolas accurately predicted the scenario that later prompted the Ninth Circuit to discard the test articulated in *Stock West*: "The Navajo reservation is located within four states—Utah, Colorado, Arizona, and New Mexico. Would a Navajo corporation be deemed to be a citizen of all four states?" Id.

66 See, for example, *Cook v Avi Casino Enterprises, Inc*, 548 F3d 718, 721 (9th Cir 2008).

67 Id at 728 (Fernandez concurring in part and dissenting in part).

68 Id.

69 548 F3d 718 (9th Cir 2008).

70 Id at 722.

71 See *American Vantage*, 292 F3d at 1094 n 1. The Ninth Circuit had also previously asserted diversity jurisdiction over a suit against a corporation created under tribal law, though it did not consider the language used by the *Stock West* court. *Johnson v Gila River Indian Community*, 174 F3d 1032, 1035 (9th Cir 1999).

72 *Cook*, 548 F3d at 721.

73 See id; *Stock West*, 873 F2d at 1226.

74 *Cook*, 548 F3d at 723.

75 28 USC § 1332(c)(1) (2006) (emphasis added). Section 1332 was subsequently amended by the Federal Courts Jurisdiction and Venue Clarification Act of 2011 § 102, Pub L No 112-63,

Avi Casino's principal place of business was in Nevada, and it was incorporated by the tribe at its headquarters in California.[76] If Avi Casino had been incorporated under California law, it would have unquestionably been a citizen of both Nevada and California. But the *Cook* court reasoned that the tribal corporation was not incorporated "by" California, or any other state. Rather it was incorporated "by" the Fort Mojave Indian Tribe.[77]

Accordingly, the court held that corporations formed under tribal law are only citizens of the state where they have their principal place of business.[78] The consequence is that these corporations are always citizens of just a single state. Thus, all else equal, corporations formed under tribal law are more likely to be subject to diversity jurisdiction than corporations formed under state law. This expansive notion of diversity jurisdiction contrasts sharply with the Eighth Circuit's intimation in *Auto–Owners* that a tribal corporation is never subject to diversity jurisdiction.[79]

125 Stat 758, 758–59, codified at 28 USC § 1332(c)(1). For further discussion of the amendment, see note 77.

76 *Cook*, 548 F3d at 721–22.

77 See id at 724 ("Although [Avi Casino] might have been physically present 'in' the state of California when it was created by the Tribe, it was not created 'by' California, as is required by the diversity statute to establish citizenship.").

Congress amended 28 USC § 1332(c)(1) three years after *Cook* was decided. It now provides that "a corporation shall be deemed to be a citizen of every State *and foreign state* by which it has been incorporated and of the State *or foreign state* where it has its principal place of business." Federal Courts Jurisdiction and Venue Clarification Act § 102, 125 Stat at 758–59, codified at 28 USC § 1332(c)(1) (emphasis added).

After the amendment to § 1332(c)(1), the *Cook* court would ask a different question, but it would almost certainly arrive at the same answer. Under the previous version of the statute, the tribal corporation would be considered a citizen of "any State by which it has been incorporated." 28 USC § 1332(c)(1) (2006). The word "State" did not include foreign countries. 28 USC § 1332(e) ("The word 'States', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."). Under the current version of the statute, the tribal corporation would be considered a citizen of "every State *and foreign state* by which it has been incorporated." 28 USC § 1332(c)(1) (emphasis added).

The same logic that led the *Cook* court to conclude that Avi Casino was not incorporated "by" any US state would very likely lead it to conclude that the corporation was not incorporated "by" a foreign state either. Indian tribes are not considered foreign countries. See *Cherokee Nation v Georgia*, 30 US 1, 16–18 (1831); *Means v Navajo Nation*, 432 F3d 924, 929 (9th Cir 2005) ("[A]lthough Indian tribes enjoy some sovereign powers, their 'domestic, dependent' nature distinguishes them from the governments of foreign countries."), quoting *Cherokee Nation*, 30 US at 17.

78 See *Cook*, 548 F3d at 724.

79 See *Auto–Owners*, 495 F3d at 1021.

4. Applying all of § 1332(c)(1).

A fourth possibility was suggested by Judge Ferdinand Francis Fernandez in his partial dissent in *Cook*. The court could have treated the tribal corporation exactly like a corporation formed under state law by interpreting the word "by" less rigidly. The dissent noted that the Ninth Circuit had previously used words like "by," "where," and "of" interchangeably when discussing § 1332(c)(1).[80] It is true that the tribal corporation was not incorporated "by" California in the sense of being incorporated under California law because it was incorporated "by" the Fort Mojave Tribe. But California is the state "where" it was incorporated—by virtue of having been chartered on an Indian Reservation within the borders of the state—and hence, it could arguably be considered a citizen "of" California.

In 2011 the Seventh Circuit, in *Wells Fargo Bank, NA v Lake of the Torches Economic Development Corp*,[81] joined the Ninth Circuit in expressly holding that § 1332(c)(1) should govern the state citizenship of corporations formed under tribal law.[82] The court did not address whether it was applying both parts of § 1332(c)(1) or just the principal place of business prong like the majority in *Cook*. Unlike the tribal corporation in *Cook*, Lake of the Torches had its principal place of business in Wisconsin and was incorporated by an Indian tribe located there.[83] The corporation would thus have been considered a citizen of Wisconsin alone, regardless of whether the court thought it was incorporated "by" Wisconsin under § 1332(c)(1).

But the court's reasoning supports an argument that § 1332(c)(1) should be applied in full:

> [T]he diversity statute itself does not distinguish between types of corporations or limit its reach to businesses incorporated under state law. . . . Moreover, we do not discern any significant reason that corporations organized under tribal law and participating in economic transactions with individuals and businesses from a variety of states merit different jurisdictional treatment than their counterparts organized under state law.[84]

The court emphasized the importance of uniformity between state and tribal corporations unlike the *Cook* court, which adopted a reading

80 See *Cook*, 548 F3d at 728 (Fernandez concurring in part and dissenting in part), citing *Industrial Tectonics, Inc v Aero Alloy*, 912 F2d 1090, 1092 (9th Cir 1990).

81 658 F3d 684 (7th Cir 2011).

82 Id at 693.

83 See id at 688.

84 Id at 693.

that causes nonuniform results by making it more likely that tribal corporations will be subject to diversity jurisdiction than their state-law counterparts. The Seventh Circuit's holding in *Lake of the Torches* does not compel, or even suggest, a different result than the one reached in *Cook*. But this reasoning offers a pragmatic basis for a more expansive interpretation of what it means for a corporation to be incorporated "by" a state.

Yet it seems unlikely that a court focused on the text of § 1332(c)(1) would conclude that a corporation formed under tribal law was incorporated "by" a US or foreign state. The meaning of the word "by" is stretched beyond recognition if any action performed within a state is regarded as having been performed "by" that state. As used in § 1332(c)(1), the word "by" could mean "through the means or instrumentality of" or "with the witness or sanction of."[85] Even the latter definition at a minimum requires the recognition or permission of the state. But a tribal corporation exists by virtue of its incorporation under tribal law. No action by the state is necessary to recognize its existence. Nor is any action even effective, as the state where a tribe's reservation is located cannot nullify the tribe's business code or declare that the corporations that it charters do not exist.[86] It is true that courts often say that a corporation is a citizen of the state "where" it was incorporated or the state "of" incorporation. Yet as the *Cook* court noted, nothing ever turns on the distinction in these cases because the corporations were formed "by" a US state under state law.[87] Although some courts have paraphrased to some degree, their actions cannot be read as having amended the text of the statute or as having altered its plain meaning.

