

TRIBAL VALUES OF TAXATION WITHIN THE TRIBALIST ECONOMIC THEORY*

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Tribal Nations in mid-North America currently exercise their inherent rights as self-governing sovereign peoples by imposing taxes within tribal territories. Taxation is one of the powers of government that flows from sovereign status. The success of tribal taxation has been curtailed by intrusion of the United States federal government and its component state governments within the tribal territory. In exploring the ramifications of U.S. economic interference in tribal economies, the tribal power of taxation will be the primary focus of this article.

In Part I of this article, the history of the United States seeking to diminish tribal sovereignty up to the current time period will be discussed. In Part II, an explanation of the current battleground over the tribal taxing jurisdiction, the key values that inform the planned economic activities of Tribal Nations, and the Tribalist Economic Theory will be explored. The focus of Part III involves the potential impact of international indigenous legal principles as they evolve to provide a strengthening of tribal sovereignty leading to sole taxation within the tribal territory. In the final section, Part IV, this article will conclude with the argument that Tribal Nations should exercise their sovereignty in applying taxes within the tribal territory as the exclusive taxing authority.

I. U.S. POLICIES INTENDED TO DESTROY TRIBAL SOVEREIGNTY

To begin understanding tribal taxing authority, an examination of tribal governmental powers and the state of the tribal territory is necessary. A

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** This is the author's Dakota name translating to "Good EagleWoman Who Takes Care of the People."

historical overview of U.S. policies towards Tribes in mid-North America reveals the intention to impoverish tribal peoples, seize tribal lands, and legally subjugate tribal authority to federal control backed by military threat. In opposition to these intentions, Tribal Nations continue to withstand the assault of federal policies to assert taxing authority as a natural exercise of sovereignty.

Tribal Nations are inherently sovereign. Sovereignty is a term that is commonly understood around the globe as a nation's power to govern within its territory and enter into relations beyond its territory. The inherent powers of Tribal Nations continue to hold force with tribal people and are exercised daily by tribal leaders.¹

However, there are currently two prevailing perspectives on tribal sovereignty. One is the holistic sovereignty of tribal people that tribal leadership employs in their decision-making and tribal spiritual leaders bless - it is the peoplehood of Tribal Nations. To borrow from the field of property law, this sovereignty is the full bundle of tribal powers contained in the concept of sovereignty that is understood around the world as nationhood.

There is a second concept of tribal sovereignty that has been qualified through federal Indian law, U.S. Supreme Court decisions, federal jurisprudence, and congressional legislation. This second external perception of tribal sovereignty has been described in various ways throughout United States jurisprudence including statements that Tribal Nations are actually "domestic dependent nations,"² or have quasi-sovereignty or are limited to control over internal relations without the express consent of the United States Congress. This latter proposition was set forth with great particularity in the 2001 U.S. Supreme Court decision *Nevada v. Hicks* through the following statement: "[the] exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express congressional delegation."³ This second view of tribal sovereignty is an external imposition aimed directly at circumscribing the inherent sovereignty of Tribal Nations.

With two conflicting perspectives on tribal sovereignty, Tribal Nations, tribal peoples, tribal leaders, and tribal intelligentsia are faced with the challenge of reconciling internal and external perceptions. The schism between these two viewpoints is clear when the history, values, and

1. See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196 (2001) ("Our Ancestors recognized themselves as distinctive cultural and political groups, and that was the basis of their sovereign authority to reach agreements with each other, with the European sovereigns, and then the United States. In each of these instances, our Ancestors exercised governmental authority to protect their lands, resources, peoples and cultures.").

2. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

3. 533 U.S. 353, 359 (2001) (emphasis removed) (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)).

battleground over tribal taxation is examined.

A. *Historical Tribal Commerce*

From the historical information that has survived the prolonged campaign to annihilate tribal peoples and governments, we have an idea of the commerce engaged in prior to the formation of the United States. Trade routes stretched from ocean to ocean and north to south.

[T]here were also intertribal contacts utilizing trails and canoe routes over distances of several hundred miles, extending in the case of war parties and diplomatic missions to 1,000 or 1,500 miles. These longer routes formed a network that also had a bearing on life in the individual villages. The entire communication system, composed of local subsystems, hubs or intermediate terminals, and connections with other networks, can be roughly outlined with the view of demonstrating the wide range of contacts accessible to southeastern Indians.⁴

Research on tribal trade routes has established more than one hundred twenty-five (125) separate pathways allowing for travel of thousands of miles. Trade routes were composed of both land routes and water routes along major waterways.⁵

Trading relationships were based upon the concept of kinship relationships with an implied good faith element in the exchanges. Ownership of goods was not an end goal in itself, rather such ownership provided for a full and rich lifestyle that included generosity as a basic value.

Buffalo hunters, traders, farmers, fishermen and whalers, for example, could be very prosperous private business people who accumulated considerable amounts of privately owned goods and wealth. Many tribes understood the value of amassing economic goods to provide time for leisure activities, to engage in religious and cultural ceremonies, and to make art and handicrafts. For many Indians, nature's bounty and their work and ingenuity provided an ample source of life's necessities and their 'economic year,' or the time it took to gather or produce all their annual food and subsistence needs, left plenty of time for leisure and ceremony.⁶

Wealth was neither hoarded nor equally distributed, rather those with prized skills often retained an amount of quality goods as they fully participated in community give-aways, a process through which honor was received when bestowing gifts on others in the community.⁷ The underlying philosophy of

4. Helen H. Tanner, *The Land and Water Communication Systems of the Southeastern Indians*, in *POWHATAN'S MANTLE: INDIANS IN THE COLONIAL SOUTHEAST* 6 (Peter H. Wood, Gregory A. Waselkov, & M. Thomas Hatley eds., 1989).

5. *Id.* at 8-17.

6. Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 776-77 (2001).

7. See, e.g., MARCEL MAUS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN*

the tribal community permeated the ways of commerce, a sense of interdependence between all of the families forming clans and kinship groups as the foundation for the larger tribal organization.

From the early days of contact with Europeans, accounts have been passed down of the generosity extended by Tribal Nations to Europeans unfamiliar with the territory they had entered. Accounts were made of the familial care that Tribal Nations extended to each other and to those invited into the tribal community as guests. Throughout the 1700s, boatloads of Europeans joined the scant settlements of the few traders and plantation owners who had negotiated for living space within tribal territories. These newcomers began populating the colonial villages along the eastern seaboard. Interactions with Tribal Nations were based on a respect for the indigenous people and recognition of their superior force.

The Indian tribes . . . were recognized as legitimate entities capable of dealing with the European nations by treaty. Since the first settlements were very small, mere outposts in a hostile land, and rarely contained more than a few hundred inhabitants, treaty-making was a feasible method of gaining a foothold on the continent without alarming the natives. Most early settlements in fact needed the protection of larger Indian tribes in order to survive threats made by smaller groups whose lands they invaded.⁸

Gaining a political foothold with powerful tribes served an important purpose for the new immigrants. It provided a means of protection as colonial settlements were established within known territories of smaller tribes who may have been seasonally absent from particular lands.

