COLT

COALITION OF LARGE TRIBES
Blackfeet Nation • Cheyenne River Sioux Tribe • Crow Nation • Eastern Shoshone Tribe
Fort Belknap Indian Community • Mandan, Hidatsa & Arikara Nation • Navajo Nation • Northern Arapaho Tribe
Oglala Sioux Tribe • Rosebud Sioux Tribe • Sisseton Wahpeton Sioux Tribe
Shoshone Bannock Tribes • Spokane Tribe • Ute Indian Tribe • Walker River Paiute Tribe

August 18, 2023

Hon. Chief Lynn Malerba
Treasurer of the United States

Mr. Krishna Vallabhaneni
Tax Legislative Counsel, Office of Tax Policy

U.S. Department of the Treasury

VIA EMAIL

Re: Coalition of Large Tribes Comments on the Tax Treatment of Tribally-Chartered Corporations and Other Entities Organized by Tribes Under Tribal Law

Dear Chief Malerba and Mr. Vallabhaneni:

On behalf of the Coalition of Large Tribes ("COLT"), a national tribal organization representing the interests of the more than 50 federally recognized Indian tribes that have reservations of 100,000 acres or more, I write to provide notice of COLT's comments responding to the Department of the Treasury May 15, 2023 Dear Tribal Leader Letter and the tribal consultations on the tax status of tribally chartered corporations held in June 2023 in which COLT participated through counsel, Mr. Del Laverdure and Ms. Jennifer Weddle, both subject-matter experts. COLT's member tribes hold more than 95% of Indian Country lands and their citizens comprise approximately one half of the U.S. Native American population. This letter, and its substantial Legal Appendix, supplement COLT's feedback to date. As you know, COLT is itself a Section 17 corporation wherein numerous tribes have organized themselves into an intertribal organization to advocate on issues of common concern to large land base tribes.

First, COLT thanks the Department for engaging in government-to-government consultation on this important topic. As we approach the 100th anniversary of the Indian Citizenship Act of 1924, this consultation marks an important opportunity for the Biden-Harris Administration to right historic wrongs that trapped Native Americans in classic cases of taxation without representation for decades and that have unjustly crippled Native economies since because of the litany of legally-baseless, results-oriented federal court decisions and agency interpretations that drifted far afield from the sovereign-to-sovereign relationship between tribes and the United States enshrined in the Constitution and our treaties. *See Haaland v. Brackeen*, 599 U.S. __ (2023) (Gorsuch, J., concurring, Slip Op. 13-36) (detailing the legal history, steadfast persistence of tribal sovereignty and limited powers of the federal government, and virtually non-existent powers of state governments, with respect to tribal sovereign

entities).[1] The Department's consultation is timely inasmuch as Justice Gorsuch's concurring opinion in *Brackeen* precisely identifies where the U.S. Supreme Court "stepped off the doctrinal trail" with respect to Indian Law. *Id*. at 32. The Department need only follow Justice Gorsuch's path to return to the Constitution's foundation to set things right in the taxation context. COLT urges the Department to meet this moment.

Our Legal Appendix provides the details. In addition to the very deep dive on the historic inequities and legal inaccuracies that underlie *any* taxation of tribal entities, COLT provides the following comments in response to your May 15, 2023 letter.

For clarity, while the Department's request for comment appears narrowly focused only on tribally-chartered corporations; these comments will utilize the term "tribal business entities" to refer to both corporations and limited liability companies created and organized by Tribal governments. In the experience of COLT's member tribes, corporations are an increasingly rare structure for many tribes to utilize and many tribes prefer LLCs. **But whatever internal choices tribes make (for myriad reasons) about the structure of the government-owned and government-controlled entities they use to fund services to their tribal citizens is really beside the point—COLT's primary message is that tribes should enjoy the same assumptions of tax immunity that state and local government entities traditionally and routinely enjoy. This is a matter of comity, economic dignity and economic justice**.

1. ESTABLISHED FOUNDATION PRINCIPLES.

Over the years, the Internal Revenue Service ("IRS") has developed three foundation principles regarding how Indian tribes[2] and entities owned by Indian tribes should be treated for federal income tax purposes:

[1] From the earliest years of the republic, courts have recognized the political independence and self-governing status of Indian tribes. *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (classifying tribes as "domestic dependent nations"); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (explaining that the tribes are "distinct independent political communities, retaining their original natural rights" and not dependent on federal law for their powers of self-government). An Indian nation's sovereignty is not the result of reparations or a specific grant of authority by Congress, but rather the "inherent powers of a limited sovereignty which has never been extinguished." *U.S. v. Wheeler*, 435 U.S. 313, 322-23 (1978). The Department's approach to the tax treatment of tribal entities should no longer seek to evade this controlling legal framework.

[2] While not expressly stated by the IRS, the term "Indian tribe" refers to "federally-recognized" Indian tribes, nations, confederations, rancherias, or communities.

Principle No. 1 – *Tribal governments are not considered to be taxable entities subject to federal income tax.*[3] For nearly 60 years, IRS guidance has recognized that income earned by Indian tribes is not subject to federal income tax, simply declaring that "[i]ncome tax statutes do not tax Indian tribes. The tribe is not a taxable entity."[4] While its reasoning for the guidance is not expressly stated, the IRS recognized that "the political entity embodied in the concept of an Indian tribe" exempts from federal taxation income earned by the tribe both within and outside of its reservation.[5]

Principle No. 2 – *Tribally-owned corporations chartered under federal law – known as "Section 17 corporations" – are also not subject to federal income tax.*[6] Section 17 corporations, like COLT, derive from the authority granted by Congress to the Secretary of Interior under the Indian Reorganization Act of 1934 to issue charters to Indian tribes to promote their economic development.[7] The IRS has concluded that a "federally chartered Indian tribal corporation shares the same tax status as the Indian tribe" and is therefore not subject to income taxation.[8] In doing so, the IRS recognized the U.S. Supreme Court's decision in *Mescalero Apache Tribe v. Jones* that "**the question of tax immunity <u>cannot</u> be made to turn on the particular form in which the Tribe chooses to conduct its business**."[9]

Principle No. 3 – *Tribally-owned corporations organized under state law are subject to federal income taxation.* The IRS has stated that the reason why state-chartered entities owned by Indian tribes is because "a corporation organized by an Indian tribe under state law is not the same as an Indian tribal corporation organized under Section 17 of the IRA and does not share the same tax status as an Indian tribe for federal income tax purposes."[10] As more fully explained in

[3] *See* Rev. Rul. 67-284, 1967-2 Cumulative Bulletin 55 (July 1967).

[4] *Id.*

[5] *See* Rev. Rul. 81-295, 1981-2 Cumulative Bulletin 15 (July 1981) (on-territory income exempt); Rev. Rul. 94-16, 1994-1 Cumulative Bulletin 19 (March 21, 1994) (on and off-territory income exempt).

[6] Act of June 18, 1934, ch. 576, §17 (codified at 25 U.S.C. § 5124).

[7] *Id.*

[8] Rev. Rul. 81-295 (for on-reservation income, later modified by Rev. 94-16 for all income regardless of source).

[9] 411 U.S. 145, 157 n. 13 (1973) (emphasis supplied).

[10] Rev. Rul. 94-16. Implied within this conclusion is the distinction that a federally-chartered corporation created by the Secretary of the Interior pursuant under the IRA – which to a tribe is as "foreign" a source of law as state law – is

the Legal Appendix, COLT believes Principle 3 is incorrect and legally baseless. But again, that is really beside the point as in COLT member tribes' experience, it is exceedingly rare for tribes to use state law structures because of the Service's erroneous interpretations that make state entities largely useless for tribal governments.

2. TAX POLICY RECOMMENDATIONS.

Recommendation No. 1 –*Income earned by tribally-organized, tribally-owned entities should not be subject to federal income taxation regardless of the source of income.*

From the foundational principles set forth above and in the Legal Appendix, the Department should conclude that corporate entities created by Indian tribes and wholly-owned by them are not subject to federal income taxation regardless of the source of income. If a Tribe creates a corporation or limited liability company and is the 100% owner, income earned by such a corporate entity should have complete pass-through tax treatment with income from all sources treated as tax-exempt because of the tax-exempt status of the Indian tribe as the owner.

Such a conclusion follows logically from the prior IRS guidance cited above. The IRS recognizes that income earned by tribes is not subject to federal income tax. The IRS also recognizes that tribally-owned corporations chartered under federal law are not subject to income tax. Thus, tribally-owned corporations chartered under tribal law should not be subject to income tax. The most important question to ask is *"is the entity created by the tribe, for the tribe and under tribal law*?" With the proper focus on ownership, not corporate form, prior guidance can be reconciled with the proposed tax immunity of income earned by corporate entities organized under tribal law whether they are corporations, LLCs, unincorporated entities or something else.[11]

Tribal governments form businesses to fund the provision of services to their citizenry—i.e, the creation and maintenance of courts of law, police forces, fire departments, education systems, transportation systems, public utilities, healthcare, and economic assistance, and

adequate to preserve tribal income tax immunity. The IRS should consider revisiting the guidance that income earned by state-chartered entities owned by Indian tribes cannot be tax immune. If a state-chartered entity such as a limited liability company is wholly-owned by an Indian tribe, "pass through" tax treatment should apply to the income earned by that company consistent with limited liability companies owned by non-Indians. The "identity" of the entity, which has been the basis for prior IRS guidance, is irrelevant in relation to the question of ownership of the entity.

[11] Which, again, is also why the prior guidance regarding the taxability of state-chartered corporations wholly-owned by Indian tribes is irreconcilable. *Id.*

domestic and social programs.[12] Tribal governments need funding for governmental programs. Unlike state and local government, tribes lack a tax base. COLT member tribes generally have no property tax base because trust lands are not taxable because they are owned by the United States for the benefit of tribes. Regarding the non-trust lands within our reservations that are taxable, the case law has awkwardly evolved to allow the states to tax it, even though it is within tribes' sovereign territorial boundaries. Nor do COLT member tribes have any reliable sales or income tax bases. Such taxes are simply infeasible on our remote rural reservations where we constantly battle unemployment greater than 50%. And with the lack of federal clarification of preemption, the case law has improperly evolved to allow the states to tax sales to non-natives on sales within our lands. Further, in Montana (home to a number of COLT member tribes), the state does not have a sales tax. So any tribal sales tax would put us at a dramatic competitive advantage.

[12] Because a tribe retains all inherent attributes of sovereignty that have not been divested by Congress, the proper inquiry with respect to a tribe's exercise of its sovereignty is whether Congress—which exercises plenary power over Indian affairs—has limited that sovereignty in any way. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130,148-149 n.11 (1982); Felix Cohen's Handbook of Federal Indian Law, § 6.02[1] (2005). Further, "[I]n the absence of federal authorization .... *tribal sovereignty* is privileged from diminution by the States." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986) (emphasis supplied). Congress has never acted to constrain tribes' organizations of tribal enterprises in any way.

The range of potential entities used by tribes for economic development activities includes at least the following:

- The tribe acting through its General Council, Tribal Council, Business Committee, Tribal Board or other tribal governing body entity
- The tribe acting through a department, office, or commission of the tribe
- Unincorporated tribal enterprises and economic subdivisions which are arms and instrumentalities of a tribe
- Political subdivisions of a tribe, such as villages, chapters, and districts
- Tribal-owned entities chartered, incorporated or organized under tribal law
- Tribal government corporations
- Tribal government LLCs
- For-profit business entities established pursuant to tribal law
- Non-profit business entities established pursuant to tribal law

Which of these entities a tribe might select for any particular function has no bearing on the sovereignty of any tribal entity. Most tribal governments meticulously document their intention for an entity to exist as an arm of the tribe, share in the tribe's sovereign immunity, and benefit the tribe in specific ways. That governmental intention matters much more than entity's form.

A tribe's right to self-governance should extend to all activities of the tribal government. Congress has not limited, nor has the Supreme Court qualified, a tribe's self-governing authority to apply only to intramural matters.

Therefore, with no traditional tax base, COLT member tribes are dependent upon two primary sources of government revenue, treaty-based federal governmental appropriations, and competing in the private marketplace with our tribal entities that function as economic arms of COLT member tribes.

In her concurring opinion in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), Justice Sotomayor explained: "A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding." 134 S. Ct. at 2040. She further explained the policies established by Congress:

> [T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases 'may be the only means by which a tribe can raise revenues,' Struve, *36 Ariz. St. L. J., at 169*. This is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means.

134 S. Ct. at 2043. *See also* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue,* 80 N.D. L. REV. 759 (2004).

Tribal governments must utilize tribal entities to fund basic governmental functions. Tribal governments typically select organizational structures they believe are most advantageous to the tribe and that best isolate the tribe and other tribal entities from any risks associated with a particular line of business. That is no different than what state and local governments so, and indeed, no different than any reasonable actor does when engaging in the marketplace. Tribal entities should have the same market access—including immunity from taxation—that state and local governments do.[13]

Federal law and policy considerations support this position.[14] For example, Congress in 2000 presented definite and unambiguous support for the unencumbered development of tribal

[13] The U.S. Supreme Court has recognized that the doctrine of tribal immunity (and Congress's overt choice to leave it unfettered) as applied to a tribe's commercial activities promotes the goal of Indian self-government, including the overriding goal of encouraging tribal self-sufficiency and economic development. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)).

[14] *See e.g.* Indian Tribal Regulatory Reform and Business Development Act of 2000, Pub. L. 106-447, §2(a) ("Congress finds that . . . the United States has an obligation to assist Indian tribes with the creation of appropriate

economies. In the Native American Business Development, Trade Promotion and Tourism Act, Congress made specific findings regarding tribal economic development and the role of the federal government and federal agencies in that nation-building pursuit. Specifically, the Act found that:

> (1) Clause 3 of Section 8 of Article I of the United States Constitution recognizes the special relationship between the United States and Indian tribes;
>
> (2) beginning in 1970, with the inauguration by the Nixon Administration of the Indian Self-Determination Era, each President has reaffirmed the special government-to-government relationship between Indian tribes and the United States;
>
> (3) in 1994, President Clinton issued an Executive memorandum to the heads of departments and agencies that obligated all Federal departments and agencies, particularly those that have an impact on economic development, to evaluate the potential impacts of their actions on Indian tribes;
>
> (4) consistent with the principles of inherent tribal sovereignty and the special relationship between Indian tribes and the United States, *Indian tribes retain the right to enter into contracts and agreements to trade freely, and seek enforcement of treaty and trade rights*;
>
> (5) Congress has carried out the responsibility of the United States for the protection and preservation of Indian tribes and the resources of Indian tribes through the endorsement of treaties, and the enactment of other laws, including laws that provide for the exercise of administrative authorities;
>
> (6) the United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes;

economic and political conditions with respect to Indian lands to—(A) encourage investment from outside sources that do not originate with the Indian tribes; and (B) facilitate economic development on Indian lands").

(7) the capacity of Indian tribes to build strong tribal governments and vigorous economies is hindered by the inability of Indian tribes to engage communities that surround Indian lands and outside investors in economic activities on Indian lands;

(8) despite the availability of abundant natural resources on Indian lands and a rich cultural legacy that accords great value to self-determination, self-reliance, and independence, Native Americans suffer higher rates of unemployment, poverty, poor health, substandard housing, and associated social ills than those of any other group in the United States;

(9) the United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands to—

(A) *encourage investment from outside sources that do not originate with the tribes*; and
(B) *facilitate economic ventures with outside entities that are not tribal entities*;

(10) the economic success and material well-being of Native American communities depends on the combined efforts of the Federal Government, tribal governments, the private sector, and individuals;

(11) the lack of employment and entrepreneurial opportunities in the communities referred to in paragraph (7) has resulted in a multigenerational dependence on Federal assistance that is—

(A) insufficient to address the magnitude of needs; and

(B) unreliable in availability; and

(12) *the twin goals of economic self-sufficiency and political self-determination for Native Americans can best be served by making available to address the challenges faced by those groups*—

(A) the resources of the private market;

(B) *adequate capital*; and

(C) technical expertise.

25 U.S.C. § 4301(a) (emphasis supplied to highlight tribal rights to trade freely and seek out capital).

Congress has established that subdivisions of Tribal governments are to be afforded income tax immunity if imbued with "substantial government functions" of the Tribe.[15] This policy supports the tax-immunity of wholly-owned Tribally chartered entities that have been granted tax immunity by the Indian tribe.

Tribal governments create corporate entities for purposes of engaging in revenue-generating activities to support tribal government functions and the delivery of services to their citizens. Doing so promotes administrative convenience and effectiveness both in governance and business operations. Research supports the conclusion that tribal government economic development is furthered when the functions of governance and business operation are separated.[16] Indeed, this was the reason why Congress established under the Indian Reorganization Act of 1934 provisions for tribes to organize themselves as either or both Section 16 constitutional governments and/or federally-chartered Section 17 corporations (like COLT).

Moreover, outside of the context of tribally-chartered entities, the IRS has long recognized that sole proprietorships, partnerships. S-corporations, and limited liability companies are not to be taxed at the business entity level. Instead, these businesses possess "pass through" tax treatment and are taxed at the ownership level. The same principle should apply to tribally-organized entities.

Tribal governments have become increasingly sophisticated in the structuring of business operations and transactions. Some tribes have created not just corporations and limited liability companies, but general codes allowing the general public to organize such a business entity.[17] Other tribes have utilized their Section 17 corporations in conjunction with tribally-organized

[15] 26 U.S.C. § 7871(d).

[16] *See* Tribal Business Structure Handbook, Office of Indian Energy & Economic Development, 2008, at I-5; *see e.g.* Harvard Project on American Indian Economic Development, *"JOPNA: What Makes First Nations Enterprises Successful? Lessons from the Harvard Project"* (2006).

[17] *See e.g.* MILLE LACS BAND STATUTES ANNOTATED, Title 16 Corporations, § 1102 ("One or more natural persons of full age may act as incorporators of a corporation by filing with the Commissioner articles of incorporation for the corporation").

entities, with tribal entities as subsidiaries. And others have utilized tribally-chartered entities as pooled investment instruments with non-Indians to share equity participation and corresponding economic benefit. Policy favors maximum flexibility and support for Indian tribes through the utilization of tribally-organized entities regardless of their mode of formation.

Recommendation No. 2 – ***Prior IRS Guidance declaring that Tribally-owned state-chartered entities are subject to taxation should be withdrawn.***

Consistent with Recommendation No. 1, the relevant consideration for income tax purposes is not which government's law provide the basis for the organization of the corporate entity, but instead "what is the tax status of the owner?" For various business purposes and regulatory considerations, particularly with regard to an "off-territory" business venture, a tribal government may decide to utilize a state law-organized entity. It should be immaterial for tax purposes that a tribal government does so if the tribal government is the sole owners of the state law-organized entity.

Recommendation No. 3 – ***The general rule of "pass through" tax treatment for tribally-owned entities should only apply to tribally-chartered entities that are at least 51% majority-owned by an Indian tribe.***

It is implied by prior IRS guidance, but not expressly stated, that the reason why federally-chartered corporations are not subject to income tax is because they are wholly-owned by an Indian tribe. Section 17 corporations can only be owned by an Indian tribe and so the foundation rules previously established do not clearly address the question of how to address how to treat income earned by a corporate entity that is only partially-owned by an Indian tribe.

However, both corporations and limited liability companies regardless of where they might be organized may only be partially owned by an Indian tribe. Corporations, by virtue of being able to issue multiple shares of stock, can be owned by an Indian tribe in common with other corporations, individuals, or partnerships whether they be Indians, non-Indians or other Indian tribes. Similarly, limited liability companies, by virtue of their more flexible form, can also have many owners of which an Indian tribe may be just one of several. However, again we note that in COLT member tribes' experience, anything less than 100% tribal ownership of entities utilized by an Indian tribe for governmental purposes is extremely rare. Most COLT member tribes' entities are 100% tribally owned and have credit arrangements only with third parties, whether they be tribal member investors, banks, or private capital creditors.

If an Indian tribal government charters a corporate entity that possesses the same tax-exempt status of the tribe, there are strong policy reasons to recognize the authority of Indian tribes to participate in partial- or multi-owner corporate entities and carry forward 100% income tax immunity at the entity-level. It is a foundation principal of American capitalism that corporate entities exist in the first place to promote the aggregation of capital and the insulation of liability from ownership to promote investment and economic development. Indian tribes should have the same opportunity to secure outside investment and engage in business activities utilizing the corporate form. Indeed, Congress has expressly said so.[18]

This rule should not apply in two situations: (i) where the tribe is a minority owner or has minority control, or (ii) where the tribal government has not established in the first place that the tribally-charted entity possesses the tribe's tax status. The prevalence of the first exception will be heavily influenced by the IRS guidance that is ultimately issued. The second exception is likely a less common circumstance where a tribe creates a corporate entity that does not possess its own tax immunity.

Thus, for example, if a tribally-chartered entity is 75% majority-owned by non-Indians and the Indian tribe is only a 25% minority owner, that entity is outside the ownership and control of the Indian tribe. For that reason alone, the income of that entity should be subject to the same rules governing non-tribally-organized entities. Such an entity like a limited liability company may qualify for "pass through" tax treatment, but tax immunity is dictated by the majority ownership, not the minority ownership.

Nonetheless, federal policy supports the ability of Indian tribes to utilize corporate entities to generate revenue through "joint venture" or "partnership" dynamics even when they exercise little actual governance or provide little investment capital to the corporate entity. For example, an Indian tribe might enter into a transaction in which the tribe is the majority owner, but which much of the investment capital and day-to-day management is provided by an outside non-Indian investor. This type of "passive" investment approach is often a useful way for tribes inexperienced in a particular industry to build capacity, or for a tribe with significant experience but who wishes to dedicate day-to-day management responsibilities to other priorities. As long as the Indian tribe retains ultimate control and the non-Indian investor remains subject to its own income tax responsibilities, an Indian tribe should be able to utilize its tax status advantage *at the entity level* to generate economic benefit for itself and its citizens.

[18] 25 U.S.C. § 4301(a).

Recommendation No. 4 – ***Tribally-organized entities that are owned by individual Indians should carry the same tax status as the individual Indians, including the preservation of treaty and statutory tax immunities.***

Indian tribes are increasingly enacting comprehensive codes to establish Tribally-chartered corporations and limited companies for their own citizens and even non-Indians to promote entrepreneurship and economic diversification. Such entities do not carry the tax-exempt status of the Tribe but are entities for business purposes similar to privately owned corporate entities created under state law.

In developing guidance on this subject, the Department and the Service should incorporate the fact that individual Indians possess income tax immunity for certain forms of income such as income derived from tribal lands (such as grazing leases) or income earned from exercising treaty hunting rights.[19] The Department should recognize the individual Indian's income tax immunity if he or she decides to utilize a tribally-organized entity to conduct the tax-exempt activity. In other words, the mere fact that an individual Indian may utilize a tribally-organized business entity to conduct his or her business activities should not serve to undermine the tax-exempt status of the income earned by that individual Indian.

Congress has provided guidance on this issue as it relates to income tax immunity for Indians exercising treaty fishing rights.[20] The Department should adopt a similar rule to address

[19] *See e.g. Squire v. Capoeman*, 351 U.S. 1 (1956).

[20] *See* 26 U.S.C. § 7873(b)(3)(A) defining a "qualified Indian entity" entitled to federal income tax immunity:

> The term "qualified Indian entity" means, with respect to an Indian tribe, any entity if—
>
> (i) such entity is engaged in a fishing rights-related activity of such tribe,
>
> (ii) all of the equity interests in the entity are owned by qualified Indian tribes, members of such tribes, or their spouses,
>
> (iii) except as provided in regulations, in the case of an entity which engages to any extent in any substantial processing or transporting of fish, 90 percent or more of the annual gross receipts of the entity is derived from fishing rights-related activities of one or more qualified Indian tribes each of which owns at least 10 percent of the equity interests in the entity, and
>
> (iv) substantially all of the management functions of the entity are performed by members of qualified Indian tribes. For purposes of clause (iii), equity interests owned by a member

the tax-exempt treatment of tax-exempt income earned by Indians through tribally-organized business entities.

3. ANSWERS TO THE DEPARTMENT'S MAY 15, 2023 DTLL QUESTIONS (COLT'S RESPONSES IN BLUE)

1. What role do Tribally-chartered corporations (wholly, majority, or jointly owned) perform for Tribal governments and Tribal economies?

As noted above, they are the essential revenue-raising instrumentalities of many tribal governments, given tribes' lack of a reliable tax base otherwise (no property tax on lands held in trust, no reliable sales or income tax base with historic poverty and unemployment).

(a) In what ways are Tribally chartered corporations different than a non-Tribal government owned business?

Tribally chartered corporations might fall into one of two categories: (1) corporations chartered by the tribe under tribal law; or (2) corporations chartered by persons or entities other than the tribal government by persons other than the tribe, but nonetheless chartered pursuant to tribal business entities laws. This is just like a state law business entity. The state government might itself charter a corporate entity, or individual citizens might use state law to do so. In the tribal context, it is often the tribal government that is doing the chartering as part of the government's economic development authority.

(b) Do Tribes consider Tribal corporations to be arms of the Tribal government and/or political subdivisions or instrumentalities. If so, please explain the factors that inform this determination.

Yes, they do. Tribes establish tribal corporations to develop their economies and fund services to citizens. Tribal governments' authorizing resolutions typically expressly state that tribes consider their tribal corporations as arms of the tribe and that their purpose is to support the tribe's governmental objectives and delivery of services to tribal citizens and reservation residents. Most tribes are empowered in their constitutions to organize any lawful business entity that serves the tribe's

(or the spouse of a member) of a qualified Indian tribe shall be treated as owned by the tribe.

governmental mission of providing services to citizens.

2. Existing IRS Regulations and Revenue Rulings provide that Federally chartered corporations under the Indian Reorganization Act of 1934 (IRA) and Oklahoma Indian Welfare Act (OIWA) are not subject to Federal income tax.

(a) What challenges do Tribes encounter in chartering such corporations?

It can take a long time—six months at the fastest, to more like 18-24 months to navigate the Department of the Interior review and approval process. The form of charter is pretty antiquated. The local DOI Solicitors reviewing draft Section 17 corporate documents often do not have any business experience, but are nonetheless opining on structures designed by 30-year big corporate firm lawyers. It is a mismatch of skills and experience.

(b) What limitations do Tribes see in these structures that result in chartering under the alternative categories listed in question 3.

The lack of flexibility is a problem. If you want to amend, you have to go back to the Secretary and engage in another long process. Additionally, termination of a federally-chartered entity requires an Act of Congress.

3. Tribal governments may charter a business under Federal, State, or Tribal law and subject to such laws Tribes may consider a variety of structures, including but not limited to wholly owned, majority owned, and jointly owned corporations.

(a) What advantages and disadvantages exist for the following business structures for Tribal governments?

(1) Corporations chartered under Tribal law (tribally chartered corporations);

This is less frequently used than an LLC structure. It is harder to make changes. There are often questions around whether the shareholders are adult tribal members or the tribal government itself. Corporations are less flexible and more formal, which typically makes them less preferred by tribal governments that have adopted LLC codes.

(2) Corporations chartered under the law of a State;

Again, corporations are not often preferred structures if an LLC option is available. COLT member tribes typically only use this type of structure if the

entity is doing substantial off-reservation business (such as a real estate company buying buildings in urban areas). State law entities have been determined in several courts to be creatures of state law that do not have immunity. Tribes often avoid these structures to avoid being treated just like any individual that might charter a state corporation.

Another significant disadvantage of a state corporate entity owned by a tribe is the prior IRS guidance that the income of such an entity is subject to income tax. This guidance is in error and should be withdrawn. If a state-chartered entity is wholly-owned by a Tribal nation, then the entity should have "pass through" tax treatment.

i. Limited liability companies organized under Tribal law or State law; and

Again, tribes very rarely use state law to organize tribal entities. LLCs are easier and more flexible than corporations generally. A lot of tribes do not yet have LLC codes and only have corporate codes.

ii. Partnerships organized or operating under Tribal law or State law (for example, joint venture partnerships).

COLT member tribes do not commonly (or really ever) use partnerships under either tribal or state law. There is simply too much potential liability and tribes are often focused on maximum risk isolation and mitigation.

(b) What factors shape a Tribes decision to charter a corporation as a wholly owned, majority owned, or jointly owned corporation?

Tribes would make every corporation wholly owned if they could afford it. The reasons that tribes choose lesser ownership arrangements is often when they need to remunerate someone who brought them the idea or who is bringing expertise or capital to the venture. Basically, the same factors that influence entity formation in non-tribal business ventures are the same factors influencing entity formation of tribal business ventures.

(c) How important to the success of a Tribal business enterprise is stock investment from investors other than the Tribal government (as opposed to, for example, debt financing).