5. Applying all of § 1332(c)(1), but to no effect.

Judge Fernandez's dissent in *Cook* also questioned the majority's assumption that Nevada was the state "where" the tribal corporation had its principal place of business.[88] Avi Casino's business was located on the Fort Mojave reservation, which raises a question about whether a corporation that operates on Indian lands can be

85 *Webster's Third New International Dictionary of the English Language: Unabridged* 307 (Merriam-Webster 1993).

86 See *Washington v Confederated Tribes of Colville Indian Reservation*, 447 US 134, 154 (1980) ("[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."); *Williams v Lee*, 358 US 217, 220 (1959) ("Congress has [ ] acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.").

87 See *Cook*, 548 F3d at 723–24.

88 See id at 729 (Fernandez concurring in part and dissenting in part).

regarded as having its principal place of business in the state where the reservation is located. If the answer is no, then neither of the two means of determining state citizenship under § 1332(c)(1) applies to corporations formed under tribal law. The tribal corporation would not have been created "by" any US or foreign state, nor would any US or foreign state be the place "where" the tribal corporation has its principal place of business. Even if a court thought that § 1332(c)(1) was the place to look, the statute would fail to provide an answer. Tribal corporations would slip back into a gap beyond the reach of any statute.

This type of argument has been rejected by the circuit courts in the context of natural persons who are domiciled on Indian reservations. The courts have held that residents of a reservation are considered citizens of the state where the reservation is located when determining whether the parties are diverse.[89] For example, courts may not assert diversity jurisdiction over a suit between two North Dakota citizens, one of whom lives on an Indian reservation.[90] But two individuals who live on the same reservation are diverse if one resides on the North Dakota side and the other on the South Dakota side.[91] In other words, the state-citizenship analysis is unaffected by the fact that one or more parties reside on an Indian reservation. Following this precedent, the courts will likely continue to assume that a tribal corporation has its principal place of business in a state even if its operations are confined to a reservation.

B. A Solution for Defining the State Citizenship of Corporations Formed under Tribal Law

The Seventh and Ninth Circuits applied § 1332(c)(1) in their recent decisions on the state citizenship of corporations formed under tribal law.[92] This approach increases the likelihood that cases involving tribal corporations will be subject to diversity jurisdiction over the alternatives, but it is not obvious that § 1332(c)(1) should govern the state citizenship of corporations formed under tribal law. The *Cook* court noted there was "an absolute dearth of case law on this issue."[93] The position adopted by these courts is contestable because corporations formed under tribal law are treated as anomalous. But case law on the state citizenship of foreign corporations that have

89 See, for example, *Poitra v Demarrias*, 502 F2d 23, 29 (8th Cir 1974).

90 See, for example, *Schantz v White Lightning*, 502 F2d 67, 70 (8th Cir 1974).

91 See *Poitra*, 502 F2d at 29.

92 See *Lake of the Torches*, 658 F3d at 693; *Cook*, 548 F3d at 723.

93 *Cook*, 548 F3d at 723 (quotation marks omitted).

their principal place of business in a US state provides a helpful analogue. By tapping into this line of cases, a more principled application of § 1332(c)(1) emerges. Instead of choosing from a number of plausible legal fictions in an ad hoc manner,[94] the courts can draw on an existing line of analogous cases interpreting § 1332(c)(1).

Since a corporation formed under tribal law is seemingly not incorporated "by" any US or foreign state,[95] the key question confronting the courts is whether the two-part test set out in § 1332(c)(1) is divisible into two separate tests. In other words, does § 1332(c)(1) dictate that a corporation is a citizen of the state where its principal place of business is located even if it was not incorporated "by" a US or foreign state? Or must a corporation have been incorporated "by" a US or foreign state for the principal place of business test to apply?

This is the same question that previously arose when a corporation formed under the laws of a foreign country had its principal place of business in a US state.[96] Assume that a corporation is formed in the Bahamas and conducts all of its business in Illinois. Under the current version of § 1332(c)(1), which took effect in 2012,[97] the corporation would be considered a citizen of both the Bahamas and Illinois. Recall that the statute provides that a corporation is deemed a citizen of "every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business."[98] Yet the previous version of § 1332(c)(1) did not clearly dictate the state citizenship of the Bahamian corporation with its principal place of business in Illinois. It provided that the corporation would be deemed "a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."[99] Under this version of the statute, the corporation was not incorporated "by" any "State" because it was incorporated by the Bahamas.[100]

For several decades before the 2012 amendment, the courts would have been divided over whether the Bahamian corporation would be considered a citizen of Illinois—its principal place of business—even

94 Consider id at 728–29 (Fernandez concurring in part and dissenting in part).

95 See id at 724 (majority). See also text accompanying note 85.

96 See, for example, *Southeast Guaranty Trust Co v Rodman & Renshaw, Inc*, 358 F Supp 1001, 1005–07 (ND Ill 1973).

97 See Federal Courts Jurisdiction and Venue Clarification Act § 105(a), 125 Stat at 762.

98 Federal Courts Jurisdiction and Venue Clarification Act § 102, 125 Stat at 758–59, codified at 28 USC § 1332(c)(1).

99 28 USC § 1332(c)(1) (2006).

100 28 USC § 1332(e) ("The word 'States', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.").

though it would not have been incorporated by any US state. In other words, the courts were divided over whether the second prong of § 1332(c)(1) should apply even if the first prong does not. This is the same question that still confronts courts in cases involving tribal corporations because they are not incorporated by either a US state or a foreign state. The case law applying the pre-2012 version of § 1332(c)(1) to foreign corporations can therefore inform how courts should apply the current statute to corporations formed under tribal law.

In the context of foreign corporations, the question was first addressed by a district court in *Eisenberg v Commercial Union Assurance Co*.[101] The court held that "[u]nless a corporation is incorporated by a State of the United States it will not be deemed a citizen of the State where it has its principal place of business."[102] This means that a Bahamian corporation with its principal place of business in Illinois would *not* be an Illinois citizen because it was not incorporated by any US state.

The *Eisenberg* approach was followed by some district courts shortly after the case was decided, but then it was largely abandoned.[103] The majority rule held that the two prongs of the previous version of § 1332(c)(1) were divisible, so that a corporation with its principal place of business in a US state was a citizen of that state, even if it was chartered by a foreign country. The first circuit court to adopt this rule was the former Fifth Circuit in *Jerguson v Blue Dot Investments*.[104] The *Jerguson* rule was favored by the circuit courts that expressly addressed the issue.[105] The Southern District of New York, which decided *Eisenberg*, also discarded *Eisenberg* in favor of the majority approach.[106]

The plain language of § 1332(c)(1) compelled the migration toward *Jerguson* because the state of incorporation prong did not qualify the principal place of business prong. The *Eisenberg* court based its decision on the fact that the word "States" in § 1332(c)(1) refers solely to US states, not to foreign states.[107] This is undoubtedly correct,[108] but as the *Jerguson* court explained, "Reading the word 'State'

101 189 F Supp 500 (SDNY 1960).