Further inland, European traders representing primarily Spain, France, and Britain sought commercial relations with Tribal Nations traveling through the ancient trade routes. The values of kinship were soon manipulated by traders entering into tribal territories by the early 1700s. An example of this is illustrated in an account of Comanche society from this time period.

Comanches responded positively to demonstrations of social behavior like that involved in gift giving. American traders, unfamiliar with the ways of Indians, quickly learned the positive effects of providing their hosts with gifts. In this way persons without any kinship or other social connections to the Comanches could begin to establish such ties through which

ARCHAIC SOCIETIES 35-36 (1967). Describing the Tlingit and Haida potlatch system, Maus states that “[n]o less important is the role which honour plays in the transactions of the Indians. Nowhere else is the prestige of an individual as closely bound up with expenditure, and with the duty of returning with interest gifts received in such a way that the creditor becomes the debtor. . . . Progress up the social ladder is made in this way not only for oneself but also for one’s family.” *Id.*

8. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 3 (1983).

commerce could be conducted.⁹

Through the mid-1700s, “[i]ntercultural commerce flourished near European settlements and used the extensive Native American trade network to reach areas remote from colonial population centers.”¹⁰ As the resources of mid-North America became known to those emigrating from the overcrowded town centers, elitist-controlled land baron systems, and ingrained class systems of the so-called ‘Old World,’ the attacks on tribal territories and resource use went into full swing.¹¹

B. Diminishment of Tribal Territorial Sovereignty

As this article is primarily concerned with the contemporary status of tribal taxation in conflict with the United States, the evolution of relationships between the representatives of European countries and the various Tribal Nations will now be explored. The one important point to be noted for this article’s section is that the Dutch, Spanish, French, and English all recognized treaty-making as the most effective means to engaging in profitable relationship with Tribal Nations.¹²

After the formation of the United States in 1776, treaty-making with Tribal Nations by the new republic soon commenced. In 1778, the first written treaty by the United States was entered into with the Delaware Nation.¹³ To establish the supremacy of the U.S. federal government in commercial trade with Tribal Nations, Article I, Section 8, clause 3 of the U.S. Constitution provided that Congress would have the authority to regulate commerce with Indian Tribes, thereby precluding state governments from forming trade relationships with the tribes.¹⁴ Over the next century approximately six hundred treaties and agreements were entered into between Tribal Nations and the United States, often motivated by the European-American intention to gain control of the tribal territory.¹⁵ U.S. Congressional Representative Henry Dawes of Massachusetts introduced a successful rider to the appropriations bill of 1871 declaring that no further treaties would be entered into with Tribal Nations, although major agreements continued to be ratified by Congress up through 1914.¹⁶

In 1823, the U.S. Supreme Court issued a foundational decision that has continued to skew the relations between the United States and Tribal Nations

9. GERALD BETTY, *COMANCHE SOCIETY: BEFORE THE RESERVATION* 116 (2002).

10. John L. Williams, *Paving the Way for the Future: Potential Structures for Tribal Economic Development*, 2 *UCLA INDIGENOUS PEOPLES’ J.L., CULTURE & RESISTANCE* 59, 62-63 (2005).

11. *See, e.g.*, ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 271-80 (1990).

12. *See* COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW*, § 1.02 (2005).

13. *Id.* at § 1.02[2].

14. U.S. CONST. art. I, § 8, cl. 3.

15. *See* DELORIA, JR. & LYTLER, *supra* note 8, at 3-4.

16. *See id.* at 5.

to this day. In *Johnson v. McIntosh*, Chief Justice Marshall relied on the international principle known as the doctrine of discovery to determine the property rights of the unrepresented Tribal Nations across mid-North America.¹⁷ Here is the theory he pronounced:

This principle was, that discovery gave title to the government by whose subject or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring soil from the natives, and establishing settlements upon it.¹⁸

Marshall then went on to describe the rights of the Tribal Nations to their own territory as limited to a right of occupancy, an unfounded extension of the doctrine discovery.

[T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.¹⁹

With a swoop of the pen, this decision set up U.S. federal Indian law as a law of constraint on the sovereignty of Tribal Nations due to the presence of European settlers in the tribal territory. This pretense continues to inform federal Indian law to this day.

Marshall's judicial opinion foreshadowed one of the greatest land dispossessions in the history of the world. Soon after, the U.S. federal government would legalize its intentions to own the tribal territory. In 1887, Republican Senator Henry Dawes furthered the federal policies commenced when he was a congressional representative with passage of the General Allotment Act, commonly known as the "Dawes Act."²⁰ By 1887, the federal policy toward Tribal Nations was one of control by any means necessary with the threat of military force behind legislative policies.²¹ The purpose of the

17. 21 U.S. (8 Wheat.) 543 (1823).

18. *Id.* at 573.

19. *Id.* at 574.

20. 25 U.S.C. §§ 331-33 (1994), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 106(a)(1). *See also* FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 170 (2000) (providing the text of the General Allotment Act of 1887).

21. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 12, at § 1.04 (2005) ("United States military policy was designed to bring natives under control and support the civilian dream of open lands for white settlement."). *See also* THEODORE ROOSEVELT & HENRY CABOT LODGE, ADDRESSES AND PRESIDENTIAL MESSAGES OF THEODORE

Dawes Act was to redistribute Indian land into non-Indian hands.²²

What had not been accomplished by the doctrine of discovery would now be completed with the allotment policy. The tribal land base was broken into one hundred sixty acre tracts or less with a deed issued to the head of the Indian household as determined by the local Indian agent.²³ As part of this process, the government formulated the official tribal membership rolls with frequent mistakes such as incorrectly noting of individuals names, incorrectly noting tribal affiliation, exclusions of those not in the vicinity at the roll taking time, inclusion of visitors and spouses of other Tribes just to name a few of the typical errors.²⁴ Utilizing the government derived tribal rolls, allotments were deeded as small tracts to individual tribal members commencing the quick road to poverty that would persist for decades after.²⁵

The stated goal of the allotment policy was to magically turn tribal peoples into Christian property owners with U.S. citizenship and renunciation of the tribal culture and lifestyle.²⁶ After dividing up the tribal estate, the U.S. government then declared the remaining tribal lands as surplus which the U.S.

ROOSEVELT 1902-1904, 336 (1904). In the Message Communicated to the Two Houses of Congress at the Beginning of the Fifty-Seventh Congress, President Theodore Roosevelt characterized the General Allotment Act as follows:

The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly on the family and the individual. Under its provisions some sixty thousand Indians have already become citizens of the United States. We should now break up the tribal funds, doing for them what allotment does for the tribal lands; that is, they should be divided into individual holdings. *Id.*

22. See ROBERT ODAWI PORTER, *SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER* 186 (2005) (“Over the next fifty years, the Allotment Act had just such an effect on many reservation Indians. The fee patent program and the surplus lands program served as the vehicles for transferring eighty-seven million acres – approximately 65% of all Indian land – to white owners.”).

