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Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development

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TRIBAL BONDS: STATUTORY SHACKLES AND REGULATORY RESTRAINTS ON TRIBAL ECONOMIC DEVELOPMENT*

GAVIN CLARKSON**

Upwards of \$50 billion in capital needs go unmet each year in Indian Country in such vital sectors as infrastructure, community facilities, housing, and enterprise development, in part due to the restrictions imposed on tribal access to the capital markets, specifically the ability of tribal governments to issue tax-exempt debt. Section 7871 of the Internal Revenue Code requires tribal tax-free bond proceeds to be used only for “essential governmental functions,” a restriction not applicable to state and municipal bonds, and § 7871(e) further limits the scope of available tax-exempt bonding to activities “customarily performed by State and local governments with general taxing powers” without providing any guidance as to when a particular activity becomes “customary” for a non-tribal government.

These restrictions have severely limited tribal abilities to access the capital markets, and although American Indians make up more than 1.5% of the population, tribes issued less than 0.1% of the tax-exempt bonds between 2002 and 2004. These restrictions harm the poorer tribes the most, as the differential between tax-exempt and

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taxable interest rates often determines the feasibility of a project. Without access to tax-exempt rates, poorer tribes simply cannot afford the debt service required to address glaring economic and infrastructure deficiencies.

Tribal governments are also victims of a disproportionate number of enforcement actions by the IRS. The IRS audits less than 1% of the tax-exempt municipal offerings each year, but direct tribal tax-exempt issuances are thirty times more likely to be audited within four years of issue than city and state issuances. In addition, 100% of tribal conduit issuances have been or are currently being challenged by the IRS. The ambiguity of the statute has led to a number of IRS enforcement actions that simply would not have happened had the issuer not been a tribe. In each of these cases, the tribes financed activities that had previously been routinely financed by state and local governments without any challenge from the IRS. This Article argues that tribal governments should have the same tax-exempt bonding authority as their state and local counterparts, and that expansion of tribal bonding authority would increase federal revenues.

INTRODUCTION	1011
I. BRIEF HISTORY OF TRIBAL LAW AND POLICY	1019
II. BRIEF REVIEW OF PUBLIC FINANCE	1030
A. <i>The Nature of Municipal Debt</i>	1030
B. <i>Sources of Municipal Debt</i>	1031
1. Bank Debt	1031
2. Bond Indentures	1031
C. <i>Tax-Exempt Debt</i>	1032
1. The Historical Justification for States' Tax-Free Bond Authority: Federal Subsidy of Governmental Obligations and State Sovereignty	1032
2. Uses for Tax-Exempt Debt	1034
III. LEGISLATIVE AND REGULATORY MANEUVERING OVER TRIBAL TAX STATUS	1037
A. <i>The Tax Status of Indian Tribes Before the 1982 Tribal Tax Status Act</i>	1037
B. <i>The Passage of the 1982 Tribal Tax Status Act</i>	1039
C. <i>Initial Implementation of the 1982 Tribal Tax Status Act</i>	1041
D. <i>Congress Closes the Door: The 1987 Amendments to the Tribal Tax Status Act</i>	1043

E.	<i>The IRS Nails the Door Shut: Aggressive Enforcement of the Essential Governmental Function Requirement</i>	1045
F.	<i>Is the IRS Blocking a Fire Escape? Uncertainty Regarding Tribal Conduit Financing</i>	1052
IV.	THE ECONOMIC RATIONALE FOR EXPANDING TRIBAL TAX-EXEMPT BONDING AUTHORITY	1054
A.	<i>Customary Use of Tax-Exempt Bonds by Non-Tribal Governments for Commercial Activities</i>	1054
B.	<i>The Restrictions on Tribal Tax-Exempt Bonding Authority Are Significantly Damaging the Market for Tribal Bonds</i>	1061
C.	<i>Expanding Tribal Tax-Exempt Bonding Authority Will Actually Increase Federal Revenues</i>	1063
V.	APPLICATION OF THE MEMMI TYPOLOGY SUGGESTS AN ALTERNATE RATIONALE	1065
A.	<i>Examining the Actions of Representative Gibbons</i>	1068
1.	The Strategy of Difference.....	1068
2.	The Assignment of Negative Values to Difference ...	1069
3.	Generalization	1071
4.	Justification of Hostility	1072
B.	<i>Examining the IRS's Enforcement Activity</i>	1073
1.	The Strategy of Difference.....	1073
2.	The Assignment of Negative Values to Difference ...	1074
3.	Generalization	1075
4.	Justification of Hostility	1076
VI.	A PROPOSAL FOR EXPANDING TRIBAL TAX-EXEMPT BONDING AUTHORITY	1082
	CONCLUSION	1084

INTRODUCTION¹

Promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized.²

1. Portions of this Introduction have been adapted from the author's testimony before the Senate Finance Committee. Gavin Clarkson, Assistant Professor, Univ. of Mich. Sch. of Info., Sch. of Law & Native Am. Studies, Written Testimony Before Subcommittee on Long-Term Growth and Debt Reduction of the U.S. Senate Committee on Finance (May 23, 2006), available at <http://www.senate.gov/~finance/hearings/testimony/2005test/052306testgc.pdf>.

2. *Kelo v. City of New London*, 545 U.S. 469, 470 (2005) (syllabus).

Just like state and local governments, Indian tribes, as separate sovereign governments, have an obligation to improve the lives of their citizens. When such governmental entities engage in economic development activities to elevate the economic status of their constituencies, they often seek outside funding to finance those activities. Many tribal governments, however, are still suffering from the impacts of historical federal policies.³ Additionally, tribal communities are often burdened with extremely low socioeconomic factors, including low educational achievement,⁴ high unemployment,⁵ high poverty,⁶ and low per capita income.⁷ For many tribes the only source of capital to address these problems is limited to grants and other assistance from the federal government, but such “funds are often insufficient to address the myriad responsibilities facing tribal governments.”⁸

Contrary to popular belief, gaming does not provide sufficient funds to meet the needs of all tribal governments, as most of the more than 560 federally recognized Indian tribes⁹ do not have any form of gaming operations,¹⁰ and of those that do, only a small handful generate significant revenues.¹¹ While a small number of tribes near major metropolitan centers have started successful gaming enterprises, hundreds of tribes have not entered the gaming industry,

3. See *infra* Part II.

4. RAYMOND C. ETCITY, ADVISORY COMM. ON TAX EXEMPT & GOV'T ENTITIES, TRIBAL ADVICE AND GUIDANCE POLICY, at II-7 (2004), http://ftp.qai.irs.gov/pub/irs-tege/act_rpt3_part2.pdf.

5. Average unemployment on Indian reservations is 13.6% (with some reservations having unemployment levels above 50%). *Id.* at II-7 n.17. “The general U.S. population has [an] unemployment rate of 5.8%” *Id.*

6. The average percentage of American Indians living in poverty is 25.67%, compared with 12.38% for the general population. *Id.* at II-7 n.18.

7. Per capita annual income for American Indians is \$12,893, compared to the overall U.S. average of \$21,587. *Id.* at II-7 n.19.

8. *Id.* at II-7.

9. Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 70 Fed. Reg. 71,194, 71,194–98 (Nov. 25, 2005).

10. According to the National Indian Gaming Association, only 224 tribes had gaming operations of any kind as of 2005. See NAT'L INDIAN GAMING ASS'N, AN ANALYSIS OF THE ECONOMIC IMPACT OF INDIAN GAMING IN 2005, at 2, available at http://www.indiangaming.org/NIGA_econ_impact_2005.pdf.

11. See NAT'L GAMBLING IMPACT STUDY COMM'N, NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT 2-10 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/2.pdf> (“The 20 largest Indian gambling facilities account for 50.5 percent of total revenues, with the next 85 accounting for [only] 41.2 percent. Additionally, not all gambling facilities are successful. Some tribes operate their casinos at a loss and a few have even been forced to close money-losing facilities.”).

and many that have participated actually operate casinos located “far from population centers.”¹²

“[E]xtensive land bases spread out communities and homesteads, . . . mired in one long-standing poverty cycle” characterize most reservations.¹³ In fact, the need for economic development in Indian Country remains acute and affects nearly every aspect of reservation life, as most Indian tribes have an economy that is on par with third-world countries. The unemployment rate, for example, hovers around 50% for Indians who live on reservations, nearly ten times that for the nation as a whole, and almost one-third of American Indians live in poverty.¹⁴

All too many tribal governments lack the ability to provide the basic infrastructure most U.S. citizens take for granted, such as passable roadways, affordable housing, and the plumbing, electricity, and telephone services that come with a modern home. According to the U.S. Census Bureau, approximately 20% of American Indian households on reservations lack complete plumbing facilities, compared to 1% of all U.S. households.¹⁵ “About 1 in 5 American Indian reservation households dispose of sewage by means other than public sewer, septic tanks, or cesspool”¹⁶ The Navajo reservation is the same size as West Virginia, yet it has only 2,000 miles of paved roads while West Virginia has 18,000 miles.¹⁷ Investors and employers, even in the most distressed inner cities of the United States, take roads, telephones, electricity, and the like for granted. Their absence from large portions of Indian Country poses a daunting barrier to tribal leaders’ attempts to attract new private sector investment and jobs.

Such realities highlight the importance of stimulating economic development to create economic opportunity for tribal members.

12. See Donald L. Barlett & James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002, at 44.

13. *Entrepreneurial Sector Is the Key to Indian Country Development*, INDIAN COUNTRY TODAY, Sept. 6, 2002, at A2, available at <http://www.indiancountry.com/content.cfm?id=1031321315>.