102 Id at 502.

103 See *Astra Oil Trading NV v PRSI Trading Co*, 794 F Supp 2d 462, 467–69 (SDNY 2011).

104 659 F2d 31, 35 (5th Cir 1981).

105 See *Danjaq, SA v Pathe Communications Corp*, 979 F2d 772, 773–74 (9th Cir 1992); *Vareka Investments, NV v American Investment Properties, Inc*, 724 F2d 907, 909 (11th Cir 1984).

106 See *Astra Oil*, 794 F Supp 2d at 468–69.

107 See *Eisenberg*, 189 F Supp at 502.

108 See 28 USC § 1332(e).

to refer only to an American state, however, does not necessitate the conclusion that the principal place of business part of section 1332(c) cannot be applied to alien corporations."[109] The minority approach tacked an additional qualification onto the end of § 1332(c)(1) by providing that the corporation was a citizen of the state "where it has its principal place of business," but only if the corporation was incorporated by a US state.[110]

Relative to the *Eisenberg* rule, the *Jerguson* rule decreased the scope of federal diversity jurisdiction. Assume the plaintiff is from Illinois and the defendant is a Bahamian corporation with its principal place of business in Illinois. Foreign corporations are subject to alienage jurisdiction under § 1332(a)(2), which vests federal courts with subject matter jurisdiction over suits between "citizens of a State and citizens or subjects of a foreign state."[111] A corporation chartered by the Bahamas is certainly a citizen of a foreign state. The only question in cases like *Eisenberg* and *Jerguson* was whether the Bahamian corporation was *also* a citizen of Illinois, its principal place of business. The *Eisenberg* rule provided that it was not an Illinois citizen. Thus, the Illinois plaintiff would have been diverse from the Bahamian defendant under § 1332(a)(2). Under the *Jerguson* approach, however, the defendant was also deemed an Illinois citizen. There would have been Illinois citizens on both sides of the dispute, and the parties would not be completely diverse under either § 1332(a)(1) or § 1332(a)(2).[112]

Interestingly, these rules have the opposite effect in cases involving tribal corporations. Unlike the Bahamian corporation, the

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109 *Jerguson*, 659 F2d at 35.

110 See *Astra Oil*, 794 F Supp 2d at 469.

111 28 USC § 1332(a)(2). The diversity jurisdiction statute, 28 USC § 1332, sets out four scenarios where the parties are subject to federal subject matter jurisdiction. The first scenario, which has been the focus of the analysis to this point, exists when the parties are "citizens of different States." 28 USC § 1332(a)(1). The next three scenarios are only implicated when at least one of the parties is a foreign state or citizen of a foreign state. In the hypothetical suit between the corporate plaintiff from Illinois and the corporate defendant from the Bahamas, the two parties are "citizens of a State and citizens or subjects of a foreign state." 28 USC § 1332(a)(2). This form of diversity jurisdiction is often called alienage jurisdiction. See, for example, H. Geoffrey Moulton Jr, Note, *Alien Corporations and Federal Diversity Jurisdiction*, 84 Colum L Rev 177, 188 (1984). The other two subsections of § 1332(a) do not further affect the analysis because they address additional scenarios involving suits between citizens of a US state, citizens of foreign states, and foreign states themselves. See 28 USC § 1332(a)(3) (providing for federal jurisdiction over actions involving "citizens of different States and in which citizens or subjects of a foreign state are additional parties"); 28 USC § 1332(a)(4) (providing for federal jurisdiction over actions involving "a foreign state . . . as plaintiff and citizens of a State or of different States").

112 See *Astra Oil*, 794 F Supp 2d at 466, 469.

tribal corporation would never be subject to alienage jurisdiction under § 1332(a)(2). Corporations formed under tribal law are not citizens of a foreign state because Indian tribes are not foreign countries.[113] Under the *Eisenberg* approach, the tribal corporation would not be a citizen of the state where it has its principal place of business. As a result, it would not be a citizen of any state, domestic or foreign, under § 1332(c)(1). The source of diversity jurisdiction, § 1332(a)(1), applies only if the parties are "citizens of different States," which implies that all parties must be citizens of at least one US state.[114] The tribal corporation thus falls into the same gap as the constitutional tribe—beyond the reach of any statutory grant of diversity jurisdiction. It is not a citizen of any US state, so § 1332(a)(1) cannot apply. Nor is it a foreign state or a citizen of a foreign state, which rules out the rest of § 1332(a).

Conversely, the *Jerguson* rule has the counterintuitive effect of expanding the scope of diversity jurisdiction relative to the *Eisenberg* rule by granting state citizenship to tribal corporations. Since § 1332(c)(1) is divisible under the approach adopted by the *Jerguson* court, the tribal corporation is a citizen of the state where it has its principal place of business, even though it is not incorporated by a US or foreign state. The suit would involve "citizens of different States"[115] whenever the parties opposite the tribal corporation are not citizens of the state where the corporation has its principal place of business.

In sum, corporations formed under tribal law present the same interpretive challenge to the current version of § 1332(c)(1) that foreign corporations with their principal place of business in the US presented under the pre-2012 version of the statute. In cases involving corporations formed under tribal law, courts can rely on the *Jerguson* rule, which was followed by a majority of courts and is reflected in the current language of § 1332(c)(1). Under this approach, the two prongs in § 1332(c)(1) are severable. In other words, the tribal corporation is deemed a citizen of the state where its principal place of business is located even though it was not incorporated by any US or foreign state.

113 See *Cherokee Nation v Georgia*, 30 US 1, 17 (1831).

114 The alienage jurisdiction provision, § 1332(a)(2), which governs diversity jurisdiction between "citizens of a State and citizens or subjects of a foreign state," would be superfluous if "citizens of different States" encompassed scenarios where only one party was a citizen of a US state.

115 28 USC § 1332(a)(1).

III. THE STATE CITIZENSHIP OF FEDERALLY CHARTERED § 17 CORPORATIONS

The previous Part outlined five methods for defining the state citizenship of corporations formed under tribal law, and it proposed a solution that analogized these entities to corporations chartered by foreign countries that have their principal place of business in a US state. This Part applies the same template to federally chartered § 17 corporations. It describes three plausible approaches to determining when, if ever, § 17 corporations should be subject to federal diversity jurisdiction. These corporations pose a different challenge than corporations formed under tribal law because there is an existing body of case law governing the state citizenship of federally chartered corporations that are not subject to a specific jurisdictional statute. This Part advocates for a reading of that case law that accommodates the uniquely local nature of § 17 corporations.

A. Three Methods for Defining the State Citizenship of Federally Chartered § 17 Corporations

This Section examines how courts have defined the state citizenship of federally chartered § 17 corporations. Courts have suggested or adopted three approaches.