23. See Angelique EagleWoman, *The Bureau of Indian Affairs and Reservations*, in *HANDBOOK OF NORTH AMERICAN INDIANS, VOL. 2: INDIANS IN CONTEMPORARY SOCIETY* 88 (Garrick Bailey ed., 2008) (detailing the provisions of the distribution of allotments under the General Allotment Act of 1887).

24. See COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 12, at § 3.03[4]. (“Formal tribal enrollment first achieved prominence through the allotment policy of the late nineteenth century, which required official lists of tribal members entitled to participate in the anticipated per capita distributions of tribal property.”).

25. See Stacy L. Leeds, *Borrowing from Blackacre: Expanding Tribal Land Bases Through the Creation of Future Interests and Joint Tenancies*, 80 N.D. L. REV. 827, 834 (2004) (“Regardless of the condition of a tribe’s pre-allotment economy or pattern of individual property rights, one thing is clear: not only was the allotment era a failure of social engineering and property law, but it was responsible for the destruction of tribal economies.”).

26. See COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 12, at § 1.04 (“The white advocates of native reform policy, the so-called ‘Friends of the Indians,’ were determined to make farmers out of the American Indian. Under the federal allotment and assimilation policy, the Native American was to become another lost race in the American melting pot.”). See also Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 8 (1995) (“The 1880s witnessed the fundamental shift in federal policy from separatism within reservations to assimilation. And yet the goals of the allotment and assimilation era were in many respects continuations of the reservation goals: agriculture, Christianity, and citizenship were to be the ultimate outcome.”).

then bought at the price it determined.²⁷ The so-called surplus lands were then sold to settlers.²⁸ One of the purposes of encouraging white settlement within the tribal territorial boundaries was stated as a means of providing role models to tribal members of Christian farmer property owners.²⁹ Through these means, the United States forcibly dispossessed the Tribal Nations of over 97 million acres of land.³⁰ Tribal oral histories abound on the trickery and deceit used in the implementation of the allotment policy. Commentators have stated that the allotment policy was successful at accomplishing only one of its goals – the goal of transferring tribal property to the non-Indian population was exceedingly successful with as much as “two-thirds of all the land allotted pass[ing] into non-Indian ownership.”³¹

Tribal economies were devastated in this process. U.S. lawmakers feigned ignorance that the allotment policy would wreck havoc within tribal territories often flourishing on the abundance of natural resources and human industry. Senator Dawes, himself, commented on the prosperity of the Cherokee Nation after a visit finding the people to be fully self-sufficient.³²

In addition to overlooking or ignoring tribal property laws in the push for allotment, the federal government also ignored the existence of tribal economies. Proponents of allotment argued that Indians would be more self-sufficient if they became private property owners because, without private property, there was no incentive for economic progress. What the allotment proponents ignored, was the fact that many tribal communities were already self-sufficient, with growing economies, at the time the lands were allotted.³³

Thus, allotment was a double blow to Tribal Nations by disrupting tribal prosperity and creating the method to seize large areas of the tribal land base. The resulting impoverishment of tribal peoples is the logical consequence of interruption of the tribal economic life and deprivation of the primary resource – land.³⁴

27. See Royster, *supra* note 26, at 13 (“The General Allotment Act provided that, once reservation lands were allotted in severalty, the remaining ‘surplus’ lands could, at the discretion of the President, be opened to non-Indian settlement.”).

28. *Id.*

29. *Id.* (“Non-Indian settlement interspersed with Indian allotments, assimilation advocates believed, would promote interaction between citizens and Indians and encourage Indians to adopt white ways.”).

30. *Id.* (“Despite the devastating effects of fee patents, the 27 million patented acres lost to non-Indians represented only about one-third of the tribal losses during the allotment era. More than twice as much land – some 60 million acres – was lost under the surplus land program.”).

31. See Leeds, *supra* note 25, at 832.

32. *Id.* at 833.

33. *Id.* at 832.

34. See *id.*; Lloyd Burton, *The American Indian Water Rights Dilemma: Historical Perspective and Dispute-Settling Policy Recommendations*, 7 UCLA J. ENVTL. L. & POL’Y 1 (1987); INDIGENOUS PEOPLES, THE ENVIRONMENT AND LAW 375 (Lawrence Watters ed., 2004) (“Of the 156 million acres held by Indian tribes in 1881, title to roughly 90 million acres (more than half of pre-allotment holdings) had fallen into non-Indian hands by the time the allotment

Another consequence of allotment has been the creation of complex jurisdictional issues. With the U.S. government seizing tribal lands within Indian country, the lands have been redistributed into non-Indian ownership with U.S. states claiming jurisdiction over the converted tribal parcels. This effect has been termed the “checkerboard” pattern within Indian country where the loss of tribal lands has led to the state assertion of authority and jurisdiction to parcels within tribal territory where Tribal Nation jurisdiction and authority is present.³⁵ The parcels claimed to be under state jurisdiction are often alongside parcels that have never left tribal ownership and thus, lead to the image of the checkerboard pattern. Tribal officials must determine the ownership of particular parcels of land to evaluate whether state jurisdiction will be asserted even though the parcel lies within the tribal territorial boundaries.³⁶ This raises issues for economic development, criminal jurisdictional, and almost every aspect of tribal regulatory authority.

Finally, the allotment policy has resulted in the fractionation of land interests as the original allotments have passed down within tribal families. As part of the allotment policy, allotted parcels were placed into trust status under the care of the federal government’s Bureau of Indian Affairs.³⁷ Trust status exempted the parcels from state and federal taxes.³⁸ Initially the trust period was for twenty-five years; however, the period has been extended indefinitely.³⁹ Few allottees devised their interests in allotted parcels through wills and with each succeeding generation more heirs own interests in common

policy was repudiated 50 years later. Further, about 20 million acres of the reservation lands not allotted were unirrigated desert, considered essentially valueless by most whites.”).

35. Anna-Marie Tabor, *Sovereignty in the Balance: Taxation by Tribal Governments*, 15 U. FLA. J.L. & PUB. POL’Y 349, 355 (2004) (“Allotment has continued to create problems for tribes long after the policies themselves ended. In addition to the policies’ direct long-term impact on members and tribes that lost land, the land status ‘checkerboard’ created within Indian Country has created a jurisdictional conundrum for courts and legislatures and weakened tribal power by making the scope of self-governance uncertain.”).

36. See generally Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 505-507 (1976); Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX. REV. L. & POL. 329, 354-55 (2008).

37. General Allotment Act of 1887, 25 U.S.C. § 331-333 (1994). See also PRUCHA, *supra* note 20, at 171 (providing the text of Section 5 of the General Allotment Act of 1887) (“That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefore in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made. . . .”).