Generally, in the experience of COLT member tribes, stock ownership in a tribal entity is never even discussed because it dilutes tribal control. With the rise of the so-called

'arm-of-the-tribe' legal test, pretty much every entity is wholly owned by the tribe. COLT member tribes reported no recent experience with stock investments from non-tribal investors other than a few scattered minority interest transactions where some stock was owned pursuant to a tribal citizen's minority interest in the company (such as an 8(a) government contracting entity acquired by a tribe from a tribal member Native American veteran graduating out of the SBA's 8(a) program). And again, the same factors that influence investment in non-tribal business ventures are the same factors that influence investment in tribal business ventures.

4. Some Tribes have partnerships with outside investors that consist of varying degrees of ownership by the Tribe and its non-governmental partner. We seek to better understand the reason for these structures and the needs they address. To that end, when launching a business enterprise with investors other than the Tribal government:

   (a) What are the most important considerations for Tribes when choosing what type of legal entity to operate the business enterprise?

   Choosing the entity to operate is really about the expertise and experience, not the structure, of the entity.

   (b) What are some typical barriers that Tribes face when competing with non-tribal competitors in the marketplace?

   Access to capital, fear of the unknown (such as tribal courts as forums for dispute resolution), lack of experienced consultants in industry space.

   (c) In addition to typical barriers described above, what are a few noteworthy barriers that you have faced when competing with non-tribal competitors in the marketplace?

   A major barrier is state attempts to enforce state licenses, fees and taxes on tribal trade and commerce. For example, COLT member tribe the Rosebud Sioux Tribe and all nine tribes co-located within the State of South Dakota are constantly in a battle with the state regarding jurisdiction and taxes. It is clear cut from the treaties the tribes signed with the federal government and the Enabling Act the State signed in order to join the United States that the tribes retain inherent sovereignty over their lands and nations, which includes commerce, trade, tax and regulatory jurisdiction.

But collectively the Great Sioux Nation wastes millions of dollar annually litigating and negotiating with the State on every single possible variation that the State thinks the can impose on tribal nations and lands. The State of South Dakota alone has dozens of taxes that they try to impose on tribal commerce, each one requiring a fierce legal battle on a case-by-case basis, resulting in absolutely hamstrung tribal economies. Below is a sample of just a handful of the dozens of regulations, fees, and taxes the South Dakota is constantly trying to impose on trade and commerce with the Rosebud Sioux Tribe and within its boundaries, on top of Rosebud Sioux Tribal licenses, fees and taxes, *and* federal licenses, fees, and taxes. Many COLT tribes throughout the West face similar state-imposed burdens that drive business away from our reservations. These are just a few examples.

South Dakota Commercial Licenses, Fees, and Taxes

Business Licenses Taxes:

1. **Contractors' excise tax license:** A contractors' excise tax license is required if your business is entering into a realty improvement contract or a contract for construction services enumerated in division C of the Standard Industrial Classification Manual, 1987.
2. **Manufacturer's license:** A manufacturer's license is required if your business fabricates or manufacturers items which are sold to other companies for resale, and if your company has a manufacturing facility in South Dakota.
3. **Sales tax license:** A South Dakota sales tax license is required if your business sells, rents, or leases any kind of tangible personal property, products transferred electronically, or provides any kind of service.
4. **Use tax license:** A use tax license is required if your business purchases tangible personal property, products transferred electronically, or services on which South Dakota sales tax was not paid.
5. **Wholesales license:** A wholesale license is required if your business sells all products to other businesses for resale.

Motor Fuel Licenses:

6. **Bulk Plant Operator:** A Bulk Plant Operators license is required if your business operates a fuel storage facility in South Dakota (other than a terminal).
7. **Blender:** A Blenders license is required if your company produces a biodiesel blend which is a blended special fuel containing a minimum of five percent by volume of biodiesel. A Blenders license is also required if your company blends two or more products (other than 100% ethyl alcohol with gasoline), to

produce a product that is capable of use in the generation of power for the propulsion of a motor vehicle, airplane, motorboat or snowmobile.

8. **CNG Vendor:** A CNG Vendors license is required if your business is a utility company that is regulated by the Public Utilities Commission and sells compressed natural gas for use in motor vehicles.

9. **Ethanol Producer:** An Ethanol Producers license is required if your company produces ethyl alcohol in South Dakota that is 99% pure and distilled from cereal grains for sale, use, or for the purpose of making ethanol blends.

10. **Highway Contractor:** A Highway Contractors license is required if your business performs construction, reconstruction, repair, or maintenance on publicly funded highways and roads in South Dakota, including township work and snow removal.

11. **Supplier:** A Suppliers license is required if your business owns fuel within a pipeline system and can withdraw that fuel or authorize its withdrawal at a terminal located within South Dakota or, if your business owns fuel within a pipeline system located outside of South Dakota, can withdraw or authorize withdrawal of that fuel for sale, use or storage in South Dakota and wants to collect and remit South Dakota taxes and Tank Inspection fees to the state. Your business must also be licensed as a Position holder with the Internal Revenue Service.

12. **Importer/Exporter:** An Importer/Exporters license is required if your business owns fuel which is transporter into or from South Dakota from another state or country for sale or delivery by truck, rail car, or any means other than a pipeline. If you export fuel from the state you must be licensed to either collect and remit fuel taxes, or be licensed to deal in tax free fuel in the other specified state(s) to which the fuel is exported.

13. **LPG User:** An LPG Users license is required if your business uses liquid petroleum gas in the engine fuel supply tank of a motor vehicle and wishes to purchase the fuel on a tax unpaid basis. Or if your business is purchasing liquid petroleum fuel for multiple uses which are subject to different taxes.

14. **LPG Vendor:** An LPG Vendors license is required if your business sells liquid petroleum gas for use in motor vehicles, or sells to other LPG vendors that are selling the product for motor vehicle usage.

15. **Marketer:** A Marketers license is required if your business sells fuel products in South Dakota as a wholesale distributor or retail dealer. A separate license is required for each business located within the state.

16. **Tribal Marketer:** A Tribal Marketers license is required if your business sells fuel products as a wholesale distributor or retail dealer on Indian Country (Reservations) in South Dakota where the Tribal Government has a tax agreement

with the state. A separate license is required for each business located within the state.

17. **Terminal operator:** A Terminal Operators license is required if your business by ownership or contractual agreement is responsible for the operation of a terminal in South Dakota.
18. **Transporter:** A Transporters license is required if your business provides transportation of fuel in quantities over 4,200 gallons within South Dakota or to areas outside the state by transport truck, rail car, or means other than a pipeline.

Special Tax Licenses:

19. **Artisan Distiller:** A South Dakota distillery may produce up to 50,000 gallons annually using at least 30% of South Dakota ingredients. The resulting product may be sold on their premises for either on premise or off premise consumption.
20. **Carrier License:** This license allows any person who transports passengers for hire (bus, limo, taxi) to sell all types of alcohol for consumption in the vehicle only.
21. **Common Carrier:** A carrier engaged in the business of transporting wine.
22. **Dispensers Liquor:** Allows duly licensed medical personnel or hospitals, clinics, industrial companies, etc. to purchase alcohol for scientific or medicinal purposes only.
23. **Direct Shipper:** Allows eligible wineries to ship their product directly to end consumers in the State of South Dakota.
24. **Farm Winery:** Enables a South Dakota Winery using a majority of South Dakota grown products to produce up to 150,000 gallons annually and to sell their product for either on premise or off premise consumption.
25. **Liquor Distiller:** Any distillery that manufactures distilled spirits within the State of South Dakota but does not meet the requirements of the Artisan Distiller license.
26. **Manufacturer Malt Beverage:** South Dakota malt beverage manufacturers which produce up to 5,000 barrels annually may sell their product for on premise consumption only.
27. **Retail on Premises Manufacturer**: A retailer which provides a location for customers to produce wine or beer on the premises.
28. **Solicitors:** Any person employed by a wholesaler who is selling or promoting alcoholic beverages to retailers.
29. **Transporters Alcohol:** Any carrier or private vehicle which transports distilled spirits and wine to South Dakota alcohol licensees.

30. **Wholesaler Malt Beverage:** This license type allows a wholesaler to sell malt beverages to retailers only.
31. **Wholesaler Liquor:** This license allows a wholesaler to sell all types of alcohol to retailers only.

It is commonplace for tribes to wastes hundreds of thousands of dollars each year for attorneys' fees to handle the constant battle of attempted state encroachment into our commerce and trade.

(d) Are there different considerations or barriers that Tribes face in forming business structures for investments involving tax credits, for example, the New Markets Tax Credit?

Quite simply, they are all too complicated. Many tribes fear taking on any kind of debt especially debt that might stretch over a decade or more or require security. You can't combine NMTC with USDA programs. Overlapping bureaucratic requirements are routine deal-killers. You can't Frankenstein many different sources of funding together and any of these sources, standing alone, is usually insufficient to fund a new tribal venture.

5. With regard to a non-wholly owned Tribally chartered corporation or company that limits the legal liability of its owners:

(a) Is there a typical threshold percentage of stock or equity investment from investors other than the Tribal government that a Tribe would be comfortable with to maintain Tribal government control of an enterprise it charters?

51%

(b) Is there a typical threshold percentage of board seats controlled by investors other than the Tribal government that a Tribe would be comfortable with to maintain Tribal government control of an enterprise it charters?

49%

6. How important to Tribal governments are the following requirements when creating a Tribally chartered corporation or other entity that limits the legal liability for its owners under the law of the Tribal Council (or other legislative body)?

(a) The Tribal Council (or other legislative body) must approve the entity's:

(1) Articles of incorporation or organization or charter (including amendments);

This is standard in the experience of COLT member tribes.

(2) Bylaws (including amendments); and

This is standard in the experience of COLT member tribes.

(3) Decisions regarding major actions of the entity (for example, acquiring or investing in a business, selling a business, paying dividends or making other distributions to owners, liquidating or dissolving, etc.).

Not at all. This is a recipe for entity failure (see Harvard studies). Tribes should not mix governmental / policy and business decision-making.

As Dr. Joe Kalt of the Harvard Project on American Indian Economic Development often observes, it is a foundational principle of tribal economic success to keep politics out of tribal enterprises. A recent article, "*What Determines Indian Economic Success? Evidence from Tribal and Individual Indian Enterprises*" summarizes the issues well:

> Instead, it was the existence of a *non-politicized* board that mattered to success. Indeed, in this sample, all enterprises with a profit index score of zero lacked an independent board. The implication is that a board that serves as a buffer between the (inherently) political tasks of setting tribal direction and strategy and the more specialized and technical tasks of managing enterprises contributes to success. This result from the statistical data is congruent with the results from NCAI's case studies, which indicate that keeping political actors and their constituents' immediate concerns out of business decisions is beneficial to enterprise health.
> A recurring theme in the surveys and in NCAI's case studies is that effective enterprise and tribal

> governance matter to success. Enterprises that are insulated from political pressures are more successful. Where political leaders can interfere directly in enterprises, pressures tend to mount for them to do so—to the detriment of performance. Conversely, where mechanisms exist to separate strategic (that is, political) decision-making from operational (that is, managerial) decision-making, enterprises seem to perform better.
>
> Tribal policymakers can ensure that a separation of functions exists between civic governance and corporate governance. Around the world, government-owned businesses face challenges that other enterprises do not, and this places a premium on structures of good corporate governance.

The entire article is attached, along with another leading article, but the conclusions are nothing new.

(4) Decisions regarding the day-to-day operations of the entity's business.

Not at all. This is a recipe for entity failure (*see* Harvard studies). Tribes should not mix governmental / policy and business decision-making. *See* Response 6(a)(3) above.

(b) A majority of the entity's board of directors (or other government body) must be Tribal members.

This is standard in the experience of COLT member tribes.

(c) The Tribal Council (or other legislative body) has the power to:

(1) Select and remove board directors (throughout the life of the corporation);

Again, this is a bad idea for tribal entity success. A tribal council might make initial appointments to an entity board, but thereafter, nominations and qualifications requirements should come from the entity board itself.

Tribal governments might retain some rights of approval over appointments from nominations made by a tribal entity board. Separating tribal business operations from political interference is essential to their success.

(2) Review the financial and operating records of the corporation;

Usually a tribal council receives audited financials and has a right to inspect the books and records of the company on reasonable notice—like typical shareholders in any corporate context. Again, separating tribal business operations from political interference is essential to their success.

(3) Approve, or disapprove, all capital and operating budgets of the corporation; and

Again, this is a terrible idea. Councils are not business people. Hiring skilled workers for these tasks, managed by a qualified board, is key to success.

(4) Receive periodic (for example, quarterly) financial reports from the corporation.

This is standard in the experience of COLT member tribes.

7. How feasible would it be to require that more than half of a Tribally chartered corporation's board consist of members of the Tribe?

This is standard in the experience of COLT member tribes. But this is a tribe's sovereign right to choose and there is no reason that a tribe cannot make the governmental determination to, for example, form a board of professionals who are citizens of other tribes, to avoid nepotism and internal tribal politics.

8. How important to Tribal governments is the use of corporate or partnership subsidiaries in carrying out a business venture?

The use of entity structures general is very important to tribes. Tribes use sophisticated business structures to isolate risks and safeguard the tribal government's general funds to ensure continuity in services to citizens even if a tribal enterprise incurs liabilities. Again, partnership structures are largely unused in the experience of COLT member tribes.

9. To the extent the Federal tax status of a Tribally chartered entity derives from the tax status of the Tribal government that owns interests in the entity, what mechanism would you recommend for the IRS to know if the ownership of a Tribally chartered entity or its other characteristics is significantly changed (for example, the Tribal government sells or transfers its interests in the entity to an individual or a new entity that is not a Tribal government)?

A simple self-certification form would do it each tax year. Is the entity formed and existing by the tribe, for the tribe and under tribal law? If yes, its's a tribal entity and immune from taxation. Has there been any change in that status since the last filing, and if so, on what date was such change effective? That's really all you need to cover.

10. Based on your experience, how do the rules of your Tribe's business or corporate code that govern Tribally chartered corporations, companies, or other entities differ (if at all) from corporate codes of neighboring State governments?

In the common experience of COLT member tribes, it is identical—copied word-for-word and replacing "State Name" with "Tribe Name" and making the tribal secretary's office the recording office.

11. What other information, comments, or suggestions are important for the Department of the Treasury and the IRS to know in developing guidance on the Federal tax status of Tribally chartered corporations or companies organized under Tribal laws that protect owners from legal liability?

In the vacuum of accurate federal regulations, litigation has filled the void with a ridiculous patchwork of case law that could not have done a better job at destroying tribal economies than if it had been by purposeful design. The Department's guidance should set the record straight and respect tribal sovereignty as enshrined in the Constitution.

What more is the federal trust responsibility if it is not intended to promote economic success in order to sustain tribal self-sufficiency? Instead, the current tax treatment of tribal entities has evolved to support dependency. Under no definition of trust responsibility is the goal to enforce poverty in perpetuity.

LACK OF FEDERAL CLARIFICATION = CONSTANT LITIGATION AND COMPLETE ECONOMIC OPPRESSION

Currently if you would like to trade with an Indian or a tribe you have to hire a lawyer

to analyze a minimum of 50 different variables, and the patchwork of inconsistent, results-oriented case law, in order to determine which jurisdictions' regulations and taxes apply.

Depending on the answer to each of these questions the taxing / regulatory authority could be tribal, state, or federal, or a combination of any or all of the three. Depending on the answer to each of these questions, the taxing authority and which specific taxes and tax incentives apply could be tribal, state, or federal, or a combination of any or all of the three. Further, the answers are rarely clear, usually leading to extensive and costly litigation on at least one or more of the fifty questions. We have attached the list our attorneys must use in evaluating any one of our business deals:

"50 QUESTIONS OF ECONOMIC OPPRESSION"

Each of these questions must be researched and answered before you can determine whether tribal, state, and/or federal regulations or taxes apply for each project or business?

Ownership

1. Is the business owned by a Native American or a non-Native American?
2. Is the business owned by a tribal government?
3. What percentage of the business is owned by each?

Use of Funds

4. If the business is owned by the tribal government, what exactly does the business use its profits for?

Place of Incorporation

5. Is the business incorporated under federal, state law or tribal law?
6. If owned by a tribal government is it a federal Section 17 Corporation, state, or tribal corporation?

Location

7. Will the business be located on or off the reservation?
8. If on the reservation, is the business located on trust land or fee land?
9. If off the reservation is the business located on off-reservation trust land or fee land?
10. Is the product manufactured on or off the reservation?

11. If the product is primarily manufactured off the reservation, is there "value added" to it on the reservation?
12. Are your company's email and data storage servers located on or off the reservation?

Government Services/Infrastructure

13. If the business is located on the reservation, does the federal, tribe or state government provide the government services (fire, police, roads, trash collection, roads, etc.)?
14. If more than one government provides services what percentage of government services does each government provide?
15. Which government provides electricity and communications infrastructure?
16. Does the tribal court or conflict resolution process look like what a westerner would be comfortable with?

Improvements

17. Have any "improvements" have been built on the lands?
18. Are the improvements permanent or non-permanent?
19. Are the improvements built on trust land or fee land?
20. Were the improvements built by Natives or non-Natives?
21. Are the improvements owned by Natives or non-Natives?

Type of Business

22. What type of business it is?
23. Is the business one that would predominately be considered a "government function"?
24. Does the business involve a "treaty activity"?
25. Does the business involve fishing or hunting?
26. Does the business involve gaming?
27. If it involves gaming, is it directly or tangentially involved?
28. If it's a building near gaming, does it actually physically touch the casino?
29. Does the business involve alcohol?
30. Does the business involve tobacco?
31. Is this an industry that is predominately regulated by the federal government?
32. Is it natural resource?
33. Is the natural resource being extracted by Natives or non-Natives?

Type of Customer

34. Are sales being made to Indians or Non-Indians?
35. Is the sale on tribal land or non-tribal land?
36. Does the product stay exclusively within the reservation or does it leave the reservation?
37. If the product leaves the reservation is it tangible or e-commerce/service?
38. What percentage of the reservation population is below the poverty level?

Type of Employees

39. Are your employees Native American?
40. If so, what percentage of your employees are Native?
41. Are each of your Native employees enrolled with the tribe where the business is actually located?
42. If your employees are non-Native are they married to and/or supporting a Native family?
43. Do your employees live on or off the reservation?
44. Do your employees travel off the reservation for work?

Leasing

45. Do you need to lease for the business?
46. If you need a lease is it for land or natural resources?
47. If the lease is for land, is it tribal trust land, or individually Native owned trust land?

Outsourcing

48. Do you outsource any of your work?
49. If you do outsource what percentage of the company's work?
50. What sort of daily control do you exert over the outsourced companies?

Capital and investors work with areas with the highest reward to risk ratio. The risk and uncertainty of 50+ variables just to determine the regulatory and tax implications is too expensive for most any business. Thus, high-risk businesses and risk-tolerant investors are often the only pool of capital and resources available to poor, rural tribes.

Tribal governments, reservation-based businesses, and their investment and business partners waste hundreds of millions of dollars annually on legal bills answering these questions and litigating them in court. Without bright-line guidance from the Department, tribal economies will continue to languish and tribes will was millions of dollars each year litigating the minutia of these stupid tests that miscomprehend the

sovereign roles of tribes under our Constitution.

THE FEDERAL GOVERNMENT HAS AN AFFIRMATIVE OBLIGATION TO "PROTECT" TRIBAL COMMERCE AND TRADE

In addition to the costs lost to litigation and to capital partners unwilling to navigate the increase risks of doing business in Indian Country, billions of dollars are lost annually in direct tax revenue diverted to state government tax overreach.

Without exception, every economic endeavor that has proved viable for tribes comes under aggressive state attack by either regulations or tax. Tobacco, gas, minerals development and gaming are just a few examples. The states angle to either tax or regulate the tribal industry out of business. Almost all the same self-serving, insincere arguments made over and over:

1. Tribes are trying to skirt state laws.
   TRUTH: Tribes are implementing tribal law. State law is inapplicable.
2. Tribes are avoiding state taxes.
   TRUTH: Tribes are implementing tribal taxes. State taxes are inapplicable.
3. Tribes are in unsavory industries; tribes need to be protected.
   TRUTH: Tribes can decide which industries and business they want to enter, just like any other sovereign.
4. The business partners make all the money, tribes get unfair business terms.
   TRUTH: With "50 Questions of Economic Oppression" frightening capital, tribes often have to accept less favorable business terms than are available to other governments. It is the regulatory scheme that needs to be fixed.

States take every tribal tax opportunity away from Tribes they can, despite the fact that many disclaimed any such power as a condition to entering the Union. For example, Montana agreed to federal preemption to become a state in the Montana Enabling Act. Further many states specifically waived and conceded their ability to this overreach in their "Enabling Act" which brought them into the Union as states. Montana, South Dakota, North Dakota and Washington certainly did.[21]

[21] Sec 4. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be

> Yet they play with the impetus of tax until they find a taxable entity doing business with the tribe. Just a few examples: the Oklahoma Tax Commission is in constant litigation with Oklahoma tribes; COLT member the Three Affiliated Tribes in North Dakota have lost over $1 billion dollar in revenue due to state tax overreach; the entire tribal tobacco industry has been crippled due to state tax overreach.

4. Conclusion.

Thank you for the opportunity to comment on this important subject. Indian tribes are indigenous sovereign governments whose existence as distinct, self-governing political entities predates the formation of the United States government and the United States Constitution. The tax treatment of tribal entities should correspond to that Constitutional foundation. If the Department's guidance reflects the plain language and true intent of the Constitution, to ensure federal preemption over tribal commerce for the benefit and protection of Indians, we could finally eliminate the root of the Indian Country's perpetual economic oppression—systemic tax and regulatory uncertainly and constant state encroachment.

> repugnant to the Constitution of the United States and the principles of the Declaration of Independence. * * *
>
> That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to … all lands lying within said limits owned or held by any Indian or Indian tribes;
>
> and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;
>
> *** that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use.
>
> But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

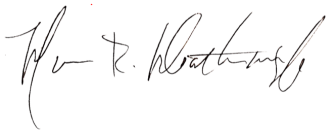
COLT and its member tribes should be treated as sovereign governments, with primary and exclusive local tax authority within its own territory. And any illegitimate federal taxes should be rendered inapplicable to tribal governments, their entities of choice, and tribal citizens operating within their tribal homeland and serving their relations. The difficult choice to purge unjust laws begins with a small group of people supporting the legally justified decision—allowing for tribal nations to make their own decisions—recognizing that all tribal commercial actions are governmental—and with entities of their own creation and/or choice, to best serve their homelands and citizens.

Real change for the betterment and empowerment of our reservation communities requires boldness:

> **"Economic dignity can't be achieved through status quo policies."**
>
> - **Gene Sperling, ECONOMIC DIGNITY 131 (Penguin Press 2020).**

COLT hopes the Department will disrupt the status quo, embrace boldness, and at long last, restore the full dignity of the government-to-government relationship between tribes and the United States consecrated in the Constitution and our treaties.

Respectfully,



Hon. Marvin Weatherwax, COLT Chairman
Councilman, Blackfeet Nation Tribal Business Council

LEGAL APPENDIX

TAXATION WITHOUT REPRESENTATION: AMERICAN INDIANS, GOVERNMENT & TAXES

"The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[1]

"Laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."[2]

I. INTRODUCTION

In America today, several levels of government exist that provide services to meet public needs. Each level of government independently assesses, enforces and collects taxes on various

[1] Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363 at 1 (1970).

The inseparability of tribal commercial development and governmental activity is the bedrock of the federal policy of Self-Determination. For nearly half a century, the federal government, both the Executive and Legislative branches, has been committed to strengthening tribal self- government through tribal economic development.

President Nixon initiated the commitment in 1970, stating in his historic Self-Determination Message that "it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure." Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, at 7. President Barack Obama expressly reaffirmed the federal government's commitment to "honor treaties and recognize tribes' inherent sovereignty and right to self-government under U.S. law . . . by . . . promoting sustainable economic development." Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (June 26, 2013).

From the 1970s to the present, the Legislative Branch has also continuously supported tribal government efforts to generate economic development through various pieces of legislation, including: the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450-458bbb, in which Congress committed to "supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities," 25 U.S.C. § 450a(b) (emphasis added); the Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. §§ 3501-3506; and the Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. §§ 4301-4307.

As the U.S. Supreme Court explained, "both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-36 (1983) (citations omitted).

[2] JOHN RAWLS, A THEORY OF JUSTICE 3 (1971).

forms of private wealth to yield public revenue.[3] Throughout the history of our republic, and especially in the past half century, government tax collections have yielded substantial public revenue,[4] enhancing the presence and power of the federal, state and local governments.[5]

The sovereign power to tax and collect is firmly established in modern society and therefore debate has shifted from governmental authority to tax to tax cuts and public spending choices.[6] The arguments concerning the amount of tax burden and spending of public revenue primarily occur in the political branches of government, with sharp policy debates occurring during national and local electoral campaigns.[7] More recently, for example, Congress enacted and

[3] "Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs." 1 Thomas M. Cooley, The Law of Taxation Sec. 1, at 61-63 (Clark A. Nichols ed., 4th ed. 1924).

[4] For example, federal tax revenue has increased from $10.8 million in 1800, to $567.2 million in 1900, to $37.0 billion in 1950, and currently exceeds $2 trillion. Graetz & Schenk, Federal Income Taxation: Principles and Policies 13 (4th Edition, Foundation Press, 2002). The federal income tax is the primary source of the federal budget today but other federal taxes contribute as well: payroll; corporate and excise. Similarly, state government tax collections have soared over this past century: $156 million in 1902, $7.93 billion in 1950, and $541.79 billion in 2000. Jerome Hellerstein and Walter Hellerstein, *State and Local Taxation: Cases and Materials*, 2-5 (West 7th Ed. 2001). States used to focus on property taxes and then changed to income, sales & use, and other excise taxes (gas, cigarettes, etc.) to fund their budgets. Other local governments (cities, counties, etc.), with some exceptions, have grown from minimal public revenue in 1950 to tax collections in excess of $270 billion in 2000. Jerome Hellerstein and Walter Hellerstein, *State and Local Taxation: Cases and Materials*, 10 (West 7th Ed. 2001). Property taxes have become the revenue backbone for counties around the country.

[5] Professor Reich detailed the rise of modern government largess, and power, where the "wealth of more and more Americans depends upon a relationship to government." Reich, *The New Property*, 73 Yale L.J. 733 (1963-64). Professor Reich demonstrated that newly created forms of government wealth (e.g., money, benefits, services, contracts, franchises, and licenses) diminish individual autonomy in favor of American governments as the primary provider, national and local, of essential services. Reich, The New Property, 73 Yale L.J. 733, 746, 774 (1964). In fact, Reich's article was cited as support for the decision in *Goldberg v. Kelly,* 397 U.S. 254 (1970) (holding that individual had right to welfare benefits).

[6] For instance, the U.S. Supreme Court has held that taxpayer and citizen suits against the federal government are generally prohibited. *Flast v. Cohen*, 392 U.S. 83 (1968). Indeed, actions by "tax protestors" are treated as frivolous and may be subject to penalties and interest. For example, a $500 penalty is imposed on any individual who files a document that purports to be but is not a correct tax return. I.R.C. ' 6702(a). If a taxpayer knows or should have known that his position is groundless, the courts have held that a perjury penalty applies. *Coleman v. Comr*., 791 F.2d 68 (7th Cir. 1986). In addition, the U.S. Tax Court is authorized to impose a penalty of up to $25,000 on a taxpayer whenever a taxpayer has: (i) instituted a proceeding for delay; (ii) advocated a position in a proceeding that is frivolous or groundless; or (iii) unreasonably failed to pursue administrative remedies. 26 U.S.C. § 6673(a)(1).

[7] *See e.g.*, Gary Klott, *Election 2000 Tax Guide: Comparison of Tax-Cut Plans*, *available at* http://www.taxplanet.com/election/election.html (August 31, 2002) (analyzing the federal budget proposals by

President Trump signed the federal legislation entitled Tax Cuts and Jobs Act of 2017, which implemented a campaign promise to reduce the corporate tax rate from 35 percent to 21 percent.

Meanwhile, in geographic areas that comprise some of the most impoverished communities in the United States—Indian Country[8]—many persons, property and entities[9] are potentially subject to five government taxes (federal, tribal, state, county and city)[10]—an unconstitutional phenomena that COLT terms "Indian tax law." Unlike other governments, Indian tribes are mired in tax disputes with local residents and other governments. The constant tax litigation is based on

Governor Bush and Vice-President Gore including details regarding tax rate cut, retirement savings, estate tax relief, marriage penalty relief, education, etc.); Charles S. Johnson, *Selective sales tax OK'd by Senate*, Gazette State Bureau, April 3, 2002, Selective sales tax OK'd by Senate (billingsgazette.com) (reporting on a proposed sales tax by the Montana legislature assessed on restaurant food, alcohol, rental cars, bakeries, etc., in order to reduce state income taxes $55 million per year for its state residents).