1. An indistinguishable part of the constitutional tribe.

First, the § 17 corporation could be considered a "stateless entity" that always destroys diversity jurisdiction, just like the § 16 constitutional tribe. This view extends the rule suggested by the Eighth Circuit in *Auto–Owners*, where the court decided not to inquire into whether the tribal entity was separately incorporated under tribal law.[116]

Although the rule has not been expressly applied to federally chartered § 17 corporations, there are sensible reasons to refuse to distinguish them from the constitutional tribe. This approach would avoid fact-intensive disputes about whether the entity was controlled by the tribe on behalf of its governing body or its § 17 corporation. Furthermore, the strategic creation and destruction of diversity is a persistent concern throughout diversity jurisdiction jurisprudence.[117] This concern materializes, however modestly, if the rule changes when the tribe takes off its constitutional hat and puts on its corporate hat.

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116 See *Auto–Owners*, 495 F3d at 1021. See also notes 58–61 and accompanying text.

117 See *Miller & Lux, Inc v East Side Canal & Irrigation Co*, 211 US 293, 304–05 (1908); David Crump, *The Case for Restricting Diversity Jurisdiction: The Undeveloped Arguments, from the Race to the Bottom to the Substitution Effect*, 62 Me L Rev 1, 7 (2010).

It is also unclear whether the cases involving the corporate tribe systematically differ from those involving the constitutional tribe in a way that makes a federal forum more necessary. Additionally, there are many implications that flow from the creation of a separate corporate identity such that failing to treat § 17 corporations differently for diversity purposes would not nullify the purpose of allowing tribes to incorporate.

Yet the available evidence indicates general support for a rule that comprehensively severs the identity of the § 17 corporation from the constitutional tribe. In a 1958 opinion, the Solicitor of the Department of the Interior, which the Indian Reorganization Act charges with issuing § 17 charters,[118] wrote that the § 17 "corporation, although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credit and otherwise expediting the business of the tribe. . . . As a result, the powers, privileges and responsibilities of these tribal organizations materially differ."[119] A § 17 charter issued by the Department of the Interior in 2011 similarly provides that "[t]he Corporation is a distinct legal entity wholly owned by the Tribe . . . and its corporate activities, transactions, obligations, liabilities and property are those of the Corporation, and not those of the Tribe."[120] These statements, like the text of § 17 itself, do not expressly address the state citizenship of § 17 corporations. But they reaffirm that the entity should be treated like a corporation rather than like an Indian tribe. There is no compelling reason to treat the § 17 corporation like the constitutional tribe solely when determining its state citizenship.

2. Applying the principal place of business half of § 1332(c)(1).

A second possibility is considering the federally chartered § 17 corporation as a citizen of the state where it has its principal place of business. The Tenth Circuit noted in dicta that a corporation "chartered under the Indian Reorganization Act . . . may be considered a citizen of

118 See 25 USC § 477 (permitting the Secretary of Interior to issue charters of incorporation to petitioning Indian tribes).

119 Edmund T. Fritz, Deputy Solicitor, DOI, Letter to Commissioner of Indian Affairs, *Request for Interpretive Opinion on the Separability of Tribal Organizations Organized under Sections 16 and 17 of the Indian Reorganization Act* (Nov 20, 1958), in Marie J. Turinsky, ed, 65 *Decisions of the Department of the Interior* 483, 483–85 (GPO 1959), online at http://www.doi.gov/solicitor/decisions/doi_decisions_065.pdf (visited Nov 24, 2012).

120 *Corporate Charter of the Mashpee Wampanoag Community Development Authority* art 3.2 (Mashpee Wampanoag Tribe 2011), online at http://www.mashpeewampanoagtribe.com/Mashpee_FEDERAL_CHARTER_OF_INCORPORATION_9.11.2011 (visited Nov 24, 2012).

the state of its principal place of business for diversity jurisdiction purposes."[121] A district court in the Eighth Circuit later adopted the same approach.[122] The implied rationale behind this rule is identical to the Ninth Circuit's reasoning in *Cook* in the context of corporations formed under tribal law:[123] the courts should follow § 1332(c)(1) to the extent possible since it is the most applicable statutory authority. But corporations chartered by the federal government under § 17 of the Indian Reorganization Act were not incorporated "by" any US or foreign state. The first part of the two-part test in § 1332(c)(1) falls away, meaning the § 17 corporation is only a citizen of the state where it has its principal place of business. This outcome is also consistent with the reasoning applied to corporations formed under tribal law in Part II.B.

3. The localization test for corporations created under federal law.

In *Inglish Interests, LLC v Seminole Tribe of Florida, Inc*,[124] the Middle District of Florida advanced a third approach in 2011. It held that § 17 corporations should not be forced into the framework designed for determining the state citizenship of either the constitutional tribe or corporations formed under state law. Instead, the court applied the judge-made rules that have developed for determining whether federal courts may exercise diversity jurisdiction over other federally chartered corporations that are not subject to a statute establishing their state citizenship.[125]

Although the vast majority of US corporations are incorporated by the states, a number of different types of corporations are created under federal law. For example, the Office of the Comptroller of the Currency has chartered several hundred national banks.[126] There are also federally chartered credit unions and thrifts, called federal savings

121 *Gaines v Ski Apache*, 8 F3d 726, 729 (10th Cir 1993).

122 See *Veeder v Omaha Tribe of Nebraska*, 864 F Supp 889, 898–99 (ND Iowa 1994).

123 See *Cook*, 548 F3d at 723.

124 2011 WL 208289 (MD Fla).

125 See id at *4.

126 See Office of the Comptroller of the Currency (OCC), *A Guide to the National Banking System* 11 (Department of the Treasury 2008), online at http://infousa.state.gov/economy/industry/docs/nbguide.pdf (visited Nov 24, 2012). For a list of federally chartered banks, see OCC, *National Banks Active as of 11/30/2011* (Department of the Treasury Nov 30, 2011), online at http://occ.treas.gov/topics/licensing/national-bank-lists/bank-list-national-by-name-v2.pdf (visited Nov 24, 2012). These banks are chartered and regulated by the OCC. See OCC, *National Banks and Federal Savings Associations* (Department of the Treasury Sept 30, 2012), online at http://www.occ.gov/topics/licensing/national-bank-lists/index-active-bank-lists.html (visited Nov 25, 2012).

associations.[127] Furthermore, Congress has directly chartered several corporations to serve particular purposes, including the American National Red Cross, the US Olympic Committee, and Little League Baseball.[128]

The presence of a federally chartered corporation that is not owned by the US government does not automatically confer federal question jurisdiction on the courts.[129] And since the Supreme Court's 1916 decision in *Bankers Trust Co v Texas and Pacific Railway Co*,[130] the baseline rule has been that federally chartered corporations are not subject to diversity jurisdiction.[131] Like Indian tribes, they always defeat diversity jurisdiction because they are not considered citizens of any state.