38. See FRANCIS PAUL PRUCHA & D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 105 (1973) (“The Dawes Act, providing for the twenty-five year Federal trust period during which time the land might not be encumbered, meant, it was clear, that no State could tax the allottee’s holdings.”).

39. See ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY & SARAH KRACKOFF, *AMERICAN INDIAN LAW, CASES AND COMMENTARY* 130 (2008) (“The key provisions of the Indian Reorganization Act were as follows: . . . (2) [t]he existing periods of trust or restrictions placed upon any Indian lands would continue indefinitely.”).

on the single allotment parcel.⁴⁰ With multiple heirs sometimes up into the hundreds on parcels held in trust, land management decisions are often made or encouraged by the U.S. Bureau of Indian Affairs rather than by tribal landowners.⁴¹

C. *Forced Tribal Assimilation by Governmental Restructuring and Federal Recognition of Tribal Status*

In 1934 with passage of the Indian Reorganization Act (IRA), the allotment policy was halted by the U.S. Congress.⁴² The IRA provided for federal recognition of tribal governments organized according to federal dictates.⁴³ The Bureau of Indian Affairs (BIA) advised tribes to adopt boilerplate constitutional structures with clauses providing that the Secretary of the Interior approve of tribal actions. The acceptance of this type of governmental structure allowed tribal communities to receive federal monies owed from treaty negotiations, agreements and land sales. In 1936, the Oklahoma Indian Welfare Act was passed providing Tribal Nations in Oklahoma the same opportunity to be recognized through the BIA boilerplate constitutional model.⁴⁴

Although heralded in as a policy of recognizing tribal governmental authority, the constitutional model did not provide the checks and balances of the U.S. system. Rather, the model created an all-powerful council subject only to the limitations of the U.S. Secretary of the Interior. This model would prove to create civil unrest and issues of tribal government legitimacy upon the adoption of this foreign form of government.⁴⁵

From 1934 to the present, the consequences of the allotment policy continue to plague Tribal Nations, particularly through the lack of vast acreages, creation of complex jurisdictional issues, and disruption of economic prosperity. With the passage of the IRA, tribal governments have been largely restructured into a foreign unbalanced form of government creating civil unrest.⁴⁶ These factors taken together represent major obstacles in the

40. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 12, at §16.05[2][c].

41. See ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 39, at 110.

42. 25 U.S.C. § 501 (1936).

43. *Id.*

44. 25 U.S.C. §§ 501-09 (1936). See also COHEN'S HANDBOOK ON FEDERAL INDIAN LAW, *supra* note 12, at § 4.07[1][a].

45. ROBERT ODAWI PORTER, SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS, A READER 523-24 (2005) ("The dysfunction may be most easily identifiable in the dependent constitutional or corporate governments. In these nations, the official government fundamentally has been established by the United States with no formal role for the participation of the traditional leadership. In most instances when this occurred, the traditional leadership simply did not magically disappear. It remained intact and was thus simply bypassed by those tribal members selected to serve as the 'official' tribal council. There seems little doubt that the establishment of constitutional governments within those Indian nations where there remained viable traditional governments served to institutionalize division among the people affected.").

46. *Id.* at 524 ("In sum, then weakness within tribal governments is directly related to the

stabilizing of the tribal economy to engender a sustainable tribal tax base. However, federal policy would shift again leading to an even greater threat to tribal survival – the termination era.

A few decades later, U.S. policy shifted from recognition of tribal governments to the termination policy of the 1950s.⁴⁷ During this policy era, the U.S. Congress approved termination of the federal relationship involving approximately one hundred ten Tribal Nations.⁴⁸ Federal termination resulted in all tribal lands being designated subject to state jurisdiction and in some cases the lands being immediately sold.⁴⁹ A final roll was prepared of tribal assets and then distributed to tribal individuals or placed under the control of a state-chartered corporation with management authority over the former tribal property.⁵⁰

Although the language of different termination acts varied, the most common features of this legislation were: (1) tribal rolls were closed; (2) fundamental changes in land ownership patterns were made, either by selling tribal land to the highest bidder and distributing proceeds to the tribal members, placing land in a private trust, transferring tribal land to a state corporation, or distributing land in fee to individual tribal members; (3) the trust relationship was ended for most purposes; (4) state legislative jurisdiction was imposed for most purposes; (5) most exemptions from state taxing authority was ended; (6) most special federal programs to these tribes and their members were discontinued; and (7) federal protection for tribal sovereignty and jurisdictional prerogatives were ended.⁵¹

This policy was finally abandoned in 1958 by the U.S. Congress as a result of the overwhelming tribal response in protest.⁵² In the aftermath, those subject to the termination policy encountered severe obstacles in maintaining a tribal economy.

As tribal community leaders and the urban Indian population added their voices to the Civil Rights Movement transforming U.S. policies on racial discrimination, a new policy stance was promoted by Washington toward Tribal Nations. The passage of the 1975 Indian Self Determination and Education Assistance Act signaled an end to the domination of termination and

degree to which tribal government is not reflective of or supported by the tribal membership. Where traditional people do not support the constitutional government, or where the progressive people do not support the traditional government, conflict arises. With this conflict comes division, dysfunction, and governmental weakness . . .”).

47. H.R. 108, 83rd Cong. (1953).

48. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 12, at § 3.02[8][a]. See also Charles F. Wilkinson and Eric Briggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151-54 (1977) (“[A]pproximately 109 tribes and bands were terminated. A minimum of 1,362,155 acres and 11,466 individuals were affected.”).

49. See ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 39, at 139-43.

50. *Id.* at 142.

51. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 12, at § 3.02[8][a].

52. See DELORIA, JR. & LYTLE, *supra* note 8, at 3-4.

assimilation proponents and a return to recognition of tribal governmental authority.⁵³ As the pressure to defend tribal sovereignty from the U.S. federal government decreased, tribal leaders redirected their efforts towards economic endeavors and facilitating educational opportunities for tribal members.⁵⁴

As U.S. policy has swung like a pendulum from respecting tribal governmental authority to attempting to annihilate tribal governments, the Tribal Nations have stood strong as sovereigns pre-dating the United States. Throughout this shifting political landscape, Tribal Nations have adapted to different governmental structures, a new language introduced on this continent, an unfamiliar legal system, and a variety of different cultures settling as neighbors. In the face of monumental changes, Tribal Nations have held firmly to the core values that define tribal peoples. In accordance, tribal leaders in line with tribal values have formalized taxation through legislation.

II. BATTLEGROUND OVER JURISDICTION AND THE TRIBAL TAX BASE

Prior to levying a tribal tax, tribal leaders must undergo an analysis of the tax base. To assess a tax, the tax capacity of the community is examined to determine the amount of taxation that will allow for governmental revenue without depleting the taxpayer's resources and spending power.⁵⁵ Private tribal member owned businesses account for a growing segment of the tribal economy, but as one tribal commentator has stated, "American Indian tribes are over 50 years behind the times when it comes to private business development."⁵⁶ The tribal businesses that continue to operate over a sustained period of time are generally those that are tribally chartered pursuant to tribal government.⁵⁷ Within the tribal jurisdiction, there are often non-Indian-owned businesses as well.