[8] In 1948, Congress codified the term "Indian Country" and defined it to include "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C.A. § 1151. Although this statutory definition was originally intended for criminal jurisdiction, it has been applied to civil jurisdiction, including tax, as well. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995).

[9] Generally accepted objects of taxation have changed over time for different governments. At its broadest level, taxes can be viewed as increasing the cost of doing business. However, COLT has picked two broad conceptual categories—persons and entities—to specifically illustrate the historical and current problems of taxation in Indian Country. It is COLT's analysis that current governments have simply redefined the broader conceptual categories to create new subcategories of taxes. Much like property law and its bundle of sticks, these taxes flow from the sovereign power to create taxable property interests.

[10] *The Cherokee Tobacco*, 78 U.S. 616 (1870) (upholding federal power to impose tobacco taxes on products manufactured and sold by Indians in Indian Country); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (affirming the power of tribes and states to tax cigarette sales to non-Indians in Indian Country); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) (holding that county had authority to assess and collect property taxes on fee simple parcels of land owned by a tribe); *City of Sherill v. Oneida Nation of New York*, U.S. (2005) (upholding the City of Sherill's power to assess property taxes on the Oneida Nation).

the mistaken beliefs of many Americans that Indians do not pay taxes,[11] tribes are not legitimate governments,[12] and unjustly profit from nontaxable tribal casinos.[13]

Indian tax law prevents tribes from becoming the primary governing entity over their own tax base because tribal governments cannot, as an economic and policy matter, generally collect taxes from persons, property, and entities in Indian Country.[14] Without public revenue to provide basic services to citizens in Indian Country, the substandard socioeconomic conditions will not improve, and tribal governments will not achieve meaningful self-determination. Moreover, the

[11] *See e.g.*, Dara Kam, Governor blames lawmakers for stalled Indian slot talks, The Palm Beach Post (August 3, 2005) (quoting Florida Governor Bush stating, "We don't have the ability to tax the Indians."); Upstate Citizens for Equality, Inc., Sovereignty (August 31, 2004), at http://www.ucelandclaim.com/sovereignty.html ("Increased expenses paid by all NY taxpayers to support services for roads, water, sewer, emergency and fire protection on reservation land – these can be demanded by the tribe, at taxpayers' expense;" "Removal of land from tax rolls of Cayuga and Seneca counties' communities and school districts, increasing taxes for all taxpayers – Cayuga Indians refuse to pay taxes to New York State;" and "Imposition of unfair business practices in which local, tax-paying businesses are forced to compete with non-taxpaying reservation businesses, immune to local, state, and federal regulations"). Contrast Minnesota Indian Gaming Association, Questions and Answers on Indian Gaming (August 31, 2002), at http://www.minnesotagaming.com/migaqna.html (listing and responding to a frequently asked question, "Do Indians pay taxes? Yes. Indians pay federal income and excise taxes like everyone else").

[12] *See e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding Congress' power to unilaterally abrogate federal-tribal treaties despite an express treaty provision to the contrary); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (holding that tribal community did not have recognized title to land and therefore was not entitled to just compensation for taking of their land); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) (holding that tribes lacked inherent criminal jurisdiction over non-Indians for crimes committed in Indian territory); Diana Hefley and Scott North, *Respect Tulalips' Authority, law says*, Herald Net, August 3, 2005, https://www.heraldnet.com/news/respect-tulalips-authority-law-says/ ("some non-Indians who told him of plans to ignore traffic stops by tribal officers, or to resist if detained at the scene of a suspected crime").

[13] *See* Government Accounting Office, Report to the Chairman, Committee on Ways and Means, House of Representatives, Tax Policy: A Profile of the Indian Gaming Industry (May 5, 1997), at http://www.unclefed.com/GAOReports/gao97-91.html (demonstrating that in 1995, with all combined gaming revenue markets, Indian gaming holds a 10% market share; whereas non-Indian private gaming constitutes 40% of the total gaming revenues and state lotteries receive 34% of total gaming revenues). William Rusher, The Indian casino racket (August 4, 2005) (stating "Thanks to the loophole of 'limited sovereignty,' the nation's Indian tribes are going into the casino business wholesale, financed by greedy white investors . . ."). Especially troubling is recent increased scrutiny by the Internal Revenue Service to view casinos as "potential money-laundering conduits for terrorists or other evildoers." Lynda Edwards, Increased IRS scrutiny targets terrorists, nettles casinos, Arizona Daily Star (August 3, 2005).

[14] For example, the Supreme Court held that tribal governments lack authority to collect taxes from non-Indians doing business on non-Indian owned land, even when operating within Indian Country. *Atkinson v. Shirley*, 532 U.S. 645 (2001). Perhaps that is why one Indian law scholar, Carole Goldberg, argued even before tribal gaming was a large industry that it takes a dynamic view for tribes to tax non-Indians. Carole E. Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 Law and Contemporary Problems 166-189 (Winter 1976).

wealth extracted from Indian Country rarely, if ever, materializes into public services for tribal citizens.

The path from dependent sovereign to meaningful tribal governance begins by broadening tribal regulation of wealth in Indian Country, reasserting tribal government tax authority, and collecting tribal public tax revenue to provide much needed services in Indian Country. Furthermore, Indian tax law illustrates that tribal governments and tribal citizens need structural safeguards in other governments, if they are subject to taxation by those governmental institutions.

In this submission, COLT begins by describing the unjust and unconstitutional structure of Indian tax law in Section II. In Section III, COLT provides a theory to resurrect tribal control, and tribal government taxation, of wealth in Indian Country. Under principles of treaty federalism and reserved rights, tribal government tax powers should be at least equal to state tax authority, with tribes retaining their original and natural right to be the only local taxing power in Indian Country. Alternatively, tribal governments and tribal citizens must have political representation in other governments to prevent taxation without representation.

In Section IV, in light of this return to original legal principles, COLT critiques and suggests reforms regarding the unjust and unconstitutional structure of non-Indian control of wealth in Indian Country and subordination of tribal governments to other American governments' tax powers. In Section V, COLT concludes that restoration of tribal government control and taxation of wealth in Indian Country is consistent with foundational Indian law principles and brings additional social and economic benefits to historically impoverished communities.

II. UNCONSTITUTIONAL STRUCTURE OF INDIAN TAX LAW

As the original inhabitants, Indian tribes were independent nations with established local economies and trade networks.[15] In North America at the time of contact, the Indian population is estimated to be between five and fifty million.[16] Contact initiated an economic link between

[15] *See* Francis Jennings, *The Founders of America: How Indians Discovered the land, pioneered in it, and created great classical civilizations; how they were plunged into a Dark Age by invasion and conquest; and how they are now reviving,* 1-411 (1993) Available at https://archive.org/details/foundersofameric00jenn/page/442/mode/2up; Francis Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from its Beginnings to the Lancaster Treaty of 1744,* 1-375 (1984) Available at: The ambiguous Iroquois empire : the Covenant Chain confederation of Indian tribes with English colonies from its beginnings to the Lancaster Treaty of 1744 : Jennings, Francis, 1918-2000; Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region*, 1650-1815 (Cambridge University Press 1991).

[16] *See, e.g.*, Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 Ark. L. Rev. 77, 78-79 (1993) (estimating at least 5 million and up to 18 million Indians upon contact); U.S. Senator Daniel Inouye, *Preface*, *in* Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S.

different societies; an exchange of goods and services between the citizens of Indian Nations, colonies, and European Nations.

Since the founding of the republic, every generation of Americans and their elected officials, local and national, has debated who should control and distribute some form of wealth in Indian Country, actual or potential. Many of these debates materialized into federal Indian policies such as removal, allotment, Indian reorganization and termination.[17] It is revealing to note that each of these historic policies resulted in non-Indian control of wealth in Indian Country, substantially diminishing the tribal tax base and tribal governments' ability to provide services.[18]

Indian tax law has always been, and continues to be, taxation without representation. For instance, the legal and political status of tribal governments and tribal citizens has consistently changed throughout American history and wealth from Indian Country simultaneously, and now predictably, materializes into regulatory control by other governments and becomes public services for non-Indians. Because of the overwhelming nature of examining all forms of taxation in Indian Country, the focus of the inquiry will concentrate on two subjects of taxation, each representing a primary source of revenue in Indian Country: (1) persons and (2) entities.

Constitution ix (1992) (estimating the indigenous population to be a minimum of 10 million and as many as 50 million); Francis Jennings, The Invasion of America: Indians, Colonialism, and the Cant of Conquest 30 (1975) (estimating the aboriginal population to be between 10 and 12 million).

[17] *See e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189 (1999) (describing that, in 1830, Congress authorized President Jackson to "convey land west of the Mississippi to Indian tribes those chose to 'exchange the lands where they now reside, and remove there'") (quoting 4 Stat. 411, 412 (1830)); The General Allotment Act, Ch. 119, 24 Stat. 388; The Indian Reorganization Act of 1934, 48 Stat. 984; The Termination Act of 1953, H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

[18] Demands by local political officials and state citizens for Indians to "pay their share," of tribal gaming proceeds represents a modern reincarnation of old federal Indian policies that invariably results in further erosion of tribal authority over their sovereign tax bases.

A. PERSONS

1. Non-Indians

From the first European contacts in North American, the relationship of Indian tribes to other governments, and their respective citizens, was critical to international trade and diplomacy. However, the Constitution's design of exclusive federal authority to regulate commerce and treaties with Indians morphed into control of internal Indian commerce and eventually extended to regulation of all persons in Indian Country.[19] Despite delegating its authority to deal with Indian tribes to the federal government, state and local governments continue to assert jurisdiction over wealth in Indian Country – a power increasingly affirmed by the federal courts, especially over the last forty five years.

a. Colonial Trade

Prior to ratification of the Constitution, colonies regulated trade with Indians.[20] "The whole Indian trade . . . was of inestimable importance to the colonies."[21] The Indian fur trade was a significant source of wealth for colonists and therefore subject to strict colonial control.[22] Despite the importance of wealth created from Indian commerce, colonial regulation of Indian trade was a failure.[23] The individual traders were unscrupulous and dishonest in their dealings

[19] For a comprehensive analysis of federal power in Indian Country, see Nell Newton, *Federal Power in Indian Affairs,* 132 U. Pa. L. Rev. 195 (1984); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AMER. BAR FOUND. RE. J. 1; Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. Rev. 219 (1986); Philip P. Frickey, *A Common Law For Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L.J. 1 (1999); VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO (University of Oklahoma Press 1988) (1970). *See also, Haaland v. Brackeen*, 599 U.S. __ (2023) (Gorsuch, J., concurring, Slip Op. 13-36), and the amicus brief submitted in *Brackeen* by Professor Greg Ablavsky: ablavskyamicus.pdf (wordpress.com).

[20] Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs*, 69 B.U. L. Rev. 329 (1989) (discussing history of Indian policy before the Revolutionary War); *See* Curtis G. Berkey, *United States - Indian Relations: The Constitutional Basis*, *in* EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION 189-208 (1992).

[21] FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834 p. 8 (First Bison Book ed. 1974) (1962); accord HENRY F. DE PUY, A BIBLIOGRAPHY OF THE ENGLISH COLONIAL TREATIES WITH THE AMERICAN INDIANS INCLUDING A SYNOPSIS OF EACH TREATY (1917).

[22] FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834, p. 8 (First Bison Book ed. 1974) (1962).

[23] *Id*. at 9.

with Indians. Tribal government leaders lost trust in colonial leaders due to a lack of uniform dealing by licensed and colonial officials.[24]

When the original thirteen colonies formed the Articles of Confederation, Indian trade and land continued to be subject to intense debate.[25] The Continental Congress agreed that the individual states maintained a veto right over Indian issues within what they viewed as their geographical boundaries:

> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States provided that the legislative right of any State within its own limits be not infringed or violated.[26]

The state legislative veto right almost tore the confederacy apart before ratification of the Constitution. Constant conflict existed among the colonies and tribal governments. Moreover, the national government held minimal power over individual states that sought to control Indian commerce and land. Eventually, states delegated their authority to deal with Indian tribes to the federal government.

Article I, Section 8 of the United States Constitution delegates to Congress exclusive authority "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This power was intended to address a fundamental flaw in the text of the Articles of Confederation, which read:

> The United States in Congress assembled shall also have the sole and exclusive right and power of…regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."[27]

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[24] *Id*.

[25] *See e.g.*, *Oneida Indian Nation v. New York*, 860 F.2d 1145 (2d Cir. 1988).

[26] Art. IX, Paragraph 4 of the Articles of Confederation.

[27] 1 U.S.C. Organic Laws.

This provision in the Articles gave authority to regulate trade with Indians to both the Continental Congress, and to the states within their borders—what proved to be a policy disaster. In the Federalist No. 42, James Madison described the purpose of the Indian Commerce Clause as the fix to the mess the bifurcated authority contained in the Articles of Confederation had created:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

b. Federal Interests

The Founding Fathers were acutely aware of the importance of alliances with tribal governments, including with respect to the United States' military, trade and diplomacy interests. The constitutional framers sought and received, by express colonial delegation, exclusive national authority to regulate commerce with Indian tribes, a significant trade venue and source of wealth.[28] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes* . . . ."[29]

[28] Charles Beard, An Economic Interpretation of the Constitution of the United States (1913); Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs*, 69 Boston University Law Review 329-85 (1989); American political officials remained concerned about possible alliances, trade and diplomatic, between tribal governments and other European countries. *See e.g.*, Act of January 17, 1800, 2 Stat. 6 ("An Act for the preservation of peace with the Indian tribes"); Vine Deloria, Jr. and David E. Wilkins, *Tribes, Treaties and Constitutional Tribulations* (2000).

[29] U.S. CONST. art. I, § 8, cl. 3 (emphasis supplied). For insight on the origin and meaning of this clause, see Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055 (1995); Robert Laurence, Indian Commerce Clause, Arizona L. Rev. (1981). In some instances, the power to regulate Indian trade had been delegated by treaty from several tribes to the United States. FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 69-70 (University of New Mexico Press Reprint 1971) (1942). *See e.g.*, The Treaty of September 17, 1778, with the Delaware Nation, Article 5: "a well-regulated trade, under the conduct of an intelligent, candid agent . . ."

With exclusive commerce power, federal officials negotiated hundreds of treaties with tribal governments, seeking peace, friendship, and exclusive trade.[30] The federal-tribal relationship, at least initially, resulted in federal regulation of non-Indians seeking to do business with Indian Nations and their citizens.[31] In 1790, for example, Congress enacted the Indian Trade & Intercourse Act ("Nonintercourse Act")[32] to require licenses of Indian traders by the federal government, license revocation for violations of the Act, and property forfeiture for those trading without a license.[33]

Early deviations from the subject of trade revealed that the federal government sought to regulate more than just commerce.[34] After the War of 1812, however, the Americans purged the remaining British presence in the Great Lakes region, creating a paradigm shift in trade and political relations with Indian tribes.[35] With exclusive trade relations, in fact and in law, the federal

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[30] *See e.g.*, 1825 Treaty with Crow Tribe, preamble: "For the purpose of perpetuating friendship which has heretofore existed . . . "; 1825 Treaty with the Crow Tribe, Article 4: "the United States agree to admit and license traders to hold intercourse with said tribe, under mild and equitable regulations: in consideration of which, the Crow tribe bind themselves to extend protection to the persons and property of the traders, and the persons legally employed under them, whilst they remain within the limits of their district of country." Despite America's victory over the British in the Revolutionary War, trade continued between Indian tribes and England. In the 1795 Treaty of Greenville, the British sought to continue their trade and political relationship with Indian tribes by negotiating a withdrawal from the United States that sought to affirm their longstanding commitment to continued tribal sovereignty. Treaty of Greenville August 3, 1795.

[31] *See* Robert N. Clinton, *There is No Federal Supremacy Clause For Indian Tribes*, 34 Ariz. St. L.J. 113-260 (2002). In fact, Indian traders must still obtain a license to do business in Indian Country from the federal government.

[32] Act of July 22, 1790, ch. 33, 1 Stat. 137. *See also* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834 1-277 (First Bison Book ed. 1974) (1962); FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIAN 1-47 (Abridged ed., University of Nebraska Press 1986) (1984); *accord* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 69.

[33] *Id*.

[34] The Act regulated the sale of Indian lands and crimes committed by whites against Indians. *Id*. Several amendments were made to the 1790 Nonintercourse Act, with two provisions directly relevant to this paper. First, in 1793, Congress provided that Indians within the jurisdiction of any of the individual states shall not be subject to trade restrictions. Act of March 1, 1793, Section 13, 1 Stat. 329. Second, in 1796, Congress required passports for individuals traveling into Indian Country. Act of May 19, 1796, Sec. 3, 1 Stat. 469. In 1802, Congress made the Nonintercourse Act permanent and added a provision to prohibit liquor in Indian Country. Act of March 30, 1802, 2 Stat. 139.

[35] In the early nineteenth century, the federal government negotiated treaties of alliance with the goal to eliminate the European powers from the territorial boundaries of the United States. *See* Treaty of Alliance Between the United States and France, Feb. 6, 1778; Treaty of Aranjuez, April 12, 1779.

government began regulating subject areas that far exceeded the original, binding intent of the Constitution and treaties entered into by the United States and tribal governments.[36]

In 1817, for example, Congress passed the first Indian removal act, relocating tribal governments surrounded by the State of New York, and amended the Nonintercourse Act to provide for general federal enclave jurisdiction over both Indians and non-Indians in Indian Country.[37] In 1834, Congress enhanced federal jurisdiction in Indian Country by directly regulating liquor trade and by creating the Department of Indian Affairs.[38] Similar to Congress, the executive and judicial branches of the federal government initially recognized federal actions in Indian Country to be limited to non-Indians, but then shortly thereafter facilitated federal control of all commerce in Indian Country.

c. State Interests

As a historical matter, states delegated their authority to Congress to regulate Indian commerce. Consequently, in principle, states should not have regulatory authority, including the power to tax, over Indian tribes or their members for activities within Indian Country.[39] However, as illustrated above, a closer examination of federal and state decisions reveal that states exercise a substantial degree of regulation in Indian Country and collect a significant amount of public revenue.

After monopolizing Indian trade and then extending its regulations to many aspects of Indian life, the federal government displaced tribal governments from a traditionally recognized local government function. Because federal management of Indian affairs is pervasive, the Supreme Court held that there was also no room for a State to tax an overregulated industry of

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[36] Tecumseh's vision to band tribal communities together to stem the tide of settlers and colonies against Indians. Initially victorious, the goal of tribal unification quickly dissipated and the federal government soon learned that divide and conquer was a viable strategy to gain control over Indian affairs. *See e.g.*, Frank Waters, Brave Are My People: Indian Heroes Not Forgotten (1993).

[37] Act of Mar. 3, 1817, ch. 92, sec. 2, 3 Stat. 383. Congress, however, specifically disclaimed jurisdiction over crimes committed by Indians against Indians – a provision important to a later U.S. Supreme Court.

[38] Act of June 30, 1834, ch. 161, sec. 25, 4 stat. 729. Congress also legislatively reaffirmed the Nonintercourse Act, and subsequent amendments, which continues in substantial effect to this day.

[39] *See e.g.*, *Chickasaw Nation*, 115 S.Ct. at 2219.

Indian commerce.[40] The doctrine of federal preemption, eventually, precluded both tribal and state regulation of Indian commerce for over a century and a half.

B. Individual Indians

1. Citizenship

Historical records shed little light on the only constitutional phrase regarding individual Indians, "Indians not taxed."[41] It was clear that individual Indians that maintained their tribal relations were not taxed, and presumably not federal and/or state citizens, and therefore did not count for apportionment purposes in the U.S. House of Representatives. But the phrase implies that some Indians were taxed, setting the stage for a confusing trail of court decisions that considered the issue. Over time, the courts interpreted the phrase differently, and over further time, ignored the phrase altogether.

For most of American history, individual Indians were legally determined to be tribal citizens and not federal or state citizens.[42] Extradition provisions in treaties confirm the separate character of tribal governments and their citizens.[43] However, if an Indian severed his or her tribal relations and became assimilated, then they became subject to federal and state taxes.[44] In other words, Indians were absorbed into other governments of the American polity and were expected to "pay their fair share" even if they were not formally citizens of those governments.

In the first official opinion on Indian citizenship in 1856, U.S. Attorney General Cushing stated just because "Indians are born in the country [that] does not make them citizens of the United States."[45] Attorney General Cushing's justification for his position was blatant racism: "**It is an**

[40] *See Warren Trading Post v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

[41] "Representatives and direct Taxes shall be apportioned among the several States . . ., according to their respective Numbers, . . . and *excluding Indians not taxed*, ..." U.S. CONST. ART. I, § 2, cl. 3 (even after ratification of the fourteenth amendment in 1868, Congress retained the phrase, "excluding Indians not taxed" in Section 2 of the amendment).

[42] *See Elk v. Wilkins*, 112 U.S. 94 (1884) (holding that Indians did not automatically become citizens after ratification of the fourteenth amendment); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866) (concluding that local property taxes were not applicable to tribal Indians in Indian Country).

[43] *See* Grant Christensen, *The Extradition Clause and Indian Country*, 97 N.D. Law Review 355-374 (2022).

[44] One way for Indian women was marrying a non-Indian. She then became an American citizen. *See* Act of Aug. 9, 1888, ch. 818, § 2, 25 Stat. 392 (codified at 25 U.S.C. § 182).

[45] 7 U.S. Op. Atty. Gen. 746, 749 (1856).

incapacity of his race."[46] Cushing further explained, Indians "cannot become citizens by naturalization under existing general acts of Congress . . . [since] those acts only apply to white men, but Indians, of course, can be made citizens of the United States by some competent act of the General Government, either a treaty or an act of Congress."[47] Even though Indians could not become federal citizens by general acts of Congress, Cushing concluded that "Indians are domestic subjects of this [Federal] Government . . . ."[48]

After the Civil War, in 1868, Congress ratified the Fourteenth Amendment to the U.S. Constitution and declared: "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[49] Thus, by virtue of the Fourteenth Amendment, it seemed that Indians who were born within the territorial boundaries of the U.S. would finally be considered American citizens. Moreover, according to Attorney General Cushing, Indians were deemed "domestic subjects" of the federal government and therefore would logically fall within the meaning of "subject to the jurisdiction thereof" under the text of the Fourteenth Amendment.

In 1869, the supreme court of the Territory of New Mexico held that the Pueblo Indians were citizens and not Indians because they were industrious and hardworking, contrary to other Indians in the racist views of the court.[50] Consequently, land speculators could buy and sell Pueblo

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[46] *Id.* at 750 (emphasis supplied).

[47] *Id*. at 749-750. Even when a treaty or act of Congress provided for citizenship, further proof was often required by federal courts, including whether: the Indian changed his domicile; he had maintained tribal relations; he had ended his so-called Indian status and assimilated into mainstream society; and he had the capacity and fitness to become a U.S. citizen. *Id.* at 752-753.

[48] *Id.* at 749.

[49] U.S. CONST. amend. XIV, § 1.

[50] *U.S. v. Lucero*, 1 N.M. 422 (N.M., 1869). In fact, the court held that they were originally Mexican citizens and after the Treaty of Guadalupe Hidalgo they chose to accept American citizenship. Again, blatant racism was evident on the face of the decision:

> Land was intended and designed by Providence for the use of mankind, and the game that it produced was intended for those too lazy and indolent to cultivate the soil, and the soil was intended for the use and benefit of that honest man who had the fortitude and industry to reclaim it from its wild, barren, and desolate condition, and make it bloom with the products of an enlightened civilization. **The idea that a handful of wild, half-naked, thieving, plundering, murdering savages should be dignified with the sovereign attributes of nations, enter into solemn treaties, and claim a country five hundred miles wide by one**

land and were not barred by the Federal Nonintercourse Act. In 1871, a federal district court in Oregon held that the Fourteenth Amendment's grant of citizenship did not include a child born to tribal Indians.[51] Even though the child was born within the territorial limits of the United States, the court reasoned that Indians maintain their primary allegiance to their tribe and not the federal government.[52]

> **thousand miles long as theirs in fee simple, because they hunted buffalo and antelope over it, might do for beautiful reading in Cooper's novels or Longfellow's Hiawatha, but is unsuited to the intelligence and justice of this age, or the natural rights of mankind**. **The government of the United States, while thus dignifying these savages with the title of quasi nations, with whom the United States has, from time to time, and quite often, entered into stipulations to purchase their lands, have generally purchased at an average of about two cents an acre, and then sold it out to the people at from one dollar and a quarter to ten dollars and fifty cents per acre, thus making a speculation off of the Indian lands of over fifty millions of dollars, if their title is anything but an ingenious and benevolent fiction**. This property of over fifty millions of dollars, the treaties with the Indian tribes and sales of public lands to the people will demonstrate. Let us now look at the pueblo Indians of New Mexico, and see if there is anything in their past history or present condition which renders applicable to them a set of laws designed and intended to regulate the trade and intercourse of civilized man with **wandering tribes of savages**. Columbus, the daring hero of the seas, discovered America in 1492. December 11, 1620, the pilgrim fathers landed on a granite bowlder lying on the shore of Plymouth bay, in the new world. Now, it is worthwhile to know, that in 1530, ninety years before that event, Alsar Nunie Cohega de Baca, Alonzo del Castillo, Alejandro Andres Dorantes, and Estefana, a blackamoor, passed from the gulf of Mexico through Louisiana and Texas into New Mexico; spent several years in this valley of the Rio Grande, visiting the various villages of pueblo Indians in New Mexico during the year 1534, and passing south-west in May, 1536, and near the Pacific ocean, at the village of San Miguel, in Sonora, and finally reached the City of Mexico, after seven years' wandering in the wilderness. Our timid forefathers, who peeped out into the wilderness from their colony of Plymouth, are not to be compared to the true Spanish adventurers who planted the cross of civilization two thousand miles distant, in the valley of the Rio Grande, ninety years prior to their arrival in the new world.

Id. at *2 (emphasis added).

[51] *McKay v. Campbell*, 16 F. Cas. 161 (D. Or. 1871).

[52] *Id*.

In 1879, in *U.S. v. Cook*,[53] a federal territorial court held that when tribal members dissolve their tribal relations, they become assimilated and can choose citizenship of another government. This test of tribal relations and the citizenship question continued in the federal courts for several decades until the 1924 Indian Citizenship Act.[54] The federal courts, then, served as a de facto administrator of how Indians could become American citizens.

In 1884, in *Elk v. Wilkins*,[55] the U.S. Supreme Court affirmed earlier federal courts' interpretation of the "Indians not taxed" language in the Fourteenth Amendment, holding that such language barred American citizenship for Indians.[56] In denying American citizenship, the Supreme Court said, "The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States."[57] Furthermore, the Court stated that "General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[58]

Eventually, the *first Americans* obtained citizenship and the right to vote in the United States in 1924.[59] Prior to this grant of citizenship, federal laws were already extended to include taxation over indigenous peoples in Indian Country, classic taxation without representation.[60] Similar to the American colonists, Indians experienced taxation without representation in the nineteenth and early twentieth centuries, when Indians were not considered citizens of the United States, yet they were held subject to federal taxation.

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[53] 5 Dill. 453, 25 F. Cas. 695, No. 14891 (C.C. Neb. 1879).

[54] *See e.g.,* Willard Hughes Rollings, *Citizenship and Suffrage: Native American Struggle for Civil Rights in the American West*, 5 Nevada Law Journal 126 (2004).

[55] 112 U.S. 94 (1884).

[56] *Id.* Eventually, on June 2, 1924, Congress granted national citizenship to all individual Indians born within the territorial boundaries of the United States. The Act of June 2, 1924, ch. 233, 43 Stat. 253 (*repealed and incorporated into* 8 U.S.C. ' 1401).

[57] *Elk v. Wilkins*, 112 U.S. at 94.

[58] *Id.* at 100.

[59] In 1924, Congress granted national citizenship to all Indians. Act of June 2, 1924, ch. 233, 43 stat. 253.

[60] *See, .e.g, The Cherokee Tobacco*, 78 U.S. 616 (1870) (federal tax laws); *U.S. v. Kagama*, 118 U.S. 375 (1886) (federal criminal laws).

Problems regarding the legal status of Indians continued despite the 1924 Indian Citizenship Act. In 1942, the noted Indian law scholar Felix Cohen observed, "large sections of our population still believe Indians are not citizens, and recent instances have been reported of Indians being denied the right to vote because the electoral officials in charge were under the impression that Indians have never been made citizens."[61] The uncertainty of Indian citizenship still continues, as illustrated by decades of litigation since passage of the 1924 Citizenship Act.[62]

2. Early Tax Application

The earliest agency interpretations concluded that federal taxes did not apply to Indians.[63] Interestingly, these decisions held that internal revenue laws did not apply to individual Indians even when they had been later statutorily confirmed as American citizens. It appears that these decisions followed the prior citizenship decisions wherein the federal agencies and courts held that general federal acts did not apply to individual Indians unless Congress expressly states such.