14. See, e.g., NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., PUB. NO. 2005-116, AMERICAN INDIAN AND ALASKA NATIVE CHILDREN: FINDINGS FROM THE BASE YEAR OF THE EARLY CHILDHOOD LONGITUDINAL STUDY, BIRTH COHORT 3 (2005), available at <http://nces.ed.gov/pubs2005/2005116.pdf>.

15. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, HOUSING OF AMERICAN INDIANS ON RESERVATIONS—PLUMBING 3 (1995), available at http://www.census.gov/apspd/www/statbrief/sb95_9.pdf.

16. *Id.*

17. Michael J. Kurman, *Indian Investment and Employment Tax Incentives*, 41 FED. B. NEWS & J. 578, 583 (1994).

Many scholars, investors, and tribal officials charged with developing their economies are well aware that access to capital for tribes and individual Indian entrepreneurs is a significant and pressing problem. The unanswered question is one of capital formation: how do tribes obtain the necessary capital to build a permanent economic base? The answer should be to access the capital markets in the same way that state and local governments do to finance their own economic development activities, but as this Article will demonstrate, severe impediments to a level playing field continue to plague Indian Country.

State and local governments obtain revenues to finance their operations primarily through three channels: tax revenues, borrowing, and federal grants.¹⁸ Borrowing has increasingly become a favored method of raising revenue for state and local governments.¹⁹ These entities may, with some exceptions, issue so-called “tax-exempt” bonds under § 103 of the Internal Revenue Code (“Tax Code”).²⁰ This tax-exempt status of municipal bonds has been a part of the Federal Tax Code since its adoption in 1913.²¹ One commentator explains that a tax-exempt bond is “a debt security in which the interest portion of the debt service paid is not included in gross income.”²² The tax-exempt status of municipal debt allows state and local governments to issue bonds at lower interest rates, since the income from those bonds results in the same level of after-tax income for taxpayers in higher tax brackets.²³

18. M. DAVID GELFAND, STATE AND LOCAL GOVERNMENT DEBT FINANCING § 1.04 (2003)

19. Such obligations fall under the heading of “municipal securities” in § 3(a)(12) of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, 884 (codified as amended at 15 U.S.C. § 78c(a)(29) (2000)). The applicable definition under this section for our purposes describes a municipal security as “direct obligations of or obligations guaranteed as to principal or interest by a State or any political subdivision thereof or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more states.” Therefore, municipal security or municipal debt, when used in this Article, can refer to a state, municipality, or an agency or instrumentality of either.

20. 26 U.S.C. § 103 (2000).

21. Eric J. Gouvin, *Radical Tax Reform, Municipal Finance, and the Conservative Agenda*, 56 RUTGERS L. REV. 409, 424 (2004).

22. ROBERT A. FIPPINGER, THE SECURITIES LAW OF PUBLIC FINANCE § 1:2.2 (2002).

23. To illustrate this phenomenon, assume that a taxpayer whose effective federal tax rate is 35% purchases a \$1000 taxable bond from a corporation that pays interest of 10%. She will receive an annual interest payment of \$100, but she must pay \$35 of that in taxes, resulting in a net income of \$65. If she were to purchase a \$1000 tax-exempt bond from a municipality that pays 6.5% in interest, she would still receive \$65 and would be economically indifferent between the two bonds, assuming that all other attributes of the

Unfortunately, such an advantage is generally not available in Indian Country. While many tribal economies still resemble those of a third-world country, a small number of tribal economies have been able to expand,²⁴ and approximately 15% of the tribes²⁵ have been able to obtain tax-exempt financing from a variety of lenders²⁶ to “finance economic development activities and infrastructure improvements.”²⁷ Most tribes, however, are still unable to access the capital markets competitively, if at all. The primary roadblocks to the tax-exempt bond market are certain provisions of the 1982 Indian Tribal Governmental Tax Status Act (“Tribal Tax Status Act”),²⁸ part of the Tax Code. While the goal of the Tribal Tax Status Act was to treat tribes and states equally in the Tax Code,²⁹ the Act falls far short of achieving the goal of equal treatment desired by tribes³⁰ and in fact substantially limits the ability of tribes to raise debt for economic development activities. Although the Tribal Tax Status Act extended “certain tax provisions to American Indian tribal governments on the same basis as such provisions apply to States,”³¹ it did not recognize

bonds were equivalent, such as the risk of default and the dates of payment. Thus, the municipality can raise the same amount of capital as the corporation for substantially less in interest expense.

24. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 21.03[1] (LexisNexis 2005) (1941) [hereinafter COHEN 2005] (Professor Clarkson was a contributing author for this most recent edition of the *Handbook*, providing material on tribal finance, tribal corporations, economic development, and intellectual property). The *Handbook* was substantially revised and reissued in 1982. FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (Michie Bobbs-Merrill 1982) (1941) [hereinafter COHEN 1982].

25. GAVIN CLARKSON, RESULTS OF JOINT RESEARCH EFFORT BY THE INTERNAL REVENUE SERVICE AND THE UNIVERSITY OF MICHIGAN SCHOOL OF INFORMATION 2 (2006), <http://www.tribalfinance.org/Publications/IRSresearch.pdf>; see also Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 70 Fed. Reg. 71,194, 71,194–98 (Nov. 25, 2005) (listing the federally recognized Indian tribes). This research summary is the result of a joint research project between the author and the Tax Exempt Bonds division of the IRS. See also *infra* Part III.E.

26. FITCH RATINGS, REVENUE CRITERIA REPORT: TRIBAL GOVERNMENTS IN THE BOND MARKET 1 (2004) (on file with the North Carolina Law Review).

27. COHEN 2005, *supra* note 24, § 21.03[1]; see also TOWNSEND HYATT, PERRY E. ISRAEL & ALAN BENJAMIN, AN INTRODUCTION TO INDIAN TRIBAL FINANCE (2005), available at <http://www.orrlick.com/fileupload/246.pdf>.

28. Indian Tribal Governmental Tax Act, Pub. L. No. 97-473, 96 Stat. 2608 (1983) (codified at 26 U.S.C. § 7871 (2000)).

29. See 127 Cong. Rec. 11,132 (daily ed. June 2, 1981) (statement of Sen. Wallop).

30. See, e.g., Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 ADMIN. L. REV. 333, 368 (1994); Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 383–89 (1985).

31. S. REP. NO. 97-646, at 2 (1982), as reprinted in 1982 U.S.C.C.A.N. 4580, 4581.

tribes as equivalent to states for *all* tax purposes, specifically denying them the elements of public finance that they desired most.³²

While the federal policy of exempting from federal taxation interest paid on state bonds issued to finance and effectuate state policy is a recognition and affirmation of that state's sovereignty, a similar recognition and affirmation of sovereignty unfortunately does not extend to Indian tribes because tribes face three additional restrictions that do not apply to their state and local governmental counterparts. In the first instance, unlike state and local governments, Indian tribes cannot issue private activity bonds.³³ Worse, however, is the Tribal Tax Status Act's "additional requirement"³⁴ that tribal tax-free bond proceeds only be used for "essential governmental functions,"³⁵ a restriction not applicable to state and municipal bonds.³⁶ Finally, the damage to tribal economic prospects was compounded in 1987 when the Act was amended to further restrict tribal tax-exempt bonding authority to projects "customarily"³⁷ financed by states and local governments.

As a result of these restrictions Indian tribes can only issue tax-exempt debt if "substantially all" of the borrowed proceeds "are to be used in the exercise of any essential governmental function,"³⁸ and "the term 'essential governmental function' shall not include any function which is not customarily performed by State and local governments with general taxing powers."³⁹ Section 7871(e) does not provide any guidance, however, as to when a particular activity becomes "customary" for a municipal government.

Given that the federal government holds most tribal land in trust, those lands are not available for property taxes,⁴⁰ and thus the tax base of a tribe is usually insufficient for a tribe to issue general

32. See COHEN 2005, *supra* note 24, § 21.03[2][d].

33. See HYATT ET AL., *supra* note 27, at 19 ("State and local governments often issue tax-exempt private activity bonds for the benefit of nonprofit corporations, or to finance mortgage loans for first-time low- and moderate-income home buyers, or to finance low- and moderate-income residential rental property. Private activity bonds are also issued for airports, docks, and wharves, solid waste facilities, sewage facilities, and certain other facilities."). Current law bars Indian tribes from issuing private activity bonds for anything other than a tribal manufacturing facility. See 26 U.S.C. § 7871(c)(2)-(c)(3) (2000).

34. 26 U.S.C. § 7871(c).

35. *Id.* § 7871(c)(1).

36. See COHEN 2005, *supra* note 24, § 21.03[2][d].

37. 26 U.S.C. § 7871(e).

38. *Id.* § 7871(c)(1). "Substantially all" is not defined in the statute but is believed to mean at least 95% of the proceeds. See HYATT ET AL., *supra* note 27, at 18.

39. 26 U.S.C. § 7871(e).

40. See COHEN 2005, *supra* note 24, § 8.03[1][e].

obligation bonds.⁴¹ Since the revenue from a revenue bond is usually linked to the project being financed, both the prohibition on private activity bonds and the additional restriction to “customary” governmental activity place tribes at a significant disadvantage relative to state and local governments in the capital markets, creating a situation that is inequitable when compared to other forms of municipal debt.