Current statistics indicate that the rate of poverty for tribal members is close to 26% which is over twice the percentage for all others in mid-North America.⁵⁸ A survey conducted by the National Indian Housing Council in 2005 found the average unemployment rate for tribal members was near

53. 25 U.S.C. §§ 450-450n (1975).

54. Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 600, 603 (2004) ("With the emergence of self-determination and its attendant emphasis on tribal control, sustained economic development for Native American nations has begun to take hold once again.").

55. See Angelique EagleWoman, *The Philosophy of Colonization Underlying Taxation Imposed upon Tribal Nations within the United States*, 43 Tulsa L. Rev. 43, 49-50 (2007).

56. *Tribes Urged to Boost Business*, Billingsgazette.com, Feb. 4, 2006, <http://www.billingsgazette.net/articles/2006/02/04/news/state/80-tribes-biz.txt>. (last visited Sept. 23, 2008).

57. See Taylor Keen & Angelique EagleWoman, *Tribal Sovereignty and Economic Development*, in HANDBOOK OF NORTH AMERICAN INDIANS, VOL. 2: INDIANS IN CONTEMPORARY SOCIETY 131-133 (Garrick Bailey ed., 2008).

58. Indian Housing Fact Sheet, <http://www.naihc.net/news/index.asp?bid=6316> (last visited October 3, 2008).

42%.⁵⁹ These statistics indicate that the tribal membership is not a reasonable source of tax revenue to supplement tribal government functions because of such high poverty and unemployment rates. Therefore, tribal governments have been cautious about imposing taxes on those with severely limited spending power.

Assessment of taxes within the tribal territory should logically be shared by those engaged in economic activities within the territorial boundaries whether they are Indian or non-Indian. However, the tribal tax base has been eroded by external forces over the past several centuries. With interference in the levying of taxes in the tribal territory, tribal leaders must now consider a fourth criterion before imposing a tribal tax – whether or not another jurisdiction is seeking to tax the resource within the tribal territory.⁶⁰ The colonial values of exploitation, consumption, and parasitic draining of the indigenous host are still being maintained by the United States towards Tribal Nations. There is discordance in the application of external taxation within tribal territories in contradiction to the values and sovereignty of Tribal Nations.

A. U.S. Interference in the Tribal Tax Base

The U.S. Supreme Court has given credence to the sharp dealings of the subdivisions of the federal government and the individual states, as each has encroached further and further into tribal governmental territory. In the field of tribal taxation, a series of court decisions have sanctioned state taxation of fee patented Indian-owned lands within Indian country;⁶¹ state taxation of oil and gas production within Indian country;⁶² state taxation on Indian businesses adjacent to Indian country;⁶³ state taxation on retail sales to non-Indians within Indian country;⁶⁴ state taxation of motor fuel en route to Indian country;⁶⁵ state

59. *Id.*

60. See Daniel H. Israel & Thomas L. Smithson, INDIAN TAXATION, TRIBAL SOVEREIGNTY AND ECONOMIC DEVELOPMENT 36 (Native Americans Rights Fund 1972) (“In effect, the states are arguing that state taxation of Indian businesses do not interfere with the Indian right to self-government under circumstances where in fact Indian tribes do not tax Indians or non-Indians with respect to business activities taking place on Indian reservations. This position of the states is responsible in part for the increasing momentum in favor of state assertion against Indian country and has left Indians responding defensively to state assertions of taxation. It is suggested that rather than responding defensively, Indians should accept in effect the challenge of the states, affirmatively seize the initiative and assert those taxation powers which they inherently possess [sic] to tax enterprises on Indian reservations.”).

61. See generally *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992).

62. See generally 25 U.S.C. § 396a (1938); *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163 (1989).

63. See generally *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

64. See generally *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Okla. Tax Comm’n v. Citizen Band of Potawatomi Indian Tribe*, 489 U.S. 505 (1991); and *Dept. of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros.*,

taxation on income earned by tribal members employed within Indian country and living outside of Indian country;⁶⁶ and federal taxation on all income earned within Indian country.⁶⁷

With these court decisions lending credence to state and federal taxing encroachment into the tribal territory, Tribal Nations have increasingly been forced to defend the tribal tax base through litigation. The U.S. Supreme Court has failed to acknowledge the full sovereignty of Tribal Nations and has instead developed frameworks to determine whether tribes and states share concurrent taxing authority within tribal territories.⁶⁸ As early as 1924, federal legislation provided for payment of state taxes on oil, gas, and mineral production in tribal territory.⁶⁹

The U.S. Supreme Court in *Washington v. Confederated Tribes of the Colville Indian Reservation* openly adopted the theory of concurrent taxing authority between state governments and Tribal Nations for cigarettes sold in tribal smoke shops within the tribal territory.⁷⁰ Dual taxing authority between Tribal Nations and state governments gained Supreme Court popularity in decisions handed down throughout the 1980's. In 1982, the U.S. Supreme Court in *Merrion v. Jicarilla Apache Tribe*, considered a challenge against the tribe's authority to assess a severance tax on oil and natural gas removed from tribal lands.⁷¹ The Court concluded that the tribe had authority to impose a tax *alongside* the state taxation of the same production on tribal lands.⁷² The natural consequence was to reduce tribal competitiveness in attracting industry where a greater number of taxes by separate governments will be levied, thus crippling the tribal revenue source or forcing tribes to abstain from levying taxes at all.

From the 1980's to the present, the U.S. Supreme Court has promoted a theory of state government taxing authority within tribal territories. State political figures have organized campaigns against tribal taxation using arguments that tribes must impose taxes equal to state taxes to "level the playing field" with area non-Indian sellers of similar products, industries, or services.⁷³ This argument fails to view Tribal Nations as distinct sovereigns

Inc., 512 U.S. 61 (1994).

65. See generally *Wagnon v. Prairie Band Potawatomi*, 546 U.S. 95 (2005) (holding that Kansas tax on motor fuel en route to tribal gas station was lawful).

66. See generally *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973) (holding that a Navajo tribal member employed on-reservation was exempt from state income taxes).

67. See generally *Jourdain v. Comm'r of Internal Revenue*, 617 F.2d 507 (1980) (holding that taxpayer's income as Chairman of the tribal council of Red Lake Band of Chippewa Indians was taxable under U.S. Internal Revenue Code).

68. See *EagleWoman*, *supra* note 55, at 50-66.

69. 25 U.S.C. § 396a (1938).

70. 447 U.S. 134 (1980).

71. 455 U.S. 130 (1982).

72. *Id.* at 144.

