IN PURSUIT OF TRIBAL ECONOMIC DEVELOPMENT AS A SUBSTITUTE FOR RESERVATION TAX REVENUE

MATTHEW L.M. FLETCHER*

I. PROLOGUE—THE DEVIL'S JOURNEY OF *BUSTER V. WRIGHT*

In the crime film *The Usual Suspects*, the characters investigate the existence and identity of a mysterious Turkish criminal mastermind known as Keyser Soze.[1] During the film, the police interrogate a petty criminal crippled by cerebral palsy named Verbal Kint who spins a web of stories about Soze after being arrested during a murderous, violent caper involving Soze.[2] Kint refuses to disclose the identity of Soze and, paraphrasing Charles Baudelaire along the way, lets the cops know that when someone like Keyser Soze is that close to getting caught, "you'll never hear from him again."[3]

In many ways, the paradox of Keyser Soze—all evidence points to his existence but no one has ever identified him—parallels important aspects of Federal Indian Law. Finding Keyser Soze is the equivalent of creating a stable reservation revenue source that would allow most Indian tribes to function adequately as governments.

A rather pedestrian case, *Buster v. Wright*,[4] an early Indian law case from the 1900s decided by the Eighth Circuit, provides an interesting microcosm of the Supreme Court's recent Indian law jurisprudence in this area. *Buster* was the equivalent of an eyewitness that could identify Keyser Soze for the tribes searching for a stable revenue source. Following *Buster*'s trail, recent cases show how tribes struggle. From the late 1970s to

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*Assistant Professor, University of North Dakota School of Law. Director, Northern Plains Indian Law Center. Appellate Judge, Pokagon Band of Potawatomi Indians. J.D., University of Michigan Law School 1997. B.A., University of Michigan 1994. The author is a member of the Grand Traverse Band of Ottawa and Chippewa Indians. I wish to thank Wenona Singel, Kirsten Carlson, Kristen Carpenter, Del Laverdure, Steve Light, Kathryn Rand, Bill Rice, and Brian Upton for their thoughtful comments on this piece. I also wish to thank Tiffany Johnson, Doug Murch, Marah deMeule, Katrina Turman, and the other editors of the North Dakota Law Review.

1. THE USUAL SUSPECTS (PolyGram Filmed Entm't 1995).

2. One need only have handy a Turkish-to-English dictionary open to the page upon which the Turkish word "sözel" is defined for an answer to Keyser Soze's identity. H.C. HONEY & FAHIR IZ, THE OXFORD TURKISH-ENGLISH DICTIONARY 430 (3d ed. 1984).

3. "The greatest trick the Devil ever pulled was convincing the world he didn't exist." THE USUAL SUSPECTS, *supra* note 1.

4. 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

2001, the Supreme Court cited *Buster* with approval.[5] In 2001, that all changed.[6]

Advocates for Indian Tribes lost Keyser Soze's trail a few years ago with a case called *Atkinson Trading Co., Inc. v. Shirley*.[7] That case concerned the taxation by the Navajo Nation of a non-Indian-owned business located on a postage-stamp of fee land in the middle of the vast Navajo Reservation.[8] Taxing non-Indian-owned businesses is a critical source of revenue for Indian tribes without enough natural resources or gaming revenue to provide adequate governmental services for its members.[9] In arguing that it had authority to tax the non-Indian-owned business, the Navajo Nation relied heavily upon *Buster v. Wright* and *Merrion v. Jicarilla Apache Tribe*,[10] a 1982 Supreme Court case.[11] The Nation argued that its tax on the non-Indian-owned business located on a speck of fee land within the vast Navajo reservation met the so-called *Montana 1* test, a test tribes must pass in order to regulate non-Indians.[12]

Under the *Montana 1* test, Indian tribes may regulate or impose taxes on non-Indians under very prescribed conditions.[13] In 1981, the Supreme Court ruled in *Montana v. United States*[14] that Indian Tribes may impose its regulatory, adjudicatory, or taxation authority on non-members in two circumstances: (1) "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements";[15] or (2) "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[16] The Supreme Court had applied these tests, known as the *Montana 1* and *Montana 2* exceptions to Indian lawyers, in several

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5. *E.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1983); Nevada v. Hicks, 538 U.S. 353, 372 (2001).

6. Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 653 (2001).

7. 532 U.S. 645 (2001).

8. *Atkinson*, 532 U.S. at 648.

9. *Id.*

10. 455 U.S. 139 (1982).

11. *Atkinson*, 532 U.S. at 649.

12. *See* Brief for Respondents at 7-8, Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001) (No. 00-454).

13. *See* Montana v. United States, 450 U.S. 544 (1981).

14. 450 U.S. 544 (1981).

15. *Montana*, 450 U.S. at 565-66 (citing, *inter alia*, Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906)).

16. *Id.* at 566 (citations omitted).

cases previous to *Atkinson Trading*.[17] Most significantly in the 1997 case *Strate v. A-1 Contractors*,[18] the Court applied the test to a case brought in a tribal court by a non-Indian motorist who had collided with another non-Indian motorist.[19] Holding that the tribal court had no jurisdiction over two non-Indian tort litigants, the Court noted that "*Montana*'s list of cases fitting within the first exception . . . indicates the activities the Court had in mind" and listed, again, *Buster v. Wright*.[20] In its parenthetical describing *Buster*, the Court wrote, "upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as 'inherent' the Tribe's 'authority . . . to prescribe the terms upon which noncitizens may transact business within its borders.'"[21] It appeared that, in *Strate*, the Court said (admittedly in dicta) that Indian Tribes have inherent authority to tax non-members that choose to do business within the borders of their reservations, *à la Buster*.[22] While it may be that many Tribes' reservation boundaries are not extant, the Navajo Nation's reservation remains a striking example of well-preserved Indian Country. [23]

What prompted the *Montana* Court to utilize *Buster v. Wright*, a lower court case nearly 100 years old that had not been cited at all between 1958[24] and 1979[25] and appeared to be headed toward the dustbin of history?[26]

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17. *See, e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); South Dakota v. Bourland, 508 U.S. 679 (1993); Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408 (1989).

18. 520 U.S. 438 (1997).

19. *Id.* at 438.

20. *See id.* at 457.

21. *Id.*

22. *Id.* at 457-58.

23. *See, e.g.*, Hagen v. Utah, 510 U.S. 399 (1994) (Uintah Valley Reservation); Wisconsin v. Stockbridge-Munsee Cmty., 67 F. Supp. 2d 990 (E.D. Wis. 1999) (Stockbridge-Munsee Reservation).

24. Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F.2d 553, 556 (8th Cir. 1958).

25. Oliphant v. Schlie, 544 F.2d 1007, 1009-10 (9th Cir. 1979).

26. Important and influential commentaries from the 1970s and early 1980s did not mention *Buster* at all. *E.g.*, WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL (1st ed. 1981); RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980); Carole E. Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Nonindians*, 40 L. & CONTEMP. PROBS. 166 (1976); S. Bobo Dean, *The Consent of the Governed?—A New Concept in Indian Affairs?*, 48 N.D. L. REV. 529 (1972); Marvin J. Sonosky, *State Jurisdiction Over Indians In Indian Country*, 48 N.D. L. REV. 551 (1972). The second major federal Indian law casebook also omitted *Buster*. DAVID H. GETCHES, DANIEL M. ROSENFELT, & CHARLES F. WILKINSON, FEDERAL INDIAN LAW: CASES AND MATERIALS (1st ed. 1979). However, the first major federal Indian law casebook excerpted *Buster*, particularly the language that suggested that Indian tribes had inherent authority to tax non-Indians. MONROE E. PRICE, LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES 176-77 (1st ed. 1973); *see also* MONROE E. PRICE & ROBERT N. CLINTON, LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES 277 (2d ed. 1983). But by the most recent

Buster did not appear to be the kind of case the Court would dredge up from the murky depths of territorial Indian law. In fact, language within *Buster* seems to confirm that Indian Tribes have the inherent authority to tax the business activities of non-members:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in an act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.[27]

In other words, the authority of Indian Tribes to tax non-Indian business activities is inherent and extant until Congress sees fit to take it away.[28] This is consistent with the federal Indian law they teach in reputable law schools. In fact, the basis for much federal Indian law is the maxim that Indian Tribes have the inherent authority of all sovereigns until Congress takes it away.[29] Chief Justice John Marshall coined the term "domestic dependent nations" that is still used to describe this state of existence for Tribal sovereigns.[30] Perhaps the most salient example of a Tribe's inherent authority is the continuing vitality of its defense of sovereign immunity from court actions.[31]

But after a twenty-one year absence from state and federal court opinions, *Buster* re-surfaced in the Ninth Circuit's decision in *Oliphant v. Schlie*.[32] The majority of the panel quoted *Buster* extensively, using the language above, for the proposition that Tribes had inherent authority to prosecute non-Indians on the reservation, over a strident dissent from then-Judge Kennedy.[33] The Supreme Court reversed the Ninth Circuit's decision in *Oliphant*.[34] Mysteriously, though *Buster* was not a Supreme Court precedent nor had it ever been followed in a Supreme Court opinion, *Buster*

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edition of this casebook, discussion of *Buster* independent of its citation in Supreme Court cases had ceased. ROBERT N. CLINTON, CAROLE E. GOLDBERG & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM (4th ed. 2003).

27. *Buster*, 135 F. at 950.

28. *Id.*

29. *E.g.*, United States v. Lara, 124 S. Ct. 1628, 1634-37 (2004).

30. Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831).

31. *E.g.*, Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 753-60 (1998).

32. 544 F.2d 1007 (9th Cir. 1979).

33. *See Oliphant*, 544 F.2d at 1009-10.

34. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

then became a regular guest star in Supreme Court opinions, showing up in the Court's opinion in *Washington v. Confederated Tribes of the Colville Indian Reservation*[35] for the innocuous proposition that the Tribes have the "power to tax non-Indians entering the reservation to engage in economic activity."[36]

In *Buster*'s next and most crucial appearance, the *Montana* Court dropped *Buster* in between three other Supreme Court cases, *Williams v. Lee*,[37] *Morris v. Hitchcock*,[38] and *Washington v. Confederated Tribes of the Colville Indian Reservation*, as authority for the *Montana 1* exceptions.[39] These cases are the four examples of when an Indian Tribe may invoke the *Montana 1* exceptions and regulate non-members. The first, *Williams*, held that state courts have no jurisdiction over civil cases brought by a non-Indian against an Indian for disputes arising out of events that occur on the reservation (again, the Navajo Nation).[40] *Williams* did not involve any tribal action, so that case does not really create an example of a situation where a Tribe can regulate a non-member. *Morris* is trickier because it involved non-member grazing on land owned and controlled by the Chickasaw Nation, but the Court read the relevant treaty and Act of Congress and concluded that Congress had intended to allow the Chickasaw Nation to tax the non-member cattle grazers.[41] *Buster*, fitting in the list right after *Morris*, appears to be virtually the same, with the Department of Interior even agreeing to collect the Creek Nation's taxes from the non-Indians, but *Buster* extended the authority to land owned by non-members.[42] *Colville* followed with a "*see*" signal, which in the Bluebook means that the "[c]ited authority clearly supports the proposition."[43] There the Court held that Indian Tribes have inherent authority to tax non-members engaging in economic activity, building upon *Buster*.[44]

These then are the four circumstances the Court cited to indicate when an Indian Tribe has inherent authority as a domestic dependent nation to regulate or tax non-members. *Williams* is inconsequential and *Morris* and

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35. 447 U.S. 134 (1980).
36. *Colville*, 447 U.S. at 153.
37. 358 U.S. 217 (1959).
38. 194 U.S. 384 (1904).
39. Montana v. United States, 450 U.S. 544, 565-66 (1981).
40. *Williams*, 358 U.S. at 218.
41. *Morris*, 194 U.S. at 716.
42. Buster v. Wright, 135 F. 947, 957-58 (8th Cir. 1905).
43. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 22 (Columbia Law Review Ass'n et al eds., 17th ed. 2000).
44. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153, 157 (1980).

Buster did not help the Navajo Nation in *Atkinson* because Congress did not provide for the taxation authority by statute. But *Colville* suggests a much broader authority. And wait! "Inherent authority" means that the Tribe had it all along, so it did not need a statute from Congress. A statute from Congress authorizing the Tribe to do something is a *delegation*.[45] Where did the "inherent authority" in *Buster* come from? The *Colville* Court cited *Buster*'s broad language about a tribe's inherent authority,[46] but wasn't *Buster* actually a case involving a Congressional delegation?

To cure this problem, this swamp of confusion, the Navajo Nation relied on *Merrion v. Jicarilla Apache Tribe* to shore up *Buster*. In *Merrion*, the Court upheld the inherent authority of Tribes to tax non-members producing oil and gas from within the reservation.[47] Again relying on *Buster*, the Court, in an opinion authored by Justice Marshall, held that Tribes have the inherent authority to tax non-members, even on land owned by non-Indians.[48] It looked like Justice Marshall settled any dispute with his adoption of *Buster*'s broadest language. According to *Merrion*, an Indian Tribe (with extant reservation boundaries) has inherent authority to tax the business activities of non-members on Indian land or on non-Indian-owned fee land.[49] Where is *Atkinson Trading*, or *Cameron Trading Post* coming from? Who do they think they are, after *Merrion*, to think they have a chance of beating the Navajo Nation on this point? There they are, located on a postage stamp of land, well within the vast Navajo Nation reservation. They were in the exact situation the Court must have been talking about in *Montana 1*.

Well, the answer is that the last twenty-odd years after *Merrion* have not been good ones for litigating Tribes appearing before the Supreme Court.[50] Professor David Getches, writing in the year before *Atkinson Trading*, noted that convicted criminals have a better win rate before the Rehnquist Court than Tribes.[51] In other words, Verbal Kint had a better

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45. *See, e.g.*, United States v. Mazurie, 419 U.S. 544 (1975).

46. *Colville*, 447 U.S. at 153 (citing *Buster*, 135 F. at 950).

47. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 142-44 (1982).

48. *See id.* at 143-44 (quoting *Buster*, 135 F. at 952).

49. *See id.*

50. Or before that, most would argue. *See, e.g.*, BARSH & HENDERSON, *supra* note 26, at 137-202 (arguing that the Court began to go wrong in the early 1970s).

51. *See* David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colorblind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 281 (2001) (citing thirty-six percent for criminals and twenty-three percent for Tribes). *See generally* Bethany Berger, *"Power Over this Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957 (2004); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405 (2003); Joseph William Singer, *Canons of*

chance of having his conviction for possession of illegal weapons, second degree, overturned on appeal than Indian Tribes would have of winning any case before the Court. The Supreme Court with the *Montana* case had erected a barrier precluding tribal authority over non-Indians.[52] Though the Court listed a few exceptions, it was not really serious about them. In fact, after *Strate*, those exceptions appeared to be shrinking into oblivion.[53] Somehow, *Merrion* had all but faded from discussion. Wasn't *Merrion* decided *after Montana*? If *Montana* is inconsistent with *Merrion*, then *Merrion* should be the boss of the hot sauce. After all, it came later. If the Court had forgotten about *Merrion*, maybe it needed to be reminded. Maybe *Merrion* needed to be rescued.

After a careful reading of *Buster* and armed with Justice Marshall's opinion in *Merrion*, the Navajo Nation thought it had something—a lead, a break in the case, some key piece of authority that would create positive precedent for Indian tribes. Finding a leak in the *Montana* barrier was akin to the police catching Keyser Soze: first, the Tribes had to prove its existence, and second, they had to exploit it. And, just like the interrogating cops in *The Usual Suspects,* who had in their possession the sole survivor of a violent criminal conspiracy spearheaded by Keyser Soze, the Navajo Nation's attorneys rounded up the best authority it could find. They thought they had the answer to unlocking the door, to finding the arch-criminal, but it did not happen.