The contemporary test for determining the state citizenship of a federally chartered corporation can be framed as a three-step sequence:

> (1) *Statutes that provide for federal corporations' citizenship*: The state citizenship of many corporations formed under federal law is expressly provided by statute. National banks, for example, are "deemed citizens of the States in which they are respectively located."[132] A federal savings association is "considered to be a citizen only of the State in which such savings association has its home office."[133]
>
> (2) *The* Bankers Trust *default rule*: If the federally chartered corporation is not governed by one of these statutes—and if the

127 See OCC, *National Banks and Federal Savings Associations* (cited in note 126). For a list of federal savings associations, see OCC, *Federal Savings Associations Active as of 9/30/2012* (Department of the Treasury Sept 30, 2010), online at http://www.occ.gov/topics/licensing/national-bank-lists/thrifts-by-name-v2.pdf (visited Nov 24, 2010).

128 See Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 Fla St U L Rev 317, 340–41 (2009).

129 See 28 USC § 1349. The Supreme Court has recognized a narrow exception to this rule. See generally *American National Red Cross v S. G.*, 505 US 247 (1992). The Court held that a "congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." Id at 255. The American National Red Cross's charter satisfied this narrow exception because it granted the corporation "the power to sue and be sued in courts of law and equity, *State or Federal*, within the jurisdiction of the United States." Id at 248 (emphasis added). The "sue and be sued" clauses in § 17 charters do not specifically mention the federal courts as required by the Court in *Red Cross*. See, for example, *Corporate Charter of the Ute Indian Tribe of the Uintah and Ouray Reservation Utah* (DOI 1938) (conferring the power "[t]o sue and to be sued in courts of competent jurisdiction within the United States").

130 241 US 295 (1916).

131 See id at 309.

132 28 USC § 1348.

133 12 USC § 1464(x).

exception in step three does not apply—then the *Bankers Trust* rule still controls, and the parties are not diverse.[134]

(3) *The localization exception*: The courts have developed a "localization exception" to the *Bankers Trust* rule. The exception provides that the corporation is considered a citizen of one state if its activities are "localized" within that state.[135]

The *Inglish Interests* court applied this test to determine the state citizenship of the Seminole Tribe of Florida, Inc.[136] Like the US Olympic Committee and Little League Baseball, § 17 corporations are federally chartered corporations that are not subject to a statute that defines their state citizenship. The *Inglish Interests* court held that it could not exercise diversity jurisdiction after concluding that "[t]he allegations in the Complaint are insufficient to allow the Court to infer localized activities for diversity purposes."[137] Although not referenced in *Inglish Interests*, a district court in the Ninth Circuit had previously found that the localization exception was satisfied in a case involving a § 17 corporation. In *Parker Drilling Co v Metlakatla Indian Community*,[138] the court held that the § 17 tribal corporation "is an Alaskan corporation for diversity purposes" because its "only major business activities, and situs, are located in Alaska."[139] Although the court held that the § 17 corporation in *Parker Drilling* was localized in Alaska, its interpretation of the localization exception seems quite narrow. The court framed the question as "whether the federally chartered corporation generally had a situs within one state or was authorized to do business and doing business in several states."[140] This statement suggests that the § 17 corporation would not have been considered an Alaska citizen—and thus would not have been subject to diversity jurisdiction—if its business operations extended beyond Alaska.

134 See, for example, *Lehman Brothers Bank, FSB v Frank T. Yoder Mortgage*, 415 F Supp 2d 636, 639, 642 (ED Va 2006).

135 See *Feuchtwanger Corp v Lake Hiawatha Federal Credit Union*, 272 F2d 453, 454–55 (3d Cir 1959).

136 *Inglish Interests*, 2011 WL 208289 at *4.

137 Id.

138 451 F Supp 1127 (D Alaska 1978).

139 Id at 1137–39.

140 Id at 1138.

B. A Solution for Defining the State Citizenship of Federally Chartered § 17 Corporations

The *Inglish Interests* and *Parker Drilling* courts correctly treated the § 17 corporation like other federally chartered corporations that are not subject to a statute defining their state citizenship. The problem is that both opinions could be read to suggest that the localization exception does not apply if the corporation is engaged in even modest out-of-state activities. This Section argues that a broader conception of the localization exception is appropriate in cases involving § 17 corporations. In other words, courts should be willing to find that a § 17 corporation is a citizen of a state for diversity purposes even if it has fairly substantial operations in multiple states.

This solution may appear at odds with the proposal for dealing with corporations formed under tribal law that was set forth in Part II.B. There it was argued that § 1332(c)(1) is divisible, which would seem to mean that § 17 corporations should also be deemed citizens of the state where they have their principal place of business.[141] A § 17 corporation is similarly created by a sovereign other than a US or foreign state because it is authorized by the federal government. And it is not otherwise governed by a specific jurisdictional statute, unlike national banks or federal savings associations.[142] Indeed, courts do not typically distinguish between corporations formed under tribal law and federally chartered § 17 corporations. In *Cook* the court held that § 1332(c)(1) applied because "a corporation organized under tribal law should be analyzed for diversity jurisdiction purposes as if it were a state *or federal* corporation."[143] The Seventh Circuit relied on this language in *Lake of the Torches*.[144]

Although Part II.B justified the result reached in these cases as it applies to corporations formed under tribal law, § 1332(c)(1) should not govern § 17 corporations. There is a key distinction between § 17 corporations and corporations formed under tribal law: federally chartered corporations are still subject to the Supreme Court's holding in *Bankers Trust* that corporations formed under federal law are not citizens of any state and always defeat diversity jurisdiction.[145] Outside the context of § 17 corporations, courts have "uniformly" applied the

141 See Part II.B.2.

142 See 28 USC § 1348 (national banks); 12 USC § 1464(x) (federal savings associations).

143 *Cook*, 548 F3d at 723 (emphasis added).

144 See *Lake of the Torches*, 658 F3d at 693. See also *American Vantage Cos v Table Mountain Rancheria*, 292 F3d 1091, 1094 n 1 (9th Cir 2002); *Gaines*, 8 F3d at 729.

145 See *Bankers Trust*, 241 US at 309.

Bankers Trust rule to other federally chartered corporations.[146] The district courts in *Inglish Interests* and *Parker Drilling* thus correctly treated § 17 corporations like other federally chartered corporations that are not governed by a specific jurisdictional statute.[147] Both courts also correctly acknowledged the localization exception to the *Bankers Trust* rule, which provides that a federal corporation will be considered a citizen of a state for diversity purposes if its activities are sufficiently localized in that state. Although some commentators have criticized this exception, it has been endorsed by multiple circuit courts and "seems to be regarded as an established rule of law."[148] But neither of these courts adopted a sufficiently expansive version of the localization exception that accounts for the peculiarly local nature of § 17 corporations.

The courts have differed over what it means for a corporation to be localized. The *Parker Drilling* court offered what seems like an especially narrow interpretation when it held that localized corporations "generally had a situs within one state," as opposed to corporations that were "authorized to do business and doing business in several states."[149] In contrast, the Eleventh Circuit held in *Loyola Federal Savings Bank v Fickling*[150] that the test "should not be simply a question as to whether that corporation's activities are exclusive to one state" and should instead encompass a "variety of factors . . . providing evidence that the corporation is local or national in nature."[151] Broadly speaking, the evidence that courts consider relevant can be divided into two categories: factual evidence about the location of the corporation's offices, employees, and customers; and primary legal materials like the authorizing statute or the corporation's federal charter.[152] Both categories should be broadly construed in cases involving § 17 corporations.