The narrow interpretation of this language by the IRS has had a stifling effect on tribes’ tax-free bonding authority.⁴² These restrictions on the scope of what can be financed with tax-exempt debt deny poor tribes in particular the opportunity to address their glaring infrastructure and economic development needs. Tribes with substantial natural resources or significant gaming operations have the option of financing certain activities on a taxable basis even if the restrictions in the Tax Code prevent them from financing those activities on a tax-exempt basis. Poorer tribes, however, do not have that luxury,⁴³ and upwards of \$50 billion in annual capital needs go unmet in Indian Country,⁴⁴ in part because the debt service required to finance the projects to meet those needs is too expensive at taxable rates.⁴⁵

The IRS’s interpretation of tribal tax-exempt bonding authority has also meant a substantially higher audit risk for tribal bonds, as tribal governments are also victims of a demonstrably disproportionate number of IRS enforcement actions. Fewer than 1% of the tax-exempt municipal offerings are audited by the IRS

41. A general obligation bond involves borrowing against the general credit of a particular government; no specific collateral or revenues are pledged.

42. See *infra* Part III.E.

43. Suppose that the municipality from the financing example mentioned in footnote 23 is instead a tribe. If the tribe wants to finance a project but cannot obtain tax-exempt treatment for the debt, it will have to pay 10% in taxable interest rather than the tax-exempt rate of 6.5%. Assume also that the revenues from the project will be insufficient to cover the debt service at 10%, but would be sufficient at 6.5%. If the tribe has sufficient funds from other sources (e.g., natural resources or gaming revenues) and still wants to pursue the project, it could still issue the bonds and use those other sources to cover the portion of the debt service not covered by project revenues. In reality, the poorer tribes simply do not have those other sources of money available, and thus the project is never undertaken. In addition, given the substantial balance sheets of some of the wealthier tribes, they would likely be able to borrow at lower taxable rates than the poorer tribes would because the wealthier tribes would almost certainly receive better taxable bond ratings from credit rating agencies.

44. See ERIC HENSON ET AL., HARVARD PROJECT ON AM. INDIAN ECON. DEV., NATIVE AMERICA AT THE NEW MILLENNIUM 120 (2001) (on file with the North Carolina Law Review).

45. Clarkson, *supra* note 1, at 1

each year, but direct tribal tax-exempt issuances are thirty times more likely to be audited within four years of issue,⁴⁶ and 100% of tribal conduit issuances have been or are currently being challenged by the IRS.⁴⁷ In all of these cases, the tribes financed activities that state and local governments had previously financed without any challenge from the IRS. While the National Congress of American Indians and the National Intertribal Tax Alliance have worked to remove these inequities for years, even the venerable Wall Street firm of Merrill Lynch is on record decrying the inequity of the tax treatment of tribes relative to municipalities.⁴⁸ This high rate of tribal audits becomes even more troubling when one realizes that tribal tax-exempt issuances make up only 0.1% of the tax-exempt bond market.⁴⁹

In order to understand the present situation, some background coverage is required. For those readers unfamiliar with federal Indian law and policy, Part I of this Article discusses the nature of Indian tribes and their relationship to the federal government, highlighting the origins of federal Indian policy. For those readers unfamiliar with public finance, Part II of this Article introduces several aspects of governmental access to the capital markets, including a discussion of the policy justifications for tax-free treatment of municipal debt. This section also identifies those elements of the public finance market that are either unavailable to tribes or are only available under restrictive conditions that apply to tribes but not to other governmental entities. Part III examines the legislative and regulatory history of the Tribal Tax Status Act, as well as its subsequent enforcement, providing empirical evidence of discriminatory treatment of tribal tax-exempt bonds.

Having reviewed in detail the legislative history of the status quo as well as differential treatment of tribes and states in IRS audit and enforcement in Part III, the Article proceeds to advocate for an expansion of tribal tax-exempt bonding authority. Part IV argues that tax-exempt bonds are being used for a whole host of economic development activities that benefit non-tribal governments, and Indian tribes should be able to take advantage of those same opportunities. Part IV also provides empirical evidence that the differential treatment of tribal governments is having a significant

46. See CLARKSON, *supra* note 25, at 2.

47. For a discussion of IRS enforcement see *infra* Part III.F and note 227.

48. See, e.g., Merrill Lynch Municipal Credit Research, Indian Gaming Bond Pricing Update (May 24, 2004) (on file with the North Carolina Law Review) (stating that tribes are forced to contend with “iniquities in the tax code”).

49. See *infra* Part IV.E (discussing IRS enforcement).

negative impact on the market for tribal tax-exempt bonds. Part IV concludes with the potentially counterintuitive proposition that expansion of tribal tax-exempt bonding authority would produce a federal revenue enhancing result.⁵⁰

For some readers the discussion of the origins of federal Indian policy in Part II coupled with Part III's description of the statutory and agency treatment of tribal tax-exempt bonds will have illuminated a status quo that looks uncomfortably like bias—and under some theoretical constructs, at least, even like racism. Assessing a practice of adverse and differential treatment for evidence of racism requires more than rhetoric, however, because an accusation of racism is one of the most incendiary charges that can be leveled in our society. To that end, Part V of this Article elucidates objective criteria for identifying racism and then analyzes the relevant legislative history and IRS enforcement activity using that criteria. Assuming that one or both of the prior sections proves persuasive, Part VI takes the next step and makes a specific legislative proposal.

I. BRIEF HISTORY OF TRIBAL LAW AND POLICY

The notions that led to the restrictions of tribal economic development are not new and trace back to the origins of the United States itself. In *Cherokee Nation v. Georgia*,⁵¹ the first Supreme Court opinion involving an American Indian tribe,⁵² Chief Justice Marshall wrote that “the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.”⁵³ A half century later the Supreme Court would opine that the “relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.”⁵⁴ Even today, Supreme Court Justices find that “[f]ederal Indian policy is, to say the least, schizophrenic. And this confusion

50. Many discussions of tax-exempt bonds identify the amount of forgone tax revenue, *see, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, FEDERAL TAX POLICY: INFORMATION ON SELECTED CAPITAL FACILITIES RELATED TO THE ESSENTIAL GOVERNMENTAL FUNCTION TEST 1 (2006), *available at* <http://www.gao.gov/new.items/d061082.pdf>, but the model presented in Part IV.C shows that, for Indian Country, the net impact on the federal treasury would be positive and not negative.

51. 30 U.S. (5 Pet.) 1 (1831).

52. An earlier Supreme Court case, *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), dealt with the issue of who could acquire title to land from Indian tribes, but no tribe was a party to the case. *See id.* at 543.

53. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

54. *United States v. Kagama*, 118 U.S. 375, 381 (1886).

continues to infuse federal Indian law and our cases.”⁵⁵ The concept that so confounds both Congress and the courts is that, on one hand, Indian tribes are separate sovereigns, “domestic dependent nations”⁵⁶ that are ensconced as a “third sovereign”⁵⁷ in the federal framework. On the other hand, Congress has plenary authority over Indian tribes.⁵⁸ While the fabrication of this plenary authority has dubious origins,⁵⁹ the continued maintenance of such authority is justified by a legal discourse whose origins were clearly based on a negative perception of tribalism.⁶⁰

55. *United States v. Lara*, 541 U.S. 193, 219 (2004).

56. *Cherokee Nation*, 30 U.S. at 17.

57. In the words of Justice O’Connor, “Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes. Each of the three sovereigns . . . plays an important role . . . in this country.” Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 *TULSA L.J.* 1, 2 (1997).

58. COHEN 2005, *supra* note 24, § 4.03[1].

59. Arguably, the Supreme Court simply made up the notion of plenary authority. In *Kagama*, the Court stated that

These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

Kagama, 118 U.S. at 383–84. Unable to find a source for such plenary authority in the Constitution, the Court held that

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

Id. at 384–85.

60. *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 588 (1832) (stating that the “humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling”); *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 (1831) (“[Indians] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 590 (1823) (“But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . .”). These three cases, often referred to as the “Marshall Trilogy,” form much of the foundation for federal Indian law. *See generally* COHEN 2005, *supra* note 24, § 1.03[4][a] (providing history of these three cases).

The acknowledged existence of tribal sovereignty, however, has served to balance the exercise of that plenary authority. While each tribe has its own separate history, the struggle to maintain a separate sovereign existence is common to most tribes. The economic importance of that struggle cannot be overstated, particularly in the modern context, as the “first key to economic development is sovereignty.”⁶¹ It is important to review the origins of the federal Indian law and policy before addressing the modern context.

Although the legal principles that existed at the moment Europeans first made contact with the Indians had their origins in legal theories developed to justify the Crusades,⁶² as the competing European nations began to expand their empires, the papacy began to grant exclusive rights to lands as they were “discovered,” including rights of sovereignty over the indigenous populations.⁶³ Even after England broke away from the authority of Rome, English law still supported this “Doctrine of Discovery,”⁶⁴ although the validity of the

61. Stephen Cornell, *Sovereignty, Prosperity and Policy in Indian Country Today*, COMMUNITY REINVESTMENT, Winter 1997, at 5, 6, available at <http://www.kc.frb.org/publicat/commrein/u97pers2.htm>.

62. See, e.g., Pope Innocent IV, *Commentaria Doctissima in Quinque Libros Decretalium*, in *THE EXPANSION OF EUROPE: THE FIRST PHASE* 191, 191–92 (James Muldoon ed., 1977) (“[I]t is licit to invade a land that infidels possess or which belongs to them? . . . [I]t is licit for the pope to [demand allegiance, and] if the infidels do not obey, they ought to be compelled by the secular arm and war may be declared against them by the pope and not by anyone else.”); see also ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 29–41 (discussing the crusading era origins of the legal doctrines which governed European land claims in the Americas).

63. See, e.g., Bull “Inter Caetera Divinae” of Pope Alexander VI Dividing the New Continents and Granting America to Spain (May 4, 1493), in *CHURCH AND STATE THROUGH THE CENTURIES* 153, 156–57 (Sidney Z. Ehler & John B. Morrall eds. & trans., 1967).

Wherefore, all things considered maturely and, as it becomes Catholic kings and princes . . . you have decided to subdue the said mainlands and islands, and their natives and inhabitants . . . with the proviso, however, that these mainlands and islands found or to be found, discovered or to be discovered . . . be not actually possessed by some other Christian king or prince.