The Supreme Court pulled the rug out from under the Navajo Nation, just as Keyser Soze tricked the police. The Court said, in what appears to be one of the most disingenuous and intellectually dishonest statements of the young century, "[w]e have never endorsed *Buster*'s statement that an Indian tribe's 'jurisdiction to govern the inhabitants of a country is not

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Conquest: The Supreme Court's Attack on Tribal Sovereignty, 37 NEW ENG. L. REV. 641 (2002-2003); Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law through the Lens of* Lone Wolf, 38 TULSA L.J. 5 (2002); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001); 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. 367 (2000); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993). *Cf.* Abby Abinanti, *A Letter to Justice O'Connor*, 1 INDIGENOUS PEOPLES' J. OF L., CULTURE & RESISTANCE 1 (2004) (recalling the human impact of the Supreme Court's decision in Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)).

52. *See supra* notes 13-16, and accompanying text.

53. *See* 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, 57 (1999).

conditioned or limited by the title to the land which they occupy in it.'"[54] But wait, there's *Merrion*, which quoted *Buster*'s statement on the next page of the 135th volume of the first series of the Federal Reporter that "[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners."[55] No good, said the Court, because the tax in *Atkinson Trading* was not on tribal land—"[an] Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land."[56] In other words, "*Buster* is not an authoritative precedent."[57]

It was not as if the police interrogating Keyser Soze were buffoons. The attorneys for the Navajo Nation followed the manual for litigating cases to the letter. Before *Atkinson Trading*, Indian Tribes had inherent authority to tax non-members conducting business activities within the reservation.[58] *Colville* said it.[59] *Merrion* said it.[60] *Buster* said it, and the Court relied upon *Buster* in *Montana*, the source of this line of crazed authority.[61] But, just as Keyser Soze narrowly escaped the clutches of the police with an entertaining and fantastic story, the Supreme Court told the Navajo Nation that Tribes do not have inherent authority to tax non-members on fee land, even though that is what the Court had been saying all along (admittedly in dicta).

Then a few weeks later in *Nevada v. Hicks*,[62] the Court blocked off a potential key avenue for the tribes, just as Keyser Soze conspired to assassinate Edie Finneran, the woman he believed to be the last living person that could positively identify him. After *Hicks*, it no longer mattered if the non-member was doing business on tribal land or not—the Tribes still had no jurisdiction over that person.[63]

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54. Atkinson Trading Co., Inc., v. Shirley, 532 U.S. 645, 653 n.4 (quoting *Buster v. Wright*, 135 F. 947, 951 (1905)).

55. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 143 (quoting *Buster*, 135 F. at 952 (emphasis deleted)).

56. *Atkinson Trading*, 532 U.S. at 653.

57. *Id.* at 653 n.4.

58. *E.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980)

59. *Id.*

60. *Merrion*, 455 U.S. at 142-44.

61. Montana v. United States, 450 U.S. 544, 565-66 (1981); Buster v. Wright, 135 F. 947, 957-58 (1905).

62. 533 U.S. 353 (2001).

63. *See* Hicks, 533 U.S. at 353.

The Tribes were left to walk away from these cases knowing how close they came to catching up with the Court—and to their Keyser Soze. They are not likely to get that close again. Maybe the Court made a tiny mistake in including *Buster v. Wright* in the list of *Montana 1* exceptions, but in *Atkinson Trading* and *Hicks*, it bluntly corrected that mistake. And like Verbal Kint predicted, "and like that, he's gone."

It actually appears the Tribes are worse off than the cops in *The Usual Suspects* because at least the police proved the existence of Keyser Soze; the Tribes have yet to prove the tangible existence of a *Montana* exception to the Supreme Court. But at the end of *The Usual Suspects*, a fax comes through to the police station with a sketch of the face of Keyser Soze, a sketch created from the eyewitness testimony of a Hungarian mobster on his deathbed named Artash Kobash. Kobash has burns over sixty percent of his body and spends part of the film in a coma. He is not a healthy witness. It would not take much to knock him off. It is likely that once Keyser Soze hears that Artash Kobash is singing like a canary from his hospital bed, a hired gun who does not know he is working for Keyser Soze will sneak into his room and finish the job.

But maybe there is another witness out there. Will Keyser Soze come up one last time to finish off that one, too? The police at the end of the film know what Keyser Soze looks like—they have a piece of paper with a mean-looking drawing of Kevin Spacey's face on it—but that will get them nothing if they do not have a living witness. It appears that Indian Tribal governments' last remaining witnesses were *Buster v. Wright* and *Merrion v. Jicarilla Apache Tribe*. Were their disappearances "cruel joke[s]"[64] played by the Supreme Court?

It is time for the Supreme Court to stop hiding the ball. The easiest way for the Court to accomplish this task is merely treat tribal governments as governments and not as private associations. This article proposes just that. Part II starts by noting that no government—federal, state, local, or tribal—can function without revenues. Part II then identifies the state of federal Indian law in this area. Part III discusses how tribal governments chose the only remaining option to raise revenue—economic development—an option selected by non-Indian governments in similar circumstances. Part III describes in detail many of the businesses tribes have started and where they have succeeded and failed. Part IV discusses the practical limitations of using economic development to create governmental revenue. First, federal and state law generally prohibits tribes from exploiting a government's presumptive authority to avoid taxes—known as

64. United States v. John, 437 U.S. 634, 653 (1978).

"marketing the exemption"—in spite of the fact that state and local governments market their exemptions without objection. Second, special interests, usually economic competitors of tribes, object to tribal economic development by using their lobbying resources and power to create a backlash against tribal economic development. Third, Indian tribes have artificial institutional limitations to creating economic development. Fourth, there are actual physical dangers for some tribes in generating economic development, dangers from both inside and outside the tribe. Part V provides four suggestions for law reform. The first three amount to what some commentators and Indian advocates have called the "Hicks fix," perhaps an impossible task in practice, but the fourth is a relatively simple solution to many problems facing Indian tribes in this area, a solution that could be implemented with a favorable court ruling or a technical amendment to the Tribal Tax Status Act.[65]

II. COMPARATIVE ANALYSIS OF GOVERNMENT REVENUE—FEDERAL GOVERNMENT, STATES, LOCALITIES, AND TRIBES

One of the more critical lessons learned by the Founders at the time of the Constitutional Convention was that a government cannot function without revenue.[66] As a result, the Constitution provides the federal government with the power to lay taxes.[67] State constitutions provide state

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65. *See generally* Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2607 (codified as amended at 26 U.S.C. § 7871 (2000)).

66. *See* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 587 (1895) (Field, J., concurring).

> The subject of taxation in the new government which was to be established created great interest in the convention which framed the constitution, and was the cause of much difference of opinion among its members, and earnest contention between the states. The great source of weakness of the confederation was its inability to levy taxes of any kind for the support of its government. To raise revenue it was obliged to make requisitions upon the states, which were respected or disregarded at their pleasure. Great embarrassments followed the consequent inability to obtain the necessary funds to carry on the government. One of the principle objects of the proposed new government was to obviate this defect of the confederacy by conferring authority upon the new government by which taxes could be directly laid whenever desired.

Id.; *see also* Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands*, 32 GONZ. L. REV. 291, 297 (1996-1997) ("Initially, the central government relied upon revenue requests made to the states to pay the young nation's debt."). *See generally* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999).

67. *See* U.S. CONST. art I, § 8, cl. 1; *see also id.* §§ 2, 8, 9; Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 488 (1939) (Frankfurter, J., concurring) ("Congress . . . can reach every person and every dollar with due regard to Constitutional limitations as to the method of laying taxes.") (citing U.S. CONST. art. I, § 8).

governments—and, concomitantly, local governments—the power to lay taxes.[68]

Indian tribes are not states, nor are they local governments.[69] Other than three innocuous references to Indian tribes,[70] the Constitution is silent as to the powers of tribal governments.[71] They are "extra-constitutional."[72] They are, according to the Supreme Court, "domestic dependent nations."[73] Much legal scholarship has arisen debating the origins and meaning of this

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68. *See* Pollack v. Farmers' Loan & Trust Co., 158 U.S. 601, 621 (1895) ("The founders anticipated that the expenditures of the States, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property . . . ."); Union Pac. R.R. Co. v. Peniston, 85 U.S. 5, 29 (1873). In *Union Pacific*, the Supreme Court held:

> That the taxing power of a State is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within the territorial boundaries of the State, except so far as it has been surrendered to the Federal government, either expressly or by necessary implication, are propositions that have often been asserted by this court.

Id.; Gibbons v. Ogden, 22 U.S. 1, 42 (1824) (noting that state and federal taxing authority is "concurrent").

69. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191-92 (1988) (citing U.S. CONST. art. I, § 8, cl. 3); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 29 (4th ed. 2004) (citing Talton v. Mayes, 163 U.S. 376 (1896)).

70. *See* U.S. CONST. art. I, § 2, cl 3; *id.* § 8, cl. 3; U.S. CONST. amend. XIV, § 2.

71. *See* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1086-1102 (2004).

72. *See* United States v. Lara, 124 S. Ct. 1628, 1641 (2004) (Kennedy, J., concurring) (describing Indian tribes as "extraconstitutional"); Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1755 n.26 (2003) (quoting CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 112-13 (1987)); Frank Pommersheim, *Tribal Courts and Federal Courts: A Very Preliminary Set of Notes for Federal Courts and Teachers*, 36 ARIZ. ST. L.J. 63, 65 (2004) (describing federal Indian law as based on an "extra-constitutional regime") (citing Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002)); Donald E. Laverdure, *A Historical Braid of Inequality: An Indigenous Perspective of* Brown v. Board of Education, 43 WASHBURN L.J. 285, 295 n.73 (2004) (describing federal "plenary power" over Indian tribes as "extra-constitutional"); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 25 (2002).

73. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); *see also* United States v. Lara, 124 S. Ct. 1628, 1636 (2004); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 451 (1989) (Blackmun, concurring and dissenting); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982); Baker v. Carr, 369 U.S. 186, 215 (1962); Roff v. Burney, 168 U.S. 218, 221 (1897).

Armed with the "domestic dependent nations" label it firmly attached to Indian tribes, the Supreme Court in 1883 announced that Congress has plenary power of Indian affairs. *See Ex parte* Crow Dog, 109 U.S. 556 (1883); United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); *see also* CANBY, *supra* note 69, at 93 ("Congress' power over Indian affairs is plenary. It has been deemed to arise from the Indian Commerce Clause or even from the fact of conquest.") (citing United States v. Long, 324 F.3d 475, 479 (7th Cir.), *cert. denied*, 580 U.S. 822 (2003)).

phrase,[74] but suffice it to say that Indian tribes are recognized as governments,[75] replete with sovereign immunity[76] and the power to tax both its own members[77] and, in some limited circumstances, non-Indians.[78] Indian tribes and their members residing on their own tribe's land are generally immune from state taxation and regulation.[79]

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74. *E.g.*, Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77 (2004); Carey N. Vicenti, *The Social Structures of Legal Neocolonialism in Native America*, 10 KAN. J.L. & PUB. POL'Y, Spr. 2001, at 513, 518 (arguing that Chief Justice Marshall made up the term "domestic dependent nations"); Siegfried Weissner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567 (1995); Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461 (1991); Jill Norgren, *Protection of What Rights They Have: Original Principles of Federal Indian Law*, 64 N.D. L. REV. 73 (1988); William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1 (1987). *Cf.* Prakash, *supra* note 71 (searching for a textual basis in the Constitution and elsewhere for plenary power over Indian tribes); Clinton, *supra* note 72 (arguing that there is no authority for plenary power over Indian tribes).

75. *See* John F. Petoskey, *Doing Business With Michigan Indian Tribes*, 76 MICH. B. J. 440, 440 (1997); Judith V. Royster, *Oil and Water in the Indian Country*, 37 NAT. RESOURCES J. 457, 483 (1997); Allen H. Sanders, *Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights?*, 17 PUB. LAND & RESOURCES L. REV. 153, 174 (1996).

76. *See* Kiowa Tribe of Okla. v. Mfg Techs. Inc., 523 U.S. 751, 754 (1998); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Indians, 498 U.S. 505, 509 (1991); Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890 (1986); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Puyallup Tribe, Inc. v. Dept. of Game, 433 U.S. 165, 167 (1977); United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940).

77. *See generally* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980) (rejecting the argument that tribes no longer possess the power to tax) (citing United States v. Wheeler, 435 U.S. 313 (1978)).

78. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982); *see also* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 651 (2001) (describing the circumstances in which an Indian tribe may tax non-members) (quoting Montana v. United States, 450 U.S. 544, 565, 566 (1981)).

79. *See* 25 U.S.C. § 465 (2000) ("[Indian lands] shall be exempt from State and local taxation."); The Kansas Indians, 72 U.S. 737 (1866) (holding that states have no authority to tax Indian trust lands); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n.17 (1987) (noting that the Court has adopted a "per se" rule: "We have recognized that the federal tradition of Indian immunity from state taxation is very strong and the state interest is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case."). *E.g.*, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) (holding that state may not impose motor fuel taxes in Indian Country where the legal incidence of the tax falls on the tribe or its members); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993) (holding that state may not impose vehicle excise and registration fees on Indians who live and garage their vehicles on the reservation); Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) (holding that a state could not tax tribal royalties from mineral leases); Bryan v. Itasca County, 426 U.S. 373 (1976) (holding that a state had no authority to tax non-trust land owned by a tribal member where the land is located on the tribe's reservation); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) (same); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (holding that affixation to real estate at tribal off-reservation economic development projects were exempt from state taxation because it was situated on land leased from the federal government); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973) (holding that a state may not tax income of tribal members residing on their own reservation).

Complicating these matters exponentially, states and localities may tax non-Indians residing in Indian Country[80] and, in some limited circumstances, the Indians living in Indian Country.[81] This has created on some reservations the specter of double taxation, meaning that where an Indian tribe might tax a non-Indian owned business, the state may also do so.[82] This, in turn, creates a strong disincentive for non-Indian businesses to operate businesses in Indian Country.[83]

Tribal governments have extreme difficulty in raising revenue; they have virtually no tax base.[84] As one federal court noted, "the Indians have no viable tax base and a weak economic infrastructure. Therefore, they, even more than the states, need to develop creative ways to generate

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80. *E.g.*, Ariz. Dept. of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999) (holding that a state may tax non-member company that performs work on the reservation); Dept. of Taxation & Fin. v. Milhelm Attea & Bros., 512 U.S. 61 (1994) (holding that Indian traders are required to collect sales taxes from non-Indians and remit those taxes to the state); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) (holding that a state may tax non-members in Indian Country); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175 (1989) (holding that a state may tax a non-Indian business that does business with a tribe or the federal government even where the "financial burden" of the tax falls on the tribe or the United States); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (same); Thomas v. Gay, 169 U.S. 264 (1898) (holding that states may tax property of non-Indians in Indian Country); Utah & N.R.R. v. Fisher, 116 U.S. 28 (1885) (same).

81. *E.g.*, Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) (holding that a state may tax land owned by a tribe where land had been made freely alienable by Congress); County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) (same).

82. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (permitting dual taxation of oil and gas severance tax); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (permitting dual taxation of cigarettes sold in tribal smoke shops). *Cf.* Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998) (holding that a state was not required to return excessive tax receipts collected in Indian Country).

83. *See* White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1283 (9th Cir. 1981) (acknowledging that dual taxation reduces tribal revenues); Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 TULSA L.J. 541, 611 (1993) ("The dual tax burden renders tribal mineral development considerably less attractive than development of off-reservation minerals, reducing the value of the mineral resource."); Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. PA. L. REV. 491, 491-92 (1975) ("Another important economic element in the leasing context is state taxation of reservation lessees. Indeed, such a state tax may place a far greater burden on the lessee than do the contractual royalty payments provided in the lease agreement.") (footnotes omitted).