73. See Michael Wines, *Is Trump Betting Against American Indian Casinos?*, in *SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS*, 245 (Robert Odawi Porter ed.,

free to impose whatever level of tax they deem appropriate within the tribal territory. Furthermore, the “level playing field” argument is apparently reserved for Tribal Nations because this argument is not employed when adjacent states have widely divergent taxes on the same product, industry or service.⁷⁴ In essence, such arguments are based on two conflicting premises: the first is the false premise that Tribal Nations are entities within the U.S. government system to be brought into conformity with surrounding state practices, and the second is that although different states assess different tax rates, somehow when Tribal Nations assess taxes it creates an uneven playing field.⁷⁵

As the political groups propounding the erroneous “level playing field” rhetoric have become more vocal, it appears that the federal Indian law pendulum is once again poised to swing back to the eras of federal policies centered on undermining the authority tribal governments. As revenue is generated from economic ventures such as gaming establishments, tribal governments have sought legal and formal taxation structures. However, as tribal governments have formalized taxation, the United States has sought to interfere and deprive tribal governments of the taxes to be reaped from the tribal territory. In this new area of contention over tribal economic development, the Tribal Nations continue to defend their sovereign rights including developing wise policies for taxation systems in harmony with tribal values.

B. Tribal Values of Generosity Result in Taxation

There is congruence between tribal values and the basic concept of taxation. The basic definition of “tax” is “a contribution for the support of a government required of persons, groups or businesses within the domain of

2005) (In discussing a federally proposed thirty-four percent corporate income tax on tribal gaming enterprises, the press secretary for Republican Rep. John Ensign of Nevada, Katy Bauer “said he did not do it, but he does support the tax. Because private gambling companies pay the tax, ‘you should only level the playing field’ with private gambling companies.”).

74. See Luke Engan, *Tulsa Lawmakers Call for Special Session on Tobacco Tax*, THE SMOKERS CLUB, INC., June 14, 2005, <http://www.smokersclubinc.com/modules.php?name=News&file=article&sid=1607>

(Noting “[o]n June 1, Kentucky increased its rate to 30 cents from 3 cents, its first increase in a generation. The state previously had the lowest tobacco tax of any. But the tax remains low enough for the state’s smoke shops to attract smokers from neighboring Indiana, where the tax is more than 55 cents.”).

75. See JOANNA KAKISSIS & PAT DOYLE, *SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS* 243 (Robert Odawi Porter ed., 2005) (Noting in response to a federal proposal to assess corporate taxes on tribal gaming enterprises, “Marge Anderson, chief executive of the Mille Lacs Band of Chippewa, called the proposal ‘a radical new tax on Indian governments’ and ‘insulting.’ Her tribe owns casinos in Hinckley and near Onamia. Anderson said the proposal contradicts the federal policy of promoting the economic self-sufficiency of Indian tribes. Anderson and other tribal leaders accused Congress of using a double standard in considering taxing casinos owned by tribal governments but not lotteries run by state governments.”).

that government.”⁷⁶ The concept of interdependence envelops the basic concept of taxation – a recognition that for the tribal government to provide services contributions are expected from those skilled within the community. Informally, contributions are made among tribal members on a daily basis along kinship, clan and family lines. Those who are employed are expected to contribute when requested on an individual basis for necessities of other community members.

Tribal historians and commentators have provided insight into these values. Charles Alexander Eastman, Ohiyesa, explained the view of generosity in this way: “[I]t has always been our belief that the love of possessions is a weakness to be overcome. Its appeal is to the material part, and if allowed its way it will in time disturb the spiritual balance for which we all strive.”⁷⁷ Eastman spoke from the Dakota tradition of generosity. Gift-giving among the Dakota/Lakota/Nakota (commonly referred to as the “Sioux” by non-Indians) is a core value that has been insisted upon by tribal society for centuries.

[A] precept of the Sioux was stated frequently by the tribesmen: ‘A man must help others as much as possible, no matter who, by giving him horses, food or clothing.’ Generosity was a virtue upon which Sioux society insisted. To accumulate property for its own sake was disgraceful, while to be unable to acquire wealth was merely pitiable. The ownership of things was important only as a means of giving, and blessed was the man who had much to give. The Sioux pattern further required not only that a proffered gift might not be refused but that a return gift, even though a token, should sometime be exchanged.⁷⁸

This system of caring for the less fortunate in tribal society provided talented individuals with a method of gaining status for exercising generosity while ensuring that no tribal member was destitute and lacking. By highly rewarding generosity, tribal leaders rose to prominence by frequently bestowing the necessities of life upon the needy. Thus, all members of society were necessary for balance to be maintained and to distinguish those who would lead.

The value of generosity has been embraced by all Tribal Nations from coast to coast as fundamental to balance in native society.⁷⁹ In a 1987

76. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006), available at <http://dictionary.reference.com/browse/tax>.

77. CHARLES ALEXANDER EASTMAN (OHIYESA), THE SOUL OF AN INDIAN AND OTHER WRITINGS 26 (Kent Nerburn ed., 2001) (“Therefore, we must early learn the beauty of generosity. . . . Public giving is a part of every important ceremony. It properly belongs to the celebration of birth, marriage, and death, and is observed whenever it is desired to do special honor to any person or event. . . . Upon such occasions it is common to literally give away all that one has to relatives, to guests of another tribe or clan, but above all to the poor and the aged, from whom we can hope for no return.”).

78. ROYAL B. HASSRICK, THE SIOUX: LIFE AND CUSTOMS OF A WARRIOR SOCIETY 36 (1964).

79. See MAUSS, *supra* note 7, at 32-37; see also HASSRICK, *supra* note 78, at 35-36..

dissertation by Jean Alice Maxwell, the value of sharing among households of Colville and Spokane tribal members along the West Coast were analyzed.⁸⁰ The research led to the conclusion that “by holding and observing these values, Colville and Spokane make a statement about who they are; and as they themselves say, among Indian people who you are is more important than what you have.”⁸¹

In his work on traditional American Indian economic policy, Ronald Trosper has characterized the four central components of this economic policy as community, connectedness, regard for the seventh generation, and humility.⁸² In economic policy, the tribal value of community is understood as a sense of fairness in exchanges and that community is broad enough to include all living beings. Connectedness describes the interdependence and relationship that carries responsibility with it. A regard for the seventh generation necessarily involves the concept of stewardship and protection of resources for those yet to be born. Finally, humility embodies the awareness that if humans do not act appropriately, the natural world is powerful and may retaliate.⁸³

These four principles are useful in synthesizing tribal values operative in commercial relations. As stated earlier, the historic tribal economic system was based upon moderation – with neither large wealth accumulation nor equal distribution of all goods. This article posits that Tribal Nations not be categorized as either communistic socialists or early capitalists. Rather, the most appropriate label for tribal commercial activity should be summed up in the term: tribalists. The term “tribalist” is an integration of both the contemporary revenue generating activities of Tribal Nations through economic development and the values traditional to tribal peoples of generosity, service, stewardship, conservationism, humility, connectedness, and responsibility.