Id.; see also Bull “Romanus Pontifex” of Pope Nicholas V Granting the Territories Discovered in Africa to Portugal (Jan. 8, 1454), in *CHURCH AND STATE THROUGH THE CENTURIES*, *supra*, at 144, 146–47 (granting Portugal the exclusive right to colonize the Canary Islands and all other parts of Africa); WILLIAMS, *supra* note 62, at 15–18 (discussing the “universal right asserted by popes and Christian prihees to enforce Christianity’s vision of ‘civilization’” in the conquest of non-European lands). See generally Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1 (1942) (tracing the influence of Spanish law on the development of Indian law in the United States).

64. See, e.g., Calvin’s Case, 77 Eng. Rep. 377 (K.B. 1608)

doctrine was a subject of debate among early colonial settlers.⁶⁵ Irrespective of conflicting religious interpretations of Indian rights, “practical realities shaped legal relations between the Indians and colonists.”⁶⁶ “The necessity of getting along with powerful” and militarily capable Indian tribes dictated that the settlers seek Indian consent to settle if they wished to live in peace and safety, buying lands that the Indians were willing to sell rather than displacing them by other methods.⁶⁷ As a result, the English colonial governments acquired most of the lands by purchase from the Indians.⁶⁸ During this period “the Indians were treated as sovereigns possessing full ownership rights to the lands of America.”⁶⁹

At the outbreak of the French and Indian War in 1754, treaty-making assumed a new dimension, as each of the competing European powers sought to form alliances with the various tribes. The military importance of treaty alliances would continue throughout the Revolutionary War period as well. After the war,

All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, . . . he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue; and in that case, until certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity.

Id. at 397–98. This opinion was authored by Lord Chief Justice Edward Coke, who, coincidentally, coauthored the charter for the Virginia Company in 1606. See WILLIAMS, *supra* note 62, at 201–02.

65. Compare Cheister E. Eisinger, *The Puritans' Justification for Taking the Land*, 84 ESSEX INST. HIST. COLLECTIONS 135–56 (1948) (recounting arguments of John Winthrop that as “for the Natives in New England they inclose noe land neither have any settled habitation nor any tame cattle to improve the land by, & soe have noe other but a naturall right to those countries”), with Eisinger, *supra*, at 135–43 (recounting arguments of Roger Williams, “‘I have knowne them make bargaine and sale amongst themselves for a small piece, or quantity of Ground.’ And this they do ‘ . . . notwithstanding a sinfull opinion amongst many the Christians have right to *Heathens* Lands.’ ”).

66. See COHEN 2005, *supra* note 24, § 1.02[1].

67. *Id.* Despite devastating outbreaks of disease, the Indians would continue to outnumber the European settlers for several decades. See *id.*

68. *Id.* The Dutch similarly opted to obtain land via consented purchase rather than more bellicose methods.

69. *Id.*

however, a powerful group of tribes that had sided with the British during the war confronted the founding fathers. Those tribes still maintained claims to the territory between the Appalachian Mountains and the Mississippi River. George Washington detailed his proposed policy for dealing with the Indians in a letter to James Duane, the head of the Committee of Indian Affairs of the Continental Congress:

[P]olicy and [economy] point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expense, and without that bloodshed, and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them⁷⁰

Although many consider Washington's letter the founding document of American Indian policy,⁷¹ its notion of Indians as "savages" sits alongside the pragmatic necessity of making treaties with the Indians.⁷² As the newly formed United States began its inexorable march westward, the Indian lands usually were not taken by force but were instead ceded by treaty in return for, among other things, the establishment of a trust relationship,⁷³ often in specific

70. Letter from George Washington to James Duane (Sept. 7, 1783), in DOCUMENTS OF UNITED STATES INDIAN POLICY 1, 1–2 (Francis Prucha ed., 3d ed. 2000). Francis Prucha notes that George Washington's recommendation was adopted by the Continental Congress. *See id.*

71. *See, e.g.,* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 44 (2005) (tracing the history of Indian policy).

72. *See* Letter from George Washington to James Duane, *supra* note 70.

73. The scope of the trust relationship is multifaceted. "Many treaties explicitly provided for protection by the United States." COHEN 2005, *supra* note 24, § 1.03[1]; *see, e.g.,* Treaty with the Kaskaskia art. 2, Aug. 13, 1803, 7 Stat. 78, *reprinted in 2 INDIAN AFFAIRS, LAWS AND TREATIES* 67, 67 (Charles J. Kappler ed., 1904) [hereinafter INDIAN TREATIES] (providing that the United States would protect the Kaskaskia tribe); Treaty with the Creeks art. 2, Aug. 7, 1790, 7 Stat. 35, *reprinted in 2 INDIAN TREATIES, supra*, at 25, 25 (providing that the United States would protect the Creek Nation). Other treaties provided the means for subsistence. *See, e.g.,* Treaty with the Sioux art. 10, Apr. 29, 1868, 15 Stat. 635, *reprinted in 2 INDIAN TREATIES, supra*, at 998, 1001 (providing for

consideration for the Indians' relinquishment of land.⁷⁴ It is important to note that these treaties were always entered into as government-to-government relationships between the tribes as collective political entities and the United States.⁷⁵ "[F]rom the beginning of its political existence, [therefore, the United States] recognized a measure of autonomy in the Indian bands and tribes. Treaties rested upon a concept of Indian sovereignty . . . and in turn greatly contributed to that concept."⁷⁶

For many, treating tribes as governments was clearly more a function of pragmatism than a generally held belief that tribal governments were legitimate sovereigns, and although the Indian tribes regarded treaty obligations as sacred, condescending notions of the inferiority of tribalism prompted many to question whether their provisions were binding on the United States. During this time period, the legal discourse of opposition to tribal sovereignty argued that "tribal Indians, by virtue of their radical divergence from the norms and values of white society regarding use of and entitlement to lands, could make no claims to possession or sovereignty over territories which they had not cultivated and which whites coveted."⁷⁷

subsistence rations for the Sioux); Treaty with the Western Cherokee art. 8, May 6, 1828, 7 Stat. 311, *reprinted in* 2 INDIAN TREATIES, *supra*, at 288, 288 (providing for twelve months of rations); COHEN 1982, *supra* note 24, at 81 ("[E]ach Head of a Cherokee family . . . who may desire to remove West, shall be given, on enrolling himself for emigration, a good Rifle, a Blanket, and a Kettle, and five pounds of Tobacco: (and to each member of his family one Blanket,) also, a just compensation for the property he may abandon.").

74. *See, e.g.*, Treaty with the Sioux art. II, *reprinted in* 2 INDIAN TREATIES, *supra* note 73, at 998, 998–99 (providing that the Sioux relinquish all claims to lands in the United States); Treaty with the Kaskaskia art. I, *reprinted in* 2 INDIAN TREATIES, *supra* note 73, at 67, 67 (providing that the Kaskaskia Indians "relinquish and cede to the United States all the lands in the Illinois country"); Treaty with the Creeks art. IV, *reprinted in* 2 INDIAN TREATIES, *supra* note 73, at 25, 26 (providing that the Creek nation "extinguish forever all claims" to specified lands).

75. *See, e.g.*, Treaty with the Sioux art. XVI, *reprinted in* 2 INDIAN TREATIES, *supra* note 73, at 998, 1003 (referring to the Sioux as "the Nation"); Treaty with the Wyandot, etc. pmbl., Jan. 21, 1785, 7 Stat. 16, *reprinted in* 2 INDIAN TREATIES, *supra* note 73, at 6, 6 (describing the treaty as between the United States and the Wiandot, Delaware, Chippewa, and Ottawa nations of Indians); Treaty with the Six Nations art. IV, Oct. 22, 1784, 7 Stat. 15, *reprinted in* 2 INDIAN TREATIES, *supra* note 73, at 5, 6 (describing the treaty as between the United States and the Six Nations).

76. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 2 (1994).

77. Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 243–44 (1989). Such arguments were made by several prominent individuals, including President John Quincy Adams:

The Indian right of possession itself stands, with regard to the greatest part of the country, upon a questionable foundation . . . [W]hat is the right of a huntsman to

Various political factions disagreed over whether tribalism could survive contact with white civilization and whether the appropriate course of action was to make the Indians assimilate into that society or to remove them beyond the reaches of that society.⁷⁸ Ultimately, notions of tribal inferiority prevailed, and Congress passed the 1830 Removal Act.⁷⁹ Several tribes in the Southeast, however, already had treaties that secured their right to remain on their ancestral homeland. In response, Georgia Governor George Gilmer declared that

[T]reaties were expedients by which ignorant, intractable, and savage people were induced without bloodshed to yield up what civilized peoples had a right to possess by virtue of that command of the Creator delivered to man upon his formation—be fruitful, multiply, and replenish the earth, and subdue it. [The practice of purchasing land from the Indians was merely] the substitute which humanity and expediency have imposed, in place of the sword, in arriving at the actual enjoyment of property claimed by the right of discovery, and sanctioned by the natural superiority allowed to the claims of civilized communities over those of savage tribes.⁸⁰

Over the next forty years, however, tribal sovereignty was nonetheless explicitly and repeatedly recognized through treaty-making as tribes agreed to either remove to the west of the

the forest of a thousand miles over which he has accidentally ranged in quest of prey? Shall the liberal bounties of Providence to the race of man be monopolized by one of ten thousand for whom they were created? Shall the exuberant bosom of the common mother, amply adequate to the nourishment of millions, be claimed exclusively by a few hundreds of her offspring? Shall the lordly savage not only disdain the virtues and enjoyments of civilization himself, but shall he control the civilization of a world? . . . No, generous philanthropists! Heaven has not been thus inconsistent in the works of its hands! Heaven has not thus placed at irreconcilable strife, its moral laws with its physical creation!