Most corporations that have satisfied the localization exception are federally chartered credit unions or thrifts.[153] Like § 17 corporations, a federal credit union's membership is often largely confined to a particular community, unless its members are united by another

146 *Lehman Brothers*, 415 F Supp 2d at 639, 642.

147 See *Inglish Interests*, 2011 WL 208289 at *4; *Parker Drilling*, 451 F Supp at 1137–38.

148 Lund, 36 Fla St U L Rev at 358 (cited in note 128).

149 *Parker Drilling*, 451 F Supp at 1138.

150 58 F3d 603 (11th Cir 1995).

151 Id at 606.

152 See, for example, *Little League Baseball, Inc v Welsh Publishing Group, Inc*, 874 F Supp 648, 653–54 (MD Pa 1995) (determining that Little League Baseball is not sufficiently localized to be considered a state citizen for diversity purposes).

153 Since 2006, the state citizenship of thrifts has been governed by 12 USC § 1464(x). But before Congress intervened, the state citizenship of thrifts was determined by the *Bankers Trust* rule and the localization exception. See, for example, *Loyola Federal*, 58 F3d at 606.

"common bond," such as a shared occupation.[154] And like § 17 corporations, their operations often touch multiple states, even though they are chartered to serve a local community. Yet this has not prevented courts from holding that these financial institutions were sufficiently localized. In *Loyola Federal*, the federally chartered corporation was considered a Maryland citizen even though one-third of its residential mortgages were in other states.[155] In *Sovereign Bank v Chicago Title Ins Co*,[156] the court held that the corporation was localized in Pennsylvania even though 143 of its 302 branches were located outside of Pennsylvania and it had nonbranch offices in seven other states.[157] In *Elwert v Pacific First Federal Savings and Loan Association of Tacoma, Washington*,[158] the first case to adopt the localization exception, the corporation was deemed a Washington citizen even though two of its five branches were in Oregon.[159] Following these cases, substantial out-of-state operations need not prevent courts from holding that a corporation is localized in one state.

Some other courts have been less forgiving of multistate operations.[160] They often rely on a statute, regulation, or charter to conclude that the federal corporation was intended to serve a national purpose and therefore is not localized. The Veterans of Foreign Wars, for example, was not localized because the "statute authorizing creation of the [Veterans of Foreign Wars] conveys a picture of a national organization," and the "designation of corporate purposes further sounds the national theme."[161] The National Consumer Cooperative Bank was not localized because the "congressional statement of purpose, contained in the chartering statutes, provides that the [National Consumer Cooperative Bank] was established in order to assist user-owned cooperatives, *on a nationwide basis*, as a means of strengthening the *[nation's] economy*."[162]

This evidence should be given equal weight when it cuts the other way. Unlike these corporations, which were created to serve a national purpose, the § 17 corporation is obligated to serve the interests of a tribe that is located in a particular geographically defined location.

154 12 USC § 1759(b).

155 *Loyola Federal*, 58 F3d at 606.

156 2000 WL 1100800 (ED Pa).

157 Id at *2–3.

158 138 F Supp 395 (D Or 1956).

159 Id at 401–02.

160 See, for example, *Little League Baseball*, 874 F Supp at 651.

161 *Crum v Veterans of Foreign Wars*, 502 F Supp 1377, 1379 (D Del 1980).

162 *Iceland Seafood Corp v National Consumer Cooperative Bank*, 285 F Supp 2d 719, 725 (ED Va 2003) (emphasis added and quotation marks omitted).

The § 17 corporation is a membership corporation that, in many cases, consists solely of the members of the tribe who live on its reservation.[163] The shares of § 17 corporations must remain wholly owned by the tribe.[164] Sometimes the corporation's membership will include all of the tribe's enrolled members rather than just residents of the reservation.[165] But even then, the tribe's governing body must vote to adopt a § 17 charter in the first place.[166] Furthermore, the § 17 charter typically reveals the corporation's local purpose. For example, the purpose clause of one charter, issued by the Department of the Interior, provides that it exists "to further the economic development of the Confederated Salish and Kootenai Tribes of the *Flathead Reservation in Montana*."[167] Even when a § 17 corporation operates in multiple states, the purpose of those activities is to benefit a specific localized community. The Third Circuit relied on a federally chartered corporation's local purpose in *Feuchtwanger Corp v Lake Hiawatha Federal Credit Union*[168] in holding that the corporation was sufficiently localized. The court noted that the credit union was chartered "for the purpose of promoting thrift *among its members*" before concluding that "the statute and the charter combined to make this a peculiarly local institution of a single community in the state of New Jersey."[169]

Primary legal materials like the statute and charter can play two roles in helping a court assess whether a § 17 corporation is localized. First, they provide readily available evidence of localization, even absent a detailed factual record about the extent of the corporation's operations. To illustrate, consider *Crum v Veterans of Foreign Wars*.[170] There, the court considered the statute and charter as conclusive evidence that the corporation was *not* localized even though the parties "failed to offer facts concerning its operations."[171] Nothing about the localization standard seems to prevent courts from making

163 See, for example, *Corporate Charter of the Gila River Pima-Maricopa Indian Community* (cited in note 36).

164 See *Tribal Business Structures* at 9 (cited in note 13).

165 See, for example, *Corporate Charter of the Mashpee Wampanoag Community Development Authority* art 8.1 (cited in note 120).

166 See 25 USC § 477. Before 1990, the § 17 charter did not take effect until it was "ratified at a special election by a majority vote of the adult Indians living on the reservation." Indian Reorganization Act § 17, 48 Stat at 998, repealed by § 3(c), 104 Stat at 207, codified at 25 USC § 447 (providing that "such charter shall not become operative until ratified by the governing body of such tribe").

167 *Corporate Charter of the Confederated Salish and Kootenai Tribes of the Flathead Reservation* 1 (DOI 1936) (emphasis added).

168 272 F2d 453 (3d Cir 1959).

169 Id at 454–55 (emphasis added).

170 502 F Supp 1377 (D Del 1980).

171 Id at 1379.

the opposite finding when these sources evince a local purpose. Applying this rationale to § 17 tribal corporations, the *Inglish Interests* court could have considered these materials rather than quickly concluding that it lacked evidence of localization.

Second, when the primary materials indicate the corporation's local character, courts should be more forgiving of substantial out-of-state operations. This is a natural consequence of treating the localization exception as a multifactor standard.[172] And this reasoning is implicit in cases like *Loyola Federal*, *Sovereign Bank*, and *Elwert*, where the courts held that federally chartered corporations were localized despite extensive multistate activities. Textual evidence of a corporation's purpose could even be the basis for a well-defined division between two almost qualitatively different types of federally chartered corporations. On the one hand, there are membership corporations like § 17 corporations and some credit unions that exist to serve the local needs of a geographically concentrated community. On the other hand, there are corporations created to serve a national purpose, like the US Olympic Committee, the Securities Investor Protection Corporation, and the Federal Deposit Insurance Corporation.[173] The § 17 corporation falls squarely into the former category of corporations that are created to further a local purpose. As a result, courts should be more willing to hold that a § 17 corporation satisfies the localization exception, such that it is a citizen of a state, even if its activities span multiple states.