3. The Paradox: Indian Taxation Without Representation

Two years after Congress ratified the Fourteenth Amendment, the U.S. Supreme Court considered the issue of Congress's power to tax tobacco products manufactured and sold by

[61] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 152 (1942).

[62] *See Meyers v. Board of Educ. of San Juan School Dist.*, 905 F. Supp. 1544, 1558 (D. Utah 1995); *Goodluck v. Apache County*, 417 F. Supp. 13, 15 (D. Ariz. 1975) (concluding that state citizenship extends to individual Indians because it is derivative of federal citizenship); *Montoya v. Bolack*, 372 P.2d 387, 394 (N.M. 1962) (holding that Indians cannot be denied their right to vote as long as they comply with statutory voting requirements); *Harrison v. Laveen*, 196 P.2d 456, 458 (Ariz. 1948) (holding that Indians residing within the geographical boundaries of Arizona were state citizens).

[63] 2 U.S. Op. Atty. Gen. 340 (May 26, 1830) (proper good and effects of Indians are not liable to duty); 12 U.S. Op. Atty. Gen. 208, 210 (July 24, 1867) ("Our internal revenue system has not in any instance or for any purpose been extended over the Indian Country" and the internal revenue act therefore did not apply to cotton grown in Choctaw country).

Cherokee Indians within Indian Country[64] in the *Cherokee Tobacco* case.[65] The Cherokee Nation and the U.S. had negotiated a treaty in 1866, which provided for the taxation of products sold *outside* of Indian Country.[66] Shortly after the treaty, Congress passed the internal revenue act of July 20, 1868, which imposed taxes on liquor and tobacco "produced anywhere within the exterior boundaries of the United States."[67]

A Cherokee Indian, Elias Boudinot, argued that the Cherokee territory was outside of any revenue collection district of the U.S. and that the manufactured tobacco, raw material, and other property had never been within any collection district; therefore, he did not have to comply with the internal revenue laws of Congress.[68] Further, Boudinot claimed that the Cherokee Indians were in compliance with Article 10 of the 1866 Treaty: "the revenue laws were complied with as to all tobacco sold or offered for sale outside of said Indian Country . . . ."[69] Despite the express treaty language, the U.S. Supreme Court upheld the application of the federal tobacco taxes on the products manufactured and sold by individual Cherokees *within* Cherokee territory.[70]

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[64] In 1948, Congress codified the term "Indian Country" and defined it to include "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151. Although this statutory definition was originally intended for criminal jurisdiction, it has been applied to civil jurisdiction, including tax, as well. *DeCouteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995).

[65] 78 U.S. 616 (1870).

[66] *The Cherokee Tobacco*, 78 U.S. at 618. Article 10 of the 1866 Treaty stated, "Every Cherokee Indian and freed person residing in the Cherokee nation shall have the right to sell any products . . . and to ship and drive the same to market without restrain, *paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory." Id.* (emphasis added).

[67] *The Cherokee Tobacco*, 78 U.S. at 617-618 (citing 15 Stat. at Large 167, Section 107). Section 67 of the 1868 Act required that stamps "be sold only to manufacturers of tobacco in the respective collection districts." *Id.* at 618. The federal statute did not explicitly mention Indians, tribes, or their territory.

[68] *The Cherokee Tobacco*, 78 U.S. at 617.

[69] *The Cherokee Tobacco*, 78 U.S. at 617.

[70] *Id.* at 621. Additionally, although not at issue, the Supreme Court held that the internal revenue laws extended to liquor products sold within Indian territory. *Id.*

The Supreme Court gave several reasons for affirming the federal tax. First, "The Indian territory is admitted to compose a part of the United States."[71] Second, the Supreme Court said, "Crowds, it is believed, would be lured thither by the prospect of illicit gain."[72] Third, regarding the direct conflict between the federal statute and Indian treaty, the Supreme Court decided, "In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered."[73] The Supreme Court concluded that "Congress not having thought proper to exclude them, it is not for this court to make the exception."[74] The Court also stated a common rationale for taxpayer liability, "As regards those articles only the same duties are exacted as *from our own citizens*. The burden must rest somewhere. Revenue is indispensable to meet the public necessities."[75] Thus, the Supreme Court held that federal tobacco taxes applied to the products manufactured and sold by Cherokee Indians ***within*** the Cherokee territory. The Court's decision was obviously results-oriented.

Although Indians were held to be subject to federal taxation, as discussed earlier, they were legally determined not to be U.S. citizens at that time. How can the U.S. Supreme Court's decisions in *Elk v. Wilkins* and *Cherokee Tobacco* be reconciled? How could Indians be taxed if they were not American citizens?[76] Justice Pound aptly described the anomaly of permitting federal taxation of noncitizen Indians: "they are at once nationals and without a nation."[77] The *Cherokee Tobacco* case was the first U.S. Supreme Court decision affirming the federal tax power over individual Indians within Indian Country.[78] *Cherokee Tobacco* has provided the foundation

[71] *Id.* at 619.

[72] *Id.* at 620.

[73] *Id.* at 621. The Court also said that "A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. *Id.*

[74] *Id.* at 620. The Court said, "Further discussion of the subject is unnecessary. We think it would be like trying to prove a self-evident truth." *Id.* The Court also added, "If a wrong has been done the power of redress is with Congress, not with the judiciary . . . ." *Id.* at 621.

[75] *Id.* at 621 (emphasis added).

[76] Today, there is one major exception for individual Indians from federal taxes. *Squire v. Capoeman*, 351 U.S. 1 (1956) (holding that an Indian owner of allotted land was exempt from federal taxes for income received from his sale of timber derived directly from his allotment).

[77] Cuthbert W. Pound, *Nationals Without a Nation: The New York State Tribal Indians*, 22 Colum. L. Rev. 97, 98 (1922). Justice Pound was referring to federal and state power over noncitizen Indians. *Id.*

[78] A little over a century later, the U.S. Supreme Court affirmed the state governments power to assess taxes upon tobacco products sold in Indian Country. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

for imposing all other federal taxes against individual Indians within Indian Country and its reasoning is generally accepted by federal courts today.[79]

Over time, the *Cherokee Tobacco* decision has been generally applied to uphold federal taxation of Indians in Indian Country. Later decisions summarily held Indians were subject to federal tax laws.[80] In *Choteau v. Burnet*,[81] for example, the Supreme Court held that a citizen of the Osage Nation was liable for federal taxes on his mineral headrights income that he received from his allotment. Specifically, the Court held that internal revenue laws need not state that Indians were subject to federal taxes in order for them to be liable.[82]

Further, the U.S. Supreme Court continued with broad application of general tax rules over constitutional text, treaties, and federal Indian law precedent and. The Court said that he was not "exempt" from federal taxes because he was an Osage Indian and because his income derived from his allotted, trust land.[83] The Court, thus, said his exemption from tax was not clearly expressed in a treaty or statute, and therefore he was taxable – just like any other American citizen.[84] In 1935, the Court reaffirmed *Choteau* in *Superintendent v. Commissioner*,[85] stating that

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The *Moe* decision is a significant barrier to economic development in Indian Country because it affirmed the ability of three sovereigns to tax the same activity. For an insightful critique of the *Moe* decision, *see* Russel Lawrence Barsh, *The Omen: Three Affiliated Tribes v. Moe and the Future of Tribal Self-Government*, 5 Am. Indian L. Rev. 1 (1977).

[79] *See e.g.*, *Choteau v. Burnet*, 283 U.S. 691 (1931); *Holt v. Com'r*., 364 F.2d 38 (8th Cir. 1966), *cert. denied*, 386 U.S. 931 (1967); *Fry v. U.S*., 557 F.2d 646 (9th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *Lazore v. Com'r.*, 11 F.3d 1180 (3rd Cir. 1993).

[80] *Choteau v. Burnet,* 283 U.S. 691 (1931)*; Superintendent v. Commissioner*, 295 U.S. 418 (1935).

[81] 283 U.S. 691 (1931).

[82] The Court said that Congress intended "to levy the tax with respect to all residents of the United States and upon all sorts of income." *Id*.

[83] *Id.* In the larger federal policy context, the federal government divested tribes of two-thirds of their land base in the General Allotment Act. It carved aboriginal territory into two main parts: (i) specified acreage parcels to individual tribal citizens; and (ii) the remaining tribal lands, called surplus, awarded to non-Indian settlers, territories, states, and/or kept by the federal government. The federal government held the former parcels in trust for the Indians until such time that they would transfer fee title to the allottee "free of all charge or encumbrance whatsoever." Act of February 8, 1887, 24 Stat. 388.

[84] *Id*.

[85] 295 U.S. 418 (1935).

"reinvestment" income originally derived from an Indian allotment was taxable because it was not expressly exempted or excluded from taxation by treaty or an act of Congress.[86]

4. Limited Exception

In 1956, in *Squire v. Capoeman*,[87] the Court held that an individual Indian allotment owner was not subject to federal income tax on income he had received from the sale of timber from his allotted land. The capital gains tax did not apply to income from his land that was allotted under the 1887 General Allotment Act.[88] Although acknowledging the general rule concerning tax exemptions and stating that Indians are subject to federal income taxes like other American citizens, the Court held that income derived directly from Indian allotments were exempt from such taxes.[89]

In holding that such allotments were "exempt" from federal income tax, the Court reasoned that the General Allotment Act was ambiguous and thus the Indian canons of construction were applicable – leading to the conclusion that the statute's ambiguity should be construed in favor of the Indians.[90] Despite the Supreme Court's ruling, questions remained concerning the scope of the *Squire* exception. For example, issues regarding what type of land qualified for the exemption and when was income "derived directly" from the allotted Indian land continued. A series of revenue rulings followed to clarify the exemption and it largely resulted in a narrow construction of the *Squire* exemption.[91]

And subsequent court decisions followed the IRS general tax rule interpretations and further limited the types of allotments and allowable uses on such allotments that qualified for the

[86] *Id*.

[87] 351 U.S. 1 (1956).

[88] *Id*.

[89] *Id*.

[90] *Id*.

[91] *See e.g.*, Rev. Rul. 56-342 (listing examples of income "derived directly from land); 58-64; 60-377; 67-284. The latter provided a five-part test to determine whether an enrolled citizen of a tribal government qualified for the exemption: (i) land was in trust with federal government; (ii) land is restricted and allotted for individual Indian; (iii) income was derived directly from land; (iv) statute, treaty or other authority expresses congressional intent that Indian allotment is used to protect Indian until he or she becomes competent; and (v) clear congressional intent exists that land is not subject to taxation. *Id*.

Squire exemption.[92] More recent cases involving income from operating smoke shops and gaming facilities have followed the same interpretations and precedent and held that type of revenue is not derived directly from the land in Indian Country[93] and is therefore subject to federal income tax. In similar cases, income from a motel and restaurant[94] or tourism business[95] by Indians in Indian Country were held to be not derived directly from Indian land and therefore taxable.

5. Modern Cases

In general, courts have concluded that state citizenship for individual Indians creates a tax nexus that legitimizes local tax powers in Indian Country.[96] In addition, the U.S. Supreme Court has held that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,"[97] and tribal governments cannot tax a non-Indian trading post operating in Indian Country.[98] Consequently, Indian tribes and their citizens continue to exhaust valuable

[92] *See Critzer v. United States*, 597 F.2d 708 (Ct. Cl. 1979) (*en banc*), cert denied, 444 U.S. 92 (1979); *U.S. v. Anderson*, 625 F.2d 910 (9th Cir. 1980); *Holt v. Commissioner*, 364 F.2d 38 (8th Cir. 1966), cert. Denied, 386 U.S. 931 (1967); *Wynecoop v. Commissioner*, 76 T.C. 101, (U.S.T.C. 1981*); Red Lake Band of Chippewa Indians v. U.S.*, 861 F. Supp. 841 (D. Minn. 1994), aff'd, 62 F.3d 1421 (8th Cir. 1995). *Cf. Stevens v. Commissioner*, 452 F.2d 741 (9th Cir. 1971).

[93] *Dillon v. U.S.*, 792 F.2d 849, 854 (9th Cir. 1986); *Hoptowit v. Comm'r*, 709 F.2d 564, 566 (9th Cir. 1983); *Farris v. Comm'r*, T.C. Memo 1985-346, *aff'd*, 823 F.2d 1552 (9th Cir. 1987).

[94] *Critzer v. U.S.*, 597 F.2d 708, 713 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 920 (1979).

[95] *Saunooke v. U.S.*, 806 F.2d 1053, 1056 (Fed. Cir. 1986), *aff'g*, 9 Cl. Ct. 537 (1986).

[96] *See e.g.*, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (holding that nonmember Indians are more like non-Indians because they are state and not tribal citizens); *LaRock v. Wisconsin Dept. of Revenue*, 621 N.W.2d 907 (Wisc. 2001) (holding that Menominee tribal citizen living on Oneida land is a state citizen for Wisconsin income tax purposes).

[97] *Montana v. U.S.*, 450 U.S. 544, 565 (1981).

[98] *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

resources to protect the vestiges of their separate sovereignty, which includes the power to tax, [99] within Indian Country.[100]

For example, in a typical federal-tribal tax case in 1982, the Ninth Circuit considered an action by an Indian tribe to recover federal excise taxes paid in connection with the operation of a tribal sawmill.[101] The Tribe owned and operated a sawmill to process and market timber derived from the reservation.[102] Four separate federal excise taxes were at issue: (1) highway motor vehicle tax; (2) diesel fuel tax; (3) special fuel tax; and (4) manufacturing tax assessed on truck chassis assembled by the Tribe.[103] The Tribe argued that it was exempted from such taxes because states were exempt; and that federal statutes and the tribe's treaty impliedly exempted it from the federal excise taxes.[104]

The Court responded to the tribe's first argument: "It follows that the state government exemption is not applicable to the Tribe merely because it is recognized as a governmental entity

[99] *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (holding that the Navajo Nation could not collect a hotel occupancy tax assessed against a non-Indian conducting business within the territorial boundaries of Indian Country); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) (affirming the Tribe's right to tax a non-Indian company doing business within Indian Country, even without federal approval of the tribal tax ordinance); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (concluding that the Tribe had the right to impose a severance tax on a non-Indian business extracting resources from Indian Country).

[100] *See generally* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE (2nd printing 1999) (1997); Philip P. Frickey, *A Common Law For Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L.J. 1 (1999); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme court in Indian Law*, 84 Calif. L. Rev. 1573 (1996); Russel L. Barsh, *Is There Any Indian "Law" Left? A Review of the Supreme Court's 1982 Term*, 59 Wash. L. Rev. 863 (1984); Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 Tulsa L.J. 267 (2000).

[101] *Confederated Tribes of the Warm Springs Reservation of Oregon v. Kurtz*, 691 F.2d 878 (9th Cir. 1982). This case had been decided prior to the 1982 Tribal Governmental Tax Status Act and therefore is an accurate discussion of the type of analysis employed when conflicts resulted from federal taxes assessed against tribal operations, government or business.

[102] *Id.* at 879 ("Timber located on the reservation is the Tribe's principal resource and principal source of revenue").

[103] *Id.*

[104] *Id.* at 880.

with the limited powers of a quasi-sovereign. A specific exemption remains necessary."[105] Further, the court added, "But 'wishing' an ambiguity does not make. Courts are not free to create ambiguities in order to serve the interests of Indians."[106] Finally, and perhaps most importantly, the Court recognized that the Tribe's 1855 Treaty is silent on the issue of federal taxation.[107]

The Court ultimately concluded, however, that there is no exemption for Indian tribes from the federal excise taxes at issue.[108] In sum, the *Kurtz* case and its analysis is emblematic of the fundamental misunderstanding of the legal status of Indian tribes in America: a third sovereign with territorial jurisdiction over Indian Country, unless granted to other governments by treaty or expressly authorized by Congress.

In the last forty-five years, litigants, other than tribal citizens, have been extremely successful in asserting their claims against tribal governmental authority within Indian Country because of *Kurtz* and other fundamentally wrongly decided cases.[109] Simultaneously, the three

[105] *Id.* at 880. The Court also said, "Unlike state governments, however, the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." *Id.* This statement ignores principles of treaty federalism and is a recurrent theme in recent cases that continue to limit tribal sovereignty.

[106] *Id.* at 881. The Court further cited the Congressional activity leading up to the eventual 1982 Tax Status Act as justification to not find an exemption. *Id.*

[107] *Id.* at 882. The Court then erroneously cited a state tax case of a tribal business conducting a ski resort off of the reservation as direct authority for the following well-accepted proposition: "absent a definitely expressed exemption," Indian tribes and their members are subject to federal taxation. *Id.*

[108] *Id.* at 882-883. Moreover, the Court said, "We deal here with an explicit federal Indian policy and an explicit federal tax statute that does not exempt the taxpayer. The Tribe must address its prayer for relief to Congress, not the courts." *Id.* at 883. Obviously a valid federal-tribal treaty is not a federal policy, but rather the supreme law of the land. According to the Indian canons of construction, the conflict must be resolved in favor of the Indian tribes. *See Menominee Tribe v. United States*, 391 U.S. 404 (1968).

[109] *See e.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that, as a necessary result of their dependent status, tribes lacked inherent criminal jurisdiction over non-Indians for crimes committed on the reservation); *Montana v. United States*, 450 U.S. 544 (1981) (holding that, as a necessary result of their dependent status, Crow tribe lacked civil regulatory jurisdiction over non-Indian land within boundaries of the reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that tribe lacked civil adjudicatory jurisdiction over a car accident between non-Indians on a state highway within the boundaries of the reservation because the state right-of-way was deemed equivalent to non-Indian owned fee land and was therefore subject to the *Montana* holding).

primary governments (tribal, federal, and state) in our tripartite federalism can currently tax most persons and activities within Indian Country.[110]

Ironically, many Indian reservations, such as those of COLT member tribes that are often the poorest communities in the U.S. with individual Indians having the lowest per capita income, continue to be mired in tax conflict and poverty. Therefore, it is critical to begin reconstructing tax policy in Indian Country by focusing on the evolution of federal power to tax individual Indians, tribal governments,[111] and their activities.[112] Most importantly, it is time to acknowledge and restore the original legal and policy foundation in lieu of the longstanding problematic structure of Indian tax law, beginning with Treasury treating tribal entities as nontaxable choices by tribal nations regardless of revenue.

In this written testimony, COLT seeks to restore a legal framework for the federal-tribal relationship that is analogous to federal-state relationship, beginning with intergovernmental immunity. With a clear doctrinal coherence to the original federal-tribal relationship, COLT believes that the tribal-state relationship can be more appropriately addressed. Moreover, the pre-constitutional time period of this country contains the information necessary to address a root cause of current Indian tax problems; namely, misinterpretations and omissions of Indian tribes,

[110] *See e.g.*, *The Cherokee Tobacco*, 78 U.S. 616 (1870) (holding that Congress could impose federal taxes on tobacco products manufactured and sold by Indians in Indian Country); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (affirming the ability of tribes and states to tax cigarette sales to non-Indians made within Indian Country); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (holding that state and tribe can tax cigarette sales to non-Indians and nonmember Indians made within Indian Country); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (affirming state power to impose, in addition to the tribe, severance and privilege taxes on the production of oil and gas by a non-Indian lessee in Indian Country); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (upholding tribe's power to impose severance tax on non-Indian business in Indian Country). *See e.g.*, *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989); *Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, *Montana v. Crow Tribe*, 484 U.S. 997 (1988).

[111] For an analysis of Indian taxation before tribal gaming, see Richard L. Perez, *Indian Taxation: Underlying Policies and Present Problems*, 59 Cal. L. Rev. 1261, 1261-1264 (1971); Sandra Jo Craig, *The Indian Tax Cases - A Territorial Analysis*, 9 N.M. L. Rev. 221, 221-223 (1979); Russel Lawrence Barsh, *Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique*, 54 Wash. L. Rev. 531, 533-534 & 542-544 (1979); JAY VINCENT WHITE, TAXING THOSE THEY FOUND HERE: AN EXAMINATION OF THE TAX EXEMPT STATUS OF THE AMERICAN INDIAN 1-191 (1972); James R. McCurdy, *Federal Income Taxation and the Great Sioux Nation*, 22 S.D. L. Rev. 296, 296-299 (1977).

[112] Although COLT's focus is on federal taxation in Indian Country, other legal issues contribute to economic development problems in Indian Country. *See e.g.*, 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 (1994); Mark A. Jarboe, *Fundamental Legal Principles Affecting Business Transactions in Indian Country*, 17 Hamline L. Rev. 417 (1994); John F. Petoskey, *Doing Business With Michigan Indian Tribes*, 76 Mich. B.J. 440 (1997).

individual Indians, and their relationship to the federal and state governments in American political and legal history.

The early erroneous case decisions continue to be relied upon by succeeding generations of jurists and politicians and remain the cornerstone for characterizing the federal-tribal relationship even though the opinions are internally inconsistent and contain questionable rationale, contradictory language, and inaccurate history.[113] Consequently, a careful examination is necessary to correct the distortions, to include omitted history, and to purge untenable reasoning. The process to restore conceptual clarity to the federal-tribal relationship is absolutely critical to reestablish economic dignity in Indian Country.

III. THE CONSTITUTION AND INDIAN TRIBES

American republican democracy requires that each sovereign government, the means by which citizens make and effectuate collective decisions, has the authority to exercise power over the legal persons and activities in its respective domain: "[t]hat to secure these Rights [(Life, Liberty, and the Pursuit of Happiness)], Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . . ."[114] John Locke's political philosophy provides an underlying theory for political society and government: the right and power of governing is a fundamental, individual, natural right and power, simultaneously considered with preserving oneself and the rest of mankind.[115] Consent of the governed is the fundamental guiding principle of American republican democracy. Therefore, in the United States, consent is a prerequisite to federal, state, and tribal governmental action, including the power to tax.

At the Constitutional Convention, selected representatives ratified an enduring social compact, the U.S. Constitution, among all citizens of the United States.[116] The Constitutional

[113] The major decisions that continue to have an enduring impact on the rights of Indian tribes and their citizens include: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); and *Mitchel v. United States*, 34 U.S. (9 Pet. 711 (1835). The first three cases are often referred to as the Marshall Trilogy because Chief Justice John Marshall authored the majority opinion in each of those decisions.

[114] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). For the tribal perspective of the Declaration of Independence, see John R. Wunder, *"Merciless Indian Savages" and the Declaration of Independence: Native Americans Translate the Ecunnaunuxulgee Document*, 25 Am. Indian L. Rev. 65 (2000-01).

[115] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 352-353 (Peter Laslett ed., Cambridge University Press 1988) (1960). Another philosopher examines the theoretical underpinnings of the social contract and is therefore useful in analyzing American governance. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT (Donald A. Cress ed., Hacket Publishing Company 1987).

[116] *See* Robert N. Clinton, *A Brief History of the Adoption of the Constitution*, 75 Iowa L. Rev. 891 (1990).

framers created a single, uniform federal government with limited and enumerated powers. The principle of federalism emerged when the drafters created shared decision making authority between two sovereigns, the federal government and state governments, with states and their citizens reserving all powers not expressly granted to the federal government.[117] Professor Wechsler persuasively argues that, more importantly, by virtue of their very existence in American governance states have institutional safeguards against federal action (federalism): "the national political process in the United States - and especially the role of the states in the composition and selection of the central government - is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states."[118]

A. The Indian Commerce Clause

Seemingly, the legal and political framework for shared governance among all Americans was set, except one glaring omission—Indian tribes and their citizens.[119] Despite Indian tribes' close physical proximity and pre-existing sovereignty vis-a-vis the colonies, tribal representatives were not invited nor did they participate in the Constitutional Convention.[120] Despite the absence of tribal representation, the framers contemplated and eventually empowered the federal government with the right to regulate trade with Indian tribes.[121] In fact, Indian tribes, as collective

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[117] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." U.S. CONST. amend. X.

[118] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 558 (1954). Professor Wechsler notes that federal intervention in local affairs is "determined less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority." *Id.* at 544.

[119] Although Indian tribes and their citizens were not represented at the Constitutional Convention, there were numerous other people similarly excluded including women, non-property owners and blacks. For an insightful analysis of the Constitutional framers and their underlying reasons for passing the U.S. Constitution, *see* CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 1-325 (1913).

[120] Treaty negotiations evidence a different type of convention between two peoples and those compacts enumerated the power distribution between the federal government, which obtained limited and delegated powers from tribes by treaties, and Indian tribes, who reserved all powers not specifically delegated.

[121] Although the convention lacked tribal representation, the power to regulate Indian trade had been delegated by treaty from several tribes to the United States. FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 69-70 (University of New Mexico Press Reprint 1971) (1942). *See e.g.,* The 1778 Treaty with the Delaware Nation, Article 5: A well-regulated trade, under the conduct of an intelligent, candid agent . . . ." *See also* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834 1-277 (First Bison Book ed. 1974) (1962); FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIAN 1-47 (Abridged ed., University of Nebraska Press 1986) (1984).

entities, are explicitly mentioned only once in the body of the U.S. Constitution: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes* . . . ."[122]

As shown by the proportion of Congressional activity affecting Indians to overall legislation, Indian affairs occupied the main agenda of the new republic. In fact, "of the first 13 statutes enacted by the first Congress of the United States, four dealt . . . with Indian affairs."[123] Notwithstanding the magnitude and activity affecting Indian affairs, the constitutional framers did not formally establish a direct relationship between tribes and the federal and state governments.

Several scholars have argued that the same constitutional federalism principles which guide the federal-state relationship apply equally to the federal-tribal relationship.[124] Because tribes and states each possess distinct sources of sovereignty, an analogous relationship to the federal government is supported by theory and logic. Several cases illustrate the analogy and the following consistent principles: "(1) that both state and tribe pre-existed the Union as international, independent entities, (2) that they are the sources of their own sovereignty, (3) that they relinquished some measure of that sovereignty to the Union, (4) that the movement of that relinquishment was from the local entities to the central, not vice-versa, and (5) that what was not relinquished was reserved."[125]

With respect to federal authority, Indian treaties serve the same function for tribes as the Tenth Amendment does for states.[126] In 1905, in *U.S. v. Winans*,[127] the U.S. Supreme Court explicitly affirmed the treaty federalism principles in *Worcester* by interpreting the 1859 Treaty

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[122] U.S. CONST. art. I, ' 8, cl. 3 (emphasis supplied). For insight on the origin and meaning of this clause, see Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055 (1995).

[123] FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 69.

[124] FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 122-123; Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. Tol. L. Rev. 617 (1994); Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indians Tribes*, 38 Ariz. L. Rev. 963 (1996).

[125] Monette, *A New Federalism*, *supra* note 124, at 654. Professor Monette convincingly argues that several cases illustrate an analogy between the Union/state and Union/tribe relationships. *Id.* at 650-654.

[126] The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." U.S. CONST. amend. X.

[127] 198 U.S. 371 (1905).

with the Yakima Nation in an analogous fashion to the Tenth Amendment: "*the treaty was not a grant of rights to the Indians, but a grant of rights from them, B a reservation of those not granted*."[128] Importantly, in *Winans*, and with treaties and federal statutes generally, the federal government did not *grant* any rights to the tribal citizens, but instead the tribes and their citizens retained the off-reservation hunting and fishing rights that they already possessed.[129] Analogous to the Tenth Amendment, which reserves all state powers not expressly delegated to the federal government, Indian tribes retain all sovereign rights that have not been expressly divested by treaty or bilateral agreement.[130]

Felix Cohen succinctly summarized treaty federalism in his original handbook in 1942:

> From the earliest days of the Republic the Indian tribes have been recognized as 'distinct, independent, political communities,' and, as such, qualified to exercise powers of self-government, *not by virtue of any delegation of powers from the Federal government*, but rather by reason of their original tribal sovereignty. Thus treaties and statutes of Congress have been looked to by the courts as limitations upon original tribal powers, or, at most, evidences of recognition of such powers, rather than as the direct source of tribal powers.[131]

Because treaty federalism has been repeatedly affirmed by the U.S. Supreme Court in cases such as *Worcester*, *Winans*, and more recently in *Minnesota v. Mille Lacs Band of Chippewa*

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[128] *Id.* at 381 (emphasis supplied). Importantly, in *Winans*, the Supreme Court expressly recognized the source of tribal sovereignty, which was not the U.S. Constitutions, but rather: They reserved rights, however, to every individual Indian . . . ." *Id.* This recognition is analogous to the Tenth Amendment's explicit reservation of state authority to the people."

[129] *See e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (upholding the tribes' reserved treaty rights with respect to off-reservation hunting and fishing in previously ceded lands).; *United States v. Winans*, 198 U.S. 371 (1905) (holding that the tribe, pursuant to its treaty with the federal government, reserved the right to hunt and fish off-reservation); *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983) (concluding that the tribes' reserved right to hunt, fish and gather on ceded lands survived implied abrogation by later executive orders or treaties).

[130] *U.S. v. Winans*, 198 U.S. 371 (1905); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (reaffirming *Winans* construction of reserved treaty rights with respect to off-reservation hunting and fishing in previously ceded lands).