C. Tribal Economic Theory

In putting forth the idea of the tribalist economic theory, the key characteristics of this theory are a sense that economic development does not exist in a void. Tribal peoples have always understood that there is a natural balance that must be maintained in this world.⁸⁴ Tribal peoples rotated

80. Jean Alice Maxwell, *The Circle of Sharing Among Colville and Spokane Indians* (1987) (unpublished Ph.D. dissertation, University of Michigan).

81. *Id.* at 398-99.

82. RONALD L. TROSPER, *CONTEMPORARY NATIVE AMERICAN POLITICAL ISSUES* 140 (Troy R. Johnson, ed., 1999).

83. *Id.*

84. See PEGGY V. BECK ET AL., *THE SACRED: WAYS OF KNOWLEDGE, SOURCES OF LIFE* 102 (1990) (“One of the important concepts Native American tribal people share with respect to the sacred is that all things in the universe are dependent on each other. This concept is first introduced to a child through the stories and songs of the origin histories. Behind the ceremonials and rituals each tribe carries out throughout the year is the notion of balance and imbalance.”).

between various regions within their territory so as to prevent depletion of resources through prolonged habitation in a particular area. In hunting, prayers were offered for the spirit taken whether animal, fish, or bird and no more than was needed for the tribal community was hunted.⁸⁵ A sense of stewardship informed the use and growth of timber for those living among the forests. These basic ways of respecting resources were found from coast to coast, from the salmon and whale harvesting of the West Coast, to the buffalo, deer, turkey, and moose hunting across the continent.⁸⁶

In defining the “tribalist economic theory,” the contours may be shaped by discussing what the theory does not embrace. The theory does not embrace a consumerist mentality that allows for the extinction of a resource, nor does the theory embrace the production of goods without thought to their disposal. The further removed a product is from its natural state the less likely its decomposition will blend with the environment when disposed of. Tribalistic economic theory would be opposed to the creation of products that necessarily lead to large waste areas, landfills, and offshore waste disposal. Chemicals and toxins that contaminate land, water, and air would not be embraced in this theory.⁸⁷ Products developed and released without an understanding of their effects on humans and other living beings would not be in harmony with the tribalistic economic theory.

In terms of human interaction, the tribalistic economic theory would value the sharing of wealth rather than the accumulation of resources by an elite with the subsidiary creation of economic classes of people. In the tribalistic view, every person has a role and responsibility in the tribal society. This basic cultural concept illustrates the respect and esteem exchanged from person to person no matter what their economic state. Within the concept of interdependence and responsibility, the tribalistic economic theory supports the

85. See Lawrence Watters & Connie Dugger, *The Hunt for Gray Whales: The Dilemma of Native American Treaty Rights and the International Moratorium on Whaling*, 22 COLUM. J. ENVTL. L. 319, 324-25 (1997) (“Whaling was a central part of the Makah culture, transcending modern economic notions of natural resource consumption. The primacy of this legacy in their heritage and the impact of its temporary demise due to the practices of more recent settlers is difficult to overstate. Whaling fulfilled social, economic and spiritual functions in a manner similar to the role of salmon in other Pacific Northwest tribes. Whaling provided not merely food, clothing and shelter – it formed an integral part of the world view, heritage, and identity of the Makah.”).

86. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 176-77 (1999) (explaining the insistence by the Chippewa to preserve hunting, fishing, and gathering rights in treaty negotiations); and *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 664-66 (1979) (detailing the importance of the salmon and trout for the Northwest Tribes in terms of social unity, ceremonial expression, commerce, and basic diet). Both cases illustrate the continual assertion of tribal rights to hunting, fishing, and continued stewardship over natural resources.

87. See Beck, *supra* note 83, at 143-44 (“Since sacred traditions among native people were based on cosmologies which included certain lands, the waters upon them, the sky above them, and all the creatures inhabiting these places, taking and destroying the land meant destroying what was sacred.”).

intertribal alliances and trade agreements contemporary Tribal Nations are revitalizing to strengthen each other.⁸⁸ The tribalist economic theory requires thoughtful reflection before engaging in an economic activity by weighing the consequences of such an activity on the tribal community, other communities, other living beings, and the total environment. Tribal peoples have continued to carefully choose what areas of economic activity to engage in similar to the principles articulated here as the tribalist economic theory.⁸⁹

D. Tribalist Economic Theory in Practice

Tribal Nations face the reality that revenue must be generated to support the work of government and sustain the tribal homeland. The pressing issue for most Tribal Councils in the last several decades has been how to spur on economic development. Tribal Nations have been cognizant of the consequences in their choices of economic development in accord with the tribalist economic theory. For example, across the continent there has been a movement to enter into the field of Indian gaming. This movement grew out of the operation of tribally-owned bingo halls.⁹⁰ Bingo was introduced to Tribal Nations by Christian missionaries attempting to convert tribal peoples to their religion. Prior to bingo, tribal peoples often socially gambled with horse races, through traditional games known as ‘moccasin games’ and ‘stick games,’ and other gaming activities. Viewed through this history, gaming is a natural outgrowth of tribal social values combined with the Christian customs introduced to Indian country through missionaries.

Gaming does not fundamentally deplete resources and in its simplest terms is centered on the exchange of currency for entertainment. This type of economic activity would not be viewed as contrary to the tribalist economic theory. Tribal Nations also have tempered the entertainment of gaming with large contributions to services for those who are beset by addiction to balance any harm that may occur in the operation of such facilities.

An example of economic development contrary to the tribalist economic theory is extraction of uranium and other minerals intended for creation of nuclear energy and other energy development. On December 3, 2006, various tribal groups signed a declaration seeking “a ban on uranium mining,

88. See Eric Facer, *Inter-tribal Trade, Re-establishing Ancient Trade Routes*, INDIAN COUNTRY TODAY, Sept. 9, 2003 (“Today, the circumstances are ideal for Indian nations to re-open the ancient trading routes that historically have bound all Native peoples.”).

89. See Graham, *supra* note 54, at 627 (“The ‘preservation and enhancement of indigenous cultures’ and ‘the freedom and ability to practice those cultures’ are often cited as important goals of economic self-sufficiency. Thus, a crucial aspect of the development dialogue is whether a particular plan or project will enhance or jeopardize a tribe’s cultural integrity or traditions.”).

90. See Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development As a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 780 (2004) (“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[.]’ (quoting David Owen, *Indians Dealing On New Terms*, FIN. TIMES (LONDON), Apr. 14, 1987, at 6)).

processing, enrichment, fuel use, and weapons testing and deployment, and nuclear waste dumping on indigenous lands.”⁹¹ Tribal leaders have discussed the development of wind energy as a means of supplementing the reliance upon gasoline and petroleum imports into Indian country or extraction from Indian country.⁹² Other examples include industrialization and intensive synthetic manufacturing as they have not become popular areas of tribal economic development largely because of the dissonance between these actions and the foreseeable consequences that would impact tribal membership, community and the total environment.⁹³

E. Tension Between the Tribal Economic Theory and Capitalist Market Economy

Traditional tribal values are often at odds with the economic philosophy that Tribal Nations are now surrounded by with the formation of the United States. Tribal Nations are now surrounded by a capitalist market economy that is navigated successfully by those motivated by self-interest and greed. This type of economy has made it possible for sharp dealings, outright theft, and legal sanctioning of the dispossession of tribal peoples from their resources, lands, and any other items found to have value on the capitalist market including cultural and spiritual items and ideas.⁹⁴ When the values of Tribal Nations are examined through the lens of a capitalist market economy, the tribal values are relegated to “primitive,” “socialistic,” and “wasteful.” When capitalist market values are examined through the lens of tribal values, the capitalist values are viewed as promoting greed, treachery, lies, and fraudulent behavior.