IV. THE BENEFITS OF EXPANDING THE SCOPE OF DIVERSITY JURISDICTION IN CASES INVOLVING TRIBAL CORPORATIONS

The doctrinal rules proposed in the previous two Parts increase the likelihood that federal courts will have diversity jurisdiction over cases involving tribal corporations. This Part argues that a more expansive conception of diversity jurisdiction in these cases will have a positive effect on furthering widely shared goals. This pragmatic claim—that more diversity jurisdiction is better—supports the doctrinal arguments provided in the previous Parts, especially since these types of jurisdictional rules are sometimes derided as legal fictions.[174]

172 See *Loyola Federal*, 58 F3d at 606.

173 See Lund, 36 Fla St U L Rev at 341 nn 149–50 (cited in note 128).

174 See, for example, *Cook*, 548 F3d at 728 (Fernandez concurring in part and dissenting in part); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum L Rev 809, 809–12 (1935).

Many Indian communities are among the most underdeveloped and economically isolated places in the United States.[175] The § 17 corporation was intended to improve the economic lot of tribes that elected to adopt a federal charter.[176] The charters issued after the Indian Reorganization Act's enactment in 1934 often state that the purpose of the § 17 corporation is to "further the economic development" of the tribe.[177] Yet non-Indian companies may be deterred from doing business with tribes and their corporations because of the legal uncertainties that arise.[178] Jurisdictional rules would not seem to be a natural place to look for solutions to such an extensive problem. But jurisdictional barriers that prevent parties from consistently accessing a convenient and reliable forum likely contribute to underinvestment. Professor Dao Lee Bernardi-Boyle writes,

> [M]any outsiders feel that tribal court systems are often an inadequate substitute. "There is a widespread feeling held by many non-Indians that tribal judges are biased against them. There are also complaints of incompetence, and even corruption in some tribal courts." If a tribal court is the only court with jurisdiction over a tribe, an outside investor may worry about having a fair means of enforcing a contract against the tribe. . . . [M]any tribes have developed or have begun to develop reliable court systems. While tribes are waiting for non-Indians to recognize their advances, they need to be able to assure that they can be held accountable in non-tribal court.[179]

This Part argues that tribes and their members benefit when tribal corporations are more likely to be amenable to suit in federal court. Selecting rules that maximize the scope of federal diversity jurisdiction over tribal corporations is one modest way to further this goal.

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175 See US Census Bureau, *Population Profile of the United States: Dynamic Version; Poverty in 2005* 3 (2006), online at http://www.census.gov/population/pop-profile/dynamic/poverty.pdf (visited Nov 24, 2012).

176 See notes 28–29 and accompanying text.

177 See, for example, *Corporate Charter of the Saginaw Chippewa Indian Tribe of the Isabella Reservation of Michigan* 1 (cited in note 29).

178 See, for example, Blaine I. Green and G. Allen Brandt, *Doing Business in Indian Country: Unique Opportunities and Challenges* 1–8 (Pillsbury Winthrop Shaw Pittman Aug 31, 2010), online at http://www.pillsburylaw.com/siteFiles/Publications/IndianLaw_WhitePaper_08-31-2010_FINAL.pdf (visited Nov 24, 2012) (describing the difficulties in doing business with tribal corporations, such as the uncertain scope of sovereign immunity and problems using tribal property as collateral).

179 Dao Lee Bernardi-Boyle, *State Corporations for Indian Reservations*, 26 Am Indian L Rev 41, 54 (2001).

A. An Ex Ante Perspective on Suits against Tribal Corporations in Federal Court

Almost all of the cases that are relevant to this topic follow a simple and familiar pattern: A non-Indian party sues an Indian entity in tort or contract. The tribal corporation then usually attempts to defeat federal jurisdiction over the objection of the non-Indian plaintiff. If the federal court refuses to exercise subject matter jurisdiction, the tribal entity will likely be able to litigate in a forum that it prefers and the non-Indian party finds less desirable.[180] It will also be able to impose costs on the non-Indian plaintiff, making it less profitable for the non-Indian plaintiff to pursue its claim. In short, tribal corporations prefer rules that minimize the scope of federal jurisdiction ex post. The previous Parts have mentioned various ways that federal courts use jurisdictional rules to avoid reaching the merits in suits against tribal corporations. There is perhaps an underlying assumption that the outcome preferred by the tribal entity ex post is the outcome that is more likely to benefit the tribe's interests.

But ex ante, tribal corporations—and the tribes and their members—presumably would prefer a rule that maximizes their susceptibility to suit in federal court. If non-Indians have no meaningful opportunity to legally enforce the obligations assumed by the tribal entity, they are more likely to refrain from doing business with tribes and their corporations, or at least demand more onerous terms. The tribe needs to be able to create an entity that can make judicially enforceable promises if it wants to do business on reasonable terms.

This concept is perhaps most evident in the context of sovereign immunity. Ex ante the tribal corporation prefers a rule that allows it to waive its sovereign immunity in suits arising out of the contracts that it enters. Otherwise, the tribal corporation will need to pay a higher price because its promises will not be judicially enforceable. The rule permitting waivers of sovereign immunity by tribal corporations and other sovereign entities satisfies this preference. The tribal corporation can opt in to the sovereign immunity regime by doing nothing, or it can opt out by waiving its immunity ex ante. The only threat to the effectiveness of this rule is inconsistent enforcement. If some courts are more reluctant to enforce the waiver, then the non-Indian party will be unable to assume that it would survive an ex post challenge, and the tribal corporation will be unable to reap the benefits of making a binding promise.

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180 See id.

B. Applying the Principle to Diversity Jurisdiction

The same principle can be applied to diversity jurisdiction given non-Indian parties' general preference for litigating in federal court instead of tribal court. But there is one major caveat: federal jurisdiction poses an unusual challenge because parties can opt out, but they cannot always opt in. If the court does not have subject matter jurisdiction, it cannot hear the case even if both parties prefer a federal forum. This is different from sovereign immunity, for example. It is possible to imagine a rule stipulating that waivers of sovereign immunity will always receive the full effect permitted by the plain meaning of their terms. This would resolve the problem posed by inconsistent enforcement mentioned in the previous Section. But it is impossible to imagine a rule that allows the parties to always submit to the jurisdiction of the federal courts given that they are courts of limited jurisdiction.

The parties can, however, opt out of federal court even though they cannot always opt in. For example, they can agree to arbitrate or to be bound by the judgment of a tribal court. Some tribal corporations have also adopted charter provisions that limit any waiver of sovereign immunity to suits by particular parties or suits arising out of particular events.[181] Tribal corporations can carefully calibrate when they will *not* be susceptible to suit in a particular court.

Given that tribal corporations can opt out of the federal court system, the best alternative is to select the default rules that maximize the likelihood that courts will be able to exercise diversity jurisdiction over cases involving tribal corporations. A federal forum will certainly not be available in all instances. When the parties are clearly citizens of the same state or the amount in controversy is unlikely to exceed $75,000, there will never be diversity jurisdiction, regardless of which rule the court applies. But the non-Indian parties that are most likely to account for the potential for litigation ex ante are large businesses entering high-value contracts. These are the same parties that are most likely to prefer a federal forum and are most likely to be diverse from the tribal corporation. The cases where the default rule is most likely to affect the outcome are thus identical to the cases where the parties are most likely to alter their behavior in response to the rule.