[131] FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 122.

Indians[132] and *McGirt v. Oklahoma*,[133] it continues to be the law. Presently, with respect to federal authority and local tribal power in Indian Country, treaty federalism principles continue to guide federal court decisions regarding tribal sovereignty. A fidelity to tribal-federal treaties and application of treaty federalism, with presumptive tribal tax authority within Indian Country, must be applied to the federal-tribal-state relationship due to the lack of political safeguards to protect tribal interests in Congress.

In fact, even before the U.S. Supreme Court's decision in *Mille Lacs*, several federal circuit courts of appeal relied upon treaty federalism principles to confirm inherent tribal power against imposition of federal statutes of general applicability. Therefore, an instructive analysis has reemerged with some recent federal court decisions regarding the conflict between federal statutes of general applicability, i.e., federal power, and tribal sovereignty in Indian Country. In these cases, the courts recognize and affirm treaties as well as principles of treaty federalism to bar the application of federal statutes of general applicability to Indian tribes, unless expressly stated otherwise by Congress.

B. Federal Statutes of General Applicability

Currently, there is a split among federal circuit courts of appeal regarding the operation of federal statutes of general applicability upon Indian tribes in Indian Country. Federal labor and employment laws, like internal revenue laws, are federal statutes of general applicability. Similar to internal revenue laws, most federal labor and employment laws are silent as to their applicability to tribes, with two notable exceptions.[134] Consequently, the determination as to whether these federal laws apply in Indian Country has, for the most part, been decided by federal courts.[135]

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[132] 526 U.S. 172 (1999) (reaffirming *Winans* construction of reserved treaty rights with respect to off-reservation hunting and fishing in previously ceded lands).

[133] 591 U.S. __ (2020).

[134] 42 U.S.C. §§ 2000e(b) & 2000e-2(i) (1988) (expressly excluding tribes from the definition of "Employer" in Title VII of the 1964 Civil Rights Act and explicitly sanctioning Indian preference by employers on or near reservations); 42 U.S.C. §§ 12101-12213 (1988) (expressly excluding tribes from the definition of employer under the Americans with Disabilities Act).

[135] There is hardly a political question in the United States which does not sooner or later turn into a judicial one . . ." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (1969). Alexis de Tocqueville accurately observes that in the United States the judicial branch is given the task of analyzing and deciding, for all of the American people, the difficult questions in society. *Id.*

When federal laws are silent and tribes or tribal citizens are not specifically mentioned, the application of such laws becomes an issue of treaty and statutory interpretation. Because tribal sovereignty is neither constitutionally defined nor circumscribed,[136] general federal laws should not be able to curtail tribal rights, absent tribal consent.[137]

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[138] the Supreme Court established a clear rule: a statute that uses the term "person" "does not include the sovereign" unless there is an "affirmative showing of statutory intent to the contrary."[139] "The presumption is, of course, not a hard and fast rule of exclusion, but it may be disregarded only upon some affirmative showing of statutory intent to the contrary."[140] There is no indication that Congress had any intent to regulate any tribal public entities as taxable, and under settled law, silence is an insufficient basis on which to apply a statute that would abrogate tribal rights of self-government.[141]

More generally, COLT would urge the Department to adopt the standard promulgated by Tenth Circuit where, "respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization."[142] "[I]f there [is] ambiguity . . . the doubt would benefit the tribe, for 'ambiguities

[136] *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that the Fifth Amendment does not apply to Cherokee tribal laws); *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (concluding that the First Amendment is inapplicable to Indian nations); *U.S. v. Wheeler*, 435 U.S. 313 (1978) (affirming the tribe's and federal government's right to prosecute a defendant for the same offense, which does not violate the double jeopardy clause of the Fifth Amendment).

[137] *See* David E. Wilkins, *The Reinvigoration of the Doctrine of Implied Repeals: A Requiem for Indigenous Treaty Rights*, 43 Am. J. Legal Hist. 1 (1999).

[138] 529 U.S. 765 (2000).

[139] *Id.* at 780-81.

[140] *Id*. at 781 (quotation omitted).

[141] *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17- 18 (1987); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) ("[T]he proper inference from silence is that [sovereignty] remains intact"); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002).

[142] *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010); *see also EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (Age Discrimination in Employment Act does not apply to Indian tribes) *and Donovan v. Navajo Forest Prods. Indus*., 692 F.2d 709, 714 (10th Cir. 1982).

in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence."[143]

Authority to the contrary is derived from a single sentence in *Federal Power Commission v. Tuscarora Indian Nation*,[144] which "is of uncertain significance, and possibly dictum, given the

[143] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)).

[144] 362 U.S. 99, 116 (1960). *Tuscarora* is one of the worst Indian law decisions of all time in COLT's view because it shows how a single sentence from the U.S. Supreme Court in 1960 continues to have major implications for tribes exercising their sovereign rights to develop and regulate their economies. In *Tuscarora*, the Supreme Court held that the Federal Power Act authorized the condemnation of land owned by the Tuscarora Indian Nation for the purpose of constructing a reservoir and hydroelectric facility in the Niagara River. At issue in the case was whether the Tuscaroras' land, owned in fee simple by the Tribe, qualified as a "reservation" under the terms of the FPA. If so, the FPA required a finding that the license (and therefore the condemnation of land to facilitate the license) would not interfere with the purpose of the reservation. If not, then the Tribe's land could be condemned without any additional process.

The *Tuscarora* Court analyzed the FPA's plain language as well as its legislative history and concluded that Congress's intent was clear: any lands other than those owned by the United States were not included in the definition of "reservation" in the Act. After the Court concluded Congress's intent was clear in the Act, the Court nonetheless carved out an exception for Tuscarora's fee lands and in doing so, delivered a single sentence unnecessary to the holding, stating that "[I]t is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." In support of that proposition, the Court cited only to unsurprising decisions upholding federal or state taxes imposed on individual Indians. The Court did not opine on tribal sovereignty in *Tuscarora*. Nor was *Tuscarora* interpreting Congressional silence. Nonetheless, the single sentence of dicta from *Tuscarora* has become the centerpiece of various federal agencies' arguments for assertions of broad regulatory power over tribes as sovereigns, in cases involving OSHA, ERISA, the NLRA, Dodd-Frank and many other statutes, and is referenced as "the *Tuscarora* rule" following the Ninth Circuit's approach to the case in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).

In recent years, federal agencies have urged the application of "the *Tuscarora* rule" in arguing that federal courts should bypass the foundational legal presumptions flowing from Supreme Court precedents: (1) that any Congressional abrogation or diminishment of tribal rights must be clear and (2) any doubtful expressions in statutory text should be resolved in tribes' favor. We have seen federal agencies arguing that, irrespective of these clear canons of construction, statutes that are silent with respect to tribes should nonetheless apply to tribes as governments, regulating their economies.

A Supreme Court that recognizes the legal and historical predicate for economic development activities as a tribal sovereign prerogative should reject any effort by federal agencies to further perpetuate "the *Tuscarora* rule," and the Department should abandon it entirely. COLT anticipates that the Court might call out "the *Tuscarora* rule" for what it is, an antiquated line of dicta erroneously interpreted decades later, inconsistent with the Supreme Court's recent

particulars of that case" and "is … in tension with the longstanding principles that (1) ambiguities in a federal statute must be resolved in favor of Indians and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty."[145]

These principals apply equally when tribes engage in economic activity, which, as we have discussed, is often necessary because of our small tax bases and isolated rural locations. The U.S. Supreme Court has determined in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*[146] decision, that tribes in their commercial activity with other entities are covered under the umbrella of the tribes' sovereignty and even when tribes entered into activities, executed off-reservation, they still enjoy sovereign immunity *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*.[147]

Therefore, the analysis should begin with an understanding of reserved treaty rights because the status,[148] applicable presumptions,[149] and interpretations[150] of tribal treaties, or lack

precedents supporting tribal sovereignty, honoring treaty rights, and holding steadfast to the Constitution. *See, e.g., Herrera v. Wyoming*, 587 U.S. __ (2019).

[145] *San Manuel v. N.L.R.B*, 475 F.3d 1306, 1311 (D.C. Cir. 2007)(citations omitted); *see Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla*., 166 F.3d 1126 (11th Cir. 1999); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996); *Smart v. State Farm Ins. Co*., 868 F.2d 929 (7th Cir. 1989).

[146] 498 U.S. 505 (1991).

[147] 523 U.S. 751 (1998). *See also Garcia v. San Antonio Metro. Transit Auth*., 469 U.S. 528, 546-47 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule…that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles").

[148] "[A]ll Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land* . . . ." U.S. Const. Art. VI, Cl. 2 (emphasis supplied). In *Turner v. American Baptist Missionary Union*, 24 F. Cas. 344, 346 (C.C. D. Mich. 1852), the federal court held that a treaty with Indian tribes has the same dignity and effect as a treaty with a foreign and independent nation, and as such, are the supreme law of the land.

[149] *See e.g.,* Deborah A. Geier, *Essay: Power and Presumptions; Rules and Rhetoric; Institutions and Indian Law*, 1994 B.Y.U. L. Rev. 451 (1994).

[150] "In construing treaties, the courts have required that treaties be liberally construed to favor Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians, and that treaties should be construed as the Indians would have understood them." RENNARD STRICKLAND, ET AL., FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 222 (1982 ed.) (internal citations omitted); Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogations: AAs Long as Water Flows, or Grass Grows Upon the Earth" - How Long a Time is That?*, 63 Calif. L. Rev. 601

thereof, is almost always outcome determinative. When treaty federalism is understood and recognized by federal courts, tribal sovereignty is upheld and such laws are usually held not to be applicable to tribes.[151]

In sum, treaty federalism remains a viable and well accepted historical principle that continues to guide the federal-tribal relationship. COLT's position is that treaties and treaty federalism should presumptively bar the application of internal revenue laws to Indian tribes and their business entities regardless of the source of income. Presently, however, federal courts, Congress, and federal agencies (e.g., the Internal Revenue Service) currently treat Indian tribes like states *for some federal tax purposes*.

IV. THE DOCTRINE OF INTERGOVERNMENTAL IMMUNITY

A. Historical Origins of Federal Taxes

At the Constitutional Convention, the framers realized the importance of funding a national government and therefore representatives of states delegated to Congress the ability to tax: "The Congress shall have power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."[152] Importantly, state representatives also granted the federal government the ability to enact and enforce any such tax laws: "To Make all Laws which shall be necessary and proper for carrying into Execution the

(1975). For a comprehensive review of the federal treaty-making power, *see* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075.

[151] *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982) (holding that the Occupational Safety and Health Act, AOSHA", did not apply to the tribal business); *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) (deciding that the Age Discrimination in Employment Act did not apply to tribal employers); *accord Found du Lac v. Heavy Equipment Construction Co.*, 986 F.2d 246 (8th Cir. 1993); *NLRB v. Pueblo of San Juan*, 228 F.3d 1195 (10th Cir. 2000), *aff'd en banc*, 276 F.3d 1186 (10th Cir. 2002) (holding that the National Labor Relations Act did not preempt a tribal government from enacting a right-to-work ordinance).

[152] U.S. Const. art. I, §8, Cl. 1. "Representatives and *direct Taxes shall be apportioned among the several States* which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U.S. Const. art. I, ' 2, Cl. 2 (emphasis supplied). Additionally, the framers stated "No Capitation, *or other direct, Tax* shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. Const. art. I, ' 9, Cl. 4 (emphasis supplied).

foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[153]

Pursuant to its tax power, Congress enacted the first internal revenue law on March 3, 1791, by imposing a tax on distilled spirits and stills.[154] Subsequent legislation imposed taxes upon carriages, retail dealers in wines and foreign spirits, snuff, refined sugar, property sold at auction, legal instruments, real estate and slaves. These taxes and the offices that enforced them were abolished in 1802. Due to the War of 1812, Congress again imposed internal revenue taxes in 1813 on a variety of products, including those initially taxed prior to 1802.[155] Between 1818 and 1861, a period of 43 years, no internal revenue taxes were imposed.[156]

In 1861, due to the Civil War, Congress considered a proposal to assess taxes on incomes and real property.[157] A year later, Congress passed the Act of July 1, 1862; the first revenue law to tax income.[158] Even though Congress sought to collect taxes on everything that could yield

[153] U.S. Const. art. I, ' 8, Cl. 18 (commonly referred to as the "necessary and proper clause").

[154] Lind, Federal Income Taxation (4th ed. 1997) (citing "Codification of Internal Revenue Law," p. IX (1939), reproduced at 26 U.S.C.A. XIX-XX). One scholar traces the history of the federal income tax beginning with the origin of federal taxing power. *See* Arthur C. Graves, *Inherent Improprieties in the Income Tax Amendment to the Federal Constitution*, 19 Yale L.J. 505 (1909-1910). In fact, federal tax power was originally intended as an emergency mechanism to support the federal government in a time of crisis. *Id.* at 522-26. The federal tax power emerged due to the Revolutionary War by the Founding Fathers where the country attempted to sustain the War without money, resources or power to collect taxes. *Id.* at 522.

[155] All of these taxes were repealed by Congressional Act of December 23, 1817.

[156] In fact, Professor Graves states, "from 1838 until practically the time when the war broke out, trade and industry were at a high-water mark . . . . During this period the revenue of the [federal] government . . . was practically derived from duties on imports." Graves, *Inherent Improprieties in the Income Tax Amendment to the Federal Constitution*, 19 Yale L.J. at 523.

[157] The Secretary of the Treasury, in his annual report to Congress "apologetically suggested an income tax, but scarcely recommended it." Graves, *Inherent Improprieties in the Income Tax Amendment to the Federal Constitution*, 19 Yale L.J. 505, 523 n. 49. The 1861 revenue measure taxed 3% of all incomes over $800, but the federal government did not levy or enforce this tax. *Id.* at 523 n.50. The real property taxes collected under the 1861 Act were returned to the states under the authority of the Act of March 2, 1891.

[158] Graves, *Inherent Improprieties in the Income Tax Amendment to the Federal Constitution*, 19 Yale L.J. at 523-524. Professor Graves emphasizes that this emergency measure, which sought to assess and collect federal income taxes to fund the Civil War, ultimately represented a small percentage of total federal tax revenue necessary to sustain the Civil War. *Id.* at 524-526 (estimating the total cost of the war to be $2.5 billion dollars and the income taxes collected during the war as $86 million dollars).

revenue, three products remained the staple of the federal internal revenue system: spirits, tobacco and beer.[159] Although the federal income tax played an important part in funding a small percentage of the Civil War, Professor Graves argues that the federal income taxes assessed and collecting were not necessary to preserve the United States.[160] Notwithstanding the minimal historical and economic role of the federal income tax, Professor Graves proved prophetic in his prediction of the federal income tax power: "The income tax will be, therefore, the only kind of imposition known to our Constitution, which can be levied without any restraints whatever."[161] In 1916, the Sixteenth Amendment was passed pursuant to Congress'' tax power and commerce power and stated, "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[162]

As predicted by Professor Graves, federal and state courts have given the broadest possible interpretation to the scope of the Internal Revenue Code.[163] Section 61 of the current Internal Revenue Code states, "[G]ross income means all income from whatever source derived, including

[159] The internal revenue laws were first codified in the Revised Statutes of 1873, Title XXXV.

[160] Graves, *Inherent Improprieties in the Income Tax Amendment to the Federal Constitution*, 19 Yale L.J. at 525-526 (arguing that historically and financially the 16th Amendment to the Constitution, which provides the federal government with the power to levy and collect direct income taxes, is inconsistent with federalism principles set forth in the Constitution; a national government of limited and enumerated powers and local sovereign states, each of which has its own sphere of exclusive jurisdiction and powers of taxation).

[161] After passage of the 16th Amendment to the Constitution, the federal power to tax income was continuously upheld against numerous taxpayers. Stanley S. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 Ill. L. Rev. 779, 780 (1940-1941) (documenting that every government request for certiorari, regarding an adverse tax decision below, was granted; 84% of similar taxpayer requests were denied; and during the term the federal government prevailed in 80% of all taxpayer cases decided).

[162] U.S. Constitution Amend. XVI (overturning *Pollock v. Farmers' Loan and Trust Co.* (1895)).

[163] After federal courts repeatedly affirmed the federal income tax power, Congress began implementing a series of internal revenue laws, and over time with each internal revenue act passed, the federal internal revenue system became more voluminous and complicated. After passage of the 1928 Revenue Act, the Joint Committee on Internal Revenue Taxation sought to compile and codify the operative internal revenue statutes with the passage of the Internal Revenue Code of 1939. H. Rep. No. 6, 76th Cong., 1st Sess. (1939) 1939-2 C.B. 532-533. Fifteen years later, Congress passed a wholesale statutory revision of the 1939 Code with the Internal Revenue Code of 1954. 100 Cong. Rec. 8536 (1954) (*codified at* 26 U.S.C.A. XXI). The most recent comprehensive revision, the Internal Revenue Code of 1986, remains the statutory basis of our current tax laws.

(but not limited to) the following items."[164] Moreover, any tax exemptions are to be strictly construed.

1. Federal Taxes and State Activities[165]

In *McCulloch v. Maryland*,[166] the Supreme Court held that a state cannot tax notes issued by a national bank because it directly interfered with powers expressly granted to the federal government under the U.S. Constitution. Hence the doctrine of intergovernmental immunity, which restrains taxes by the federal and state governments on each other's activities, was born even though it is not expressly stated in the Constitution. The doctrine is consistent with federalism principles because the restraints guarantee self-government, federal and state, in their respective spheres. In the last half century, the doctrine has eroded considerably but COLT examines its core principles because the analysis is directly applicable to the federal-tribal relationship.[167]

[164] 41 "(1) Compensation for services, including fees, commissions, fringe benefits, and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust." I.R.C. § 61(a).

[165] For a good review of this area *see* Herbert Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954); Arthur C. Graves, *Inherent Improprieties in the Income Tax Amendment to the Federal Constitution*, 19 Yale L.J. 505 (1909-1910); Bernard Tall, *Exemption From Federal Income Tax of Salaries of State and Municipal Officers and Employees*, 7 N.Y.U.L.Q. Rev. 942 (1929-1930); David M. Richardson, *Federal Income Taxation of States*, 19 Stetson L. Rev. 411 (1990).

[166] 17 U.S. (4 Wheat.) 316, 431 (1819) (wherein Justice Marshall wrote that "The power to tax involves the power to destroy").

[167] Ironically, intergovernmental immunity has been successfully argued by various tribes but only with respect to state taxes on activities in Indian Country. The doctrine has been incorrectly used, as shown by the following successful argument: tribes or federally licensed traders are federal instrumentalities and therefore state tax is impliedly prohibited. *See Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Warren Trading Post v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965). From a treaty federalism perspective, these cases are problematic because it does not rely on tribal self-government within Indian Country. With respect to tribal tax of state activities and vice-versa, a tax credit or state-tribal compact is the most consistent recognition of each other's primary sovereign status within their respective territorial jurisdictions. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (Stewart, J., concurring).

The doctrine of intergovernmental immunity was applied to bar a federal tax on the salary of a state judge.[168] Importantly, the Supreme Court concluded that the federal income tax invaded an essential governmental function of the state.[169] In 1895, the Supreme Court reiterated the reciprocal relationship of the doctrine of intergovernmental immunity:

> [T]he States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that e United States have no power under the Constitution to tax either the instrumentalities or the property of a State.[170]

Additionally, in *Pollock*, the Court reviewed the Constitutional framers' intent with respect to types of taxation by states and their instrumentalities and by the general government:

> The founders anticipated that the expenditures of the states, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general governments should not be exercised except on necessity . . . . Those who made it knew that the power to tax involved the power to destroy, and that *. . . the only security against the abuse of this power is found in the structure of the government itself*. In imposing a tax, the legislature acts upon its constituents.[171]

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[168] *The Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870).

[169] *Id*. The legal principle that barred federal taxes of states' essential governmental functions was codified in the Internal Revenue Code. *See* I.R.C. ' 115. In 1982, Congress enacted a comparable, but much less inclusive, statute recognizing intergovernmental immunity for Indian tribes, but only with respect to essential governmental functions. *See* I.R.C. § 7871; Robert A. Williams, *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 Harv. J. on Legis. 335 (1985).

[170] *Pollock v. Farmers' Loan & Trust Co*., 157 U.S. 429, 584 (1895). In *Pollock*, the Court held the 1894 statute, enacting a federal income tax, invalid because state governments retained the power to impose direct taxes, income and property upon its citizens. *Id.*

[171] *Pollock*, 188 U.S. at 621 (emphasis added).

As a result of *Pollock*, Congress initiated and eventually ratified the Sixteenth Amendment to the Constitution, in 1913, to enable the federal government to impose direct taxes upon whatever source derived.[172] In 1938, the Supreme Court rejected the symmetry of intergovernmental immunity and upheld federal taxes against state instrumentalities.[173] The Court reasoned that states have institutional safeguards against federal taxes, but not vice-versa:

> [I]n laying a federal tax on state instrumentalities the people of the states, acting through their representatives, are laying a tax on their own institutions and consequently are subject to political restraints which can be counted on to prevent abuse. State taxation of national instrumentalities is subject to no such restraint, for the people outside the state have no representatives who participate in the legislation; and in a real sense, as to them, the taxation is without representation.[174]

In 1939, the Court expressly overruled *The Collector v. Day* and said the following:

> [T]he burden of a non-discriminatory general tax upon the income of employees of a government, state or national, . . . may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power.[175]

[172] "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

[173] *Helvering v. Gerhardt*, 304 U.S. 405 (1938).

[174] *Helvering*, 304 U.S. at 412.

[175] *Graves et al. v. People of State of New York ex rel. O'Keefe*, 306 U.S. 466, 489 (1939).

In response, as evidence of the institutional safeguards of states, Congress immediately passed the Public Salary Tax Act of 1939.[176] The 1939 Act confirms the power of states and the federal government to impose income taxes in a reciprocal fashion, upon both state and federal employees. In 1946, the Supreme Court affirmed Congress' power to tax states when it allowed a federal tax on New York's mineral water business.[177] In upholding the federal tax against New York, Justice Frankfurter reaffirmed the underlying rationale of states' institutional corrective in Congress:

> [I]t simply says, in effect, to a State: 'You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy.' After all, the representatives of all the States, having . . . common interests, alone can pass such a taxing measure and they alone in their wisdom can grant or withhold immunity from federal taxation of such State activities.[178]

In sum, the U.S. Supreme Court ultimately determined that the formal doctrine of intergovernmental immunity made less sense in light of the dramatic changes in the federal and state economies, with non-discriminatory taxation applying equally to all objects of taxation in their respectively overlapping spheres. In addition, states have direct representation in Congress, the governmental body that debates and implements national tax policy, and thus maintain institutional safeguards in Congress.[179] Yet, the doctrine of intergovernmental immunity played a significant historical role regarding federal taxation of state activities and vice-versa.

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[176] 53 Stat. 574. Section 4 of the Act states:

> The United States hereby consents to taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession or political subdivision thereof . . . or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation.

[177] *State of New York et al. v. United States*, 326 U.S. 572 (1946).

[178] *State of New York et al.*, 326 U.S. at 582-583.

[179] The doctrine of intergovernmental immunity persisted with respect to federal taxes on interest paid from state and local obligations. In 1988, the Supreme Court affirmed the federal tax of the interest on state bonds and again rejected

The longstanding and underlying conflict regarding the respective taxing spheres of the federal and state governments over activities in overlapping territory still exists.[180] And the principles of federalism continue to apply to a wide variety of taxable activities within and connected to state and local governments.[181] In fact, the doctrine of intergovernmental immunity has transformed into an analysis that relies upon a new legal framework based upon implied statutory immunity, statutory exclusion under Section 115 of the internal revenue code, and a series of factors or tests involving sovereign powers,[182] essential governmental functions[183] and integral parts of states and political subdivisions.[184]

Without delving further into the nuances of each of those areas of tax analysis, it is more important for governmental comparison purposes to list the examples of (non-taxable, excluded, or exempt) activities under the various tests. For state and local political subdivisions, the following non-exhaustive examples were not subject to federal income tax: rapid transit authority,[185] state-owned liquor stores,[186] district created to provide clean water for rural

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the argument of intergovernmental immunity. *South Carolina v. Baker*, 485 U.S. 505 (1988). However, Congress enacted an exclusion for this income: Gross income does not include interest on any State or local bond." I.R.C. § 103(a). The exclusion applies to local governmental functions, including water, sewer, etc., but does not extend to private activity bonds. I.R.C. § 103(b). This is consistent with historical notions of federalism and is another example of states' institutional safeguards in Congress. For a review of a comparable, but much more limited, exclusion for interest on tribal government bonds, *see* Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 Admin. L. Rev. 333 (1994).

[180] *See e.g.*, David Gamage and Darien Shanske, *Tax Cannibalization and Fiscal Federalism in the United States*, 111 Nw. U. L. Rev. 295 (2017); Daniel J. Hemel, *Federalism as a Safeguard of Progressive Taxation*, 93 N.Y.U. L. Rev. 1 (2018).

[181] *See e.g.*, Ellen P. Aprill, *Revisiting Federal Tax Treatment of States, Political Subdivisions, and Their Affiliates*, 23 Fl. Tax Rev. 73 (2019); Ellen P. Aprill, *The Integral, The Essential, and the Instrumental: Federal Income Tax Treatment of Government Affiliates*, 23 J. Corp. L. 803 (1998); Ellen P. Aprill, *Excluding the Income of State and Local Governments: The Need for Congressional Action*, 26 Ga. L. Rev. 421 (1992).

[182] *Estate of Shamberg*, 3 T.C. 131 (1944), aff'd, 144 F. 2d 998 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945).

[183] I.R.C. § 115(1) (1997) (excluding "income derived from any public utility or the exercise of any essential governmental function and accruing to a state or any political subdivision thereof, or the District of Columbia").

[184] Rev. Rul. 87-2, 1987-1 C.B. 18 (stating "Income earned by a state, a political subdivision of a state, or an integral part of a state or political subdivision is generally not taxable in the absence of specific statutory authorization for taxing such income.").

[185] Rev. Rul. 73-563, 1973-2 C.B. 24.

[186] Rev. Rul. 71-132, 1971-1 C.B. 28; Rev. Rul. 71-132, 1971-1 C.B. 29.

residents,[187] community health board serving counties,[188] and authority for sports and entertainment activities – at facilities owned and operated by a city.[189]

Additionally, income derived directly by an entity that is an "integral part" of a state or political subdivision is not subject to federal income tax. The IRS analyzes the following factors to determine if an entity is an integral part of a state or political subdivision including whether: entity was formed an independent unit; entity has its own offices and employees; such officers and employees are selected, or may be removed by, the state or political subdivision; the extent to which entity is controlled by state or political subdivision regarding investments, expenditures, and daily operations; and the entity may be dissolved or abolished by the state or political subdivision.[190] The following non-exhaustive entities were considered an "integral part" of a state or political subdivision and therefore not subject to federal income tax: lawyer trust account;[191] joint library by town and village;[192] district by city to maintain lease information, marketing data, and incentive program to help businesses;[193] home for state nursing care and veterans;[194] and education center to provide education services and planning to school districts.[195]

Similarly, under Section 115 of the internal revenue code, gross income for federal tax purposes does not include "income derived from any public utility or the exercise of any essential governmental function and accruing to a State or any political subdivision thereof, or the District of Columbia . . . ."[196] Section 115 applies to entities that are separate from, but not an "integral part" of, a state or political subdivision and the IRS considers the following factors: whether activity is traditional government activity; whether activity involves exercise of sovereign powers;

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[187] LTR 8952016 (9/28/89).

[188] LTR 8925015 (3/22/89).

[189] LTR 8832047 (5/17/88).

[190] Rev. Rul. 87-2, 1987-1 C.B. 18; LTR 9041054 (7/17/90).

[191] Rev. Rul. 87-2, 1987-1 C.B. 18.

[192] LTR 9041054 (7/17/90).

[193] LTR 89250101 (3/21/89).

[194] LTR 8835034 (6/7/88).

[195] LTR 8832056 (5/18/88).

[196] I.R.C. § 115(1) (1997).

extent of government control over activity; and extent of government financial interest in activity.[197]

And the following is a non-exhaustive list of entities whose income is excluded under Section 115: insurance risk-sharing pools of local government;[198] entity created to invest public funds;[199] state and county owned hospitals including partnership by county hospital to provide medical services, laundry services, and coordinated care;[200] county fine arts council;[201] entity providing animal control;[202] water system;[203] financing and economic development corporations;[204] entity to construct court and jail facilities;[205] unemployment compensation trust;[206] port district and tourism promotion;[207] university and higher educational programs and services;[208] mental health program;[209] services to dependent and neglected children;[210] regional

[197] *See* Rev. Rul. 77-261, 1977-2 C.B. 45.

[198] Rev. Rul. 90-74, 1990-36 I.R.B. 5 (9/4/90).