John Quincy Adams, Oration at Plymouth (Dec. 22, 1802), reprinted in FRANK MOORE, *AMERICAN ELOQUENCE: A COLLECTION OF SPEECHES AND ADDRESSES, BY THE MOST EMINENT ORATORS OF AMERICA* 251, 255 (1857).

78. See Letter from Thomas Jefferson, President of the U.S., to William Henry Harrison, Governor of Ind. Territory (Feb. 27, 1803) in *DOCUMENTS OF UNITED STATES INDIAN POLICY*, *supra* note 70, at 22–23 (“[O]ur settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi.”).

79. Indian Removal Act, ch. 148, 4 Stat. 411 (1830) (codified as amended at 25 U.S.C. § 174 (2000)).

80. FRANCIS PAUL PRUCHA, *THE GREAT FATHER* 196 (1984).

Mississippi or cede portions of their ancestral homeland in the face of advancing settlement.⁸¹

While the formal existence of the United States began at a point in time when the prevailing policy recognized tribal sovereignty through the treaty-making process, such an orientation was not permanent. Once the removal process was essentially complete, responsibility for Indian affairs, along with the authority to negotiate on a government-to-government basis with the tribes, moved from the War Department to the Interior Department,⁸² although such treaties still had to be ratified by Congress. In the 1870s, however, Congress ceased making treaties with the Indians⁸³ and instead developed a policy of allotting tribal lands to individual Indians⁸⁴ that was characterized as a “mighty pulverizing engine”⁸⁵ that would destroy tribalism and force Indians to assimilate into dominant society as individuals.⁸⁶ Notions of the inferiority of tribalism were again a catalyst for policy change, but implementation of the policy required recognition of tribal sovereignty. Realization of the

81. See, e.g., Treaty with the Choctaw art. III, Sept. 27, 1830, 7 Stat. 333, reprinted in 2 INDIAN TREATIES, *supra* note 73, at 310, 311 (signed by Choctaw leaders at *bok chukfi ahithac*—the little creek where the rabbits dance—providing for the removal from the ancestral homelands in Mississippi and Alabama to land in southeastern Oklahoma); Treaty with the Sioux art. II, reprinted in 2 INDIAN TREATIES, *supra* note 73, at 998, 998–99 (signed by the Sioux Nation at the conclusion of the Powder River War, establishing a reservation).

82. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 113 (1983).

83. Treaty-making with the Indians was ended by Congress in 1871: “[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty” Act of Mar. 8, 1871, ch. 120, 16 Stat. 544, 566, reprinted in PRUCHA, *supra* note 76, at 135.

84. General Allotment Act of 1887, ch. 119, 24 Stat. 388. The statute is also known as the Dawes Act after Senator Henry L. Dawes of Massachusetts. While the Dawes Act represented the final, full-scale realization of the allotment policy, many treaties made with western tribes from 1865 to 1868 provided for allotment in severalty of tribal lands. See ROBERT WINSTON MARDOCK, THE REFORMERS AND THE AMERICAN INDIANS 212 (1971).

85. In an address to Congress in 1901, President Theodore Roosevelt expressed his sense of the assimilation policy:

[T]he time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty pulverizing engine to break up the tribal mass [acting] directly upon the family and the individual

Gavin Clarkson, *Not Because They Are Brown, but Because of Ea: Why the Good Guys Lost in Rice v. Cayetano, and Why They Didn't Have To Lose*, 7 MICH. J. RACE & L. 317, 325–26 (2002) (quoting 15 MESSAGES & PAPERS OF THE PRESIDENT 6672 (1901)).

86. *Id.* at 326.

Allotment Act required negotiations with tribal governments, and even when dismantling the governance structure of particular tribes, such as the Five Civilized Tribes in Oklahoma, Congress still “continued [the existence of tribes and tribal governments] in full force and effect for all purposes authorized by law.”⁸⁷

If the policy objective of the Allotment Act was to improve the lives of the Indians, it was a colossal failure. By the 1930s it was clear that the United States needed to change its stance on tribal sovereignty again,⁸⁸ and Congress passed the Indian Reorganization Act of 1934 (“IRA”).⁸⁹ In an effort to reinforce tribal sovereignty, the legislation allowed tribes to adopt constitutions and to reestablish structures for governance. Post-IRA federal treatment of the tribes was less restrictive, allowing for the popular election of tribal leaders according to tribal laws and constitutions.⁹⁰ Congressional policy had completely reversed itself—tribal sovereignty was now to be encouraged rather than destroyed; however, federal Indian policy would oscillate through one more cycle in the next half century⁹¹ before President Nixon issued a landmark statement calling for a new

87. Act of Apr. 26, 1906, ch. 1876, sec. 28, 34 Stat. 137, 148.

That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of the said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

Id.

88. See, e.g., INST. FOR GOV'T RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION (1928) (documenting the failure of federal Indian policy during the allotment period).

89. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–79 (2000)).

90. RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 209 (1980).

91. The period between 1945 and 1970 is referred to as the Termination Era, and was characterized by the passage of a number of statutes that “terminated” individual tribes—“these acts distributed the tribes’ assets by analogy to corporate dissolution and afforded the states an opportunity to modify, merge or abolish the tribe’s governmental functions.” *Id.* at 132. Examples of this legislative activity include Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (Klamath), and Act of Aug. 3, 1956, ch. 909, 70 Stat. 963 (Ottawas).

federal policy of “self-determination” for Indian nations.⁹² By “self-determination,” President Nixon sought “to strengthen the Indian’s sense of autonomy without threatening his sense of community.”⁹³ Self-determination⁹⁴ led to an increase in economic development activity, but access to capital remained an impediment.⁹⁵ President Reagan also made an American Indian policy statement on January 24, 1983, stating his support for “self determination.”⁹⁶ In attempting to give definition to “self-determination,” he stated:

Instead of fostering and encouraging self-government, federal policies have, by and large, inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decision making, thwarted Indian control of Indian resources and promoted dependency rather than self-sufficiency.⁹⁷

In 1983, President Reagan established the Presidential Commission on Indian Reservation Economies.⁹⁸ In 1984 the Commission published its Report and Recommendations again calling for a major shift in federal Indian policy.⁹⁹ The Commission promulgated recommendations in the following five categories: Development Framework, Capital Formation, Business

92. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 91-363, at 3 (1970); *see* Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified at 25 U.S.C. §§ 1451–53 (2000)). Perhaps the greatest of Nixon’s contributions to Indian tribal sovereignty was the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203, §§ 102–04 (codified as amended at 25 U.S.C. §§ 450f–450g (2000)), which expressly authorized the Secretaries of Interior and Health and Human Services to contract with and make grants to Indian tribes and other Indian organizations for the delivery of federal services.

93. Samuel R. Cook, *What Is Indian Self-Determination?*, RED INK, May 1, 1994, <http://faculty.smu.edu/twalker/samrcook.htm>.

94. The key legislation of this era includes: Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified in scattered sections of 25 U.S.C.); Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1301–41 (2000)); Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified in scattered sections of 25 U.S.C.); and Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified in scattered sections of 25 & 43 U.S.C.). *See generally* COHEN 2005, *supra* note 24, § 1.07.

95. *See* COHEN 2005, *supra* note 24, § 21.03.

96. PRESIDENTIAL COMM’N ON INDIAN RESERVATION ECONOMIES, REPORT AND RECOMMENDATION TO THE PRESIDENT OF THE UNITED STATES 7 (1984).

97. *Id.*

98. Exec. Order No. 12,401, 48 Fed. Reg. 2309 (Jan. 14, 1983).

99. PRESIDENTIAL COMM’N ON INDIAN RESERVATION ECONOMIES, *supra* note 96, at 7.

Development, Labor Markets, and Development Incentives.¹⁰⁰ Pertinent to the instant inquiry, under Capital Formation, the Commission recommended private ownership or private management of tribal enterprises, amending the Securities Act of 1933 to place tribes on the same footing as state and local governments, amending the Tribal Tax Status Act to provide tribes with the same tax exemptions as state and local governments, establishing an Indian Venture Capital Fund, amending the Indian Loan Guaranty Fund and the Indian Finance Act to minimize the role of the Bureau of Indian Affairs, and encouraging the private sector to invest in Indian country.¹⁰¹

Although some scholars are resistant to the notion that tribes should adapt and change in order to participate in the modern capitalist economy,¹⁰² tribes have adapted to their environments for millennia, and the arrival of Europeans did not diminish that adaptiveness. Many tribes pride themselves on their ability to adapt: the Navajos developed a thriving weaving industry using wool from sheep brought over by Europeans,¹⁰³ the Plains Indians incorporated European horses into their culture, and the Choctaw claim that if the Europeans “had brought aluminum foil with them Choctaws would

100. *Id.* at 25.

101. *See id.* at 39–47.

102. *See, e.g.,* Williams, *supra* note 77, at 266–68. Professor Williams criticizes the IRA and the notions of evaluating tribal corporations using westernized norms of corporate performance because such evaluations often highlight perceived differences between economic development in Indian Country and corporate America. He also takes issue with the description of tribal structures contained in PRESIDENTIAL COMM’N ON INDIAN RESERVATION ECONOMIES, *supra* note 96:

As illustrated by its derogatory nomenclature for describing tribal governments’ differences (“social welfare driven”; “patronage system”; “dependent”), the Commission’s discourse of tribal self-determination clearly devalues tribal enterprises operated by tribal governments according to tribal values The Commission’s point of reference for assigning negative values to contemporary tribalism’s perceived self-determining vision of economic development is of course the dominant society’s profit driven norms. Thus, if tribalism further declines in response to the federal government’s failure to adequately fund its trust responsibility to Indian people, tribalism’s own stubbornly held difference from the superior values of the dominant society will be blamed.