In most cases, the availability of a federal forum would only modestly affect the parties' ex ante impressions of the value of a particular

[181] See, for example, *Worrall v Mashantucket Pequot Gaming Enterprise*, 131 F Supp 2d 328, 331 (D Conn 2001).

contract. But federal jurisdiction is especially important in transactions involving tribal corporations because there are strict limits on state court jurisdiction over suits against tribal entities.

In 1953, Congress established the scope of state court jurisdiction over suits arising in Indian Country in what is commonly referred to as Public Law 280.[182] The statute requires that state courts in six states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—must assert jurisdiction over all suits arising from activities that occurred on some or all of the Indian reservations in those states.[183] Public Law 280 gave all other states the option to assume jurisdiction over these cases.[184] Ten states voluntarily adopted statutes authorizing their courts to exercise jurisdiction over some types of cases that arise on tribal lands.[185] But in most of these states, the state courts' jurisdiction is limited or nonexistent as a practical matter. For example, Arizona's Public Law 280 jurisdiction is limited to enforcing the state's environmental laws, and South Dakota's attempt to assert jurisdiction was held to violate the state's constitution.[186] Only Florida's statute captures the types of cases that are most likely to involve tribal corporations.[187] This means courts in a majority of states do not exercise subject matter jurisdiction over suits against tribal corporations brought by non-Indians concerning events arising in Indian Country.

In *Williams v Lee*,[188] the Supreme Court held that state courts could not unilaterally assert jurisdiction over suits by non-Indians against Indians that arose on tribal lands without federal statutory authorization.[189] Public Law 280 is thus the exclusive source of state court jurisdiction over suits against tribal corporations arising out of events that occurred on Indian reservations. Furthermore, a tribal entity cannot voluntarily stipulate to state court jurisdiction if the

182 Pub L No 83-280, ch 505, 67 Stat 588 (1953), codified as amended at 18 USC § 1162 and 28 USC § 1360.

183 See 28 USC § 1360(a).

184 See Public Law 280 § 7, 67 Stat at 90, repealed by the Indian Civil Rights Act of 1968 § 403(b), Pub L No 90-284, 82 Stat 73, 79. Since 1968, the tribe's consent has been required for any expansion of state court jurisdiction.

185 The ten states are Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. See Stephen L. Pevar, *The Rights of Indians and Tribes* 116 (Oxford 4th ed 2012).

186 See id.

187 See id.

188 358 US 217 (1959).

189 See id at 218, 222–23.

state legislature has not authorized jurisdiction under Public Law 280, which no state has done since 1971.[190]

The non-Indian plaintiff who does not have access to state court has an especially compelling interest in invoking diversity jurisdiction to gain access to federal court. Without access to federal court, the non-Indian plaintiff would either be left to hope that the tribal court elects to assert jurisdiction over the case or be deprived of a forum altogether.[191]

For these reasons, many tribes are unable to bind themselves to be sued in either state or federal court. Non-Indian parties often attempt to sidestep this problem by including mandatory arbitration provisions in their contracts with tribal corporations, but this has not been a foolproof solution.[192] The non-Indian party might need to sue to compel arbitration or to enforce a judgment against the tribal corporation.[193] But this action does not raise an independent federal question and thus requires the court to determine whether the parties are diverse.[194] Relying exclusively on arbitration, rather than an expanded notion of federal diversity jurisdiction, is also of little help to smaller businesses that have no experience with arbitration or do not routinely negotiate the finer points of their contracts.[195]

These layers of uncertainty are a concern for non-Indians that would like to do business with a tribal corporation but are wary of litigating a potential dispute in a tribal court. And this, in turn, is likely a concern for tribal corporations that would like to do business

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190 See *Kennerly v District Court of the Ninth Judicial District of Montana*, 400 US 423, 427–29 (1971); Carole Goldberg, *Questions and Answers about Public Law 280* (Tribal Law and Policy Institute), online at http://www.tribal-institute.org/articles/goldberg.htm (visited Nov 24, 2012).

191 See Jean Pendleton, Note, Iowa Mutual Insurance Co. v. LaPlante *and Diversity Jurisdiction in Indian Country: What If No Forum Exists?*, 33 SD L Rev 528, 542 (1988).

192 See Michael P. O'Connell, *Fundamentals of Contracting by and with Indian Tribes*, 2011 No. 2 RMMLF-Inst Paper No. 1A, *1A-11 (Rocky Mountain Mineral Law Foundation Mar 3–4, 2011).

193 See, for example, *Memphis Biofuels, LLC v Chickasaw Nation Industries, Inc*, 585 F3d 917, 919 (6th Cir 2009).

194 See *Peabody Coal Co v Navajo Nation*, 373 F3d 945, 951 (9th Cir 2003) ("[A] claim for enforcement of an arbitration award sounds in general contract law and does not require the resolution of a substantial question of federal law."). See also 9 USC § 4 (directing the aggrieved party in an arbitration dispute to bring his case in federal court that would otherwise have jurisdiction over the matter).

195 Even larger corporations rarely include arbitration provisions in contracts other than consumer and employment contracts. See Theodore Eisenberg, Geoffrey P. Miller, and Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U Mich J L Ref 871, 876 (2008) (noting that 75 percent of consumer agreements require arbitration, while less than 10 percent of negotiated nonconsumer, nonemployment contracts require arbitration).

with non-Indians and would prefer to secure better terms by being able to make promises that are consistently enforceable in a forum that the non-Indian party finds convenient and reliable. A more expansive conception of diversity jurisdiction in cases involving tribal corporations would help ameliorate this problem.

CONCLUSION

The federal courts are divided over how to define the state citizenship of corporations formed under tribal law and federally chartered § 17 corporations. They have not developed a complete framework for deciding when, if ever, these entities are subject to diversity jurisdiction. The first step is recognizing the different challenges posed by these two types of tribal corporations, given that the former is chartered by a tribal sovereign and the latter is a creation of the federal government.

Corporations formed under tribal law can be analogized to foreign corporations that have their principal place of business in a US state. Under this approach, they will be considered citizens of the state where their principal place of business is located, even though they were not chartered "by" any US or foreign state within the meaning of § 1332(c)(1).

Federally chartered § 17 corporations, on the other hand, should be governed by the existing judge-made rules for determining the state citizenship of corporations formed under federal law that are not subject to a specific jurisdictional statute. Courts should consider all of the available evidence in deciding whether a § 17 corporation is sufficiently localized to be considered a state citizen, especially the contents of its charter and the purpose of its activities.

These rules are not only doctrinally sound, but they also produce desirable consequences. The rules proposed in this Comment increase the likelihood that tribal corporations will be subject to federal diversity jurisdiction relative to the plausible alternatives. A more expansive conception of diversity jurisdiction would allow tribal corporations to more effectively signal their willingness to litigate in a forum that non-Indians prefer. This potentially makes non-Indian parties more willing to engage in mutually advantageous transactions with tribal corporations, to the benefit of tribes and their members.