[199] Rev. Rul. 77-261, 1977-2 C.B. 45.

[200] See Rev. Rul. 71-589, 1971-2 C.B. 94; LTR 8932031 (5/15/89); LTR 9042059-60 (7/26/90); LTR 8839024 (6/29/88).

[201] LTR 8934052 (5/31/89).

[202] LTR 9026015 (3/26/90).

[203] LTR 9034041 (5/29/90).

[204] LTR 9027028 (4/3/90); LTR 8941052 (7/18/89); LTR 8825081 (3/28/88); LTR 9027025 (4/2/90); LTR 9017052 (1/30/90); LTR 8838052 (6/28/88).

[205] LTR 9025062 (3/27/90).

[206] LTR 9012031 (12/20/89).

[207] LTR 9004034 (10/31/89); LTR 8951048 (9/26/89); LTR 8920056 (2/22/89).

[208] LTR 8935012 (5/30/89); LTR 8950050 (9/19/89); LTR 8926078; LTR 8923024 (3/10/89); LTR 8832067 (5/19/88).

[209] LTR 8931008 (5/1/89).

[210] LTR 8847032 (8/25/88).

planning and services council and road construction;[211] management of retirement funds;[212] and multiple county library system.[213]

The Internal Revenue Service interprets and implements the internal revenue code by way of administrative decisions, including treasury regulations, revenue rulings, and private letter rulings, among several other forms of guidance.[214] Importantly, several tax rules apply to standard objects of taxation. For instance, the internal revenue code is to be interpreted broadly to cover income from whatever source derived. Additionally, tax exemptions are to be construed narrowly. Finally, doubtful expressions are to be resolved in favor of the taxpayer. Ironically, these tax rules help governments obtain tax revenue to meet public needs – and there is an expectation of the services to be provided from those taxes.

a. Federal Taxes and Tribal Activities

Against the backdrop of federal-state intergovernmental tax history, the next section summarizes and analyzes the administrative decisions and federal cases constructing the contour of the federal-tribal intergovernmental tax relationship. Several federal circuit courts of appeal and legal scholars have provided a legal analysis that is directly applicable to this paper because it is consistent with one central component of this article: treaty federalism.[215]

At the outset, it is important to set the foundation for federal tax power in Indian Country. Tribes and their citizens did not participate in the Constitutional convention. The Constitution and any amendments to the Constitution are not applicable to Indian tribes because they pre-exist all American governments.[216] However, Constitutional-like agreements, federal-tribal treaties, were

[211] LTR 8832066 (5/19/88); LTR 8825034 (3/22/88); LTR 8825096 (3/29/88).

[212] LTR 8825087 (3/28/88).

[213] LTR 8826037 (4/14/88).

[214] The tax court is also utilized by taxpayers as well as federal courts reviewing tax issues. The IRS also provides a governmental information letter to governmental units and their political subdivisions regarding their tax status. *See* https://www.irs.gov/government-entities/federal-state-local-governments/governmental-information-letter.

[215] *See* Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. Davis L. Rev. 85, 93-122 (1991); Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 Ariz. St. L. J. 681, 694-746 (1994); William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. Mem. L. Rev. 1365, 1376-1399 (1995); Kristen E. Burge, *Erisa and Indian Tribes: Alternative Approaches for Respecting Tribal Sovereignty*, 2000 Wis. L. Rev. 1291, 1300-1319 (2000).

[216] *See e.g., Talton v. Mayes*, 163 U.S. 376 (1896).

made between numerous tribal governments and the federal government on behalf of each other's citizenry.[217]

Thus, any authority for a federal tax must derive from a specific grant from an Indian tribe through a treaty.[218] In contrast, most courts require a specific exemption from federal tax in the various treaties between the tribe and federal government.[219] One author describes it as "the missing treaty provision" which would have been written as follows: ". . . nor shall said Indian tribe, nor Indians severally, nor their property, real and personal, ever be liable to taxes of any kind . . . ."[220]

Historically, however, most, if not all, federal taxes were simply not applied to Indian tribes.[221] Perhaps it was an implicit recognition of federalism-in-action, and as result, there have

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[217] Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 Calif. L. Rev. 981 (1994).

[218] This logically follows from the principles of treaty federalism, where the U.S. Supreme Court held that "treaties were not a grant of rights to the Indians, but a grant of rights from them - a reservation of those rights not granted." *U.S. v. Winans*, 198 U.S. 371 (1905).

[219] *See e.g., Confederated Tribes of Warm Spring v. Kurtz*, 691 F.2d 878 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (holding that an Indian tribe is not exempt from federal excise taxes, absent an express exemption in the Internal Revenue Code). This position turns the logic of treaty federalism on its head. Treaty federalism, consistent with numerous Supreme Court cases, reserves all tribal rights not granted and therefore the burden of persuasion rests on the federal government to show it has obtained consent to assess taxes in Indian Country. Moreover, a treaty-based tribal exemption from federal taxes will never be found because most federal taxes had never been assessed against tribes until after the treaty-making period, which ceased in 1871. Even so, the plain language of many treaties clearly suggest exclusive tribal jurisdiction in Indian Country. *See e.g.*, Article 2 of the 1868 Fort Laramie Treaty with the Crow Nation (May 7, 1868) (the Crow homeland is "set apart for the absolute and undisturbed use and occupation of the Indians herein named . . .").

[220] JAY VINCENT WHITE, TAXING THOSE THEY FOUND HERE, at 1. However, this provision is unnecessary under principles of treaty federalism because the federal government must have express authority from Indian tribes to assess any taxes within Indian Country. Often times, federal and state judges require that a provision like this be expressed in the treaty. COLT believes such a requirement is misplaced because it is a fundamental misunderstanding of tribal treaties and the concept of treaty federalism.

[221] The historical origin of this position may be derived from the Indian Reorganization Act of 1934. 25 U.S.C. ' 477. In the 1934 Act, Congress provided that a tribe may incorporate under Section 17 as a federally chartered corporation and would not be subject to federal income taxes, regardless of where the business was located. Rev. Rul. 94-16, 1994-2 CB 19. A comparable ruling was approved for tribal corporations organized under Section 3 of the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. ' 503. Rev. Rul. 94-65, 1994-2 C.B. 14 (ruling that the tribal corporation was not subject to federal income tax for income earned by the business on or off the tribe's reservation).

been relatively few federal-tribal tax disputes until recently.[222] In 1967, the Internal Revenue Service took its first formal position with respect to the legal status of tribal governments and held that Indian tribes are not taxable entities.[223] In 1981, the IRS extended its 1967 ruling when it held that an Indian tribal corporation, organized under Section 17 of the IRA, shares the same tax status as the tribe and is therefore not taxable on its income from activities carried on within Indian Country.[224] Most recently, in 1994, the IRS recognized and affirmed treaty federalism principles by requiring consistency with the federal-tribal relationship to the exclusion of any connection with the state law.[225]

i. The 1982 Indian Tribal Governmental Tax Status Act

In fact, now, most federal-tribal tax issues concentrate on the scope of the Indian Tribal Governmental Tax Status Act of 1982,[226] wherein tribes are treated like states under the Internal Revenue Code ("Code") for certain purposes.[227] The Code specifically identifies tribes in Section

[222] *See e.g., Chickasaw Nation v. United States*, 122 S.Ct. 528 (2001) (holding that the Indian Gaming Regulatory Act did not exempt Tribes from paying gambling-related excise and occupational taxes that States did not have to pay under Chapter 35 of the Internal Revenue Code); *Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000), *vacated by* 534 U.S. 84, 122 S.Ct. 528 (2001), *remanded to* 280 F.3d 1371 (Fed. Cir. 2002) (concluding that tribes were not exempt from excise taxes on pull-tab games).

[223] Rev. Rul. 67-284, 1967-2 CB 55; *accord* Rev. Rul. 94-16, 1994-1 CB 19. A revenue ruling is an official interpretation by the IRS of the proper application of the tax law to a specific transaction." BLACK'S LAW DICTIONARY 1320 (7th ed. 1999). In Rev. Rul. 67-284, the IRS also held that, unless otherwise exempt from federal income tax, tribal income that is distributed to or constructively received by its members is gross income subject to tax. We will discuss the effects of this position in the section on individual Indians.

[224] Rev. Rul. 81-295, 1981-2 C.B. 15.

[225] Rev. Rul. 94-16, 1994-1 C.B. 19. In fact, if the tribal corporation is organized under state law it is subject to federal income taxation, absent an express provision to the contrary. *See* PLR 9429011; Rev. Rul. 94-65, 1994-2 C.B. 14 (providing guidelines for tribal businesses incorporate under state law to dissolve and reincorporate under federal law or tribal law); PLR 9710011 (providing retroactive relief under Rev. Rul. 94-65).

[226] Title II of Pub. L. No. 97-473, 1983-1 C.B. 510, 511, *as amended* by Pub. L. No. 98-21, 1983-2 C.B. 309, 315 (codified as amended at 26 U.S.C. § 7871). Section 1065 of the Tax Reform Act of 1984, 1984-3 (Vol. 1) C.B. 556, made permanent the laws treating tribal governments as states for specified federal tax purposes. *See* Rev. Proc. 86-17, 1986-1 C.B. 550. For a review of the legislative history and analysis of the scope of the Act, *see* Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 Harv. J. on Legis. 335.

[227] Section 7871 treats tribes as states for the following deductions to or for the use of tribal government: charitable contribution deduction; estate tax deduction for public, charitable, and religious uses; gift tax deduction for charitable gifts; certain excise tax exemptions; real estate tax deduction; exclusion for interest on tribal government bonds; college and university tax exempt status; income tax exclusion for benefits from accident and health plans; tax of

7701, "The term 'Indian tribal government' means the governing body of any tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary, after consultation with the Secretary of the Interior, to exercise governmental functions."[228] In an analogous fashion to the federal-state relationship, Congress provided that certain favorable tax consequences for Indian tribes would ensue only if the activity[229] involved the exercise of an "essential government function" of the Indian tribal government.[230]

ii. Tribal Activities, Instrumentalities, and Officers

In 1984, the IRS ruled that an Indian tribe's purchase of fuel for school, police, and firefighting services is exempt from federal excise tax because such activity serves an essential tribal governmental function.[231] However, fuel purchased by tribes for resale to consumers is subject to federal excise taxes.[232] Under Section 7871, Indian tribes have an exemption from

contributions of certain employees for employee annuities; discount obligations; tax on excess expenditures to influence legislation; and private foundations. I.R.C. § 7871(a)(1)-(7).

[228] I.R.C. § 7701(a)(40)(A). The definition section of the Code has a special rule for Alaska Natives. I.R.C. § 7701(a)(40)(B). In the definition section, Congress defines taxable persons and sovereign governments. I.R.C. § 7701(a). Section 7701 states, "The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." I.R.C. ' §§7701(a)(1). Additionally, "The term 'United States' when used in a geographical sense includes only the States and the District of Columbia." I.R.C. § 7701(a)(9). "The term 'State' shall be construed to include the District of Columbia . . . ." I.R.C. § 7701(a)(10). Notably, Indian tribes are not included within any other definition provision of the Code, particularly the definition of geographical territory within the United States.

[229] In particular, the activity must involve: (i) an excise tax exemption for special fuels, manufacturing, communications and vehicle use; and (ii) tax-exempt bonds. I.R.C. §§ 7871(a)(2)(A)-(D), 7871(b), and 7871(c).

[230] I.R.C. § 7871(b)-(e). In fact, Section 7871(e) specifically states, the term "essential governmental function shall not include any function which is not customarily performed by State and local governments with general taxing powers." I.R.C. § 7871(e).

[231] Rev. Rul. 94-81, 1994-2 C.B. 412. The IRS's position is consistent with and follows directly from Section 7871(b) of the Internal Revenue Code.

[232] *Id.* Because the Act provides a limited exemption, courts assume that the federal excise tax applied to Indian tribes and tribally-owned businesses unless expressly exempt. *Confederated Tribe of Warm Springs Reservation v. Kurtz*, 691 F.2d 878 (9th Cir. 1982). Although the Tribal Tax Status Act is generally consistent with treaty federalism principles, it has proven to be too narrow in scope and allows the IRS to flip the presumption to be applicability of federal taxes (unless statutorily excluded) rather than placing the burden on the IRS to justify the tax.

various federal excise taxes imposed on sellers of particular items, but only if purchased by the tribe to be used in connection with essential tribal governmental functions.[233]

Like federal labor and employment laws, internal revenue laws were silent regarding the applicability of such federal taxes to tribes and individual Indians. In contrast to the federal circuit courts of appeals split with those federal laws, the internal revenue laws, unlike other federal statutes of general applicability such as federal labor and employment laws, have been presumed to apply to Indian tribes and tribal Indians in Indian Country. In general, like the federal income tax after the Sixteenth Amendment, federal taxes have also been construed to have the broadest possible application to tribal Indians in Indian Country. The modern approach is problematic because: (i) it ignores the text of the U.S. Constitution, treaties and treaty federalism; (ii) tribes and tribal Indians have not consented to such federal power; and (iii) tribes and tribal citizens lack the institutional safeguards necessary to protect their interests.

CONCLUSION

Over two centuries, the political and practical aspects of the federal-tribal relationship have been significantly altered. The federal government has grown exponentially in size and revenue; whereas Indian tribes had significantly decreased in population and political power. As a result of the power imbalance in the federal-tribal relationship, federal Indian policy became unilateral and radically changed about every thirty years, mostly to the detriment of tribal sovereignty.[234] After federal power emerged in Indian Country, it grew exponentially over a relatively short time period.

Despite its widespread acceptance, the *Cherokee Tobacco* decision is fundamentally flawed and should be reconsidered as controlling precedent. The federal tobacco tax in *Cherokee Tobacco* was upheld despite the fact that the Cherokee Indian was not an American citizen and even though the Cherokee territory was not part of an internal revenue collection district. The case

[233] I.R.C. § 7871(b); Rev. Rul. 94-81, 1994-2 C.B. 412. *See also Cook v. United States*, 32 Fed. Cl. 170 (1994), *cert. denied*, 96 F.3d 1095 (holding Section 7871 inapplicable to a group of tribal members importing, storing and selling diesel fuel on the Onondaga Nation's territory because that group was not a tribal government and was not performing an essential governmental function).

[234] *See* Vine Deloria, Jr., *The Evolution of Federal Indian Policy Making*, *in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 239-256 (University of Oklahoma Press 1985). The federal policies affecting tribes have vacillated between treating tribes as international sovereigns, imposing land allotment and forcing cultural assimilation, reorganization of tribal governments with federal approval, terminating the federal-tribal relationship, and presently supporting tribal self-determination. *Id.* Initiated by President Nixon in 1970, the most recent federal policy, tribal self-determination, returned to the pre-constitutional status of tribes vis-a-vis European nations: government-to-government. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, 91st Cong., 2d Sess. (July 8, 1970).

was decided 4-2, with three justices not taking part in the decision. It is noteworthy that Boudinot was compensated by Congress four years later for the amount of federal tax assessed, perhaps in recognition that the Supreme Court wrongly decided the case.[235] Finally, in 1912, in *Choate v. Trapp*,[236] it can be argued that the U.S. Supreme Court overruled, *sub silentio*, the decision in the *Cherokee Tobacco*.

The first step in reconstructing tax policy in Indian Country is to reevaluate the legal basis of the sovereign power to tax in our federalism. It is COLT's position that the original understanding of federal-state tax federalism principles, embodied in the doctrine of intergovernmental tax immunity, remain applicable to the federal-tribal-state set of relationships today. This original position is set forth in the text of the U.S. Constitution, in hundreds of federal-tribal treaties, and is consistent with consent and treaty federalism.

The primary goals of tribal governments are to raise revenue, provide services, and establish the conditions necessary to attract economic development and employment in Indian Country. Instead of building infrastructure, sustaining local economies, and enacting and implementing tribal tax policy, current Indian tax law forces Indian tribes and their citizenry to exhaust valuable resources litigating tax disputes against the federal and state governments and local non-Indian residents. [237] Finally, in order to address the problematic structure of Indian tax law, it is very critical for policy makers to understand and compare the ability of federal, state (and local entities created under state law) and tribal governments to assess and collect taxes on individuals, businesses, and activities within their respective jurisdictions.

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[235] The Act of May 14, 1874, ch. 173, 18 Stat. 549. Today, as was the case at the time of *The Cherokee Tobacco* decision, it is rare for Congress to redress individual taxpayer claims.

[236] 224 U.S. 665 (1912).

[237] *See e.g., Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001) (holding that Navajo Nation could not impose a hotel occupancy tax on a trading post located on fee land within Indian Country boundaries); *Oklahoma Tax Common v. Chickasaw Nation*, 515 U.S. 450 (1995) (concluding that Oklahoma cannot impose motor fuel excise taxes in Indian Country when the legal incidence falls upon the tribe or its citizens, but the State can impose its income tax on a tribal citizen domiciled outside of Indian Country, even when it is earned as a tribal government employment in Indian Country); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993) (deciding that Oklahoma cannot impose vehicle excise and registration fees on tribal citizens that live and use their vehicle in Indian Country); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (holding that Congress, pursuant to Public Law 83-280, did not grant Minnesota the power to assess a personal property tax on a mobile home owned by a tribal citizen in Indian Country); *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980) (determining that Arizona could not tax a federally-licensed trader that conducted his activities exclusively within Indian Country); *McClanahan v. Arizona State Tax Common*, 411 U.S. 164 (1973) (concluding that Arizona could not impose a tax on a reservation Indian's income derived exclusively from reservation sources).

COLT and its member tribes should be treated as sovereign governments, with primary and exclusive local tax authority within its own territory. And any illegitimate federal taxes should be rendered inapplicable to tribal governments, their entities of choice, and tribal citizens operating within their tribal homeland and serving their relations. The difficult choice to purge unjust laws begins with a small group of people supporting the legally justified decision – allow for tribal nations to make their own decisions, whether governmental or commercial and with entities of their own creation and/or choice, to best serve their homelands and citizens without any federal taxation of revenue generation.

Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't

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Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't

Stephen Cornell and Joseph P. Kalt[1]

AN INDIAN COUNTRY REVOLUTION

We begin with stories.

Choctaw

In March 1978, Chief Phillip Martin of the Mississippi Band of Choctaw Indians would not take no for an answer. He had waited for hours outside the office of the head of the federal Bureau of Indian Affairs (BIA—the agency responsible for implementing federal Indian policy in the United States). He wanted the agency to tell General Motors that the Mississippi Choctaws were a good investment risk. He finally got into the office and demanded action. The BIA vouched for the tribe, and General Motors invested in a wire harness assembly plant on Mississippi Choctaw land. For its part, the tribe backed up its ambitions with changes in government and policy that made the reservation a place where both outsiders and tribal members wanted to invest. This was the beginning of an economic renaissance. Today the Mississippi Choctaws have virtually eliminated unemployment on their lands and must turn to non-Indians by the thousands to work in Choctaw-owned factories, enterprises, schools, and government agencies. A great resurgence in well-being and cultural pride is well underway.

Apache

After decades of living under the thumb of the BIA, in the mid-1960s the White Mountain Apache Tribe in Arizona told federal officials they were no longer needed at meetings of the tribal council; they could attend only upon invitation. The tribe would let the Bureau know when it needed its advice. The tribe also barricaded a road and guarded it with armed men to stop the BIA from renewing non-Indian homesite leases on the shores of a tribal lake at a fraction of market prices. The Bureau backed down. These and other tribal actions launched a renewal of tribal sovereignty that led to two decades of economic growth.

Flathead

During the 1980s, the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana made key reforms to their tribal government, stabilizing the rule of law and

[1] This chapter has benefited from conversation, cooperation, and commentary from a number of friends and colleagues. We would like to thank in particular Manley Begay, Kenneth Grant, Miriam Jorgensen, Andrew Lee, Gerald Sherman, Jonathan Taylor, and Joan Timeche.

professionalizing their management. Armed with both the necessary institutions and the desire to run their own affairs, they gradually took over many of the tasks of reservation governance previously carried out by—or under the close supervision of—the United States government. In the process they began building one of the most effective tribal governments in the United States, reclaiming control of their lands and community and moving the tribe toward sustainable, successful economic development.

Akiachak

In the 1980s and 1990s, the Native community of Akiachak, Alaska, set out to regain control of land and related resources and of education and other services long provided by the federal government. They established the Akiachak Tribal Court to resolve disputes, reorganized village government to improve performance, took over administration of many of the social services on which the community depends, and began to build new relationships with other Yup'ik communities in that region of Alaska. In the process they became a model of what Alaska Native villages could do to improve community welfare and expand political power.

TWO APPROACHES TO RESERVATION ECONOMIC DEVELOPMENT

These brief tales are part of a much bigger story—the revolution that is underway in Indian Country. As much of the world knows, American Indian nations are poor. What much of the world doesn't know is that in the last quarter century, a number of those nations have broken away from the prevailing pattern of poverty. They have moved aggressively to take control of their futures and rebuild their nations, rewriting constitutions, reshaping economies, and reinvigorating indigenous community and culture. Today, they are creating sustainable, self-determined economies and building societies that work.

What's the secret of such performance? Is it luck? Is it leadership? Is it education, or having the right resources, or being located in the right place, or picking a winning economic project that provides hundreds of jobs and saves the day? Is it tribal gaming? How can we account for these "breakaway" tribes? Is there an approach to economic development that offers promise throughout Indian Country?

Yes, there is such an approach. It is a radically different approach to reservation development from the approach that dominated both federal policy and tribal efforts for most of the twentieth century. In this chapter, we summarize these two very different approaches—the old and the new—to reservation economic development. Not only do these approaches differ, but they have produced dramatically different results. In short, one works, and the other doesn't. The one that doesn't work we call the "standard" approach. Our version of it is broadly based on federal and tribal practices developed during the twentieth century and still prevailing today. The one that works we call the "nation-building" approach. Our version of it is based on extended research on

the breakaway tribes whose economic performances have been so striking in the last three decades of the twentieth century.

We describe here these two approaches to development, discuss why one works and the other does not, and suggest how Indian nations can move from one approach to the other. The primary source of our thinking is the growing body of research carried out in Indian Country for more than a decade and a half by the Harvard Project on American Indian Economic Development at Harvard University, joined more recently by the Native Nations Institute for Leadership, Management, and Policy at The University of Arizona.[2]

THE STANDARD APPROACH TO RESERVATION ECONOMIC DEVELOPMENT

In the mid-1920s the United States commissioned a major study of economic and social conditions on American Indian reservations. Lewis Meriam of Johns Hopkins University headed the research team, and the result, published in 1928, was one of the first examples of large-scale social science research carried out in the United States. It has since become known as the Meriam Report.[3] The report documented reservation poverty in exhaustive detail. It contributed to the passage of the Indian Reorganization Act of 1934—a watershed piece of legislation—and helped precipitate a lengthy federal effort to improve the welfare of America's Indian citizens.

That effort has taken a number of different forms over the years as the federal government tried different reservation development strategies. In the last quarter of the twentieth century, a growing number of tribes—faced with desperate economic conditions and operating under the federal policy of self-determination—also joined the effort. Many tribal governments moved economic development to the top of their policy agendas, sometimes complementing federal efforts, sometimes operating at cross-purposes. But in most cases, a single approach dominated both federal and tribal activities. We call this approach the "standard" approach.

Characteristics of the Standard Approach

This approach has five primary characteristics: it is short-term and non-strategic; it lets persons or organizations other than the Indian nation set the development agenda; it views development as primarily an economic problem; it views indigenous culture as an obstacle to development; and it encourages narrowly defined and often self-serving leadership.

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[2] For summary treatments and some examples of the research on which the present paper is based, see Cornell and Kalt (1992, 1995, 1997a, 1997b, 1998, 2000, 2003); Cornell and Gil-Swedberg; Cornell and Jorgensen; Jorgensen (2000); Jorgensen and Taylor (2000); Krepps and Caves (1994); Wakeling et al. (2001). The activities of the Native Nations Institute build directly on Harvard Project work; the two organizations share objectives and some staff and work closely together.

[3] Meriam et al. (1928).

The Standard Approach to Reservation Economic Development

- Is short-term, non-strategic
- Lets someone else set the development agenda
- Treats economic development as an economic problem
- Views indigenous culture as an obstacle to development
- Reduces elected leadership to a distributor of resources

These are generalizations. Not every case of reservation economic development that we describe as following the standard approach follows it in its entirety. Some aspects of the approach might be apparent in some cases while others may be missing. Additionally, Indian nations seldom talk about development in exactly these terms. Nonetheless, these characteristics provide a general description of what federal and tribal development efforts, regardless of intent, frequently have looked like. Far too often, consciously or otherwise, this is how development has been done in Indian Country.

Each characteristic of the standard approach deserves elaboration.

1. In the standard approach, decision-making is short-term and non-strategic.

Viewed as a single population, reservation Indians are among the very poorest Americans, with high indices of unemployment, ill health, inadequate housing, and an assortment of other problems associated with poverty. The need for jobs and income is enormous. In an era of self-determination, this situation puts intense pressure on tribal politicians to "get something going!" Grim social and economic conditions, combined with disgruntled and often desperate constituents, encourage a focus on short-term fixes instead of fundamental issues. "Get something going!" becomes "get *anything* going!" It leaves strategic questions such as "what kind of society are we trying to build?" or "How do we get there from here?" or "How do all these projects fit together?" for another day that seldom comes, overwhelmed by the need to generate immediate results for reservation residents. Short terms of elected office, common in many tribal governments, have similar effects. With only two years in which to produce results, few politicians have incentives to think about long-term strategies. They will face reelection long before most such strategies become productive.

These same factors also encourage a focus on starting businesses instead of sustaining them. It's grand openings, ribbon-cuttings, and new initiatives, not second rounds of investment or fourth-year business anniversaries, that gain media attention, community support, and votes at election time. Newly-elected leaders who want to make their mark on the community are going to be more interested in starting something new than in sustaining what the previous administration—whom

they probably opposed at election time—put in place. This means that prospective businesses, whether genuinely promising or not, often get more attention from tribal leadership than established ones do.

Finally, there is a tendency to look for home-runs: where's the killer project that will transform the local economy? Grandiose plans take the place of potentially more effective—if less dramatic—incremental building of a broadly based economy.

2. In the standard approach, someone other than the Indian nation sets the development agenda.

Some of the same factors that discourage strategic thinking also give non-Indians much of the control over the reservation development agenda. A lot of Indian reservations are heavily dependent on federal dollars to maintain social and economic programs and tribal government. This fact alone gives federal decision-makers a disproportionate degree of influence in reservation affairs.[4] Reinforcing this influence is the fact that few dollars come to Indian nations via block grants, a mechanism that would place more decision-making power in Indian hands. Most federal dollars are program-specific. The programs themselves are developed in federal offices, often with little attention to the diversity of Indian nations and circumstances.

In addition, the pressure for quick fixes encourages a search for dollars—any dollars—that might be used to employ people or start enterprises. The development strategy becomes little more than "we'll do whatever there's funding for." As tribes search desperately for dollars to maintain reservation communities and programs and manage the destructive effects of poverty, opportunism replaces strategy: the dollars matter more than the fit with long-term tribal needs or objectives.

The result is that development agendas often are set by non-Indians through program and funding decisions. In the 1980s, for example, the Economic Development Administration in the U.S. Department of Commerce offered funding for specific development activities such as building motels, hoping to take advantage of reservation tourism potential, or the construction of industrial parks. Desperate for jobs and income, many tribes pounced on such funding opportunities without considering whether these projects made sense in local circumstances or fit long-term strategic goals. Some of these projects succeeded, but a decade later, Indian Country had more than its share of boarded-up motels and empty industrial parks. Even today, many tribal planners, under pressure from tribal councils to generate economic activity of almost any kind, ransack federal funding

[4] The pattern of external control was at least partly broken in the 1960s and 1970s when Community Action and other programs associated with the War on Poverty allowed tribes to apply directly to various Washington agencies for funds without going through the Bureau of Indian Affairs (BIA). This allowed tribes to search for programs that better fit their needs and break some of the bureaucratic grip that the BIA had on reservation affairs. However, it did not significantly undermine the concentration of decision-making power in federal hands. See Castile (1998), ch. 2; Bee (1981), ch. 5; Levitan and Hetrick (1971).

announcements looking for opportunities to bring federal dollars and federally funded jobs to the reservation.[5]

Of course federal dollars often are critical to reservation survival and cannot be ignored. A federal program or initiative that employs five people may get five more families through the winter. But in approaching development this way, tribes in effect leave the strategic component of development to Congress or federal funding agencies. Driven by poverty to look for funds wherever they can find them, many tribes spend more energy chasing projects other people think are important than developing their own sense of reservation needs, possibilities, and preferences. This is a far cry from self-determined economic development.