84. *See* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 169 (2004) ("But few tribes have any significant tax base."); Milo Colton, *Self-Determination and the American Indian: A Case Study*, 4 SCHOLAR 1, 35 n.270 (2001) ("In order to be successful, tribal governments must generate revenue through the development of businesses because they are prevented from establishing a stable tax base."); Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1073 (1982) ("Unlike other governmental bodies, Indian tribes would find the loss of assets more difficult to replace because tribes only have a limited revenue base over which to spread any losses.") (*citing* Atkinson v. Haldane, 569 P.2d 151, 169 (Alaska 1977)); Janet I. Tu, *Economic Focus: As Casinos Struggle, Tribes Look to Other Industries*, WALL ST. J., Oct. 28, 1998, at 1 ("'Tribes don't have the funding base that other governments do,' says Jennifer Scott, assistant director of Washington State's Governor's Office of Indian Affairs.").

revenue."[85] Property tax revenue is generally unavailable to tribal governments, mostly because taxing tribal members would be pointless and counterproductive.[86] Moreover, often tribes control or own a relatively small proportion of land within their reservations.[87] Some tribes can create a tax base by entering into favorable tax agreements with the states in which they reside.[88] Nevada tribes can keep the sales and excise tax revenue they

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85. Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300, 1315 n. 21 (D.D.C. 1987).

86. *Cf.* Dena Aubin, *Native Americans Face Hurdles for Financing*, WALL ST. J., June 26, 2000, at A43 ("One problem is that property taxes—a key backing for city and county debt—aren't a viable option for most tribes . . . . Even tribes that own land are reluctant to tax it because of their different traditions and notions of land ownership.").

87. *See* Steven Stingley, *Indian Tribes Detail Economic Strategy to State Senators*, OMAHA WORLD-HERALD, June 8, 1984, *available at* 1984 WL 2522275. Stingley cautions:

> In addition to the lack of capital to start projects, the leaders said, Indians control very little—20 percent or less—of the land within their reservations. Most of the land has been purchased by non-Indians, creating what they called, "checkerboard" reservations because the Indians only own unconnected squares of land.

Id.

88. *See, e.g.*, Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1 (2004); Elizabeth Carvlin, *South Dakota Signs Third Tax Agreement With Indian Tribe*, BOND BUYER, Dec. 29, 2003, *available at* 2003 WL 64229435; Danny & Jim Simon, *Success of Tribal Casinos Raises Taxing Question: Indian Leaders Claim Government Has No Right to a Share of Profits*, STAR-LEDGER (Newark, N.J.), Nov. 23, 1995, *available at* 1995 WL 11799673 ("'Our option is we can try to work out constructive agreements that will allow continued economic development, or we can keep beating our treaty-rights drum, and probably stay poor.'").

Unfortunately for tribes seeking to reduce confrontation and conflict with states, some commentators argue that tribal-state tax agreements are either unenforceable or unconstitutional. One commentator argued that entering into agreements with a state will lead to the (unquantified) diminishment of tribal sovereignty. *See generally* Oliver Kim, *When Things Fall Apart: Liabilities and Limitations of Compacts Between State and Tribal Governments*, 26 HAMLINE L. REV. 48 (2002). Professor Robert N. Clinton has suggested that tribal-state tax agreements are unconstitutional under federal law. Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal-Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 22-23 n.54 (2004). Professor Clinton argues that states are constitutionally incapable of negotiating "some questions with the tribes without federal approval." *Id.* at 22 n.54. Professor Clinton argues that the modern Supreme Court would likely adopt an analysis that "could protect federal supremacy in the negotiation of Indian agreements affecting sovereignty. . . ." *Id.* at 23 n.54. Professor Clinton considers this strategy of pursuing negotiation in absence of federal approval "legally myopic and badly flawed." *Id.* at 22 n.54. However, statutes such as the Indian Tribal Economic Development Contract Encouragement Act, amended 25 U.S.C. § 81 to allow tribes to negotiate certain business deals without federal approval. *See* Jack F. Williams, *Integrating American Indian Law Into the Commercial Law and Bankruptcy Curriculum*, 37 TULSA L. REV. 557, 557-58 (2001); Anna-Emily C. Gaupp, Note, *The Indian Tribal Economic Development And Contracts Encouragement Act of 2000*, 33 CONN. L. REV. 667 (2001); *see also* Indian Tribal Economic Development and Contract Encouragement Act, Pub. L. No. 106-179, 114 Stat. 46 (codified as amended at 25 U.S.C. § 81 (2000)) (noting the intent of Congress to amend § 81 to explicitly limit the types of contracts that require federal approval). This amendment of § 81, which limits the need for federal approval of contracts to contracts that "encumber[] Indian land for a period of 7 or more years," 25 U.S.C. § 81(b) (2000), should be adequate to "authorize" a state to enter into an agreement with a tribe without federal approval. *See* Clinton, *supra*, at 23 n.54 ("The states would totally lack authority to negotiate issues commonly found in most Indian gaming compacts without the authority afforded them by the Indian Gaming Regulatory Act."). Assuming Professor

collect from non-Indians if they enter into a tax agreement with the state.[89] South Dakota has encouraged tribes to charge a gas tax rate the same as the state's rate, which, according to the state, is "'quite [the] revenue opportunity for tribes.'"[90]

The lack of a stable tax base is a product of federal Indian law. First, tribes rarely may tax non-Indian businesses.[91] Usually, because of the double taxation problem, they do not even in situations where they could.[92] Second, tribes usually do not tax their own members.[93] Indian tribal

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Clinton's constitutional argument is correct, tribes and states could attempt to file a "friendly" suit in federal court, expressing their tax issues in a complaint and counterclaims, and then stipulating to a resolution that effectively embodies the agreement previously reached between the parties. *Cf.* Matthew S. Galbraith, *Tribe Claims to Own Property on ND Campus; Federal Suit Seeks Possession, Damages for Loss of Land*, SOUTH BEND TRIB. (Ind.), Jan. 5, 2004, at A1 ("'As I understand it, it's a friendly suit,' [John Hamilton] said."). Seven Michigan Tribes and the State of Michigan resolved its gaming issues in 1993 with such a consent judgment. *See* Taxpayers of Mich. Against Casinos v. State, 685 N.W.2d 221, 248 (Mich. 2004) (Markman, J., concurring and dissenting).

Despite these commentators' pessimism, tribes and progressive states and localities continue to negotiate agreements with real world allocation of risks and benefits. *See generally, e.g.*, Fletcher, *supra* note 88 (discussing the negotiations between the State of Michigan and several Michigan Indian tribes); Stetson Gover & P.C. Williams, *Tribal-State Dispute Resolution: Recent Attempts*, 36 S.D. L. REV. 77 (1991) (describing the negotiations between the State of New Mexico and two Indian pueblos over taxes; between the State of California and a Mission Indian band over environmental regulation; between the State of Wyoming and the Wind River Tribes over taxes and water right; and between the State of New York and the Seneca Nation over taxes); Brief for Amicus Curiae National Congress of American Indians, et al, at 12-17, 20-27, Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701 (2003) (No. 02-281) (discussing law enforcement agreements between several states and localities and Indian tribes). Other distinguished commentators have strongly advocated for tribes to choose negotiation over litigation, especially considering the federal courts' reticence to uphold tribal legal positions over state legal positions. Lorie Graham, *Securing Economic Sovereignty through Agreement*, 37 NEW ENG. L. REV. 523 (2003); Richard J. Ansson, *State Taxation of Non-Indians Whom Do Business With Indian Tribes: Why Several Recent Ninth Circuit Rulings Reemphasize the Need for Indian Tribes to Enter Into Taxation Compacts With Their Respective State*, 78 OR. L. REV. 501 (1999); Joel H. Mack & Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1225 (1993). The revenue benefits to these inter-governmental agreements go both ways, as one federal court noted "[l]ocal governments in the area expect to receive significant revenues through cooperation agreements with the Pokagon [Band of Potawatomi Indians]." TOMAC v. Norton, 193 F. Supp. 2d 182, 186 (D.D.C. 2002).

89. Jerry Zremski, *Tribes Thrive on Store Sales; Unlike the Senecas, Most Indian Nations Own Businesses, and Profits Go to Reservation*, BUFFALO NEWS, June 29, 2004, at A1, *available at* 2004 WL 60043892 (discussing tax agreement entered into by Reno Sparks Indian Colony).

90. Terry Woster, *S.D. Asks Tribes to Impose Gas Tax*, ARGUS LEADER (S.D.), July 29, 2003, at A1 (quoting South Dakota Revenue and Regulation Secretary Gary Viken).

91. *E.g.* Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001) (holding that Indian tribes may not tax non-Indian-owned businesses on fee land absent narrow exceptions).

92. *E.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (holding that states may tax non-Indian-owned businesses on tribal lands even where the tribe maintains a similar tax; approving double taxation).

93. *See* Kristen E. Burge, Comment, *ERISA and Indian Tribes: Alternative Approaches for Respecting Tribal Sovereignty*, 2000 WIS. L. REV. 1291, 1317 ("Furthermore, although tribes have the power to tax and raise revenue to fund government program and services, their tax base

governments are more accountable to their constituents than virtually all non-Indian governments and therefore rarely enact taxation statutes that will affect their relatives and neighbors (not if they want to get re-elected, anyway). Even if tribes began taxing their own members, there is very little income, property, or sales they could tax.[94] If tribal members already had money and property, tribal government revenue would not be an issue, nor would tribal government services, which are very much in demand. Third, Indian tribes generally may not tax non-Indian individuals.[95] Because Indian tribes usually may not tax non-Indians (that is, the people with income and property in Indian Country), there is no stable tax base on most reservations.

Congress's attempts to assist Indian tribes in statutes, such as the Tribal Tax Status Act, have amounted to an empty action in most instances.[96] As Professor Robert A. Williams, Jr. wrote in 1985, "[t]he Tribal Tax Status Act does not provide a mechanism that would enable tribes to create a thriving economic environment within Indian Country. Instead, it offers tribes only the theoretical ability to exercise broadly based taxing authority over a nonexistent tax base."[97] In response to the lack of a stable tax base, Indian tribes have little resort except to pursue an alternative method of raising revenue: economic development.

III. THE RISE OF TRIBAL ECONOMIC DEVELOPMENT AS A SUBSTITUTE FOR RESERVATION TAX REVENUE

Despite state and local governments' protestations and the Supreme Court's apparent disregard of tribal rights, Indian tribes act as though they are functioning governments. Many reservations depend almost entirely on federal government funding to function. The Oglala Sioux Tribe, for example, is "'90 percent dependent on the Federal Government . . . .'"[98] Federal

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is small because reservations are sparsely populated and the residents often have a low per capita income.") (footnote omitted).

94. *See id.*; Comment, *supra* note 83 at 491 ("Indian tribal governments are in dire financial straits, without any adequate source of revenue. In light of the prevalence of abject poverty, unemployment, and lack of education among reservation Indians, the taxing of tribal members is not a feasible solution.").

95. *Cf.* Big Horn County Elec. Co-op v. Adams, 219 F.3d 944, 953 (9th Cir. 2000) (enjoining tribe from taxing non-Indian-owned business).

96. Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2607 (codified as amended at 25 U.S.C. § 7871 (2000)).

97. Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribe Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 385 (1985).

98. James Brooke, *Proposed Cuts in Indian Programs Hit Those Who Most Rely on Federal Aid*, N.Y. TIMES, Oct. 15, 1995, at 16 (quoting Delbert Brewer, superintendent of the Oglala Sioux Bureau of Indian Affairs office).

funding is an extremely unreliable source of revenue for tribal government.[99] And yet the unmet need for tribal government service projects approached $60 billion a year by the turn of the century.[100]

But tribal governments do not fade away in the face of these overwhelming disadvantages. As the *Wall Street Journal* noted, "Tribal governments operate much like municipal governments, providing police and fire protection, road building and education."[101] Tribal governments generally use revenue derived from tribal businesses "to build new schools and provide better health care"[102] and pay for governmental services such as "law enforcement and day care."[103] They enact zoning ordinances, law and order codes, and, when they can, engage in the most fundamental activity for any government: taxation.[104]

In operating business, Indian tribes must choose between several directions: whether to use the business as a revenue generator to pay for tribal government services; whether to use the business as a job creation mechanism for tribal members; simply whether to seek profit for its members in the same way a corporation or partnership seeks profit for its partners or shareholders; or a combination of any of the above.[105] Rarely

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99. *See, e.g., id.* Brooke explained:

> Although the bureau is required to finance tribal schools at the same per-student average as the states they are in, Congress approved separate, and unequal, education levels. In a financing pattern that is similar for most Indian education, Congressional financing allows the bureau to spend $2,900 on each high school student here, while South Dakota spends an average of $3,350 for each student in public schools outside reservations.

Id.

100. *See* Aubin, *supra* note 86, at A43 ("A recent study by the First Nations Development Institute, a nonprofit . . . corporation, estimates capital needs on Indian reservations are as high as $15 billion a year for public projects alone. Adding housing and other private needs, the total could top $56 billion a year, according to the institute."). According to another source,

> Meanwhile, welfare payments on the reservation have increased by 25 percent over the past two years, as tribal members who have lost jobs on the outside return home. At the same time, Federal money available to the tribal government for job training and development programs has declined by more than 30 percent over the same period, to $3.9 million.

William E. Schmidt, *Economy Carves New Trail of Tears for Tribe*, N.Y. TIMES, Jan. 31, 1983, at A1; COMM'N ON CIVIL RIGHTS, U.S. DEPT. OF JUSTICE, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 9 (2003) (noting that at least $2.8 billion would be necessary to meet education and health care needs alone).

101. Pat Beall, *Exiled Seminoles Meet Resistance to Bingo Plan*, WALL ST. J., Aug. 7, 1996, at F1.

102. Jim VandeHei, *American Indians Gamble on GOP*, WALL ST. J., Apr. 11, 2002, at A4.

103. Lewis Kamb, *Tribe is Ready to Roll—Its Own; Squaxins Leverage Tax Break Into a Smoking Business*, SEATTLE POST-INTELLIGENCER, Apr. 19, 2004, at A1, *available at* 2004 WL 60138167.

104. *See id.*

105. Few commentators in this area even ask these questions. They assume one method or paradigm is the right one and proceed from there. Professor Frank Pommersheim refused to

do tribes exist merely to make money. However, some tribes may form businesses that intend to maximize profit, money that is then returned to the tribal government or to tribal members through a per capita payment.[106] Some tribes do a little of both: profit maximizing and job creation.[107] Unfortunately, most tribes are not in the position to market a very profitable enterprise and resort to operating businesses merely as a public employment project.

It is typical for privatization and deregulation pundits to complain about the lack of productivity on tribal trust lands, implicitly or explicitly blaming "socialism" or "communism" or "communalism."[108] These pundits cite statistics that show "productivity" of agricultural trust land is 90% less productive than land owned by for-profit businesses, without actually noting that most trust land is arid and non-irrigable.[109] Like James Watt in the early 1980s,[110] some analysts wish to open up tribal land to private investment without much regard for the wishes and needs of tribal governments and individual Indians.[111]

The question of whether a tribal government is capitalist or socialist is one that has confounded Indian law scholars and policymakers for

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assume anything and asked these questions two decades ago. *See* Frank Pommersheim, *Economic Development in Indian Country: What Are the Questions?*, 12 AM. INDIAN. L. REV. 195 (1984); *see also* FRANK POMMERSHEIM, BRAID OF FEATHERS 162-87 (1995) (amending the article a decade later).

106. *E.g.*, GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS REVENUE ALLOCATION ORDINANCE, 18 GRAND TRAVERSE BAND CODE ch. 16, *available at* http://doc.narf.org/nill/Codes/gtcode/travcode18bgaming.htm (last visited January 11, 2005).