Williams, *supra* note 77, at 267–68. Irrespective of whether one views capitalism as good or bad, however, the reality is that tribal nations exist within a larger capitalist system, and any assumption that tribes cannot adapt to that system runs the risk of falling into the very discourse that Williams decries.

103. Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV 473, 495 (2002).

have been cooking with it while the other tribes were still regarding it with suspicion.”¹⁰⁴

The evidence from the last century of tribal economic development indicates that tribes can and must compete within the larger capitalist environment, and given a level playing field, they can thrive. If the competitive landscape is stacked against tribes, however, those impediments are highly suspect if they continue to exist with little or no legitimate purpose, given that they suppress tribal economic development and curtail tribal access to capital.

II. BRIEF REVIEW OF PUBLIC FINANCE

A. *The Nature of Municipal Debt*

Depending on the source of funds used to repay the debt, municipal debt can take a number of forms, generally under the umbrella of either general obligation or revenue bonds issued under § 103 of the Tax Code.

A *general obligation bond* can be either secured or, more commonly, unsecured, and in the latter case the issuer will generally promise to repay principal and interest from any of the issuer's available funds.¹⁰⁵ In both secured and unsecured general obligation bonds, the general credit of the issuer is pledged.¹⁰⁶

A *revenue bond* differs from a general obligation bond in that the debt obligation is limited in terms of recourse to a specifically identified source of revenue that is pledged to secure the debt.¹⁰⁷ The issuer does not pledge its general credit. In contrast to general obligation bonds, revenue bonds pledge only the earnings from revenue-producing activities, usually to project being financed.¹⁰⁸

One type of revenue bond important to the instant inquiry is the *private activity bond* (“PAB”). State or local governments will issue PABs to provide financing for private businesses or individuals, and the revenues from the financed activities are then usually pledged to

104. *Id.*

105. See FIPPINGER, *supra* note 22, § 1:2.2; see also HYATT ET AL., *supra* note 27, at 5.

106. See FIPPINGER, *supra* note 22, § 1:2.2; see also GELFAND, *supra* note 18, § 2:05; HYATT ET AL., *supra* note 27, at 5.

107. See FIPPINGER, *supra* note 22, § 1:2.3; GELFAND, *supra* note 18, § 2:13; Recourse refers to the set of actions that the lender can take to obtain payment. In this instance, the lender can only look to the revenues specifically pledged. If those are insufficient, the lender cannot look to other assets of the issuer.

108. FIPPINGER, *supra* note 22, § 1:2.4; GELFAND, *supra* note 18, § 2:13.

cover the debt service for the bonds.¹⁰⁹ For example, state and local governments often issue tax-exempt PABs for the benefit of nonprofit corporations for projects such as charity hospitals, or to finance low-income residential rental property or mortgage loans for first-time low-income home buyers.¹¹⁰ Private activity bonds are also issued for airports, docks and wharves, solid waste facilities and sewage facilities, and certain other facilities.¹¹¹

B. Sources of Municipal Debt

Although bank debt and bond indentures both represent a promise to pay a specific sum of money (principal amount) at a specified date or dates in the future (maturity date) together with periodic interest at a specified rate, each type of debt has unique attributes and establishes a relationship with a different set of lenders. Additionally, given the same level of earnings, an issuer will likely be able to borrow larger amounts for longer periods by issuing bonds rather than by borrowing from a bank.

1. Bank Debt

Commercial banks typically lend money to governmental borrowers as part of an ongoing business relationship. For larger amounts, a group of banks (often called a syndicate) will collectively lend money to the borrower. A borrower can usually borrow up to two times its annual earnings from a bank or bank syndicate, and the term of a bank loan (or note) is generally three to five and sometimes up to seven years.

Bank debt can also be used as temporary financing when a borrower plans to subsequently issue more debt through a bond offering to finance a larger project. A portion of the bond proceeds are then used to pay off the bank note.

2. Bond Indentures

Unlike bank debt that generally has a single lender holding the note, a bond indenture provides for negotiable instruments—bonds that can be bought and sold in the capital markets. Thus the lenders, or bondholders, often have no direct relationship with the issuer. While issuing a bond is typically a more complex transaction than obtaining a bank loan, issuers can generally borrow larger amounts

109. GELFAND, *supra* note 18, § 5:23

110. *Id.* §§ 4:25:20, 5:25.

111. *Id.* § 5:25.

for longer terms. An issuer can borrow as much as three to four times its annual revenues by issuing bonds, and the payments can be stretched over ten, fifteen, or even thirty years in some cases.

Bond transactions often involve a financial intermediary, usually an investment banking firm, that assists issuers in finding buyers for the bond. By marketing to a larger audience in the broader capital markets, the financial intermediary attempts to obtain the best possible interest rate and terms for the issuer, which may often be better than those available from commercial banks.

An important distinction between bank debt and bond indentures is that unlike bank loans, bonds are classified as “securities” and are therefore subject to a variety of securities laws. Note, however, that § 103(c) of the Tax Code treats all obligations as “bonds” even if they are bank loans, finance leases, installment purchases, or actual bonds issued under bond indentures.¹¹² Thus, while the debt markets differentiate substantially between bank debt and bond indentures, the Tax Code does not. For purposes of clarity, subsequent use of the term “bonds” in this Article refers to bonds issued under bond indentures in the capital markets and does not include the other forms of governmental debt considered to be “bonds” under § 103.

C. *Tax-Exempt Debt*

Tax-exempt debt is debt where the interest paid to the debt holder is not subject to taxation.¹¹³ Because the interest is tax-free, investors are able to generate the same after-tax return with a lower interest rate as they would from a similar taxable investment that pays a higher interest rate. In addition to the availability of lower interest rates, sometimes as much as 300 basis points lower,¹¹⁴ longer terms are also available in the tax-exempt market.

1. The Historical Justification for States’ Tax-Free Bond Authority: Federal Subsidy of Governmental Obligations and State Sovereignty

When the first Tax Code was established in 1913, state and local bond issuances were minimal and Congress desired to avoid political

112. 26 U.S.C. § 103(c) (2000). This treatment is also the same for tribal debt under § 7871(c) of the Tax Code. 26 U.S.C. § 7871(c) (2000).

113. See GELFAND, *supra* note 18, § 5:01 for a thorough discussion of the history and policy rationale of tax-exempt municipal debt.

114. See COHEN 2005, *supra* note 24, § 21.03[2][d]. Financial measures are often expressed in terms of “basis points.” A 300 basis point difference is the same as a three percent difference.

opposition on the matter of taxing interest paid on municipal bonds.¹¹⁵ The initial rationale for the exemption has its roots in a constitutional theory of intergovernmental tax immunity.¹¹⁶ The modern rationale for exempting municipal bond interest from taxation is a federal policy of supporting states in their operation as governmental entities.¹¹⁷ It has long been recognized that “[l]ong-term debt obligations are an essential source of funding for state and local governments”¹¹⁸ and that taxing interest paid on state and local bonds “may strike at the very heart of state and local government activities.”¹¹⁹

The ability to issue tax-free debt is crucial not to investors, but to states, because investors are willing to accept lower interest rates in exchange for the tax-exemption.¹²⁰ In effect, the tax-exemption, although falling to the individual bond buyer, is a subsidy to the state treasury.¹²¹ The federal government has an interest in subsidizing¹²²

115. GELFAND, *supra* note 18, § 1:13.

116. See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 585–86 (1895) (holding that a tax on interest income derived from a state bond, whether imposed by the federal government or by another state, was unconstitutional as an indirect tax on the state because of the burden it imposed on the state's ability to issue the bond). The Court reasoned that, although the tax was imposed on the bondholder, the tax was considered to be “on” the state because a portion of the burden, or the “incidence” of the tax, would be borne by the state in an increased interest rate or fewer buyers. *Id.* The Court's rationale was not limited to bonds in particular, but was based on a theory of intergovernmental tax immunity under which it was unconstitutional to tax any state-derived income, whether from bonds, employment or leases. See also *South Carolina v. Baker*, 485 U.S. 505, 516–17 (1988) (discussing intergovernmental tax immunity at the time *Pollock* was decided). This rationale was later repudiated by the Supreme Court in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939) (“The theory . . . that a tax on income is legally or economically a tax on its source is no longer tenable.”). See also *Baker*, 485 U.S. at 523–24 (holding that interest paid on state bonds is not immune from federal taxation under the constitutional doctrine of intergovernmental tax immunity).

117. As noted previously, the exemption from federal taxation for interest paid on state-issued debt is also related to a notion of state sovereignty. See *supra* Introduction. This notion of state sovereignty roughly parallels the doctrine of tribal sovereignty and thus provides analogous support for equal tax-free bond authority.

118. *Baker*, 485 U.S. at 531 (O'Connor, J., dissenting).

119. *Id.* at 532.