Granted, not all development has proceeded this way, and particularly since the 1960s, many tribes have sought federal funding for projects that their own people identified as important and chose to pursue.[6] Here, as with all parts of the "standard" approach, we are generalizing from diverse cases. The point is that reservation development too often has responded to non-Indian initiatives, taking a reactive instead of a proactive form, and has ended up hostage to decisions made someplace else by people disconnected from tribal situations and heavily influenced by interests other than tribal ones.

3. In the standard approach, economic development is treated as an economic problem.

This is logical enough: after all, it is *economic* development we're talking about. It should hardly seem odd that much of the conversation about development in Indian Country is preoccupied with economic factors: focusing on natural resources, lobbying for more money, promoting education, worrying about proximity to markets, and so forth. Furthermore, much of that conversation typically is about jobs and income, and these are classically economic goals. The prevailing idea seems to be that if only various tribes could overcome the market or capital or educational obstacles they face, jobs and income would follow.

This is not necessarily wrong. Economic factors loom large in development processes and typically set limits on development choices. Big successes in tribal gaming, for example, have been heavily dependent on location near major gaming markets.[7] Obviously natural resource endowments or the educational level of the reservation labor force have similarly significant impacts on development possibilities, and finding adequate financing is a recurrent problem for reservation planners. In other words, tribes are not wrong to spend time on these things.

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[5] As one long-time employee of tribal government once said to us, "from the reservation viewpoint, every federal program is first and foremost an employment opportunity."

[6] See, for example, Bee (1981), ch. 5, and more generally, Castile (1974), pp. 219-28.

[7] Cordeiro (1992); Cornell et al. (1998).

What is significant about this conversation, however, is what it *doesn't* include. Two issues in particular often are left out. The first is strategic goals. In focusing on short-term increases in jobs and income the development conversation tends to ignore longer term questions about the sort of society the tribe is trying to build.

Second, this conversation typically ignores political issues. By political issues we refer to the organization of government and the environment of governing institutions in which development has to proceed. Can the tribal courts make decisions that are free of political influence? Can the legislature keep enough distance from tribal businesses to allow them to flourish? Are the appropriate codes in place, are they fair, and are they enforced? Is the reservation political environment one which encourages investors—by which we mean anyone with time or energy or ideas or money to bet on the tribal future—to invest, or is it an environment in which both tribal citizens and outsiders feel their investments are hostage to unstable, opportunistic, or corrupt politics? In short, are tribal political institutions adequate to the development task? In its focus on economic factors, the standard approach ignores institutional and political issues and thereby misses entirely the key dynamic in economic development.

4. In the standard approach, indigenous culture is seen as an obstacle to development.

In 1969 the Bureau of Indian Affairs, in a collection of papers on reservation economies, wrote that "Indian economic development can proceed only as the process of acculturation allows."[8] Indigenous culture, in other words, is an obstacle to development: you are poor partly because you are tribal. In more recent years this viewpoint has seldom been made so explicit, but it has remained a recurrent theme.[9] Even where indigenous culture is viewed positively, it is often conceived primarily as a resource that can be sold through tourism or arts and crafts. Traditional products are to be supported, but traditional relationships or behaviors are to be discouraged.

The standard approach misses the more fundamental role that culture can play as a guide to organization or action. There is growing evidence, for example, that organizational and strategic fit with indigenous culture is a significant determinant of development success on reservations.[10] The standard approach makes the assumption that reservation economic development must follow someone else's cultural rules. But in doing so, it ignores evidence that there is more than one cultural road to success. Indigenous culture may be not an obstacle but an asset.

[8] U.S. Bureau of Indian Affairs (1969), p. 333

[9] E.g., Presidential Commission on Indian Reservation Economies (1984), Part I, p. 41; Part II, pp. 33, 36-37, 117.

[10] Cornell and Kalt (1995).

5. In the standard approach, elected leadership serves primarily as a distributor of resources

In the standard approach, tribal leadership is concerned much of the time with distributing resources: jobs, money, services, favors, etc. There are several reasons for this. First, elected leadership controls most reservation resources. Where jobs and money are scarce, whoever controls the jobs and money holds most of the power. Most employment is in tribal government; most programs are federally funded through grants to tribal governments; and many business enterprises are tribally owned. This means that tribal governments—and, therefore, elected tribal leaders—are the primary distributors of most of the resources that tribal citizens need, especially jobs.

Second, reservation socioeconomic conditions mean that there is enormous pressure on tribal governments to distribute those resources on a short-term basis. If there is money around, there is less sentiment in support of long-term investment than in support of short-term expenditures such as the hiring of tribal citizens, per capita payments, or other local distributions. Tribal politicians often get more electoral support from the quick distribution of goodies than they do from more prudent investment in long-term community success and security. This in turn reflects a local attitude toward tribal government that sees it simply as a pipeline for resources instead of as a force shaping the future of the nation. The federal government has inadvertently encouraged this view by funneling programmatic resources to tribes while denying them the power to use those resources to fundamentally alter the course of the nation.

All of this means that there are enormous incentives for tribal politicians to retain control of scarce resources and use them to stay in office. This leads to patronage, political favoritism and, in some cases, corruption. It reduces politics to a battle between factions trying to gain or keep control of tribal government resources that they can then distribute to friends and relatives. People vote for whomever they think will send more resources in their direction. Leadership becomes almost meaningless under these conditions: the nation isn't really going anywhere; it's just shoving resources around among factions.

Of course distributing resources is not the only leadership activity. The demands on tribal leaders are immense. Much of their time is taken up with day-to-day management. Much is taken up with constituent service. Much is spent in the urgent search for more federal or other resources. And much is simply fire-fighting: dealing with the latest funding crisis, the latest threat to sovereignty, the latest programmatic need, and so forth.[11] It's a small wonder that their orientation is often short-term. As one tribal leader said to us, "who has time for strategic thinking?"

[11] For a discussion of the typical activities of tribal leaders, see Begay (1997).

The Role of Non-Indigenous Governments in the Standard Approach

Before turning to what the standard approach looks like in practice, it is worth examining the role played in the approach by non-indigenous governments—in particular the federal government of the United States and federal and provincial governments in Canada.[12] As we've already pointed out, the standard approach is one in which most of the important decision-making power rests not with the indigenous nation but with the federal government or some other outsider. This power is most obvious in the funding process. Tribes may receive the authority to determine how funds will be spent within program guidelines. But the big decisions about priorities and program design are made elsewhere. Public Law 638, for example—while billed as "self-determination"—in many cases simply enlarges tribal administrative control. Tribes can take over the administration of federal programs. But the law does not give tribes a major role in determining what the programs look like or whether the policies that drive those programs are appropriate.

Of course one might argue that these are federal dollars and the federal government should control how they are spent. Fair enough. But there are many possible degrees of control. Ultimately, the question to be asked is how to improve reservation welfare, and federal control of decisionmaking and resource allocation has done a poor job of doing so. A larger tribal role in both would acknowledge that Indian nations themselves may have a better idea of what's wrong and of what the priorities should be and would allow those nations to allocate resources where they felt they were most needed.

First Nations in Canada face a similar situation. The federal government has tended to treat self-government as self-administration: major decisions are still made in Ottawa or provincial capitals while First Nations may have increased control over how already-determined programs are implemented and already-allocated funds are administered in the field.

It is not difficult to understand why non-indigenous governments would promote this approach. They recognize the demands of indigenous peoples for greater control over their own affairs, but they also face a commonplace set of bureaucratic imperatives: protect the budget, avoid newsworthy disasters, be accountable to legislatures and managerial higher-ups, and so forth. Turning over real power to Indian nations is threatening: what if they screw up? These are taxpayer dollars, after all. But the cost of this approach is high. It cripples reservation development efforts and leads, in the long run, to more poverty, more problems, and larger taxpayer burdens.

[12] State governments in the United States historically have been much less involved in Indian reservation economic development than provincial governments have been in Canada, where the provincial role in aboriginal affairs generally is substantial. However, this is beginning to change in the United States owing to increased efforts to devolve power from the central government toward state and local bodies. For some discussion of the implications of this trend for Indian nations, see Cornell and Taylor (2000).

Planning, Process, and Results under the Standard Approach

Under the standard approach, development planning and process look something like this, in admittedly abbreviated and generalized form. The tribal president or the council, under intense constituent pressure to "get something going," calls in the tribal planner. "We need to get something going," they say. The planner looks around for ideas and funding and sends out a bunch of proposals. The council decides to go ahead with whatever the tribe can get funding for. Tribal politicians then reward their political supporters by appointing them to run new programs or projects. The president and council then watch closely to see that things are done the way they want, micromanaging both enterprises and programs, and everybody prays that *this time,* something works.

The Six-Step Development Process under the Standard Approach

- The tribal council or president tells the tribal planner to identify business ideas and funding sources
- The planner applies for federal grants or other funds and responds to outside initiatives
- The tribe starts whatever it can find funding for
- Tribal politicians appoint their political supporters to run development projects
- The tribal council micromanages enterprises and programs
- Everybody prays

The results, predictably, have been poor. Many reservations have long histories of failed enterprises, which undermine self-confidence and results in frustration and hopelessness. The short life of many projects and enterprises encourages a politics of spoils in which reservation politicians, knowing that nothing much lasts very long, try to wring out of enterprises all the patronage and money they can before the enterprises go under. Reservation economies become highly dependent on federal dollars and decisionmaking, a situation that in and of itself undermines tribal sovereignty.

There's a brain drain as a lot of the people with good ideas—particularly younger tribal members—leave home for somewhere else, desperate to support their families and discouraged by political favoritism, bureaucratic hassles, and the inability of tribal government to deal with the basic problems. Patterns of failure, mismanagement, and corruption encourage outside perceptions of Indian incompetence and reservation chaos that make it even harder to defend tribal sovereignty. The ultimate economic result is continued poverty. In short, the standard approach doesn't work.

Typical Results of the Standard Approach to Development

- Failed enterprises
- A politics of spoils
- An economy highly dependent on federal dollars and decisionmaking
- Brain drain
- An impression of incompetence and chaos that undermines the defense of tribal sovereignty
- Continued poverty

This is not to say that this approach has no successes whatsoever to its name. Sometimes a determined manager or the superhuman efforts of employees can overcome the weaknesses of the approach. Sometimes an enlightened council keeps its hands off an enterprise and lets it grow. Sometimes a federal program finds a fit with tribal concerns and objectives and produces results. Sometimes a tribe has a monopoly on gaming within an urban region. Sometimes a tribe just gets lucky. But overall, the standard approach of reservation economic development has served Indian Country badly. It is fatally flawed, and it should be abandoned.

What's the alternative?

THE NATION-BUILDING APPROACH TO RESERVATION ECONOMIC DEVELOPMENT

In the last quarter of the twentieth century, American Indian nations began to invent a very different approach to reservation economic development. Only a relatively few nations have been involved, but more and more appear to be recognizing the value of this approach. We have called this the "nation-building" approach, thanks to its dual focus—conscious or unconscious—on asserting tribal sovereignty and building the foundational, institutional capacity to exercise sovereignty effectively, thereby providing a positive environment for sustained economic development.[13] Once again, we can generalize from a variety of cases and details to identify five primary characteristics of the nation-building approach: it involves comprehensive assertions of sovereignty or self-rule; it involves backing up sovereignty with effective governing institutions; it matches those institutions to indigenous political culture; it has a strategic orientation; and it involves a leadership dedicated to nation building.

[13] The labels "standard approach" and "nation-building approach" are ours and reflect a consensus neither in the literature on reservation economic development nor among American Indian nations. However, the term "nation-building" or "nation-rebuilding" has found increased currency in Indian Country and among other indigenous peoples in recent years, reflecting a growing political focus on restoring the abilities of indigenous nations to govern effectively and to establish and maintain successful, self-governing societies.

As with the standard approach, this summary is a generalization, an attempt to identify critical characteristics of a distinctive approach to development. In practice, there is plenty of variation within this approach. Few Indian nations offer "textbook" examples of nation building. But a growing number of nations are pursuing key elements of this approach, and our research indicates that the closer Indian nations come to this approach, the more likely they are to achieve sustained economic development.

Characteristics of the Nation Building Approach

As with the standard approach, we next review the central characteristics of this approach.

The Nation-Building Approach to Reservation Economic Development

- Practical sovereignty
- Effective governing institutions
- Cultural match
- Strategic orientation
- Nation-building leadership

1. In the nation-building approach, Indian nations are in the driver's seat.

The nation-building approach begins with sovereignty or self-rule: *practical decision-making power in the hands of Indian nations.* Indian nations have not always had such power. We can identify three distinct stages in the evolution of tribal sovereignty: law, policy, and practice (Table 1). As a matter of law, the United States has recognized a substantial degree of tribal sovereignty since at least the early part of the nineteenth century and the U.S. Supreme Court decisions commonly known as the Marshall trilogy.[14] Subsequent treaties, legislation, and judicial decisions in various ways modified this recognition, and over time tribal sovereignty—as a legal matter—has been increasingly constrained, but a significant legal foundation has survived.

Table 1. The Evolution of Tribal Sovereignty in the United States

Form of Sovereignty	Timing	Scope
	c. 1820s/30s	All Indian nations
As a policy matter	c. 1975	Federally-recognized Indian nations
As a practical matter	1970s…	Self-selected Indian nations

[14] The Marshall trilogy is a set of U.S. Supreme Court cases decided under the leadership of Chief Justice John Marshall in 1823, 1830, and 1832. See the discussion in Deloria and Lytle (1983).

In practice, however, Indian nations were steadily losing control over their own affairs. Over the rest of the nineteenth century, and despite this legal recognition, the United States assumed ever greater power over Indian lands and communities. Sovereignty may have been recognized in law, but it had no place in federal Indian policy. The federal government rapidly displaced Indian nations as the effective ruler of Indian Country.

The Indian Reorganization Act (IRA) of 1934 began a gradual reversal of this trend. While the IRA brought little substantive increase in tribal authority, it at least provided mechanisms through which Indian nations could begin to assert some governing power. The reversal was fragile, as the anti-tribal "termination" policy of the 1950s showed, but it gained momentum in the 1960s and 1970s with the shift to a federal policy of tribal "self-determination," made most explicit in the Indian Self-Determination and Education Assistance Act of 1975. As the federal government grudgingly accepted the principle that Indian nations should have maximum control over their own affairs, tribal sovereignty became more than simply a matter of law. It became federal policy. On paper, at least, Indian nations would now determine what was best for them.

This was a crucial development. While there is ample evidence that the federal government's notion of self-determination was a limited one,[15] and many federal bureaucrats, particularly in regional offices of the BIA, maintained a fierce grip on decision-making power, the door to practical sovereignty—self-rule—had been opened. Over the next two decades, a growing number of tribes began to force their way through that door, taking over the management of reservation affairs and resources and making major decisions about their own futures. Tribal sovereignty gradually moved beyond law and policy to *practice*: taking advantage of the federal self-determination policy, some Indian nations began exercising the sovereignty promised by law but denied by federal paternalism and control.

This development—the move to practical sovereignty or genuine self-rule—turns out to be a key to sustainable development. There are two primary reasons why.

- Self-governance puts the development agenda in Indian hands. When federal bureaucrats, funding agencies, or some other set of outsiders sets the reservation development agenda, that agenda inevitably reflects their interests, perceptions, or concerns, not those of Indian nation citizens. When decisions move into tribal hands, agendas begin to reflect tribal interests, perceptions, and concerns.

- Self-governance marries decisions and their consequences, leading to better decisions. In the standard approach to reservation development, outsiders make the major decisions about development strategy, resource use, allocation and expenditure of funds, and so forth. But if those outsiders make bad decisions, they seldom pay the price. Instead, the Indian community pays the price. This means that outside decisionmakers face little in the

[15] Barsh & Trosper (1975)

way of compelling discipline; the incentives to improve their decisions are modest. After all, it's not their community whose future is at stake. But once decisions move into Indian hands, then the decisionmakers themselves have to face the consequences of their decisions. Once they're in the driver's seat, tribes bear the costs of their own mistakes, and they reap the benefits of their own successes. As a result, over time and allowing for a learning curve, the quality of their decisions improves. In general, Indian nations are better decision-makers about their own affairs, resources, and futures because they have the largest stake in the outcomes.

There are concrete, bottom-line payoffs to tribal self-rule. For example, a Harvard Project study of 75 tribes with significant timber resources found that, for every timber-related job that moved from BIA forestry to tribal forestry—that is, for every job that moved from federal control to tribal control—prices received and productivity in the tribe's timber operations rose.[16] On average, tribes do a better job of managing their forests because these are *their* forests.

But the evidence is even broader. After fifteen years of research and work in Indian Country, we cannot find a single case of sustained economic development in which an entity other than the Indian nation is making the major decisions about development strategy, resource use, or internal organization. In short, practical sovereignty appears to be a *necessary* (but not sufficient) condition for reservation economic development.

2. In the nation-building approach, Indian nations back up sovereignty with effective governing institutions.

But sovereignty alone is not enough. If sovereignty is to lead to economic development, it has to be exercised effectively. This is a matter of governing institutions.

Why should governing institutions be so important in economic development? Among other things, governments put in place the "rules of the game": the rules by which the members of a society make decisions, cooperate with each other, resolve disputes, and pursue their jointly held objectives. These rules are captured in constitutions, by-laws, or shared understandings about appropriate distributions of authority and proper ways of doing things: they represent agreement among a society's members about how collective life should be organized.

These rules—these patterns of organization—make up the environment in which development has to take hold and flourish. Some rules discourage development. For example, a society whose rules allow politicians to treat development as a way to enrich themselves and their supporters will discourage development. A society in which court decisions are politicized will discourage development. A society in which day-to-day business decisions are made according to political criteria (for example, according to who voted for a particular official in the last election) instead of merit criteria (for example, according to who has the necessary skills to run a good business,

[16] Krepps and Caves (1994); Jorgensen (2000).

regardless of who their friends or relatives are) will discourage development. And the reverse is true as well. Where societies prevent politicians from enriching themselves from the public purse, provide fair court decisions, reward ability instead of voting records, and support other such rules, sustainable development is much more likely.

In other words, having effective governing institutions means putting in place "rules of the game" that encourage economic activity that fits tribal objectives. Whatever those objectives might be, our research indicates that several features of institutional organization are key to successful development.

- Governing institutions have to *be stable*. That is, the rules don't change frequently or easily, and when they do change, they change according to prescribed and reliable procedures.

- Governing institutions have to *separate politics from day-to-day business and program management,* keeping strategic decisions in the hands of elected leadership but putting day-to-day management decisions in the hands of managers.

- Governing institutions have to *take the politics out of court decisions* or other methods of dispute resolution, sending a clear message to tribal citizens and outsiders that their investments and their claims will be dealt with fairly.

- Governing institutions have to *provide a bureaucracy that can get things done* reliably and effectively.

Again, there is substantial evidence in support of these requirements. For example, Harvard Project studies of tribally owned and operated businesses on Indian reservations found that those enterprises in which day-to-day business management is insulated from tribal council or tribal presidential interference are far more likely to be profitable—and to last—than those without such insulation. In the long run, this means more jobs for reservation citizens.

Similarly, research shows that tribes whose court systems are insulated from political interference—in which the tribal council has no jurisdiction over appeals and in which judges are not council-controlled—have significantly lower levels of unemployment—other things equal—than tribes in which the courts are under the direct influence of elected officials. This is because an independent court sends a clear message to potential investors—whether outsiders or tribal citizens—that their investments will not be hostage to politics or corruption.[17]

When tribes back up sovereignty with stable, fair, effective, and reliable governing institutions, they create an environment that is favorable to sustained economic development. In doing so, they increase their chances of improving tribal welfare.

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[17] On separations of politics from business and on depoliticization of tribal courts, see Cornell and Kalt (1992) and Jorgensen and Taylor (2000).

3. In the nation-building approach, governing institutions match indigenous political culture.

To be effective, governing institutions have to be legitimate in the eyes of the people. One of the problems that Indian nations have had is their dependence on institutions that they did not design and that reflect another society's ideas about how authority ought to be organized and exercised. The governments organized under the Indian Reorganization Act, for example, tend to follow a simple pattern: strong chief executive, relatively weak council, no independent judicial function, and political oversight of economic activity. This approach has been applied across tribes with very different political traditions, leading to a mismatch, in many cases, between formal governing institutions and indigenous beliefs about authority.[18] Historically, some tribes had strong chief executive forms of government in which decision-making power was concentrated in one or a few individuals, while others dispersed power among many individuals or multiple institutions with sophisticated systems of checks and balances and separations of powers. Still others relied on spiritual leaders for political direction, while some relied on broad-based, consensus decision-making. Indian political traditions were diverse.

But tradition is not the issue here. In some cases, indigenous political traditions are long gone. But in many nations, distinctive ideas about the appropriate organization and exercise of authority still survive and often are starkly at odds with IRA structures or other structures imposed on Indian nations. The crucial issue is the degree of match or mismatch between formal governing institutions and contemporary indigenous ideas—whatever their source—about the appropriate form and organization of political power. Where cultural match is high, economic development tends to be more successful. Where cultural match is low, the legitimacy of tribal government also is low, the governing institutions consequently are less effective, and economic development falters.

This is not necessarily a prescription for a return to ancient political traditions. Governing institutions have to pass two tests. As we have just suggested, they have to be culturally appropriate. But they also have to be able to get the job done. The tribal governments of long ago were invented to solve the problems of the times. The times have changed. In some cases, traditional forms and practices may be inadequate to the demands of the modern world. If so, the challenge for Indian nations is to innovate: to develop governing institutions that still resonate with deeply-held community beliefs about authority but that are flexible enough to adjust to the demands of contemporary times.

4. In the nation-building approach, decision-making is strategic.

One of the primary characteristics of the standard approach to reservation economic development is its quick-fix orientation. Under enormous pressure from impoverished communities and with few resources to work with, tribal leaders and planners become opportunists, grasping at any

[18] First Nations in Canada have experienced similar impositions under the Indian Act.

available option regardless of its sustainability or its suitability to tribal circumstances or long-term goals.

The alternative to this quick-fix orientation is strategic thinking: an approach to development that starts not with "what can be funded?" but with "what kind of society are we trying to build?" and moves on from there. A strategic approach involves a shift:

- from reactive thinking to proactive thinking (not just responding to crisis but trying to gain some control over the future);

- from short-term thinking to long-term thinking (twenty-five years from now, what kind of society do you want?);

- from opportunistic thinking toward systemic thinking (focusing not on what can be funded but on whether various options fit the society you're trying to create);

- from a narrow problem focus to a broader societal focus (fixing not just problems but societies).

This sort of shift requires determining long-term objectives, identifying priorities and concerns, and taking a hard-nosed look at the assets the tribe has to work with and the constraints it has to deal with. The result is a set of criteria by which specific development options can be analyzed: does this option support the nation's priorities, fit with its assets and opportunities, and advance its long-term objectives? If not, what will?

5. In the nation-building approach, leadership serves primarily as nation-builder and mobilizer.

Leadership's primary concern in the standard approach is the distribution of resources. In the nation-building approach, leadership's primary concern is putting in place the institutional and strategic foundations for sustained development and enhanced community welfare.

This often means a loss of power for some people and institutions. The standard approach empowers selected individuals but fails to empower the nation. The chairman or president and the members of the tribal council get to make the decisions, hand out the goodies, and reward supporters, but the nation as a whole suffers as *its* power—its capacity to achieve its goals—is crippled by an environment that serves the individual interests of office-holders but not the interests of the community as a whole. Equally crippling is a community attitude, encouraged by the standard approach, that sees government not as a mechanism for rebuilding the future but simply as a set of resources that one faction or another can control.

In the nation-building approach, leadership focuses on developing effective governing institutions, transforming government from an arena in which different factions fight over resources into a

mechanism for advancing national objectives. What's more, in the nation-building approach, leadership is not limited to elected officials. It can be found anywhere: in the schools, in local communities, in businesses and programs. Its distinctive features are its public-spiritedness and its determination that empowering the nation as a whole is more important than empowering individuals or factions.

Of course the kind of leadership a nation has is determined in part by its governing institutions. Institutions that allow politicians to serve themselves—to advance their own agendas or factions, for example, by interfering in court decisions—will encourage self-interested and counter-productive leadership. Institutions that discourage such behavior with rules that, for example, focus leadership's attention on strategic issues and prevent them from micromanaging businesses or programs, will encourage forms of leadership that better serve the nation. It may take assertive and visionary leadership to put in place good governing institutions, but once those institutions are in place, they will encourage better leadership.

The Role of Non-Indigenous Governments in the Nation-Building Approach

In the nation-building approach, non-indigenous governments move from a decision-making role in tribal affairs to a resource role. In practical terms, that role involves the following:

- A programmatic focus on *institutional* capacity-building, assisting Native nations with the development of governmental infrastructure that is organized for self-rule, respects indigenous political culture, and is capable of governing well.

- A shift from program funding to block grants, thereby putting decisions about priorities in Indian hands.

- The development of program evaluation criteria that reflect the needs and concerns not only of funders but of Native nations as well.

- A shift from consultation to partnerships in which Native nations and outside governments make joint decisions where the interests of both are involved.

- Recognition that self-governing nations will make mistakes, but what does sovereignty mean if not the freedom to make mistakes and learn from them?

One of the most difficult things for non-indigenous governments to do is to relinquish control over Native nations. But this control is the core problem in the standard approach to development and a primary hindrance to reservation prosperity. As long as non-indigenous governments insist on calling the shots in Indian Country, they must bear responsibility as well for continuing poverty. Only when they are willing to let go will the development potential within Indian communities be released.

The Development Process and Its Results under the Nation-Building Approach

The development process under the nation-building approach is very different from the process under the standard approach. It has six steps, which may occur in sequence or simultaneously: asserting sovereignty, backing up that sovereignty with effective governing institutions, establishing a strategic orientation, crafting policies that support strategic objectives, choosing appropriate projects, and implementing them.

The Development Process under the Nation-Building Approach

- Asserting control
- Building capable governing institutions
- Thinking strategically
- Crafting policies that support strategic objectives
- Choosing development projects
- Implementation

Native nations operating with the standard approach tend to pursue development by focusing only on the last two of these steps—choosing projects and launching them—or sometimes on asserting sovereignty as well, ignoring the need for effective institutions, strategies, and policies. The development conversation tends to be not about growing an economy but instead about projects, and the goal is just to get something going. But without the other steps—building capable institutions, figuring out where you want to go, and putting in place the policies that can get you there—things are unlikely to last.

This is one of the places where leadership's role is critical in development. It takes visionary and effective leadership to re-orient the development conversation and change the development process so that the community embraces all six steps in the nation-building approach. Leadership can help refocus the nation's energy on building societies that work—economically, socially, culturally, politically.

Research evidence indicates that the nation-building approach is far more likely to be productive than the standard one. On the economic side, it promises more effective use of tribal resources and substantially increased chances that the community will experience successful economic development. On the political side, it recognizes that the best defense of tribal sovereignty is its effective exercise. Tribes that govern well are far less vulnerable to outside attacks on their sovereignty. Enemies of tribal sovereignty may still be able to find cases of reservation corruption or incompetence, but it is more difficult for them to use such anecdotal evidence to undermine all tribes' rights to govern themselves. As more and more Indian nations become effective governors

of their own communities, they change the prevailing picture of Indian Country and effectively defend the rights on which their own success depends.

Results Under the Nation-Building Approach to Development

- More effective access to and use of resources
- Increased chances of sustained and self-determined economic development
- A more effective defense of sovereignty
- Societies that work

FROM ONE APPROACH TO THE OTHER

The two approaches we've described here represent opposite ends of a scale or continuum. Some nations are closer to one end, stuck in the standard approach to development. Others are closer to the other end, engaged in nation building. Still others are somewhere in the middle, acting in some cases according to the standard approach but struggling to do things differently. A Native nation moving toward nation building would want to find out where it presently stands.

Where Does the Nation Stand?

Deep in the standard approach	Somewhere in between	Vigorously involved in nation building

We can also break down these two approaches into pieces, looking not at the overall picture but at various elements of the development puzzle. The final text box highlights four different dimensions of these approaches: governing institutions, business and economic development, relationships with non-indigenous governments, and elected leadership. We could add other dimensions as well, but these illustrate some of the important differences between the two. Any nation should be able to make a candid estimate of where it falls along these dimensions).

Of course the key question is how to change direction, moving away from the standard approach and closer to a nation-building one. Subsequent chapters in the forthcoming (2007) book, *Resources for Nation Building*, edited by Miriam Jorgensen and Stephen Cornell, offer an array of ideas about how to do that, as well as examples of what various Indian nations are doing to promote sovereignty, nation building, and prosperity for their peoples.

Where Does the Nation Stand?