107. The gaming enterprises of the Hoopa Valley Tribe, for example, are modest and mostly serve as a job-creation program for tribal members. *See* Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land Indian Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, (2002-2003) (noting that the Hoopa Valley Tribe's gaming consists of "tiny card rooms and bingo halls").

108. *See* Associated Press, *Watt Apologizes to Indians for Any 'Hurt' From Socialism Remarks*, N.Y. TIMES, Jan. 26, 1983, at A13.

109. *See* Terry L. Anderson, *How the Government Keeps Indians in Poverty*, WALL ST. J., Nov. 22, 1995, at A10 ("Indeed, a study of agricultural land on a large-cross section of Western reservation indicates that tribal trust land is 80% to 90% less productive.").

110. See generally Williams, *supra* note 97, arguing that,

> The Reagan administration's policy is premised principally upon the simplistic yet chimerical belief that the "avenue of development for many tribes" lies in the supposedly abundant natural resources underlying land that the nineteenth century American government regarded as useless. Unfortunately, such a policy ignores the fact that fewer than one in eight Indian Nations has energy and mineral reserves that can be developed. In the minds of many Indian leaders and their people, federal policies premised upon such a belief implicitly condone a neocolonial status for those tribes fortuitously sitting atop strategic mineral and energy stockpiles.

Id. (footnotes omitted).

111. *See* Anderson, *supra* note 109, at A10 ("Somehow, the productive success that private property makes possible must be made available to all Native Americans.").

decades.[112] For the average M.B.A. schooled in for-profit enterprises, it is shocking to see a business controlled by a tribal government. One commentator said, "You didn't realize there was a socialist government in the middle of America, did you?"[113] But as we learned so often in the movies, communism or socialism is a red herring.[114] As tribes develop their own governmental and business capacity and techniques, they are often held back by the simple fact that many tribes had no organization to learn from except the federal government, and tribal governments have consistently "remade themselves in the image of the Federal bureaucracy."[115] It is not economic theory that holds tribes back; it is the fact that their role models were also their oppressors.

Regardless of a tribe's model (or lack thereof), economic development has been and will remain a mainstay of Indian policy. Prior to gaming, tribes tried many other kinds of businesses.[116] The purpose of establishing these businesses was to develop "their own commercial ventures as a way of escaping the squalor and hardship to which many have become inured since the white man began his massive westward migration. . . ."[117] Private investors rarely come to the reservation.[118] For tribes in resource-poor, arid regions, particularly in the west, economic development is extraordinarily

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112. *Compare* Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 856 (2001) (concluding that "a private free market economy looks well suited to the history and cultures of most tribes; better in fact than does the 'socialism' of tribal governments monopolizing and directing business activity in Indian country"), *with* Raymond Cross, *De-Federalizing American Indian Commerce: Toward a New Political Economy for Indian Country*, 16 HARV. J. L. & PUB. POL'Y 445, 492 (1993) (concluding that "restoration of tribal authority and control over resources and legal relationships is a necessary step toward making tribal self-sufficiency and autonomy a working reality within Indian Country").

I envision the dominant economic paradigm in Indian Country to closely parallel what some intellectuals have called "libertarian socialism" or "anarcho-syndicalism," similar to the syndicated farms in pre-Spanish Civil War Catalonia and envisioned, but never realized, in the Israeli kibbutzim. No commentator has developed such a theory for Indian Country, but I believe it may be an ideal fit for several reasons that I intend to expound upon in a future article.

113. Michael Winerip, *Jump-Starting Capitalism*, N.Y. TIMES, Aug. 7, 1994, § 4A, at 25.

114. *See* CLUE (Paramount Studio 1985).

115. Winerip, *supra* note 113, § 4A, at 25; *see also* Robert A. Hamilton, *Connecticut Q&A: Patrice Kunesh; Defining How a Tribe Governs Its Land*, N.Y. TIMES, June 11, 1995, § 13CN, at 3 ("Tribal governments under the [Indian Reorganization] Act see themselves more as puppets of the Secretary of the Interior . . . .").

116. Winerip, *supra* note 113, §4A, at 25.

117. *Id.*

118. Judith Valenta, *A Century Later, Sioux Still Struggle, And Still Are Losing*, WALL ST. J., Mar. 25, 1991, at A1 ("Few businesses are willing to venture onto the reservations. There are no banks. In fact, there are only 14 private businesses on the reservation: two gas stations, one hairdresser and 11 small grocery stores. There are few paved roads."); Schmidt, *supra* note 100, at A1 ("Despite efforts to encourage private investors to come in, there has been no private industry on the reservation since a sawmill closed two years ago.").

difficult.[119] Many tribal businesses fail.[120] The San Carlos Apache Tribe, for example, saw cosmetics, tourism, and timber concerns fail in the early 1980s.[121] The Confederated Salish and Kootenai Tribes of the Flathead Reservation saw its hot-springs resort and modular housing businesses fail over time.[122] Before gaming, the Mashantucket Pequot Nation "tried various enterprises on the reservation—a swine farm, maple syrup production, sale of firewood. All failed."[123]

Some tribes raise revenue through the natural resources present on their reservation lands, such as oil and gas.[124] Some estimates place sixty percent of the United States' energy resources on tribal land.[125] The Council of Energy Resources Tribes, founded in 1975 by twenty-five tribes and described (insanely in my view) by the *New York Times* as an American Indian version of OPEC, "played a vital role in providing technical assistance and information to Indian tribes on resource development."[126]

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119. See James P. Sweeney, *New Indian Land Rules Pose Quandary*, SAN DIEGO UNION-TRIB., Oct. 15, 2001, at B1, *available at* 2001 WL 27294810, explaining,

> "You have to understand the desire for Indian tribes in California to acquire land in a historical context," [Howard Dickstein, tribal attorney] said. "Not only was 99 percent of their original land base taken away, but the 1 percent that was left was in many cases taken away in the Termination period of the 1950s and '60s. *The land bases that they have for the most part . . . are not useful for many purposes.*"

Id. (emphasis added). See also Michael Gartner, *Viewpoint: Indian Tribes Shouldn't Bet Their Future on Casinos*, WALL ST. J., June 28, 1990, at A15, cautioning that,

> "I don't see Ford Motor Co. coming out here to build a plant," Donald LaPoint, tribal chairman [of the Santee Sioux Tribe] . . . . "What . . . are we supposed to do" to find prosperity? The tribe's reservation is in an isolated area of northeastern Nebraska, 150 miles from Council Bluffs, and most of the 500 or so Indians still on the land live in poverty.

Id. (second italics in original). See also Schmidt, *supra* note 100, at A1, stating,

> Part of the problem is that the San Carlos reservation is a spare landscape, without the natural resources of other tribes. In contrast, the White Mountain Apache, whose lands lie adjacent to San Carlos on the north, are much better off economically because of their rich stands of timber and mountains that are now one of Arizona's most popular winter ski areas.

Id.

120. Schmidt, *supra* note 100, at A1.

121. *Id.*

122. *See* Dan Morse, *Tribal Pursuit: The Salish-Kootenai Tribe Has Succeeded Where Others Have Failed; Its Secret; Think Business, Not Bureaucracy*, WALL ST. J., Mar. 27, 2002, at 16.

123. Micah Morrison, *Casino Royale: The Foxwoods Story*, WALL ST. J., Aug. 21, 2001, at A18.

124. *E.g., Indian Tribe Offering Is Held*, N.Y. TIMES, July 2, 1985, § D, at 15 (reporting that the Jicarilla Apache Tribe secured a bond offering with its oil and gas revenues).

125. *See* William A. Means, Letter to the Editor, *The Government's Bad Deal for U.S. Indians*, N.Y. TIMES, Feb. 6, 1983, § 4, at 16.

126. William E. Schmidt, *Navajos May Quit Indian 'OPEC' Unit*, N.Y. TIMES, Nov. 21, 1982, at 36 (citing John Echohawk, head of the Native American Rights Fund).

Even with vast resources available on the reservation, most tribes have been unable to control the exploitation of their resources by non-Indian firms.[127] The so-called Hopi-Navajo land dispute arose when the federal government artificially divided Hopi and Navajo land in order to make it easier for its constituent coal companies to exploit tribal resources.[128] The Crow Tribe of Montana, as of approximately ten years ago, still could manage only a "shockingly low 0.01% rate of return per year" on its $26 billion coal reserves.[129]

Probably the most successful tribe marketing its natural resources is the Southern Ute tribe in Colorado.[130] Based on its fossil fuels ventures, the tribe "is a conglomerate with $1.45 billion in assets, making it one of the richest tribes in history and one of the few whose wealth doesn't hinge on gambling."[131] Part of the tribe's wealth is distributed in per capita payments: "Once a year, the tribe splits 10% of its profits among the 600 members between 26 and 60 years old; elders get $54,500 apiece annually."[132] The tribe "pulled in $100 million on profits from their gas-production company . . . [and] collected half of all the natural-gas royalties paid to Indian tribes."[133]

Other tribes can raise revenue through the exercise of their retained treaty rights in fishing,[134] although the tribal governments do not

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127. *See, e.g.*, Bob Gottlieb & Peter Wiley, *Hopis, Navajos and King Coal*, WALL ST. J., July 11, 1986, at A20 (discussing conflicts between the Hopi Tribe's government, the Navajo people, and coal companies).

128. *See id.* According to the *Wall Street Journal*:

> Historically, the establishment of both tribal governments was tied to mineral leasing. The Navajo tribal government was set up in the 1920s to facilitate oil leasing. The Hopi tribal government was a virtual creation of the late John Boyden, former tribal counsel and a Salt Lake City attorney, again for the purpose of signing mineral leases. Most Hopis preferred their traditional form of government led by village religious leaders, and many still refuse to recognize the tribal government.
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> . . . .
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> Peabody [Coal]'s Black Mesa mine, in particular, led to a long and bitter struggle between traditional Hopis and Navajos and their white environmentalist allies on one hand, and supporters of the tribal governments and coal leasing on the other. In secret negotiations, tribal attorney Boyden convinced both the Hopi and Navajo tribal governments that coal was central to their economic development. Many traditional Hopis and Navajos believed that strip mining would bring about the desecration of sacred lands on Black Mesa.

Id.

129. Anderson, *supra* note 109, at A10.

130. *See* Ianthe Jeanne Dugan, *Indian Affairs: A Business Empire Transforms Life for Colorado Tribe*, WALL ST. J., June 13, 2003, at A1.

131. *Id.*

132. *Id.*

133. *Id.*

134. *See, e.g.*, Tu, *supra* note 84, at 1, reporting,

necessarily tax the income of their members.[135] Some tribes have attempted to raise revenue through the taxation of non-Indian-owned businesses operating on reservation or trust lands.[136] Other tribes have leased their retained water rights to create revenue streams from actual streams.[137]

And then there is gaming. Tribes have developed a vastly creative cumulative output of economic development projects, but gaming is foremost. Indian gaming began in New York and Florida in the 1970s. The Seminole Tribe of Florida "established a 5,600-seat bingo parlour in southern Florida in 1979. . . ."[138] Tribal smoke shops and bingo palaces did not arise in a vacuum.[139] Gaming gained credence in large part because the federal government actively encouraged Indian tribes to build gaming halls in the 1980s.[140] In 2002, Indian gaming took in $14.5 billion.[141]

> [T]he S'Klallam have begun to focus more on their specialty-seafood business, called Jamestown Seafood. . . . The operation—which also produces some [1,000 gallons of oysters a month,] 400,000 pounds of geoducks, 200,000 pounds of crabs and up to 50,000 pounds of clams a year—has gross sales so far this year of about $2 million.

Id.. *See also* Wallace Turner, *Salmon Sales Tax: Is Tribe Exempt?*, N.Y. TIMES, May 15, 1986, at 22 (noting that the Lummi Tribe's "salmon fishery income is about $11 million" and that the Washington tribes "catch about $600 million worth of salmon a year").

135. *See* Barry Siegel, *Tribes Seek to Govern Non-Members; Indians' New Powers Bring Gains, Conflicts*, L.A. TIMES, May 27, 1986, *available at* 1986 WL 2197630 ("Sportsmen like how they jump when they're reeled in. To Indians, it's food.").

136. *See* Rachel Zimmerman, *Locke Referees Feud Over Tax on Reservations*, WALL ST. J., Feb. 2, 2000, *available at* 2000 WL-WSJ 3016298.

137. *See* Robert Tomsho, *States, Indians Seek Settlement of Water Issues*, WALL ST. J., Nov. 25, 1992, at B1 ("Moreover, a few settlements have created new revenue streams by allowing the tribes to lease unused water to others.").

138. David Owen, *Indians Dealing On New Terms*, FINANCIAL TIMES (London), Apr. 14, 1987, at 6.

139. *See* Associated Press, *Reagan Signs Bill Regulating Indian Gambling*, Oct. 17, 1988, *available at* 1988 WL 3817253 ("Indian tribes, faced with cutbacks in federal money and a limited tax base, have instituted gambling operations to raise needed revenues."); United Press International, *2 Indian Tribes Look at Bingo As Answer to Financial Needs*, OMAHA WORLD-HERALD (Neb.), June 20, 1984, *available at* 1984 WL 2523858 ("Tribal spokesmen said their people must do something to remedy their financial ills. They have no tax base to raise revenue, and government funds are dwindling. Bingo offers profits and jobs for the unemployed, they said.").

140. *See* Michael Nelson, *The Quest to Be Called a Tribe*, LEGAL AFF., Oct. 2003, at 56, 57, claming,

> To reduce the tribes' reliance on federal funds (if not out of concern for Indian rights), Republican presidents Richard Nixon and Gerald Ford subsidized economic development on the reservations. When the initial beads-and-pots enterprises failed to make real money, the Reagan Administration encouraged the tribes to spend their subsidies on bingo halls.

Id.; *see also, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

141. Marie Price, *Indian Gaming Wins Big Bucks*, TULSA WORLD (Okla.), Jan. 30, 2004, at A19.

Gaming revenues are critical for Indian tribes that are within a gaming market. In *California v. Cabazon Band of Mission Indians*,[142] the Supreme Court recognized that,

> The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole sources of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.[143]

Other courts have acknowledged the importance of gaming revenues for the provision of tribal government services. The Kansas Supreme Court noted, "[Indian gaming] income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding."[144]

In addition to funding governmental services, gaming operations provide critical employment opportunities for tribal members[145] and non-members[146] alike, reducing the burden on state social services.[147] A federal trial court noted the success of the Turtle Creek Casino, owned and operated by the Grand Traverse Band of Ottawa and Chippewa Indians, in its findings of fact after a trial where the State of Michigan attempted to shut down the casino:

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142. 480 U.S. 202 (1987).

143. *Cabazon Band*, 480 U.S. at 218-19.

144. State *ex rel.* Stephen v. Finney, 836 P.2d 1169, 1171 (Kan. 1992) (quoting Indian Gaming Regulatory Act, S. Rep. 446, 100th Cong., 2nd Sess. 3 (1988)); *see also* Am. Greyhound Racing, Inc. v. Hull, 146 F. Supp. 2d 1012, 1063 (D. Ariz. 2001) (finding that gaming revenues allow tribes to fund housing and infrastructure projects), *rev'd on other grounds*, 305 F.3d 1015 (9th Cir. 2002).

145. *See, e.g.*, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F. Supp. 645, 646 (W.D. Wis. 1990) (noting that eighty percent of employees at casino were tribal members).

146. *See, e.g.*, Saratoga County Chamber of Commerce v. Pataki, 798 N.E.2d 1047, 1069 n.4 (N.Y.) (Read, J., dissenting) (stating that Oneida Indian Nation's casino employed 3,300 people), *cert. denied*, 540 U.S. 1017 (2003); Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 402, 404 (1997) (noting that Indian gaming created 10,000 jobs in Minnesota and 140,000 in the United States overall).