120. WILLIAM A. KLEIN, JOSEPH BANKMAN & DANIEL SHAVIRO, *FEDERAL INCOME TAXATION* 185 (14th ed. 2006).

121. *Id.*

122. The amount of the subsidy is a matter of empirical analysis beyond the scope of this Article; suffice it to say, however, the subsidy enjoyed by states is significant. The Supreme Court has recognized that without the exemption, states would have to increase the interest they pay on bonds by between 28% and 35% over what they are able to pay with the subsidy. Because bond revenue is so important to states, “[g]overnmental operations will be hindered severely if the cost of capital rises by one-third.” *Baker*, 485 U.S. at 531 (O'Connor, J., dissenting).

state and local government operations because the subsidy both facilitates governmental operations at the local level so that the federal government does not itself have to provide these services and places control over what kinds of operations are undertaken in the hands of local officials, thus removing these operations from the federal government.¹²³

This latter rationale—local control—is related to a notion of state sovereignty. Indeed, the doctrine of state sovereignty stems from the basic constitutional structure that endows the federal government with a limited set of enumerated powers.¹²⁴ Further, the Supreme Court has long recognized the power of the federal government to tax states as a threat to state sovereignty.¹²⁵ To the extent that states are sovereigns, the federal policy of exempting interest paid on state bonds issued to finance and effectuate state policy from federal taxation is a recognition and affirmation of that sovereignty.¹²⁶

2. Uses for Tax-Exempt Debt

States issue tax-exempt bonds not only to finance a core set of traditional governmental purposes such as building schools, roads, and sewers but also to finance airports, docks, commuting facilities, utilities, mortgages, public golf courses, and even state lottery buildings and horse race tracks.¹²⁷ Changes to the Tax Code in 1986 sought to restrict this practice by placing limitations on private activity bonds.¹²⁸ After these changes, some municipalities began

123. See KLEIN ET AL., *supra* note 120, at 186.

124. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 381–82 (2d ed. 1988); see also U.S. CONST. amend. X.

125. See *Baker*, 485 U.S. at 533 (O'Connor, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (“[T]he power to tax involves the power to destroy.”)).

126. See Williams, *supra* note 30, at 358 (“Principles of federalism, together with practical financial considerations, dictate that ‘the capability of state and local governments to raise and use revenue should be facilitated and enhanced whenever possible in order that they may better serve the needs of their people.’” (quoting *Miscellaneous Tax Bills: Hearings Before the Subcomm. on Miscellaneous Revenues Measures of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 109 (1977) (statement of William E. Sudow, counsel for various Indian tribes)).

127. See KLEIN ET AL., *supra* note 120, at 186.

128. IRS Revenue Ruling 03-116 explains the § 141 definition of private activity bonds as follows:

Section 141 provides, in part, that a bond is a private activity bond if the bond is issued as part of an issue that meets the private business use test of § 141(b)(1) and the private security or payment test of § 141(b)(2). The private business use test is met if more than 10 percent of the proceeds of an issue are to be used for any

locating other sources of revenue to remain within the permissible tax-exempt bounds while still supporting private use projects. Discussing this phenomenon in the case of professional sports stadiums, Professor Frank Mayer wrote:

The practical result of the 1986 Act was to change the method of debt repayment. Municipal officials and stadium owners structured their debt repayment so that revenue streams from the actual stadium accounted for less than 10% of the total repayment, while the public was responsible for the remaining 90%. This financing plan forced the federal government to recognize a stadium construction project as a public facility and consequently permit tax-exempt bond financing. In order to reach the 90% public funding level, municipal governments have employed techniques including increasing the sales tax, tourist tax, sin taxes, and implementing a tax on lottery proceeds.¹²⁹

The more popular approach, at least concerning hotels and convention centers, involves management agreements between a private entity and a municipality arranging for the private business to run the facility. This practice accelerated after 1997 when the permissible length of these management contracts was extended from five to fifteen years, initiating a “boom in publicly financed hotels.”¹³⁰

In order to develop a baseline against which to compare tribal tax-exempt bonding authority, the Senate Finance Committee recently commissioned a study by the Government Accountability Office (“GAO”) to determine the scope of projects financed by state

private business use. The private security or payment test is met if the payment of the principal of, or the interest on, more than 10 percent of the proceeds of an issue is directly or indirectly (1) secured by an interest in property used or to be used for a private business use, (2) secured by an interest in payments in respect of such property, or (3) to be derived from payments, whether or not to the issuer, in respect of property, or borrowed money, used or to be used for a private business use.

Rev. Rul. 2003-116, 2003-2 C.B. 1083, available at <http://www.irs.ustreas.gov/pub/irs-drop/rr-03-116.pdf>. Section 141(e) provides, in part, that the term “qualified bond” includes any private activity bond that (1) is a qualified 501(c)(3) bond; (2) meets the applicable requirements of § 146; and (3) meets the applicable requirements of each subsection of § 147. While § 103(a) of the 1986 Tax Code exempts from gross income interest on state and local bonds, such exemption is not extended to private activity bonds that are not also qualified bonds. 26 U.S.C. §§ 103(b)(1), 141 (2000).

129. Frank A. Mayer, III, *Stadium Financing: Where We Are, How We Got Here, and Where We Are Going*, 12 VILL. SPORTS & ENT. L.J. 195, 210–11 (2005) (citations omitted).

130. Mary Wisniewski, *Cities Play Hotel Game: Face Choices on Independence, Risk*, BOND BUYER, Aug. 30, 2001, at 1, available at 2001 WLNR 840332.

and local governments in eight particular categories.¹³¹ The results of the study are summarized as follows:

- *Rental housing.* From 2000 through 2004, municipalities borrowed \$46.4 billion in 3,557 tax-exempt bond issues for multifamily housing projects. These types of housing projects are likely to involve rental-housing units for low-income households.
- *Road transportation.* From 2000 through 2004, municipalities borrowed \$61.4 billion in 1,094 tax-exempt issues for toll roads and highways.
- *Parking facilities.* From 2000 through 2004, municipalities borrowed \$3.5 billion in 220 tax-exempt issues for parking facilities.
- *Park and recreation facilities.* From 2000 through 2004, municipalities borrowed \$60.9 billion in 3,085 tax-exempt issues to build public facilities. This general category includes several recreation-related facilities, including libraries and museums (\$7.5 billion in 470 issues); convention centers (\$11.1 billion in 236 issues); theaters (\$0.6 billion in twenty-nine issues); parks, zoos, and beaches (\$6.1 billion in 723 issues); stadiums and arenas (\$5.3 billion in 119 issues); and other recreation facilities (\$4.6 billion in 420 issues).
- *Golf facilities.* In 2005 there were about 2,400 municipal golf courses in the United States, with such courses existing in all states. Tax-exempt bonds have financed or partially financed at least 120 golf courses in twenty-nine states. About 5% of municipal golf courses connect to resorts or real estate developments. Over the past ten years an increasing number of golf courses have been built as part of larger real estate developments. Some municipalities have issued tax-exempt revenue bonds for the construction of resorts with golf courses, lodging, and meeting facilities.
- *Convention centers.* The report noted over 300 government-owned convention centers. In addition, from 2000 through 2004 municipalities borrowed \$11.1 billion in 236 tax-exempt issues related to convention centers.
- *Hotels.* From one set of sources, the GAO identified thirty-nine hotel projects associated with convention

131. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 50, at 4–5 (2006).

centers or airports that were financed by tax-exempt bonds. Selected government financial reports that the GAO examined disclosed an additional twelve hotel projects that were financed with tax-exempt bonds in recent years.

- *Gaming-support facilities.* All but two states have some form of legal gaming. Forty-one states and the District of Columbia reported assets and revenues related to lotteries. Their annual operating income ranged from \$2 million to \$2 billion. According to selected government financial reports, tax-exempt financing has been used for capital projects to benefit gaming operations in several states.

This report was commissioned, in part, because the restrictions on tribal tax-exempt bonding have been “difficult to enforce by the [IRS and have] increased the tax compliance burden on Indian tribal governments.”¹³² Part IV contains a detailed discussion of projects that state and local governments have financed with tax-exempt bonds, but which would have to be financed with more expensive taxable debt if undertaken by tribal governments. First, however, an examination of the legislative history of the Tribal Tax Status Act is necessary in order to identify the origins of the inequities at issue.

III. LEGISLATIVE AND REGULATORY MANEUVERING OVER TRIBAL TAX STATUS

A. *The Tax Status of Indian Tribes Before the 1982 Tribal Tax Status Act*

The Tribal Tax Status Act was the culmination of a huge effort by tribes and their advocates on Capitol Hill to achieve a measure of equality with states in the Tax Code.¹³³ Before its passage, and “despite the fact that the federal government has expressly recognized tribal governments as sovereign governmental entities for more than 150 years, with responsibilities to constituents equal to that of state and local governments, Indian tribes . . . have occupied an anomalous niche within the structure of federal tax laws.”¹³⁴ Prior to 1982, IRS Revenue Rulings rather than statutes governed the

132. *Id.* at 1.

133. See generally Williams, *supra* note 30 (detailing testimony by Indians and comments by various members of Congress in considering the 1982 Act).

134. *Id.* at 358.

taxation of tribes.¹³⁵ Under Revenue Ruling 67-284, the IRS reasoned that because tribes occupy a space in government roughly analogous to states, income of a tribal government, like that going to a state, is exempt from federal taxation.¹³⁶ The IRS failed to pursue the same logic, however, when it denied tribes the ability to issue tax-free debt. Revenue Ruling 68-231 erroneously reasoned that since the powers of a tribe are delegated to it by the federal government rather than a state (in that case, Washington), it cannot be considered a "state" for purposes of § 103's exemption from federal taxation for interest paid on state and municipal debt.¹³⁷ Lingering uncertainty because of inconsistencies in how the IRS made its rulings on the tax status of tribes led Congress to take up consideration of a comprehensive Indian tax law.