Tribes historically have entered into commerce with other Tribal Nations, individual traders, and representatives from other countries. The long history of deceit and manipulation in interactions between the Tribal Nations and the United States can be partially traced back to the value conflicts between the

91. *Summit Declaration Demands Worldwide Ban on Uranium*, INDIAN COUNTRY TODAY, Dec. 27, 2006, available at 2006 WLNR 22543330.

92. *See Study Investigates Hopi Wind Power Potential*, INDIAN COUNTRY TODAY, Mar. 22, 2006, available at 2006 WLNR 4751639.

93. *See* SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 283 (1989) (“Many tribes are carefully weighing the advantages of certain types of development, especially energy development, against the possible damages to resources, the environment and health. The development of hydroelectric power plants, for example, may endanger fish and other wildlife. Uranium mining on the Navajo Reservation has led to increases in lung disease and cancer. Many members of traditional tribes, such as the Taos, San Felipe, and Santo Domingo Pueblos, and the Cheyenne and Forest County Potawatomis, believe that the scarring and destruction of land that accompanies some energy development, especially strip mining, is an act of desecration.”).

94. *See* Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 72-92 (2004) (detailing the failure of U.S. law to adequately protect tribal cultural items and traditional knowledge).

two systems of commerce. Tribal Nations did not envision the world and the components of the world as commodities for exchange. The rules of trade and exchange for tribal peoples have been governed by ethical rules that were not adhered to by the Europeans and Euro-Americans that the tribal peoples came into contact with. Operating within the tribal value system, the actions of the United States over the last several centuries have been in all respects horrific and shocking to those raised within tribal value systems. The U.S. has taken the stance of a colonial regime constantly commandeering the resources of the Tribes. To counteract this colonial mentality, Tribal Nations have been actively involved in the development of international indigenous law.

III. INTERNATIONAL INDIGENOUS RIGHTS AND LEGAL PRINCIPLES: STRENGTHENING TRIBAL SOVEREIGNTY

As international indigenous law develops, the values of Tribal Nations will become increasingly forefront issues. International law is formed in two ways: the first is through binding agreements known as treaties or conventions, and the second is through the evolution of common law principles into customary law.⁹⁵ International indigenous law has been a recent area of legal evolution as the United Nations (UN) adopted a Declaration on the Rights of Indigenous People on September 13, 2007.⁹⁶ Article 26(1) of the UN Declaration states that “[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”⁹⁷

This Declaration is not considered a binding instrument by the UN, rather it serves as guiding principles in international common law. However, the principle of indigenous ownership of aboriginal territory is a concept that went unheeded across this continent and in other areas of the world. With this basic principle entering the flow of international common law and offsetting the doctrine of discovery, governments seeking to restrain indigenous legal rights through colonial actions will be acting contrary to international legal principles.

Recognition of tribal ownership to the tribal territory has far reaching

95. See Statute of the International Court of Justice, Art. 38: (“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”). http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II (last visited on October 7, 2008). See also RICHARD B. LILLICH, HURST HANNUM, S. JAMES ANAYA & DINAH L. SHELTON, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 79-80, 152-53 (4th ed. 2006).

96. Declaration on the Rights of Indigenous Peoples, G.A. Res 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

97. *Id.*

consequences in the United States. First, ownership is much greater than the occupancy right delineated in Marshall's judicial opinion on tribal land rights. With rights greater than occupancy, the whole system of allotment is called into question and the legitimacy of the U.S. in enforcing federal legislation to dispossess Tribal Nations of lands becomes an illegitimate and unlawful act. Second, land claims for the lost tribal territory would be bolstered by international indigenous legal principles. Third, the authority of Tribal Nations within the tribal territory would be undeniable along with the power to exclude others. Finally, increased tribal territorial sovereignty would translate into not only the implementation of tribal taxes arising from activities occurring within the tribal territory but also the concomitant refutation of state and federal taxes currently being imposed as having no sound basis.

Tribal Nations serve as role models to those engaged in capitalist market economies. By exemplifying the tribalist economic theory, Tribal Nations apply the ancient wisdom of tribal cultures to contemporary economic practices. These economic practices, if adopted by others, would prevent further catastrophic occurrences where the natural world balance is upset, such as the global warming trend, the depletion of natural minerals and fossil fuels, the predictions of cataclysmic climate changes, the increasing frequency of birth defects and infertility caused by contamination, and the overall diminished quality of life experienced by many due to pollution.

Furthermore, Tribal Nations should continue to hold fast to tribal values by asserting the right of tribal governments to be the exclusive taxing authority within the tribal domain. Only by continuing to provide the tribal perspective will the ways of the colonial regimes be counteracted. The insistence by Tribal Nations that tribal taxation within the tribal territory be free from external interference into the tribal domain is necessary to force the surrounding non-tribal governments to evolve beyond colonialism.

IV. EXCLUSIVE TAXING AUTHORITY IN THE TRIBAL TERRITORY

In conclusion, the concept of taxation fits within the values of Tribal Nations as a contribution to serve the tribal community and within the tribalist economic theory. Tribal taxation is a necessary form of revenue generation for tribal government. The greatest obstacle to realizing substantial returns from tribal taxation has been the imposition of U.S. federal and state taxes within the tribal domain. The exemptions carved out of the tribal taxing authority by the United States Supreme Court leaves Tribal Nations involuntarily subsidizing the United States. The United States continues to engage in practices carrying out the colonial mentality of depleting the resources of Tribal Nations without contributing back to tribal governments for governmental services and resources provided.

In this vein, the United States is a neighboring nation to Tribal Nations with much to learn. Since the mid-1800's, the United States has used military force and threat to try to subjugate tribal peoples. Two centuries later, Tribal Nations are still crying foul and seeking to remind the United States that the

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resources being stripped by the U.S. are those protected by indigenous nations in prior generations and promised to the future seven generations of native peoples.

Within the framework of the tribalist economic theory, Tribal Nations are seeking to right the balance in mid-North America and govern according to traditional values including the value of generosity now embodied in the concept of tribal taxation. As Tribal Nations assert themselves as the exclusive taxing authority within the tribal territory, balance is restored by providing that native people are no longer left to languish in poverty while their homeland's resources are drained by a colonizing force. Tribal values are necessary to govern development on this continent, as these are the values that allowed this land to flourish and represent an oasis to the newcomers from Europe and elsewhere.