147. *See, e.g.*, Sherry M. Thompson, *The Return of the Buffalo: An Historical Survey of Reservation Gaming in the United States*, 11 ARIZ. J. INT'L & COMP. L. 520, 522 n.7 (1994) ("[T]he number of people on welfare on four rural reservations in Minnesota dropped sixteen percent after casinos were opened."). *Cf.* Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47, 76 (2002) ("[E]ven relatively modest casino revenues and levels of casino employment benefit surrounding non-Indian communities, as well as the state economy.").

> In fiscal year 2001, Turtle Creek provided approximately 89% of the Band's gaming revenue. The casino now employs approximately 500 persons, approximately half of whom are tribal members. Revenues from the Turtle Creek Casino also fund approximately 270 additional tribal government positions, which administer a variety of governmental programs, including health care, elder care, child care, youth services, education, housing, economic development and law enforcement. The casino also provides some of the best employment opportunities in the region, and all of its employees are eligible for health insurance benefits, disability benefits and 401(k) benefit plans. The casino also provides revenues to regional governmental entities and provides significant side benefits to the local tourist economy.[148]

Gaming is not profitable for all tribes. These tribes have no choice but to try something else. The Lummi Tribe's casino "had been unprofitable . . . and getting rid of it allowed the tribe to devote energy to [economic development] alternatives."[149]

Many successful gaming tribes are attempting to diversify their economic development portfolio in the anticipation that gaming revenues will decline over time.[150] "Now some tribes are expanding into energy, banks, hotels, ski resorts, meat-processing plants and cement factories."[151] The Mashantucket Pequot Nation, for a time, operated a pharmaceutical distribution system that "generate[d] more than $15 million in revenue . . . ."[152] The Tulalip Tribe "own[s] and operate[s] a marine, a cable-

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148. Grand Traverse Band of Ottawa & Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004); *see also* L. Renee Liuex, *Split, Double Down, or Hit Me: An Analysis of the 1993 and 1998 Class III Michigan Gaming Compacts*, 76 U. DET. MERCY L. REV. 853 (1999) (discussing positive aspects of Indian gaming in Michigan); Thomas L. Wilson, *Indian Gaming and Economic Development on the Reservation*, 68 MICH. B. J. 380 (1997) (same); Brief of Amici Curiae Grand Traverse Band of Ottawa & Chippewa Indians et al. at 11-26, Taxpayers of Mich. Against Casinos v. State, 685 N.W.2d 221 (Mich. 2004) (No. 122830) (same).

149. Tu, *supra* note 84, at 1.

150. *E.g.*, *Tribes Are Looking Beyond Casinos to Build an Economic Base*, N.Y. TIMES, Nov. 12, 1999, at 20; Ken Gepfert, *Gambling Advocates See Payoff in Cherokee Casino*, WALL ST. J., July 12, 1995, at 1 ("But any monopoly might not last. Mr. Taylor predicts the casino could eventually prompt North Carolina's politicians to authorize casinos elsewhere in the state. 'They aren't going to let the Indians do something they can't do,' he says.").

151. Ianthe Jeanne Dugan, *Gold Rush: A Former Actress Links Worlds of Wall Street and the Reservation*, WALL ST. J., Sept. 6, 2001, at A1; *see also* VandeHei, *supra* note 102, at A4 ("With money in their pockets and visions of greater prosperity, Indian tribes are courting outside investors for energy, telecommunication and other ventures . . . . [Tribal business leaders] also talked to energy and high-tech firms, and even made a bid to build a stadium for the National Football League's Arizona Cardinals on the reservation.").

152. David M. Herszenhorn, *Pequot Tribe Violates Law in Prescription Discount Plan, Government Says*, N.Y. TIMES, Oct. 11, 2000, § B, at 6.

television company and a tobacco shop . . ."[153] and a very successful, multi-million dollar business park located on I-5 north of Seattle.[154]

The Mescalero Apache tribe started a telecommunications business, ski resort, elk-hunting grounds, a lumber company, and a resort with a golf course, some of them prior to the expansion of gaming.[155] That tribe believed that the development of an industrial infrastructure would "'attract investment in the same way an emerging market needs to lure foreign capital.'"[156] As then-Chairman of the Federal Communication Commission William E. Kennard noted, "'[when] a tribal government establishes its own telephone company, it is creating an economic development nucleus.'"[157] The Winnebago Tribe in Nebraska has been enormously successful in its non-gaming business enterprises, operated under Ho-Chunk Enterprises, Inc. (HCI).[158] HCI's "portfolio has grown to include part-ownership of a bank and its new used-car dealership, 'Rez-Cars.'"[159] The Fort Mojave Indians have invested in power plants with gaming revenues.[160] "The Fort Mojave plant, perched on a sand dune on the 33,000-acre reservation, brings in $4 million a year from Calpine Corp., a San Jose, California-based energy firm. That's as much as the two casinos combined."[161] The Muckleshoot Tribe near Seattle "is building an office park across from its casino and has plans for a music amphitheater and a 24-hour fast food restaurant to feed hungry gamblers."[162]

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153. Tu, *supra* note 84, at 1.

154. *See* Richard Roesler, *Tribes Seek to Keep Part of Sales Tax; Tulalips' Proposal Could Affect Many Reservations*, SPOKESMAN REV. (Spokane, Wash.), Aug. 1, 2001, at A1, *available at* 2001 WL 22802140. According to local media reports,

> A retail park is sprouting on the [Tulalip] reservation's eastern edge, along the interstate. A Wal-Mart opened there in April; a Home Depot follows in a couple of weeks. A small strip mall for a tribal bank and tribal entrepreneurs is in the works, with an outlet mall, hotels and convention center planned.

Id.; Paul Shukovsky, *Tribes Reaches for Sales Tax; Tulalips Pursue 'Total Self-Governance,' State Revenue to Pay for New City's Services*, SEATTLE POST-INTELLIGENCER, July 18, 2001, at B1, *available at* 2001 WL 3563184.

155. *See* Simon Romero, *Tribe Seeking Phone System As Step to Web*, N.Y. TIMES, Oct. 2, 2000, at A1.

156. *Id.* (quoting Godfrey Enjady, general manager of the Mescalero Apache phone company).

157. *Id.*; *see generally* Tracey A. LeBeau, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development*, STAN. L. & POL'Y REV. 237 (Spring 2001).

158. *See* John J. Fialka, *Tribe Finds Ways to Create Jobs*, WALL ST. J., Feb. 18, 2004, at A4.

159. *Id.*

160. *See* David L. Greene, *Power Plants Sprout on Indian Reservations; Tax Breaks Abound; Approval is Routine*, BALT. SUN, Mar. 3, 2002, at 1A.

161. *Id.*

162. Westneat & Simon, *supra* note 88, *available at* 1995 WL 11799673.

Some tribes have refused to enter into gaming operations, or suffer internal political strife from more traditional elements of their memberships when they do. The Cherokee Nation, at the time choosing to avoid entering into gaming, focused more on small businesses in the 1980s, including a restaurant, landscaping, gardening, tourism, poultry, and hydroelectric power.[163] The Oklahoma Seminole Tribe was undermined both by the Florida Seminoles and from dissenters within the tribe when it sought to open a bingo hall in Florida.[164]

Other tribes began economic development without the benefit of large gaming revenues. The Mississippi Choctaw are near legendary in their economic progress in a very poor area of Mississippi. As of the mid-1990s, the tribe's industries had sales of over $100 million and cut its membership's unemployment rate to nil.[165]

In spite of these success stories, tribal economic development generally fails. The next part of this article discusses why.

IV. THE BARRIERS AND DANGERS OF RAISING TAX REVENUE THROUGH ECONOMIC DEVELOPMENT

"If you want an example of the failures of socialism, don't go to Russia. Come to America, and see the American Indian reservations."[166]

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163. *See* Owen, *supra* note 138, at 6.

164. *See* Beall, *supra* note 101, at F1. According to the *Wall Street Journal,*

> The nascent controversy has given rise to doubts about the idea among some Oklahoma Seminoles. "There's a real sentiment here for going back to the native homelands where our ancestors came from, and there's a strong desire to see our nation have a place there," says Dan Factor, one of 12 Oklahoma Seminole chiefs in Seminole County, Oklahoma. "But not if it's going to be developed into something that's going to create hardship or controversy."
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> ....
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> . . ."[D]isputes among Native Americans over wagering may seem inevitable when there's so much money at stake."

Id.

165. *See* FERGUS M. BORDEWICH, KILLING THE WHITE MAN'S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY 303 (1996):

> Today, Choctaw factories assemble wire harnesses for Xerox and Navistar, telephones for AT&T, and audio speakers for Chrysler, Harley-Davidson, and Boeing. The tribal greeting card plant hand-finishes 83 million cards each year. Since 1992, the tribe has operated the largest printing plant for direct-mail advertising east of the Mississippi River. By 1995, sales from the tribe's industries as a whole had increased to more than $100 million annually from less than $1 million in 1979. As recently as fifteen years ago, 80 percent of the tribe was unemployed; now, having achieved full employment for its own members, nearly half the tribe's employees are white and black Mississippians.

Id.

166. *Reagan Outlines Policy on Tribes*, N.Y. TIMES, Jan. 25, 1983, at A16; *see also* Schmidt, *supra* note 100, at A1 ("Interior Secretary James G. Watt . . . said Indian reservations

Former Secretary of the Interior James G. Watt famously described Indian tribes as an example of the "failures of socialism."[167] Many Indian leaders and advocates rightfully objected to this characterization of Indian tribes.[168] The well-documented history of tribal-federal, tribal-state, and interpersonal Indian-American relations provides a different version of why resource-rich Indian reservations are not wealthy and powerful.[169] And yet over ten years later, the *New York Times* asserted that "the problems facing the new Eastern European entrepreneurs struggling to overcome 70 years of Communist rule weren't too different from those facing Indians on a reservation, where a central tribal government dominates a heavily planned economy."[170]

In addition to the state of federal Indian law, there are other artificial barriers to economic development in Indian Country, mostly imposed on tribes by law or otherwise generated as a side effect of Federal Indian Law. It is these artificial barriers that we turn to now.

A. STRUCTURAL DISCRIMINATION AGAINST TRIBAL GOVERNMENTS IN FINANCING

Indian tribes are still hamstrung by the lack of financing available to stimulate the reservation economy. The first tax-exempt municipal bond offering by an Indian tribe in accordance with the Tax Status Act was

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demonstrated the 'failures of socialism' and fostered the nation's highest rates of unemployment, alcoholism and other social ills."); Seth S. King, *Indian Group Praises Reagan Statement on Tribes*, N.Y. TIMES, Jan. 29, 1983, § 1, at 8 ("In a television interview last week, Mr. Watt said Indian reservations offered a better example of the 'failures of socialism' than the Soviet Union did.").

Watt later apologized for his insensitive comments, but added that "his comments had focused attention on problems that have been around for decades. 'I have given you an opportunity, don't muff it,' Mr. Watt said." Associated Press, *supra* note 108, at A13. In fact, it appeared that Watt's "apology" was nothing of the sort: "Mr. Watt conceded that he might have used 'unartful language' in making the comments, but added, grinning, 'boy, I got attention.'" *Id.*

167. *Reagan Outlines Policy on Tribes*, *supra* note 166, at 16. Watt further added, sounding exactly like the advocates of the 1950s-era Termination policy, that,

> [S]ome tribal leaders "are interested in keeping this group of people assembled on a desert environment were there are no jobs, no agricultural potential, no water, because if Indians were allowed to be liberated, they'd go and get a job and that guy wouldn't have his handout as a paid government Indian official."

Id. Compare Schmidt, *supra* note 100, at A1, stating,

> Here on the reservation, where many Apaches heard the Interior Secretary on television, Mr. Watt's remarks stirred deep-seated mistrust of the Federal Government once again. It is a decades-old fear that Washington's real purpose is to do away with the reservation eventually, to drive the Indians off the land where they were forcibly resettled nearly a century ago . . . .

168. *Id.*

169. *See* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES (1970).

170. Winerip, *supra* note 113, § 4A, at 25.

announced in 1985.[171] More and more tax-exempt financings followed, albeit slowly. Lenders forced tribes to pledge their limited gaming revenues and anticipated government funds and still could not participate in the tax-exempt financing projects.[172] To advance the spread of tribal financings, some of the more wealthy tribes formed the Native American National Bank in 2000.[173] The founders of the Bank suggested that commercial banks "'are a little fearful of giving Indians loans.'"[174] By 1995, the Mohegan Tribe had become the first Indian tribe to raise money on Wall Street by partly financing the deal with an institutional placing on capital markets.[175] By the first years of the new century, large banks began to lend to Indian tribes flush with casino revenue.[176] Despite these advances, even by the turn of the century, many tribal governments still were forced to rely on "high-yield bankers" and "junkbond financing."[177] "Relying on a single source of funding—as profitable as it may be—[tribes] rarely meet criteria for investment-grade ratings."[178]

Tribal governments are "treated differently from local governments under federal tax and securities laws. . . ."[179] The legal presumption regarding tribal financing is that it is taxable unless the tribe shows that the funded project is for some "essential government function."[180] State and local governments do not have to make the same showing.[181] Also, the

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171. *See Indian Tribe Offering Is Held*, N.Y. TIMES, July 2, 1985, at D15 (reporting that the Jicarilla Apache Tribe held the first tax-exempt offering by an Indian tribe, an offering of $30.2 million secured by the tribe's oil and gas revenues).

172. *E.g.*, Richard Gibson, *Indians Sell Bonds Backed By Revenue from Bingo Betting*, WALL ST. J., June 19, 1985, *available at* 1985 WL-WSJ 249499 (discussing the Fond du Lac Band of Lake Superior Chippewa Indians' private bank financing of its health clinic).

173. *See* Paul Zielbauer, *Tribes Agree to Underwrite Proposal for Nation's Largest Indian Bank*, N.Y. TIMES, Aug. 26, 2000, at B1.

174. *Id.* (quoting Greg Bourland, chairman of the Cheyenne River Sioux Tribe).

175. *See* Tim Burt, *Indian Tribe Joins Casino Venture*, FINANCIAL TIMES (London), Oct. 3, 1995, at 26.

176. *See* Dugan, *supra* note 151, at A1, discussing interests of Morgan Stanley, Bank of America Corp., and others in lending to Indian tribes:

> Bank of America entered the market in the mid-1990s, at the suggestion of Dan Lewis, a senior vice president who is Navajo. "I pointed out that if we can lend to foreign countries, we can certainly overcome the issues keeping banks out of Indian country," Mr. Lewis recalls. "For one thing, we know tribes are not going to devalue the dollar." Since then, the bank has lent $1.5 billion in syndicated loans for tribal casinos. It routinely runs buses of bankers through reservations in California to interest them in investments.

Id.

177. Aubin, *supra* note 86, at A43.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See id.*

Securities Act of 1933 "requires tribes but not state or local governments . . . to register public offerings."[182] According to the *Wall Street Journal*, "[b]ecause registering bonds would be prohibitively expensive, most tribal financing has come from bank loans or privately placed bonds, which are exempt from the [S]ecurities [A]ct."[183] In addition to statutory and regulatory barriers, the Supreme Court has followed the prodding of state governments and sharply limited the ability of Indian tribes to exploit their tax advantages for business purposes.[184]

Another major hurdle tribes must face is capital flight. "Because most tribal communities do not have a comprehensive economic structure, tribal dollars are spent mainly in non-Indian communities where they support the tax base of these neighboring local governments."[185] In Navajo, for example, members "receive paychecks and Government assistance totaling $1 billion a year, and spend an estimated $800 million of it outside the reservation."[186]

B. COMMON LAW LIMITS ON THE ABILITY TO "MARKET THE EXEMPTION"

"As tribes become more of an economic presence in a state, they are competing with the state in many respects, and the state wants to see how far it can extend its regulatory jurisdiction on the reservation."[187] The most common argument behind extending the reach of state taxes or regulations is to "level the playing field."[188]

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182. *Id.*

183. *Id.*; *see also* Dennis Walters, *Standard & Poor's Announces Its First Public Rating on Indian Bond Issue*, BOND BUYER, Apr. 30, 1993, *available at* 1993 WL 7137018 ("Unlike state and local government bonds, tribal bonds are not exempt from registration with the Securities and Exchange Commission. As a result, most tribal bonds are either privately placed or secured with a letter of credit to avoid the often time-consuming and expensive nature of the registration process.").