Standard Approach		Nation Building Approach
Institutions are unstable, perhaps corrupt, viewed with suspicion by the people, and incapable of exercising sovereignty effectively	*Governing Institutions* →	Institutions are stable, fair, legitimate in the eyes of the people, and capable of exercising sovereignty effectively
Tribal government hinders development through micromanagement, politics, and over-regulation	*Business and Economic Development* →	Tribal government clears path for development through appropriate "rules of the game" and even-handed enforcement
Tribal government is dependent on federal funding policies and hostage to federal decisions	*Relations with Other Governments* →	Tribal government has the resources and capabilities to make its own decisions and fund its own programs
Elected leaders are preoccupied with quick fixes, crises, patronage, handing out resources, and factional politics	*Elected Leadership* →	Elected leaders focus on strategic decisions, long-term vision, and setting good rules, and bring the community with them

This report will appear as Chapter I in the forthcoming book, ***Resources for Nation Building: Governance, Development, and the Future of American Indian Nation***, edited by Miriam Jorgensen and Stephen Cornell (under review by University of Arizona Press); see <uapress.arizona.edu>.

Additional chapters include:

- "Remaking the Tools of Governance" by Stephen Cornell
- "The Role of Tribal Constitutions in Nation Building" by Joseph P. Kalt
- "Why Tribal Justice Systems Matter by Joseph Thomas Flies-Away" Carrie Garrow, and Miriam Jorgensen
- "The Challenge of Tribal Administration: Getting Things Done for the Nation" by Stephen Cornell and Miriam Jorgensen
- "Improving the Chances of Success for Tribally Owned Enterprises" by Kenneth Grant and Jonathan Taylor
- Citizen Entrepreneurship: An Untapped Development Resource by Stephen Cornell, Miriam Jorgensen, Ian Record, and Joan Timeche
- "Governmental Services and Programs: Meeting Citizens' Needs" by Alyce Adams, Andrew Lee, and Michael Lipsky
- "Intergovernmental Relationships: Expressions of Tribal Sovereignty" by Sarah Hicks
- "Rebuilding Native Nations: What Do Leaders Do?" by Manley Begay, Stephen Cornell, Miriam Jorgensen, and Nathan Pryor

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What Determines Indian Economic Success?

Evidence from Tribal and Individual Indian Enterprises

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and

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Abstract

Prior analysis of American Indian nations' unemployment, poverty, and growth rates indicates that poverty in Indian Country is a problem of institutions—particularly political institutions—not a problem of economics *per se*. Using unique data on Indian-owned enterprises, this paper sheds light on one of the core institutions of enterprise success—corporate governance. Indian enterprises that are subject to undue political influence—especially the influence of elected officials who serve as members of enterprise boards—frequently fail to thrive. Thus, enterprises without politically insulated corporate governance cannot generate ongoing profits for reinvesting in the community or for sustaining employment growth. Nonetheless, institutional means of separating business from politics are readily available—even for Indian nations committed to tribal ownership of significant portions of their economies.

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The subject of economic development in Indian Country is well-plowed territory. Presidential Commissions and Congressional Committees have investigated, tribal policy makers have experimented, bankers have innovated, and Indian entrepreneurs have put their time, talent, and treasure at risk.[2] As a consequence of this multi-fronted attack on underdevelopment, a number of salient patterns of success are coming into focus. This report applies statistical techniques to new data gathered in a joint effort by the National Congress of American Indians (NCAI), Alliance Management Systems, and the Harvard Project on American Indian Economic Development (hereinafter "the Harvard Project") funded by the Economic Development Administration of the US Department of Commerce (EDA).[3] The analysis uses survey responses from scores of tribal and individually owned Indian enterprises, representing nine commercial sectors, to isolate factors that contribute to enterprise success. The findings accord with previous research and reinforce policy approaches that the most successful enterprises in Indian Country already follow. The findings also suggest that new directions in federal policy are warranted.

Previous Research of the Harvard Project

The Harvard Project began in the mid-1980s with the question: What strategies work around Indian Country for reducing chronic Indian poverty? At the time, Indian gaming operations were modest and yet some tribes seemed to be pulling ahead of their peers in terms of reducing unemployment and sustaining tribal economies. Project researchers sought to find out what they were doing and why it worked. Since then, Project professors, fellows, and graduate students have logged hundreds of person-days on the ground in Indian Coun-

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[2] See for example, Kalt, Joseph P. and Stephen E. Cornell, *eds.*, *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* (Berkeley: University of California, 1992); *Economic Development in Indian Reservations:* Hearing before the Committee on Indian Affairs, United States Senate, One Hundredth Congress, second session, September 17, 1996 (Washington: GPO, 1996); Legters, Lyman H. and Fremont J. Lyden, *American Indian Policy: Self-Governance and Economic Development* (Westport, CT: Greenwood Press, 1994); *Indian Economic Development*: Oversight Hearing before the Subcommittee on Native American Affairs of the Committee on Natural Resources, United States House of Representatives, One Hundred Third Congress, first session, (Washington: GPO, 1993); *Moving Toward Self-Sufficiency for Indian People: Accomplishments 1983-84: An Interdepartmental Report Prepared by the Department of the Interior and the Department of Health and Human Services* (Washington: US Department of the Interior, 1984).

[3] See Wright, Victoria, *et al.*, *Building the Future: Stories of Successful Indian Enterprises* (Washington, D.C.: National Congress of American Indians, 2000). This paper is derivative of that work (Appendix D, in particular] and we are grateful to NCAI for their support and cooperation in conducting this research. We refer interested readers to *Building the Future* for nineteen case studies of Indian enterprise success.

try and consistently find that there are three keys to Indian economic development.[4] These keys are:

1. ***Sovereignty Matters*** Where tribes make their own decisions about what approaches to take and what resources to develop, they consistently out-perform outside decision-makers. Whether it is timber operations under PL 93-638, Indian Health Service programs under self-governance compacts, or water rights made secure under a treaty settlement, tribes do better when they themselves make the decisions.[5] Because tribes bear the consequences of their governments' decision-making, whereas the Bureau of Indian Affairs, non-tribal developers, state governments, and other outsiders do not, tribes that make their own development decisions do better.

2. ***Culture Matters*** Not long ago, the federal government espoused the argument that acculturation was a means to development. Indians, they argued, would develop as soon as they shed their "Indian-ness."[6] Research by the Harvard Project finds exactly the opposite: Indian culture is a resource that shores up the strength of government and has concrete impacts upon such bottom line results as forest productivity and housing quality.[7] Not only does

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[4] Currently, there are four basic missions of the Harvard Project and its sister organization, the Udall Center for Studies in Public Policy at the University of Arizona, all of which involve field-based work:

i) to conduct basic research into the causes and consequences of development success in Indian Country;

ii) to offer practical research and advice to tribes, pan-tribal organizations, and urban American Indian associations on matters ranging from program design to processes for constitutional reform;

iii) to educate senior executives in Indian Country in the US and among First Nations in Canada about the findings of the Harvard Project; and

iv) to identify, honor, and celebrate excellence in tribal government and management through the Honoring Nations awards program.

[5] See for example, Krepps, Matthew B. and Richard E. Caves, "Bureaucrats and Indians: Principal-Agent Relations and Efficient Management of Tribal Forest Resources," *Journal of Economic Behavior and Organization* 24(2)(1994): 133-151; Dixon, Mim, Yvette Roubideaux, Brett Shelton, Cynthia Mala, and David Mather, *Tribal Perspectives on Indian Self-Determination and Self-Governance in Health Care Management* (Denver: National Indian Health Board, 1998).

[6] "Indian economic development can proceed only as the process of acculturation allows," from US Department of the Interior, Bureau of Indian Affairs, "Economic Development of Indian Communities," in United States Congress, Joint Economic Committee, *Toward Economic Development for Native American Communities* (Washington: GPO, 1969).

[7] Jorgensen, Miriam R., "Governing Government," manuscript, January 1998; Jorgensen, Miriam R., "History's Lesson for HUD and Tribes," manuscript, April 2000.

the consent of the governed matter (as high school civics texts teach), but a congruence between the institutions of government and the views of the governed about what is *appropriate* government matters to success.[8] In short, good institutions of governance match cultural norms of political propriety.

3. ***Institutions Matter*** In addition to defending their sovereignty and having institutions that match their cultures, successful tribal governments share a few core institutional attributes. They settle disputes fairly, they separate the functions of elected representation and business management, and they successfully implement tribal policies that advance tribal strategic goals. Fair dispute resolution is essential to the accumulation of human, financial, and infrastructural capital because it sends a signal to investors of all kinds that their contributions will not be expropriated unfairly (see below). Separating business and government is critical because many Indian businesses are government-owned (occasionally by law and frequently by design). This feature invites the conflation of two contradicting institutional virtues—good constituent service to voters and fiduciary duty to shareholders—and thereby creates tremendous risk to profitability as elected leaders are pressured to interfere in business on behalf of voters (see below). Finally, effective administration is a feature of successful tribes because, without it, legitimacy deteriorates and sovereignty is eroded as opportunities go untapped or other powers fill the vacuum left by weak tribal government.

Essentially, the research of the Harvard Project finds that poverty in Indian Country is a political problem—not an economic one. There has been a substantial supply of labor in Indian Country for decades, yet scores of economic development plans have been unable to tap that supply on a sustained basis and thereby improve the fortunes of Indian households. Likewise, tribes possessing natural or capital resources have not led the vanguard of development. While a lack of resources can hamper tribes, and certain systemic features of Indian Country confound investment (for example, the difficulty of collateralizing trust lands), the Harvard Project finds that the real deficiency in Indian Country is a shortage of safe havens for capital. The ability to create

[8] Cornell, Stephen E., "Where's the Glue: Institutional Bases of American Indian Economic Development," National Bureau of Economic Research, Conference on Political Economy, December 1990, revised February 1991; Cornell, Stephen E. and Joseph P. Kalt, "Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache," *Economic Inquiry* 33(3)(1995):402-26; and Cornell, Stephen E., and Joseph P. Kalt, "Successful Economic Development and Heterogeneity of Governmental Form on American Indian Reservations," in Merilee S. Grindle, ed., *Getting Good Government: Capacity Building in the Public Sectors of Developing Countries* (Cambridge, MA: Harvard Institute for International Development, 1997), pp. 257-296.

these safe havens is largely a matter of tribal political and institutional effectiveness.

Table 1 provides concrete evidence of the value of stable and effective governing institutions. The data demonstrate the payoff to reservation employment levels when a tribe has an independent means of resolving disputes. The estimates are based on information from 67 tribes with more than 1000 members and show the results of a statistical analysis that controls for development-relevant factors such as natural resources, educational attainment, and local market conditions. Thus, all else equal, tribes that implement a separation of powers that leaves their dispute resolution mechanisms outside political influence enjoy a 5 percent lower level of unemployment than tribes that do not.

Table 1
Contributions of Alternate Forms of Government to Reservation Employment Levels

	General Council	Parliamentary	Strong Chief Exec
No Neutral Dispute Resolution	–	10.8%	14.9%
Neutral Dispute Resolution	5.0%	15.8%	19.9%

Note: Contributions are reported at mean sample values and are measured relative to a reservation with a general council (i.e., Athenian democracy) form of government, with no independent judiciary. All effects shown are statistically significant at the 90 percent level and higher.

Source: Cornell, Stephen and Joseph P. Kalt, "Where's the Glue: Institutional Bases of American Indian Economic Development", National Bureau of Economic Research, Conference on Political Economy, December 1990, revised February 1991.

Just as neutral dispute resolution has a concrete effect on employment, creating a separation between business and government has a material impact on the profitability of enterprises. Table 2 summarizes the results of an informal survey in which tribal leaders reported on the separation in their tribes between elected leadership and enterprise management. Enterprises whose management is insulated from elected bodies face odds of profitability of nearly seven-to-one, whereas enterprises where elected leaders participate in management face odds of profitability little better than one-to-one.

Table 2
Profitability of Tribal Enterprises
Independent vs. Council-Controlled Management

	Profitable	Not Profitable	Odds of Profitability
Independent	34	5	6.8 to 1
Council Controlled	20	14	1.4 to 1

Source: Survey of 18 tribal chairs participating in the National Executive Education Program for Native American Leadership. See also Kalt, Joseph P., "Before the United States Senate Committee on Indian Affairs: Statement of Prof. Joseph P. Kalt", Harvard Project on American Economic Development, John F. Kennedy School of Government, Harvard University, September 17, 1996.

Though compiled through informal means, Table 2 underscores a phenomenon reported in NCAI's nineteen case studies[9] and supported by the systematic data analysis presented later in this paper: Enterprise success hinges on freedom from political interference.

Statistical Analysis of Enterprise Survey Data

The data analyzed in this paper are unique in that they cover conditions affecting economic development success in Indian Country at the individual firm level. The richness of the contribution made by the surveyed enterprises lies in the depth of the information provided. The survey respondents—both tribal enterprises and privately held Indian enterprises—shared information regarding employment sustainability, profitability, industry sector, location, governance structure, comparative advantages, and use of technical assistance. In the context of policy threats to tax Indian revenues and the usual risk that a competitor may glean proprietary information, the enterprises contributing to this study are remarkable for their sheer number—more than 70 contributed survey responses.[10] Together, this depth and breadth of information enable us to revisit the original question of the Harvard Project (What works and why?) in a systematic manner and to ask a number of additional questions, including:

- Does using technical assistance help firms? In particular, does EDA technical assistance make a difference in enterprise success?
- Does employing tribal or other Indian workers increase firms' success?
- Does advertising more help?

[9] Wright, *et al.*, *Building the Future,* p. 5 *et passim.*

[10] See Appendix C of Wright, *et al.*, *Building the Future*, for a list of the contributing enterprises and Appendix B for a copy of the survey designed by NCAI and the authors. Without the contributions of so many companies, this analysis would not be possible, as no other systematic data on Indian firms are available in Indian Country.

- Does exploitation of Indian resources or tribes' other comparative advantages (like special economic niches) increase firms' success?
- Does creating boards of directors contribute to success?
- Does board structure matter, particularly separation from political leadership?
- Does tribal ownership matter to success?
- Does turnover in enterprise management affect success?

We approach this task with the statistical tool of multiple regression. Essentially, multiple regression is a way of isolating relationships in data that derive from observations of the world as it is (rather than from controlled scientific experiments). The technique allows us to ask: What is the influence of factors A, B, and C on outcome Y? To take an example from the newspapers, we can ask: What are the influences of age, weight, gender, family history, and cholesterol intake on the incidence of heart disease? Multiple regression can isolate environmental variables over which no one has much control (age, family history, and gender) from treatment (or policy) variables over which some control can be exercised (weight and cholesterol intake), and test the impact of other explanations (for example, smoking) on the outcome.

Here, our discussion will break down the variables to be analyzed into three main categories:

i) the **dependent variable** is what we hope to be able to predict (firm success);

ii) the **environmental variables** are independent measures that affect Indian enterprise success, but do not lend themselves to easy policy influence (for example, geographic market access), or they are variables that need to be accounted for so that the results are robust (industry sector); and

iii) the **policy variables** are factors that may contribute to success and over which tribal and federal governments have some control (for example, how enterprises are structured).

The Dependent Variable – How to Define Success

The research of the Harvard Project repeatedly uncovers the long-term importance of profitability as a goal for tribal enterprises. While tribal governments often view employment as the immediate problem to solve, Project research shows that managing tribal enterprises primarily as jobs engines is a recipe for on-going subsidization or for failure. Long-term enterprise health depends on profitability: if an enterprise is minding its profitability, then employment will take care of itself. Competitive pressures in labor-intensive industries will tend to allow tribal enterprises to employ more workers per dollar

invested. Conversely, competition in capital-intensive industries will allow less. Indian enterprises have to take employment intensity as a given fact of their competitive environment. It is a recipe for continuing losses if political pressures for jobs translate into mandates to enterprise management to operate against the grain of these competitive forces. For these reasons, we focus on profitability as the core measure of interest.

Having downplayed the importance of employment as a measure of success, we acknowledge that employment is nonetheless one of the ultimate goals of both federal policy and tribal economic development activity. Indeed, consultation with tribal leaders and Indian entrepreneurs confirmed to NCAI researchers that employment ought to be a key ingredient in any evaluation of Indian enterprise success.[11] Thus, we examine both profitability *and* employment trend.

First, we created an index for every enterprise based on gross and net income information (the "Profit Index").[12] Second, we created an index combining the profitability and employment information reported in the surveys (the "Profit and Employment Index").[13] The higher the profitability of the firm, or the higher the profitability of the firm and the more capable it was of sustaining a favorable employment trend, the higher the relevant index score. With these two alternate measures of Indian enterprise success in hand, we set about to determine which enterprise attributes are related to high scores.

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[11] Wright, *et al.*, *Building the Future*, p. 2.

[12] Because tribal enterprises are generally unwilling to share actual profitability information, the survey asked for revenues and net income to be reported in orders of magnitude (powers of ten—thousands, tens of thousands, hundreds of thousands, etc.). The profitability index is based on a ratio of the reported gross revenue and net income. Firms received:

0 if their profits in the last year were negative;

1 if their profit in the last year was two orders of magnitude lower than their revenues;

2 if their profit was one order of magnitude lower than their revenues; and

3 if their profit was of an equal order of magnitude as their revenues.

[13] Employment is added to the profitability index via a comparison of employment levels in the reporting year to employment levels three years earlier. Firms received an addition to their profitability index depending on their ability sustain employment over the period. They received:

0 additional points if the number of jobs they provided was shrinking over the period;

1 additional point if the number of jobs they provided remained constant over the period;

2 additional points if the number of jobs they provided increased over the period.

Environmental Variables

Before identifying the determinants of success, it is important to take account of variation in the data that results from factors beyond tribal control. This is variation that affects a firm's success, but cannot reasonably be a policy variable with which tribes could hope to influence success. For example, a firm's location may be strongly correlated with the success measure used here, but "relocate" is not useful advice to an enterprise manager committed or required to stay on or near a particular reservation. Our question should be, *given* an enterprise's location, what other factors affect its success?[14]

Similarly, reporting firms represent a wide array of industries, and the success results from those industries are highly variable. While is it possible to make a strategic choice about which industries to enter, such decisions require a great deal more data than is available here, and therefore, a better question is this: Which choices affect *all* firms' success, after accounting for their particular industrial sectors?[15]

Determinants of Success – The Independent Variables

As noted above, we use the dataset to ask a number of questions. Our analysis yielded three strong findings:

i) *firms with outstanding technical assistance (TA) needs tend to perform more poorly;*

ii) *firms with non-politicized boards of directors tend to perform better; and*

iii) *firms that were tribally owned tend to perform more poorly.*

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[14] Inadvertently, most survey respondents viewed the location question as it was posed on the survey as an "either/or" proposition and therefore checked only one box on the list of possible location variables (on-reservation, off-reservation, urban, rural) rather than two (see question two, Appendix B in Wright, *et al.*, *Building the Future*). This feature of the responses makes statistical analysis of location difficult. Nonetheless, we constructed the variable "Location" to take account of the information we did have; "Location" is coded 0 if the enterprise is located in a rural area or on the reservation and is coded 1 if the enterprise is located in an urban area or off the reservation.

[15] That said, it is interesting to note that gaming is *not* an industry with above average returns when compared to the other enterprises in the sample. Our first tests controlled for every industry sector reported in the survey—agriculture, construction, fish and wildlife, gaming, natural resources, services, and tourism. In this sample, only those enterprises in the agriculture and natural resource sectors demonstrated returns that were significantly different from average; to preserve the statistical power of the dataset, these were the only industrial sectors we controlled for in the remainder of our work. Because one would expect substantial returns in the gaming sector, we suspect that self-selection bias may be a significant problem with this data. Indian tribes unwilling to highlight their gaming success in the contemporary political environment would likely opt not to respond to the survey.

Table 3, below, shows the specific multiple regression results that point to these conclusions.[16] The first column lists the six variables we find to be highly correlated with enterprise success. The second and third columns report the effects of these variables on the "Profit Index" and the "Profit and Employment Index," respectively.

Table 3
Determinants of Enterprise Success
Effects on Profitability and Employment Sustainability
of Selected Enterprise Characteristics

Characteristic of the Enterprise	Measure of Enterprise success: Profit Index	Measure of Enterprise success: Profit and Employment Index
1. The enterprise managers have received technical assistance.	-0.41†	-0.34‡
2. Technical assistance needs were not fully met.	-0.92	-0.89
3. Elected leaders do not sit on the enterprise board.	0.40	0.88
4. The enterprise is tribally owned.	-0.43	-0.70
5. The enterprise is in a rural or reservation location.	0.38	0.92
6. The enterprise is in the agricultural or natural resource sector.	1.70	1.52
7. Constant term	2.03	3.10
Proportion of the variation in performance explained by the model.	32%	22%
Number of valid observations in the sample	59	53
Range of index values	0-3	0-5
Average index value	1.85	3.38

† For the profit index, all effects of the enterprise characteristics are statistically significant at the 90 percent confidence level; when a control for start-up enterprises is added (which may be more likely to utilize TA), enterprise managers' receipt of TA becomes a statistically insignificant variable and the statistical significance of the remainder of the variables rises to 94 percent.
‡ For the profit and employment index, all effects of the enterprise characteristics are statistically significant at the 90 percent confidence level except the first (enterprise managers have received TA), which is not significant at all; when a control for start-up enterprises is added (which may be more likely to utilize TA), the statistical significance of these other characteristics rises to the 95 percent confidence level.

A number of interesting results are readily apparent from Table 3. First, whether profitability alone or a combined profitability and employment trend index is used as a measure of enterprise success, the results are very similar.

[16] The general results shown are robust to other specifications, including multinomial logit.

Positive effects in the second column are associated with positive effects in the third column and vise-versa. Second, self-reported insufficiency of technical assistance (item 2 in Table 3) has as large negative effect on success.[17] Given the construction of the index scores, the data from this survey suggest that meeting unmet TA needs is roughly equivalent to increasing profitability by an order of magnitude or to positively changing the employment trend (since the change for item two is roughly negative one).[18] Third, the independence of boards of directors is helpful for enterprise success (item 3 in Table 3). Fourth, the data indicate that tribal ownership tends to reduce both profitability and the chances of employment stability (item 4 in Table 3).[19] We discuss each of these points in greater detail below.

The fact that many Indian-owned enterprises appear to have remaining needs for technical assistance—despite the fact that many of them *do* receive TA—indicates that available assistance fails to meet these needs. Because Indian enterprises in the sample report unmet technical assistance needs in high correlation with diminished enterprise success, the real need may be for linked financial and managerial capital investments—that is, targeted, firm-specific TA, arranged in conjunction with capital investment. In fact, in the international arena, development institutions are already making this course correction. They are turning away from "aid capital" (i.e., foreign aid) and toward the development of private capital markets, particularly venture capital. The advantage of such markets is that they result in an alignment of investors' and firm managers' incentives—venture capitalists find it in their best interest to do all they can to facilitate appropriate knowledge transfers, minimize capital risk, and increase returns from start-up enterprises. Thus, the data appear to indicate that policy toward Indian enterprises ought to mimic venture capital models in at least one way—the combination of financial investment with knowledge transfer. Nonetheless, if we take federal "aid capital" as a given, the sur-

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[17] Note that the presence of TA of any kind (item 1 in Table 3) was not strongly related to profitability and not related at all to the index of profitability and employment trends.

[18] See notes 12 and 13. Note also that there may be a causal relationship in the other direction if respondents observe their firms doing badly and conclude from performance alone that they need more technical assistance (as opposed to marketing intelligence, capital, etc). Resolving causation on this issue is beyond the scope of this analysis; however, given the widespread need for human capital development in Indian Country, it is reasonable to presume as a starting point that, compared to non-Indian enterprises, the need for technical assistance is more acute.

[19] Characteristics 5 and 6 in Table 3 control for location (see note 14) and industry sector (see note 15). Given that the coefficients are significant and positive in both cases, it might seem that an indicated long-term strategy would be to open agriculture or natural resource-based enterprises in rural or reservation locations—but that conclusion is likely unwarranted. As discussed above, the influence of industry sectors on profitability is best measured by a much larger dataset. Moreover, the location variable may be picking up the "signal" of other characteristics not included in the analysis for lack of data.

vey data indicate that, to ensure a good return on investment, tribal enterprises also must have adequate access to technical and managerial skill development resources.

Additionally, the results underscore the importance of enterprise and tribal institutions. In our statistical tests, enterprises with corporate boards did not perform markedly differently than enterprises without corporate boards. Instead, it was the existence of a *non-politicized* board that mattered to success. Indeed, in this sample, all enterprises with a profit index score of zero lacked an independent board. The implication is that a board that serves as a buffer between the (inherently) political tasks of setting tribal direction and strategy and the more specialized and technical tasks of managing enterprises contributes to success. This result from the statistical data is congruent with the results from NCAI's case studies, which indicate that keeping political actors and their constituents' immediate concerns out of business decisions is beneficial to enterprise health.

Also of note, tribal ownership of enterprises is correlated with reduced enterprise success, even after accounting for the independence of boards. As discussed above, tribally owned enterprises face competing pressures (as do all government-owned enterprises): the pressure to raise profits for the community (that is, to be accountable to shareholders) and the pressure to meet other community needs such as employment training (that is, to provide benefits to constituents). These dual pressures and the always-present possibility that elected leaders can interfere in the day-to-day running of businesses in the name of constituent service place an extra burden on tribally owned enterprises. Thus, while independent boards may provide an increase in profitability, our data indicate there is an additional premium on good institutions of government where tribally owned enterprises are concerned.[20]

The data did not support conclusions on any of the other questions posed in the bulleted list on page 6. To be specific, this dataset and our indices indicate:

- Employing tribal or other Indian workers does not have a statistically measurable impact (positive or negative) on firms' success.
- Advertising is not correlated with success.
- Exploitation of Indian resources or tribes' other comparative advantages (like special economic niches) does not measurably affect firms' success.

[20] An effort was made to poll enterprises on other attributes related to tribal governance (for example, whether they had recourse to effective dispute resolution mechanisms) in order to test the relationship established in Table 1; however, there was insufficient data to robustly test whether certain other non-board related governance mechanisms could overcome the negative influence of tribal ownership on our success indexes.

- Management turnover does not appear to affect success.

There are plausible substantive reasons these strategies may have no bearing on firms' success. For example, advertising may be indispensable to certain Indian enterprises, but only because it is an essential component of *sector* enterprise behavior, and thus, it would have no effect on *Indian* enterprise profitability.[21] Moreover, there may be a methodological reason this analysis could not identify effects: the dataset may have been too small to assess the strategies' impacts. In any statistical analysis of this type, the useable dataset shrinks as missing data disqualify certain observations, and this dataset, in particular, was fairly small to begin with. In sum, to be sure that the above hypotheses can be ruled out, a broader sampling of enterprises would be needed.[22]

This is not the only sense in which the dataset may be too small. The average firm in this analysis had a profitability-and-employment rating of 3.33. In other words, failing firms and very marginal firms were markedly underrepresented in the sample. The average firm was fairly profitable and, for at least three years, provided a steady number of employment opportunities. This underscores our impression (raised in note 15) that self-selection bias is a major shortcoming of this dataset. Enterprises that had gone out of business, of course, could not respond to the survey. Moreover, managers of enterprises that are struggling to survive may not have had the time or inclination to respond. Without these enterprises, this data sample is significantly skewed toward the successful end of the population of Indian enterprises. This inherent bias toward success may explain the counterintuitive result that management turnover does not affect success—it is likely that all Indian firms that suffered from management turnover remained unpolled.

Recommendations

A recurring theme in the surveys and in NCAI's case studies is that effective enterprise and tribal governance matter to success. Enterprises that are insulated from political pressures are more successful. Where political leaders can interfere directly in enterprises, pressures tend to mount for them to do so—to the detriment of performance. Conversely, where mechanisms exist to separate strategic (that is, political) decision-making from operational (that is, managerial) decision-making, enterprises seem to perform better. Moreover, a critical shortage of technical assistance may be having a direct negative impact on tribal enterprise success. Without this technical assistance, investments by the federal government will fall short of their potential, and investments by the private sector may not be forthcoming at all.

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[21] If there were an arms race in advertising in a given industry sector, it is plausible that no firm's advertising would yield significant differences in profitability.

[22] See also note 15.

Thus, there are implications for both tribal and federal policymakers. Tribal policymakers can ensure that a separation of functions exists between civic governance and corporate governance. Around the world, government-owned businesses face challenges that other enterprises do not, and this places a premium on structures of good corporate governance. This analysis of Indian firms indicates that a strategic review of enterprise governance systems—particularly for under-performing enterprises—is a warranted and important task for tribal governments. The good news is that the task is a piece of the economic development puzzle that is fully within the scope of tribal control where enterprises are owned by the tribe and within the scope of enterprise control under private ownership.

While prior Harvard Project research indicates that no organization is better suited to the task of governance overhaul than the tribes themselves, there is also a supporting role for federal policymakers to play in improving corporate governance and tribal self-governance. Much the way venture capital firms provide managerial talent and organizational advice with their investments of funds, the federal government could accompany its grants and other aid to tribal enterprise with even more readily available and higher quality knowledge, executive education, and information. A good deal of support has been provided in the past by various federal agencies, yet this research indicates substantially more could be done to improve the quantity and/or quality of technical assistance.