184. *E.g.*, Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (denying tribes' ability to market a tax exemption to the advantage of state governments).

185. *Tax Fairness and Tax Base Protection: Hearing on H.R. 1168 Before the House Comm. on Resources*, 105th Cong. (1998) [hereinafter *Hearing*] (statement of Kevin Gover, Assistant Sec'y of Indian Affairs, United States Dept. of Interior), *available at* 1998 WL 12761658.

186. Keith Bradsher, *In Navajos' Towns, A New Tactic to Fill A Void in Banking*, N.Y. TIMES, Nov. 25, 1994, at A1.

187. Hamilton, *supra* note 115, § 13CN, at 3.

188. *See* Westneat & Simon, *supra* note 88, *available at* 1995 WL 11799673 ("The common argument behind all these tax proposals is a desire to 'level the playing field' between tribal businesses—whether they're casinos or smoke shops—and nearby non-Indian ventures that must pay state and federal taxes."). "Leveling the playing field" is an old argument used by the dominant culture in other areas of public policy. *See* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH viii (1994). As Stanley Fish pointed out in the context of the Congressional redistricting,

States routinely object to tax-free tribal sales of cigarettes to non-Indians, known as "tax arbitrage" or, in federal Indian law, as "marketing the exemption."[189] In 2002, the conservative *Financial Times* implicitly compared Indian tribes to New York City gangsters,[190] although the paper conceded that cigarette smokers strongly support Indian tribes who provide them with cheaper product.[191]

The Supreme Court first explicitly decided that tribes could not "market the exemption" in *Washington v. Confederated Tribes and Bands of the Colville Indian Reservation.*[192] The Court held that,

> What these smokeshops offer the customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from

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> I would expect that from many readers the most distressing thing about these essays will be the skepticism with which they view the invocation of high-sounding words and phrases like "reason," "merit," "fairness," "neutrality," "free speech," "color blind," "level playing field," and "tolerance." My argument is that when such words and phrases are invoked, it is almost always as part of an effort to deprive moral and legal problems of their histories so that merely formal calculations can then be performed on phenomena that have been flattened out and no longer have their real-world shape. An exemplary (it is a bad example) instance of this practice has just been provided for us by the Supreme Court in its recent (June 28, 1993) decision that the creation by the North Carolina legislature of two black majority districts may be unconstitutional because it smacks too much of "race consciousness."

Id.

189. Amity Shlaes, *Cigarette Tax Adds Fuel to an Old Fire*, FINANCIAL TIMES (London), Oct. 17, 2002, at 22.

190. *Id.* According to the *Financial Times* of London,

> Taxes always generate tax avoidance and tax evasion. And when it comes to cigarette taxes, New York has a grand tradition. In the old days—especially between 1965 and 1980, when cigarette taxes were also high—cigarette bootlegging was a big New York business. As much as 25 percent of the cigarette market was underground; organized crime managed the business, selling cigarettes at certain exit ramps or in dark apartment hallways.

Id.

191. *See id.* ("States don't like this idea much, and have occasionally taken the tribes to court to make them collect sales taxes for them. The states have tended to win these legal battles. Still, both . . . know that the tribes tend to win the battle in the court of public opinion.").

192. 447 U.S. 134 (1980).

> state taxation to persons who would normally do their business elsewhere.[193]

The Court repeated this doctrine in later cases.[194]

However, tribes may "market the exemption" if they can prove that they have added value to a product from the reservation, or, in other words, created "reservation-based value."[195] As the *Wall Street Journal* described a California regulation defining reservation-based value, "Indian retailers will be exempt from sales tax if they make a 'substantial contribution' to the product, or if the product has a 'substantial connection' to the retailer through financing, manufacturing or marketing."[196] The Squaxin Island Tribe recently began to market their own brand of cigarettes in order to take advantage of this doctrine.[197]

C. BACKLASH AGAINST TRIBAL BUSINESS, PARTICULARLY GAMING

"When the status quo of the last 100 years is disrupted, someone's ox gets gored."[198]

There is a long history of non-Indians complaining vigorously about the so-called tax exemptions[199] that many Indian tribes, individual Indians, and Indian-owned businesses enjoy.[200] As one commentator noted, "Indians are a good whipping boy because they don't pay taxes or get regulated."[201] Business papers like the *Wall Street Journal* devote a great deal of space to local governments who, often unrealistically or unreasonably, fear they will lose sales and property tax revenue.[202] Congressional

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193. *Colville*, 447 U.S. at 155.

194. *See* Dept. of Taxation & Fin. v. Milhelm Attea & Bros., 512 U.S. 61, 71-72 (1994).

195. *See* Hamilton, *supra* note 115, § 13CN, at 3 ("Whatever resources the tribe produces on its own land are not taxable.").

196. Editorial, *Casino Royale Politics*, WALL ST. J., May 30, 2002, at A14.

197. *See* Kamb, *supra* note 103, at A1 ("Bolstered by an investment from its successful casino—and a competitive tax advantage for Indian manufacturing ventures—the Squaxin Island Tribe is betting there will be many more smokers . . . willing to give the tribe's new, inexpensive brand of cigarettes a try.").

198. Siegel, *supra* note 135, *available at* 1986 WL 2197630.

199. *See generally* JAY VINCENT WHITE, TAXING THOSE THEY FOUND HERE: AN EXAMINATION OF THE TAX EXEMPT STATUS OF THE AMERICAN INDIAN (1972).

200. *See* Patricia Callahan, *Indians vs. Whites: The Politics of Race Roil a Quiet County*, WALL ST. J., Oct. 31, 2002, at A1 ("The white establishment in Bennett County[, South Dakota] argues that the issue is less about race than about representation without taxation . . . . 'If they're going to use your roads and use your schools, they should pay taxes,' says Ed Risse . . . .").

201. Ken Geppfert, *Gambling Advocates See Payoff in Cherokee Casino*, WALL ST. J., July 12, 1995, at 1.

202. See Dugan, *supra* note 130, at A1, stating,

> The taxes paid on gas that comes out of the [Southern Ute] reservation account for a quarter of the taxes in La Plata County, where the tribe is now the biggest employer.

leaders often claim the sky is falling when it comes to Indian tax exemptions, sometimes even accusing tribes that market the exemption of being criminal tax evaders:

> Any business can reduce its prices dramatically if they simply ignore the laws on how they and competitors must operate. It is wrong to let law-breakers profit, while those who follow the law are driven out of business because they cannot compete against law-breakers. Omitting taxes from the price enables anyone to undercut competitors dramatically. The steep discount price is a powerful lure attracting customers from nearby non-tribal businesses (and even from great distances). Thus, the tribes can sell gasoline without charging the typical $.20 - .30 per gallon state fuel tax or the $.40 - .60 per pack cigarette tax. They even flaunt this by advertising to general public that they don't collect taxes . . . . The first problem is that this drives legitimate, tax-paying competition out of business for miles around. The second problem is that it destroys the tax base that states and cities use to finance roads, schools, parks, housing, public health and safety etc.[203]

Some states, such as Idaho, have proposed taxes on reservation sales in order to try to abate state budget problems.[204] Tribes argue that such taxes would reduce reservation sales, which also hurt the state imposing the taxes.[205] Some tribal leaders suspect that state governments, accountable to large special interests such as convenience store and tobacco lobbies, are basically paid to try and shut down tribal smokeshops.[206] Fortunately, there

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> But the tribe doesn't pay property taxes on land within the bounds of the reservation, and area residents fear the tribe will pull land off the tax rolls as it snaps up real estate.

Id.

203. *Hearing*, *supra* note 185 (statement of Rep. Ernest J. Istook, Jr.,), *available at* 1998 WL 12761802.

204. *See* Betsy Z. Russell, *Tribes Say Tax Bills Single Them Out Unfairly; One Would Impose Cigarette Tax; Another Would Revoke Sales Tax Exemption*, SPOKESMEN REV. (Spokane, Wash.), Feb. 18, 2003, at A1, *available at* 2003 WL 6401149; *see also* Amy Lane, *State Looks to Indian Casinos to Add Revenue*, CRAIN'S DET. BUS., Apr. 14, 2003, at 6 (discussing how Michigan Governor Jennifer Granholm and the Michigan legislature "are looking to Michigan's American Indian tribes as potential revenue sources"). *See generally* Larry Echohawk, *Balancing State and Tribal Power to Tax in Indian Country*, 40 IDAHO L. REV. 623 (2004) (discussing the Idaho legislature's proposed solution to its budget dilemma and the impact on Indian tribes).

205. *See* Russell, *supra* note 204, at A1 (noting that Idaho tribal leaders argued that state taxes on reservation sales would reduce overall state tax and tobacco settlement revenue by $9 million annually).

206. *See* Marie Price, *Smoke Shop Owners Fear Getting Burned*, TULSA WORLD (Okla.) Sept. 28, 2003, at A21 ("[Wayne] Stull[, a Delaware Tribal Council Member] also believes the state is in league with big tobacco to put individually operated smoke shops out of business.").

are some states, like Washington, that do not see a problem, as long as the tribe manufactures its own smokes.[207]

The backlash from businesses (and non-Indian governments) competing with tribal businesses has been fierce. The state government frequently litigates against Ho-Chunk Industries, Inc., the business arm of the Winnebago Tribe in Nebraska, on the company's attempts to "use the Indians' tribal sovereignty and the latent buying power that provides to undercut [its] competitors."[208]

The backlash against tribes for attempting to raise revenue by taxing non-Indians is at least as fierce. On the Yakama Reservation in Washington state, where the tribe has attempted to tax non-Indian owned businesses within the reservation boundaries, business owners (owners that sell enormous amounts of tobacco and alcohol to Indians) frequently complain that the tribal government's taxes will drive them out of business.[209] On the Crow Tribe's reservation, where non-Indian traders sell millions of dollars worth of trinkets commemorating Custer's Last Stand, the tribe imposed a small sales tax on the traders, who quickly rebelled.[210]

Non-Indian phone companies have complained about tribes entering the telecommunications market. One dispute between a tribe and a non-Indian firm resulted in the tribe purchasing the local telecommunications

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207. *See* Kamb, *supra* note 103, at A1 ("We don't have an issue with it,' says Leslie Cushman, the [Washington revenue] department's assistant director of special programs and tribal liaison. 'They've invested in business, they've bought the equipment, and they'll do the manufacturing on Indian land. That pre-empts the tax on non-Indians.'").

208. Fialka, *supra* note 158, at A4.

209. *See* Zimmerman, *supra* note 136, *available at* 2000 WL-WSJ 3016298 ("[The] owner of Little John's, a tavern ducked behind a Safeway store in Toppenish, hung this banner over the bar: 'Due to the imposed alcohol tax passed by the Yakama Nation Tribal Council, we will not be able to offer you Happy Hour until further notice.'").

210. *See* Timothy Egan, *Backlash Growing as Indians Make a Stand for Sovereignty*, N.Y. TIMES, Mar. 9, 1998, at A1:

> Tourists drive over Crow roads, they dump garbage on Crow lands, they get into disputes that involve Crow police. But until 1995, when the Crow started levying a 4 percent resort tax on businesses catering to tourists within the reservation, the tribe was getting little revenue from the millions of people who wanted to see where the man the Indians called Yellow Hair made his last stand.
>
> The Crow were making a stand for sovereignty, and for economic survival. But many non-Indians on the reservation did not see it that way. They saw it as taxation without representation, and have refused to pay.
>
> "I didn't persecute anybody at Plymouth Rock," says James Thompson, a tax opponent who owns Custer Battlefield Trading Company, just a stone's throw from where 210 soldiers fell. "This is the 1990's. We didn't do anything to them, and we don't owe them anything."

Id.

network from the firm under threat of tribal condemnation of the network, which was likely located on trust lands.[211]

But none of this compares to the most recent backlash, the national backlash against Indian gaming. This backlash is fierce and literally threatens all Indian gaming. Many Indians believe the backlash from the non-Indians is a product of "simple racism."[212] Whatever the cause for these on-going attitudes against Indian tribal businesses and Indian tribes generally, the impact on tribal economic development is substantial.[213]

Indian tribes attempting to overcome legal and political barriers to tribal economic development must also confront and quell internal political problems. This barrier is perhaps the most significant in terms of both its impact on the bottom line and to the future of Indian tribes. The impacts on reservation political stability are real, but it must not be forgotten that Indian tribes would never have needed to start businesses if Congress, the Bureau of Indian Affairs, the Supreme Court, and the states had treated Indian tribes like governments from the start. In my opinion, the next section would never have been written but for the racism and colonialism of non-Indian governments and individuals.

D. POLITICAL LIMITATIONS OF INDIAN TRIBES TO ENGAGE IN ECONOMIC DEVELOPMENT

Professor Robert A. Williams, Jr. adequately summed up the "tangible and intangible barriers" to tribal economic growth in 1985: "[territorial] remoteness, an inadequate public infrastructure base, capital access barriers and ownership patterns, and an underskilled labor and managerial sector combine with paternalistic attitudes of federal policymakers to stifle Indian Country development and investment."[214]

Indian tribes did not develop as ready-made economic growth machines, ready to dominate in business. In fact, most Indian tribes are forced to import the values and expertise required to make a profit.[215] Still,

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211. *See* Romero, *supra* note 155, at A1 (discussing dispute between the Mescalero Apache Tribe and the GTE Corporation).

212. Roesler, *supra* note 154, at A1 ("'You're disliked for being poor, and you're disliked even more for being successful,' [Caldie Rogers, president of the Greater Marysville Tulalip Chamber of Commerce] said.").

213. *See id.*

214. Williams, *supra* note 97, at 335-36 (footnote omitted).

215. *See* Associated Press, *Tribes Are Looking Beyond Casinos to Build an Economic Base*, N.Y. TIMES, Nov. 12, 1999, at 20 ("'[The tribes] never imagines that they would be negotiating with Fortune 500 companies, or with the federal government, trying to build modern economies,' [Stephen Cornell] said. 'In many cases, they're not very effective institutions, and they're not indigenous, not traditional—they didn't come out of that society. They were imports.").

business experts routinely predict that Indian tribal businesses will fall flat because of the tribes' relative inexperience in concepts such as marketing.[216] As the *Financial Times* argued, "general lack of business skills within the tribes, combined with still-powerful mistrust of outsiders, could slow expansion [of gaming in California]."[217] Even where Indian tribes retain their traditional business practices, the paper predicted that the tribes' traditional values will "inevitabl[y]" be "displaced by public relations, marketing and conventional business methodology. . . ."[218] The *Wall Street Journal* asserted in 2001 that Indian tribes "are unschooled in the ways of high finance and distrust anything involving Wall Street."[219]

The concept of Indian tribes in the nation's political discourse as businesses arose only within the past few decades. By some defenders of tribal rights, economic development on Indian reservations amounted to merely corporate exploitation, making only a few individual Indians wealthy. As recently as 1983, the venerable *New York Times* opined that tribal governments are merely "administrative authorities imposed by the Government and managed by the Bureau of Indian Affairs."[220] The editorial argued that the 1982 Tribal Tax Status Act would not bring Indians back from poverty and asserted, "it is clear that, far from being concerned with the social problems of the Indians, the [Reagan] Administration seeks only to facilitate corporate opportunities for the exploitation of resources on Indian lands."[221] The paper noted the example of the Anaconda Corporation, which "exhausted the resources" on the Laguna Pueblo and then ceased operation of the Jackpile Mine.[222]

Tribes have come a long way from the days where non-Indian-owned corporations, with the consent, assent, and collusion of federal agencies, bureaucrats, and appointed officials, would routinely exploit the natural resources of Indian reservations. Though the Navajo Nation recently lost a claim for $600 million plus interest against the federal government for cheating it out of royalties it should have earned from Peabody Coal, the

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216. *See* Christopher Parkes, *Business Replaces Tradition on California's Reservations: Poised for a Bold Expansion to Their Casino Industry, Indians are Embracing Modern Practices*, FINANCIAL TIMES (London), Mar. 30, 2001, at 11 ("Marketing is an art little known to the tribes, while southern California's population is the most diverse in the country and television advertising the costliest.").

217. *Id.* For a discussion of the legal foundations of the expansion of Indian gaming in California, *see* K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. REV. 1033 (2002).

218. Parkes, *supra* note 216, at 11.

219. Dugan, *supra* note 151, at A1.

220. Means, *supra* note 125, § 4, at 16.

221. *Id.*

222. *Id.*

Nation's claim against the coal company for the same amount is progressing nicely in federal courts.[223] Other tribes, such as the Southern Utes, have taken control of their natural resources and are using them for their own, significant benefit.[224]

However, there are dangers to Indian tribes forced to operate businesses in order to raise revenue to fund and operate governmental services. The 1983 *New York Times* editorial raised some of these issues in its crude manner, noting that "the majority of Indian people have expressed time and time again their unwillingness to exploit their economic resources for profit . . . ."[225] Moreover, the editors added, "Indians who benefit economically from this exploitation are being coerced into the abandonment of their traditional view of the relationship between human society and nature as one of cooperative support . . . ."[226] The *Times* later amended its view slightly by suggesting that only non-Indian "critics of the tribal governments argue that elected chairmen and councils are creatures of white interests in need of legally binding signatures of trade agreements and leases."[227] Though these words sound in obvious paternalism and (unintentional) condescension, the editors had a point, to a degree. There are tribes, the Hoopa Valley Tribe for example, that will virtually run out of natural resources to sell to the dominant society. While it is unrealistic to assume that the tribes in this situation will expire, as the *New York Times* seemed to assert in the early 1980s, these issues must be addressed by any tribe with finite natural resources.

Tribal members on the outside looking in on tribal business projects may oppose the projects because they feel the tribal government is not providing adequate information to the membership or for other political reasons. Many Oklahoma Seminoles opposed a tribal project to open a bingo hall in Florida because they said "the project [wa]s moving too fast and without enough details."[228]

The tribes that have most fit into the non-Indian style of business, by taking control of the businesses away from the tribal government, have been given kudos from the business newspapers as successful. The *Wall Street Journal* wrote up the Confederated Salish and Kootenai Tribes of the

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223. *See* Peabody Coal v. Navajo Nation, 373 F.3d 945 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 910 (2005).

224. *See supra* notes 130-33 and accompanying text.

225. Means, *supra* note 125, § 4, at 16.

226. *Id.*

227. Iver Peterson, *Should Majorities Rule Reservation?*, N.Y. TIMES, Sept. 29, 1985, § 4, at 4.

228. Beall, *supra* note 101, at F1.

Flathead Reservation (CSKT) as an example of this mode of thinking.[229] The *Journal* asserted that "tribal politicians still get in the way too often, micromanaging their way down to who gets hired, who gets fired and what color the walls should be painted."[230] According to the *Journal*, CSKT fit the bill for outside businesses:

> "I thought we were going to get into a situation where there was a lot of bureaucracy," admits John Willis, an Air Force executive who brought S&K Technologies in with only a one-year contract at first. But "right off the bat we saw the bureaucracy was not there, and they could make quick decisions," Mr. Willis says. One likely reason the company is so efficient: the tribal politicians stay out of it. "I've never met any of the tribal council or any of that stuff," Mr. Willis says.[231]

The *Journal* added that CSKT started the business and made itself the owner and sole shareholder, but appointed non-tribal council members to sit on the company's board of directors, a development the *Journal* praised.[232] In this circumstance, the managers of the tribal company complimented the arrangement as being less "hierarchical" than other businesses, coupled with more "urgency" and "teamwork."[233] In the event the tribal politicians attempt to regain more control over the business, the *Journal* reported that the tribe's attorneys step in and talk them out of it:

> Tribal council members—particularly those new to office—occasionally make plays to gain more control. "It does ebb and flow," says Mr. [Greg] DuMontier. "But their own tribal attorneys are quick to step in." The lawyers' argument: staying out of day-to-day operations maintains a liability wall between the tribe's private ventures and the deep pockets of its land holdings. "At that point," Mr. DuMontier says, "the tribal council's thinking becomes, 'Oh yeah, OK, we better retreat.'"[234]

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229. *See* Morse, *supra* note 122, at 16 ("The tribe's two main ventures—the IT company and an older enterprise that make circuit boards—don't wait for customers to come to rural Montana. Their first goal is profits, not jobs. And they're not messed with by their tribal politicians.").

230. *Id.*

231. *Id.*

232. *See id.* ("The council made itself the sole, single shareholder, but it didn't declare itself the board of directors, as often happens at other tribes. Instead, it appointed a board, composed of tribal members, and required the business managers to come before the council only once a year.").

233. *Id.*

234. *See id.*

Another tribal business that has succeeded, especially in the eyes of the *Wall Street Journal*, is the Winnebago Tribe in Nebraska, which operates Ho-Chunk Industries, Inc.[235] Business managers chose to seek "profit first" and then focus on a jobs creation strategy.[236] Prior to the rise of HCI, "the tribe often agonized before making business moves and focused on creating jobs for tribe members[,] . . . including . . . day long meetings" to make business decisions.[237] Once the politicians were pushed out the way, the money began to flow.

Business experts like the *Wall Street Journal* pounce on any financially successful tribe that has concomitant political problems. For these experts, "[t]ribal council meetings become a vehicle for political patronage."[238] The *Journal* recently published a story on the Southern Ute tribe in Colorado, treating the story like an exposé rather than mere coverage.[239] The article summarized the fabulous successes of the tribe by noting that "[t]he tribe's business plans and newfound wealth have led to environmental controversies, racial tensions, even a murder. And many Southern Utes are uneasy and resentful about how the tribe's wealth is distributed, a topic that inspires shouting matches at tribal meetings and requests for order of protection."[240] Reporting that the tribe's business decisions are generally made by "white executives, who dominate the tribe's top business posts,"[241] the article emphasized the complaints of tribal members who view themselves as out of the loop, quoting one member as asserting that "tribal leaders and white executives are gaining too much power, creating a 'nouveau riche banana republic.'"[242] Again asserting that tribes are socialists, the paper quoted one of the tribe's business managers as alleging, "I'm a capitalist working for a bunch of socialists."[243]

When a tribe begins to see economic success, its members quickly demand accountability, a democratic institution not seen in today's business climate (nor, it appears, in today's democracy), and readily criticized by the business experts. In the case of the Southern Utes, the *Journal* characterized this form of political pressure as paranoia: "[S]ince big business moves were made without the input of tribal members, they began to

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235. *See* Fialka, *supra* note 158, at A4.
236. *See id.*
237. *Id.*
238. Anderson, *supra* note 109, at A10.
239. *See* Dugan, *supra* note 130, at A1.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*

suspect they weren't getting their fair share of the profits."[244] Such reportage evidences the focus of business papers on the limitations of tribal governments *qua* business because of their status as tribal governments *qua* governments. This emphasis is beside the point.

In addition to criticizing any tribe that allows its tribal government to control the tribal businesses, the business papers assume that tribal courts are inherently political and biased. The *Wall Street Journal* reported the point of view of non-Indian business interests sued in tribal court: "[companies] say the tribal-court experience is like litigating in a foreign country. Tribes generally have no established business law, and cases can turn on unwritten custom and tradition."[245] Non-Indian litigants in tribal courts (usually with weak cases) sometimes refuse to even try tribal court, labeling them "kangaroo courts."[246] In the case of CSKT, the *Wall Street Journal* praised the tribe for instituting reforms that made the tribal court "less-political."[247] However, "Indian courts generally have light dockets and provide relatively swift justice."[248]

Finally, economic development strategies are bound to affect tribal culture, though there is no agreement on how traditional culture will suffer or survive in these circumstances.[249] The case of the Southern Utes demonstrates this uncertainty:

> Some Southern Utes worry that the money will erode their culture. "Before money, everything was easier, simpler," says Everett Burch, brother of the former chairman. People have lost their hunting skills, he says, and wouldn't know how to survive without their "luxuries" such as electricity. Tribal leaders argue that the money will help preserve the culture: with profits from its funds, the tribe has built an elementary school to teach the Southern Ute language and traditions. Meanwhile, . . . a new apprenticeship program will elevate more members to leadership spots in the tribe's businesses.[250]

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244. *Id.*

245. Richard B. Schmitt, *Tribal Courts Draw Adroit Lawyers*, WALL ST. J., Mar. 20, 1998, at B1.

246. James Bandler, *Tribe Gets Bigger Shield Against Suits*, WALL ST. J., Mar. 22, 2000, at 1 (discussing Bassett v. Mashantucket Pequot, 204 F.3d 343 (2d Cir. 2000)).

247. Morse, *supra* note 122, at 16.

248. Schmitt, *supra* note 245, at B1 (quoting Seth Lesser, a New York lawyer).

249. *See generally* Carole Goldberg-Ambrose, *Pursuing Tribal Economic Development at the Bingo Palace*, 29 ARIZ. ST. L. J. 97 (1997) (discussing ways tribes can limit the impacts of tribal businesses, particularly gaming, on tribal culture through the lens of Louise Erdrich's THE BINGO PALACE (1994)).

250. Dugan, *supra* note 130, at A1.

Many tribes suffer from internal divisiveness over the question of whether to commence gaming operations. As the *New York Times* recently reported,

> Inside Indian territories, which are considered sovereign entities, a battle is raging over whether casinos represent genuine salvation or false temptation. It is a clash between those with a reverence for the old ways and those with a thirst for a revenue stream. It is an argument over who will control the receipts and whether exchanging vows with state governments is worth selling a piece of autonomy.[251]

The *Times* reported that there are major rifts within families at the Saginaw Chippewa Tribe in Michigan, where disenrollments are a major feature; the Oneida Indian Nation, where the tribe's powerful and charismatic leader is opposed by his aunt, a powerful elder; and many other tribes.[252] Political territories within the Navajo Nation have strongly advocated for gaming while the remainder of the tribe opposes gaming.[253] Gaming compact terms become critical campaign issues in tribal politics.[254] Unlike non-Indian businesses, where corporate structure intends to keep politics out of the equation, tribal governments are directly accountable to their constituents. Tribal governments' democracy is far more advanced and effective than American democracy (and corporate democracy, which is an oxymoron).

One of the positive side effects of economic development revenues is that tribes have begun to think about restructuring themselves in a more culturally compatible way. Connecticut tribes, for instance, have begun this process.[255]

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251. David W. Chen & Charlie LeDuff, *Bad Blood in Battle Over Casinos; Issue Divides Tribes and Families as Expansion Looms*, N.Y. TIMES, Oct. 28, 2001, at A29.

252. *See id.*

253. *See id.*

254. *E.g.*, William Taylor, *Money Helps Government, Widens Tribe's Influence*, ALEXANDRIA TOWN TALK (La.), Nov. 2, 2003, *available at* 2003 WL 57414137 ("Tribal Chairman Lovelin Poncho and former Vice Chairman William Worfel negotiated the current compact, but their leadership is now under attack from within the tribe.").

255. See Hamilton, *supra* note 115, § 13CN, at 3, stating:

> With the introduction of a very strong and successful economic development project, the tribe has seen an opportunity and probably a need to take a look at its governing document and ask, "Does this give us adequate protection? Does this define the government structure? Does this allow us to do as much as possible with our community?" I think you will find it's not unique to this tribe, that tribes all over the country are reviewing their constitutions.

E. VIOLENT DANGER TO THE DEVELOPMENT OF TRIBAL GOVERNMENT IN THE PURSUIT OF ECONOMIC DEVELOPMENT

1. *Internal Dangers—New York Indians*

When the Onandaga Indian Nation and business owners on the reservation became involved in a dispute over reservation taxes, the dispute became violent and the state patrol closed down roads leading into the reservation.[256] Similarly, in the Seneca Nation, three Indian men were killed in a reservation dispute over whether to cave-in to the state on taxes.[257] Tribal members "referred to the coming conflict as 'the Seneca's last stand.'"[258]

The last few years have not necessarily quelled the potential for violence. When the New York legislature passed a budget requiring the governor to collect taxes from reservation retailers, tribal leaders "could not promise [that] the tribe could keep a lid on any potential disorder."[259]

2. *External Dangers—Narragansett/Kansas*

In 1995, the State of New York issued an order to plan the military invasion of three Iroquois communities so that "unpaid" taxes on the sale of cigarettes, alcohol, and gaming revenues to non-Natives could be collected by the state.[260]

The days of surrounding Indian tribes with hordes of state police, federal agents, and militias in order to force them to capitulate to the dominant culture's view of the law appear to be over, mostly.

With the advent of increased business sophistication by tribes and the rise of tribal leadership that "thought working within the system was better than resisting it,"[261] tribal leaders expected that nasty and sometimes violent confrontations with state officials would cease.[262] Recent events have proven otherwise.

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256. *See* Associated Press, *Highway Access to Onandaga Reservation Is Restricted in a Tax Dispute*, N.Y. TIMES, Sept. 15, 1993, at B6.

257. *See* Robert D. McFadden, *Seneca Feud Boils Over; 3 Are Slain*, N.Y. TIMES, Mar. 26, 1995, at 41.

258. *Id.* (quoting Duane Ray, former Seneca president).

259. *See* Al Baker, *Seneca Indians Start Ad Campaign Against State's Tax Plan for Reservations*, N.Y. TIMES, Nov. 7, 2003, at B6.

260. Kallen Martin, *Indians Not Taxed: Will Sovereignty Survive?*, AKWE-KON'S J. INDIGENOUS ISSUES, June 30, 1996, *available at* 1996 WL 16437998.

261. Stingley, *supra* note 87, *available at* 1984 WL 2522275.

262. *See id.* ("'I think we feel that there are enough professional people now in the tribes that the days of confrontation are over . . . .'") (quoting Rick Kitto, Jr. chairman of the Santee tribe).

The rise of tribal smokeshops offering tax-free cigarettes has lead to an increase of state enforcement actions against both Indians and non-Indians alike. In the Yakama reservation in Washington state, state officers routinely "confiscate[] loads of [cigarette] cartons on their way to smokeshops and untaxed cigarettes found in vehicles driven by non-Indians."[263] In Kansas, state officials swore out a warrant, for failure to pay taxes to the state, for the arrest of the chief executive officer of Ho-Chunk, Inc. only four months after he received an award from Harvard University as a model of success in tribal communities.[264]

State governments have a method of backing up their authority that tribes may never have, certainly not in the foreseeable future. States have the authority to sanction violence against Indians and tribal business. Recent history strongly suggests that states will use this force against Indians and tribes—even on their own land. If a state official believes enough in his or her legal position, he or she may literally call on attack dogs to force the law down tribes' throats. In the words of Professor Robert N. Clinton, the Supreme Court's recent history of voting down tribal government rights to regulate and tax non-Indians has "'creat[ed] a climate which gives state officials the belief that they could do what they did, which is not a healthy development.'"[265]

V. SUGGESTIONS FOR LAW REFORM

As a matter of both federal and international law, Indian tribes have a right to self-determination, self-governance, and self-sufficiency. Without economic development as a means to generate revenue, that right is empty. Currently, as noted in this article, federal and state law conspires to effectively eviscerate Indian tribes' right to generate revenue as other governments do and through economic development. Moreover, Indian tribes have inherent limitations that restrict their ability to generate revenue through economic development. There are a number of relatively simple changes in the law that would go a long way toward improving the capacity of Indian tribes to generate revenue.

The first subset of reforms includes the extension of Indian tribes' authority to tax non-Indians and to otherwise regulate non-Indians. The Supreme Court has artificially taken away this authority through a line of

263. Zimmerman, *supra* note 136, *available at* 2000 WL-WSJ 3016298.

264. *See* Matt Moline, *Nebraska Tribal Corporation Maintains Gas Tax Exemption*, TOPEKA CAPITAL-J. (Kan.), Jan. 27, 2003, at C1, *available at* 2003 WL 6854626.

265. Michael Corkery, *Indians Say it May Be Fighting Time Again*, PROVIDENCE J. (R.I.), Aug. 25, 2003, at A1 (quoting Robert N. Clinton, law professor, Arizona State University Law School).

cases starting with *Montana v. United States*[266] and culminating with *Nevada v. Hicks*.[267] This solution is a political solution, one that requires political will from Congress and the President to complete. In at least two earlier situations, Congress has effectively overruled Supreme Court decisions.[268] However, both of those decisions created what Congress believed to be a gap in criminal jurisdiction and, as a result, a political furor. A "*Hicks* fix"-type reform is very unlikely to be implemented, as it would entail the extension of tribal authority over non-Indians, ensuring a political firestorm.[269]

The second subset of reforms is a simple designation (or re-designation) of Indian tribal businesses as government entities. Congress could implement this change with a simple amendment to the Tribal Tax Status Act. Alternatively, courts could and should follow the bright-line rule of treating tribal business as arms of tribal government.

A. "*HICKS* FIX"-TYPE REFORM

This reform, known to many as the "*Hicks* fix,"[270] is in direct response to the Supreme Court's 2001 decisions *Nevada v. Hicks*[271] and *Atkinson Trading, Inc. v. Shirley*.[272] *Hicks* held that tribal courts have no jurisdiction over non-Indians absent the consent of the non-Indian or some extremely rare circumstances.[273] In particular, *Atkinson Trading* held that Indian tribes may not validly enact taxes on non-Indians, non-Indian-owned land, or non-Indian businesses absent the same circumstances as *Hicks*.[274] The "*Hicks* fix" would effectively reverse these decisions and several other Supreme Court decisions, such as *Montana v. United States*,[275] *Brendale v.*

266. 450 U.S. 544 (1981).

267. 533 U.S. 353 (2001).

268. *See* United States v. Lara, 124 S. Ct. 1628, 1633 (2004) (discussing 25 U.S.C. § 1301(2) (2000) as a Congressional response to *Duro v. Reina*, 495 U.S. 676 (1990)); CANBY, *supra* note 69, at 20 (noting that Congress effectively overruled *Ex parte* Crow Dog, 109 U.S. 556 (1883), by enacting the Major Crimes Act, 23 Stat. 385 (1885)).

269. *See* Rhina Guidos, *Tribes Making Play for More Jurisdiction*, SALT LAKE TRIB., July 29, 2003, at B5 (detailing reaction of state politicians to the "Hicks fix").

270. *See* Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 34 (2003); Guidos, *supra* note 267, at B5.

271. 533 U.S. 353 (2001).

272. 532 U.S. 645 (2001).

273. *Hicks*, 533 U.S. at 381-82.

274. *Atkinson Trading Co., Inc.*, 532 U.S. 645, at 659.

275. 450 U.S. 544 (1981).

Confederated Tribes and Bands of the Yakima Indian Reservation,[276] *South Dakota v. Bourland*,[277] and *A-1 Constructors, Inc. v. Strate*. [278]

The focus of the various proposals that would overrule *Hicks* and *Atkinson Trading* is, according to "*Hicks* fix" opponents, "criminal and civil jurisdiction over everyone in Indian Country."[279] With jurisdiction over non-Indians living in Indian Country, tribes would have the authority to tax those non-Indians. "'This is local control, right off the Republican platform.'"[280]

However, non-Indians strongly oppose Indian jurisdiction over them, arguing "the centralized power found in tribal lands raises issues of fairness."[281] And, since non-Indians have far more political power than Indians, it is extremely unlikely that a straight-up "*Hicks* fix" will ever come to pass. Nevertheless, there are alternatives.

B. TRIBAL BUSINESSES AS NON-PROFIT ARMS OF TRIBAL GOVERNMENT REPLETE WITH TRIBAL GOVERNMENT RIGHTS AND IMMUNITIES

If Indian tribes are treated properly, as governments and not as corporations, then the concept of trying to take revenue away from tribes through taxation or limiting their authority to acquire revenue becomes unreasonable. "'If you ha[ve] these conservative Republicans all of a sudden trying to tax county governments or state lotteries people would look at them like they're crazy. . . .'"[282] Those who oppose Indian taxation will appear unreasonable: "[A]ny Montana resident who drives across the border to Wyoming and buys something pays a sales tax—without any say in how that tax was levied."[283]

However, state governments see Indian tribes as mere businesses. As one state official noted, "'We don't see this as a jurisdictional issue,' said Gayle Martin of the Kansas Revenue department. 'We see them as a private company that owes the tax just like any other distributor.'"[284] This analysis is deeply flawed. Indian tribes are not businesses. The point is so

276. 492 U.S. 408 (1989).
277. 508 U.S. 679 (1993).
278. 520 U.S. 438 (1997).
279. Guidos, *supra* note 267, at B5.
280. Roesler, *supra* note 154, at A1 (quoting John McCoy).
281. Guidos, *supra* note 267, at B5.
282. Egan, *supra* note 210, at A1 (quoting Bill Gollnick, an Oneida leader).
283. *Id.*
284. Henry J. Cordes, *Winnebago Tribe's Gasoline Tankers Impounded in Tax Dispute With Kansas*, OMAHA WORLD-HERALD (Neb.), Apr. 12, 2002, at A1.

simple and yet rarely understood that it bears repeating: *Indian tribes are not businesses.*

1. *Indian Tribal Businesses are Arms of Tribal Government*

Federal and state courts, as well as federal agencies, are struggling with arcane, complicated, and subjective lines of analyses to determine whether businesses operated by Indian tribes should be treated as though they are simply businesses subjected to state and federal law. For example, some federal circuits and federal agencies engage in what is known as the *Tuscarora-Coeur d'Alene* line of analysis to determine whether a federal statute of general applicability applies to an Indian tribe or tribal business or whether it abrogates the sovereign immunity of that tribe or tribal business.[285] Other courts engage in a complex and subjective three-part test to determine if a tribal business entity may retain the sovereign immunity of the tribe.[286]

A bright-line rule that treats all tribal businesses as government entities providing government services avoids these analyses and reinforces the capacity of tribes to generate revenues that fund critical governmental services. A technical amendment to the Tribal Tax Status Act could create this bright-line rule. The amendment could read, "Business entities organized by Indian tribes under tribal, federal, or state law are governmental entities endowed with immunity from suit and exempt from state and local taxation."[287] Indian tribes are competent to waive these immunities for

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285. *E.g.*, Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126 (11th Cir. 1999) (applying *Tuscarora* principle to tribal businesses); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1994) (same); Smart v. State Farm Ins., 868 F.2d 929 (7th Cir. 1989) (same); Donovan v. Navajo Forest Prods. Indus., 672 F.2d 709 (10th Cir. 1983) (same). *See generally* Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L.REV. 691 (2005).

286. *E.g.*, Gavle v. Little Six, Inc., 555 N.W.2d 284, 294 (Minn. 1996). *Gavle* held that a tribal business must fulfill a three-part test to retain tribal sovereign immunity:

> (1) whether the business entity is organized for a purpose that is governmental by nature, rather than commercial; (2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and (3) whether federal policies intended to promote tribal autonomy are furthered by the extension of immunity to the tribal entity.

Id. See also Dixon v. Picopa Constr. Co., 772 P.2d 1104, 1110-11 (Ariz. 1989) (adopting three-part test); Trudgeon v. Fantasy Springs Casino, 71 Cal. App. 4th 632, 639, 84 Cal. Rpt. 2d 65, 69 (Cal. App. 1999) (adopting *Gavle* test); *In re* Ransom, 658 N.E.2d 989, 992 (N.Y. 1995) (adopting a six-part test).

287. *See* Stephen P. McCleary, Comment, *A Proposed Solution to the Problem of States Jurisdiction to Tax on Indian Reservations*, 26 GONZ. L. REV. 627 (1990-1991).

business purposes[288] and are wise enough to waive their immunities intelligently.[289]

2. *Allow Tribal Governments to "Market the Exemption" in Order to Compete With State and Local Governments*

State and local governments have long exempted land within its jurisdiction from taxes for the purpose of luring established businesses into the area or encouraging the establishment of new businesses in the area.[290] Often, these tax exemptions are justified by rhetoric about reducing the competitive advantages of other states and jurisdictions that do the same.[291] In essence, states and localities are marketing their exemption.

Indian tribes, most of them without a tax base, cannot encourage new business or lure existing business to Indian Country without providing some sort of tax advantage or other carrot. Tribes should be able to market whatever exemption they can, the same as state and local governments. Again, a technical amendment to the Tribal Tax Status Act could complete this goal. The prohibition against tribes marketing the exemption is, in fact, a policy decision made by the Supreme Court.[292] Congress could easily overrule this doctrine.

3. *Revive the "Tribal Infringement" Test of* Williams v. Lee

In *Williams v. Lee*,[293] the Supreme Court articulated what became known as the "tribal infringement" test.[294] The language from which this test is derived reads, "[A]bsent governing Acts of Congress, the question

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288. *See* CANBY, *supra* note 69, at 101 ("There is no longer any doubt that a tribe can waive its own immunity.").

289. *See generally* Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 28 AM. INDIAN L. REV. 309 (2000).

290. *See* Robert Gavin, *Regional Report: States Lure Plants With Tax Breaks*, WALL ST. J., June 27, 2001, at B12 (discussing a $17.5 million tax exemption for a coal-fired power plant in Illinois); Ken Gepfert & James Peter Rubin, *Breakaway (A Special Report): The Money Game: For Your Benefit: Government Incentives Aren't Just for the Big Guys, Anymore; Here's How to Get Your Share*, WALL ST. J., Sept. 28, 1998, at 9; Michael M. Phillips, *Localities Force Firms to Keep Promises; Companies That Renege Can Lose Their Tax Incentives*, WALL ST. J., June 26, 1996, at A2 (acknowledging that states and localities provide tax breaks to companies); Peter Mitchell, *Long on the Sidelines, Florida Joins the Recruiting Giveaway Game*, WALL ST. J., Mar. 8, 1995, at F5 (noting that Florida gave away $109 million in taxes to lure businesses to the state).

291. *See* Mitchell, *supra* note 280, at F5 ("'It's a competitive disadvantage we have in Florida.'") (quoting the Executive Director of the Florida Economic Development Council).

292. *See* N. Bruce Duthu, *The Thurgood Marshall Papers and the Quest for A Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict*, 21 VT. L. REV. 47, 74-97 (1996) (discussing the Supreme Court's deliberations leading the establishment of the doctrine disapproving of tribes marketing the exemption).

293. 358 U.S. 217 (1959).

294. *Williams*, 358 U.S. at 220.

has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[295] The Court later adopted a federal law preemption test to determine whether a state law is invalid in Indian Country, but the Court also made clear that these two tests are "independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members."[296] However, few courts engage in this analysis because, as one prominent commentator noted, "the standard of *Williams v. Lee* does not lend itself to a balancing process."[297]

Tribes should be able to make out a strong case that tribal self-government is impossible without the ability to generate revenue. Recently, one federal district court held that a tribe may regulate and tax the motor vehicle registration of cars on the reservation and, more importantly, that the tribe's motor vehicle and registration law preempted state law in accordance with the tribal infringement test.[298] Similarly, two state courts have recently concluded that a state court would have no jurisdiction over a lawsuit that directly affected the right of the affected tribe to govern itself,[299] even where the parties to the suit were both non-Indian.[300]

The ability of an Indian tribe to raise revenues that will adequately fund tribal government services such as housing, health care, social services, education, law enforcement and public safety, youth and elder services, and even job creation is a right of self-government. The ability of states and localities to impose a tax on top of tribal taxes in Indian Country directly and significantly curtails the right of tribes to raise revenue and, therefore, the right of the tribe to govern. The refusal to allow tribes to govern non-Indians living (voluntarily) within Indian Country affects the right of the tribes to govern. The doctrine is already on the books and should be utilized and approved by courts.

VI. POSTLUDE—CAPTURING KEYSER SOZE

Listen. Imagine that after Keyser Soze fools the police and gets away, the police keep looking. What would happen? Imagine that a group of

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295. *Id.* at 220.

296. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).

297. CANBY, *supra* note 69, at 287.

298. Prairie Band of Potawatomi Indians v. Wagnon, 276 F. Supp. 2d 1168, 1188 (D. Kan. 2003).

299. *See* Winer v. Penny Enters., Inc., 2004 ND 21, ¶ 22, 674 N.W.2d 9, 17; Rodriguez v. Wong, 82 P.3d 263, 267 (Wash. Ct. App. 2004); *see also* Milbank Mut. Ins. Co. v. Eagleman, 705 P.2d 1117 (Mont. 1985) (rejecting state court jurisdiction over a claim brought by an insurance company to collect damages from a reservation Indian).

300. *Rodriguez*, 82 P.3d at 265.

screenwriters sit down and draft a sequel, probably called something inane like *The Usual Suspects 2: The Capture of Keyser Soze*. Each year, they take this screenplay to the major movie studios. The producers hand over the draft to their interns and underlings for study and thank the drafters for this idea. They get hundreds, thousands of pitches every year. And these movie studios, these producers, are not likely to ever produce this movie. There are no stars. The producers did not write a single scene for Renee Zellwegger or Tom Cruise or Lucy Liu or Will Smith. There is nothing to guarantee a huge opening weekend. There is no likelihood that this screenplay will win any of the producers a major award. In fact, the film is likely to create a backlash against the studio from its major advertisers. It will be an unpopular film because it might take money from the pockets of the advertisers. Not a lot, but the advertisers are jealous of their revenues.

Similarly, the tribes take the "*Hicks* fix" to Congress each year in one form or another, just as they did with the "*Duro* fix." They worked hard on putting the bill together, drawing on the experience and expertise of tribal leaders, lobbyists, and lawyers. But these tribes are not multi-billion dollar corporations with millions of dollars to throw around at the Democrats or Republicans like political powerhouses. They have some money, money that gets them in the door, but not the kind of money that makes Senate committee chairs or the Speaker of the House sit down with them personally. The tribes are not political stars. And when the tribes leave after their meeting with Congressional staffers, the Senate committee chair and the Speaker receive a call from the governor of a major swing state who warns them that this bill would reduce state government revenues by millions. Of course, the economists said that the revenues would be reduced by less than one percent, but there is an extremely slight possibility that the revenues would in fact be reduced by millions. The mere threat is enough to kill the bill.

But what if the screenwriters take the screenplay to an independent film studio? Independent film studios do not need stars, although they would not mind a few who would agree to work for scale. Their movies are cheap, relatively, and they do not need huge advertisers. They often have open minds about new ideas and strange new screenplays that seem pretty viable, if original. But these indies are rare and hard to find. Plus, they hear tons of pitches, too. And when these screenwriters pitch the idea of doing a sequel of *The Usual Suspects* it is not the first time they have heard a pitch like that. The pitch has to be excellent, it has to be unique, and it has to have an airtight plot. And even that might not matter if the indie movie producers do not want a movie where the police catch Keyser Soze—they might only think about producing a film where Keyser Soze

gets away. But once in a while, a long while, they agree to make a movie with this kind of plot.

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