The 1982 Act was not the first serious attempt at comprehensive Indian tax legislation, as a bill that would have granted tribes a similar tax status to states was introduced in 1975.¹³⁸ This legislation proposed equal treatment in the areas of federal excise taxes, charitable donation deductions, and deductibility of property taxes. An important provision would have authorized tribes to issue tax-exempt bonds on nearly the same grounds as states under § 103.¹³⁹ The House Ways and Means Committee reported H.R. 8989 favorably,¹⁴⁰ but the legislation was not considered by the full House.¹⁴¹ Congress took no further action until its consideration of a

135. See Aprill, *supra* note 30, at 335.

136. Rev. Rul. 67-284, 1967-2 C.B. 55. Williams notes that the IRS made this ruling despite the absence of any express Congressional authority for such an exemption, a true anomaly in tax law. Williams, *supra* note 30, at 359 n.113. This ruling, then, indicates the strength of the premise that Indian tribes are in fact political entities within the United States with duties and obligations owed to their constituents.

137. Rev. Rul. 68-231, 1968-1 C.B. 48. As Williams notes, critics have argued that the IRS has adopted inconsistent positions in these two revenue rulings. Williams, *supra* note 30, at 360 n.116. Other revenue rulings also failed to provide equal treatment for tribes, in denying a tax deduction for a charitable donation to the Zuni Pueblo under 26 U.S.C. § 2055, see Rev. Rul. 74-179, 1974-1 C.B. 279, and denying an exemption from federal excise taxes under 26 U.S.C. § 4224 for the sale of an automobile to an Indian Tribe, see Rev. Rul. 58-610, 1958-2 C.B. 815.

138. H.R. 8989, 94th Cong. (1st Sess. 1975).

139. The 1975 Legislation would have assured "nearly" identical bonding authority for tribes as compared to states, but not "completely" identical authority because it is clear that tribes would have had a more limited ability to issue tax exempt bonds for commercial or industrial activity. Aprill, *supra* note 30, at 343. This legislation also would have limited the issuance of tax-free debt to support governmental functions. See *id.*

140. H.R. REP. NO. 94-1693, at 1 (1976).

141. See Aprill, *supra* note 30, at 344; Williams, *supra* note 30, at 364-65.

Senate bill¹⁴² that would eventually become the 1982 Tribal Tax Status Act.¹⁴³

B. The Passage of the 1982 Tribal Tax Status Act

Senate Bill 1298 was introduced by five senators¹⁴⁴ to equalize the treatment of states and tribes in a number of areas of the Tax Code, including tax-free bonding authority. Senate Bill 1298 would have enabled tribes to issue tax-exempt debt obligations to finance their governmental activities under § 103 of the Internal Revenue Code.¹⁴⁵ Tribes would have achieved equal treatment with states by virtue of the legislation's reference to § 103, which defines states' tax-free bonding authority. At the time this authority proposed in the Senate bill was quite broad and included the authority to issue controversial industrial development bonds for a variety of projects so long as the trade or business financed by the issuance occurred on the tribe's reservation.¹⁴⁶ The Senate Finance Committee reported the bill favorably and recommended passage.¹⁴⁷ The Senate incorporated this bill into House Bill 5470, the Periodic Payments Settlement Act, which the House passed without the tribal tax legislation piece.¹⁴⁸ Representative Sam Gibbons (D-Fla.), in particular, objected to the tribal tax provisions, a setback which sent the bill to a conference committee with Representative Gibbons a conferee.¹⁴⁹

While the stated purpose of the introduced legislation was to eliminate the perception of differences between tribal governments and state or local governments,¹⁵⁰ the ultimate legislation that emerged from the House-Senate Conference Committee emphasized rather than eliminated those differences. The rest of this section details those fundamental changes in the legislation.

The first major change in the legislation was to specifically prevent tribes from issuing any tax-free private activity bonds. Tribes

142. Aprill, *supra* note 30, at 344.

143. S. 1298, 97th Cong. (1982).

144. The bill was sponsored by Malcolm Wallop (R-Wyo.), Bill Bradley (D-N.J.), Mark O. Hatfield (R-Ore.), Bob Packwood (R-Ore.), and Max Baucus (D-Mont.). See S. 1298, 97th Cong. (1982).

145. *Id.*; see also Williams, *supra* note 30, at 363.

146. S. 1298, 97th Cong. (1982); Williams, *supra* note 30, at 363.

147. S. REP. NO. 97-646, at 8-17 (1982), as reprinted in 1982 U.S.C.C.A.N. 4580, 4580.

148. See *id.*

149. Many of Representative Gibbons' actions are analyzed in Part V.

150. S. 1298, 97th Cong. (1982) (stating in preamble that the legislation would treat Indian tribal governments "the same as or similar to States").

retained the ability to issue general obligation bonds, traditionally used for funding ventures such as school construction.¹⁵¹ Tribal governments, however, “lack[ed] a diversified economy as well as the broad, stable tax base” necessary to issue general obligation bonds.¹⁵² Thus, tribes were “given bonding authority they were unable to use and denied bonding authority they would have welcomed.”¹⁵³ Prior to the emergence of the conference bill, “every version of the Tribal Tax Status Act had included specific authority for tribes to engage in at least some limited form of tax-exempt [private activity bond] financing.” In fact, no “witness or member of the Senate or House, in printed hearings, committee reports, or debate, ever voiced [an] objection” to allowing tribes to enjoy the same status as state and local governments relative to private activity bonds. Moreover, the Treasury Department had specifically endorsed all of the earlier versions of the Tribal Tax Status Act, including the provisions Indian tribes used to issue tax-exempt private activity bonds, stating “that tribal governments should be treated for Federal tax purposes in the same manner as State and local governments.”¹⁵⁴ Treasury supported this legislation, despite its broader efforts to generally curtail and limit tax-exempt private activity bonds,¹⁵⁵ arguing that entities that “are similarly situated should be treated alike for tax purposes if the law is to be applied fairly and equitably.”¹⁵⁶ Given the limited tribal tax base available for general obligation bonds,¹⁵⁷ the ability to issue revenue bonds was one of the most important provisions sought by tribal governments.

The Conference Committee Report, however, stated quite clearly that “tribal governments are only permitted to issue private activity bonds ([such as] industrial development bonds [or] mortgage subsidy bonds),”¹⁵⁸ thus ensuring that tribal bonds could not be used for economic development projects that might generate profits for private actors.

151. Aprill, *supra* note 30, at 348.

152. *Id.*

153. *Id.*

154. See 1981–82 *Miscellaneous Tax Bills, XVI: Hearing on S. 1298, S. 2197, and S. 2498 Before the Subcomm. on Taxation and Debt Management of the S. Comm. on Fin., 97th Cong. 57* (1982) (statement of William McKee, Tax Legislative Counsel, Department of the Treasury) [hereinafter *McKee Statement*].

155. Williams, *supra* note 30, at 368 n.149.

156. *McKee Statement, supra* note 154, at 58.

157. See *supra* Part III.A.

158. H.R. REP. NO. 97-984, at 16–17 (1982), as reprinted in 1982 U.S.C.C.A.N. 4598, 4602.

If the elimination of any chance of private activity bonds issuance was not bad enough, the Conference Committee Report also added the additional requirement on tribes' authority to issue tax-free debt. This provision authorized tribes to issue tax-exempt bonds "only if such obligation is part of an issue substantially all of the proceeds of which are to be used in the exercise of any essential governmental function."¹⁵⁹ The essential governmental function language may seem innocuous enough, since § 103 grants states tax-free bond authority as a tool with which to perform their general governmental functions.¹⁶⁰ The "essential governmental function" element of the legislation, however, was unmistakably an "additional requirement"¹⁶¹ that was not imposed on states. Thus, by virtue of the 1982 Tribal Tax Status Act, Indian tribes receive tax-free treatment of their debt obligations under a narrower set of projects than states. The open question after passage of the 1982 Act was, what was an "essential governmental function?"

C. *Initial Implementation of the 1982 Tribal Tax Status Act*

The Conference Committee Report accompanying the 1982 Act offered little explanation of the essential governmental function requirement but did indicate that tribes were granted tax-free bond authority to undertake only a core set of government projects, and that Congress was primarily concerned with preventing private actors from benefiting from the tax subsidy. Because the essential governmental function test also circumscribes tribes' general ability to issue tax-free debt obligations under § 103; however, the issue becomes whether tribes themselves (where no private entity benefits) can engage in a broad range of activities—such as construction of hotel resorts and public-use golf courses—that are not necessarily within a set of core government-provided services.

In the wake of the passage of the 1982 Act, the IRS was charged with determining the scope of tribes' tax-free bonding authority. As Professor Ellen Aprill points out, however, defining the term "essential governmental function" is no easy task.¹⁶² Several Supreme Court cases illustrate the ambiguity of this term and its ultimate

159. Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, § 202, 96 Stat. 2607, 2609 (1983) (codified as amended at 26 U.S.C. § 7871 (2000)).

160. *See supra* Part I.

161. 26 U.S.C. § 7871(c) (2000) (listing additional requirements for tax exempt bonds).

162. *See Aprill, supra* note 30, at 348–49.

“unworkability.”¹⁶³ Early cases upheld federal taxation of income paid to the trustees of the Boston Elevated Railway Company because operating a street railway was proprietary rather than governmental,¹⁶⁴ yet struck down a tax imposed on the salary of a New York water system engineer because operating a water system *had developed into* a governmental function.¹⁶⁵ Later cases effectively eliminated the term from Congress’s arsenal by declaring (1) that “what might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable”¹⁶⁶ and (2) that the distinction had become “too entangled in expediency to serve as a dependable legal criterion.”¹⁶⁷

To address this issue, tribes obtained legal representation to advise the Treasury Department that the essential governmental function requirement should be construed broadly in light of the overriding purpose of the 1982 Tribal Tax Act to “provide relief to Indians.”¹⁶⁸ The strategy worked, and Indians were given tax-free bond authority under the regulations¹⁶⁹ not only for any activity that would be exempt if undertaken by a state or local government but also for any activity for which Indian tribes receive funding from the Bureau of Indian Affairs under either the Snyder Act¹⁷⁰ or the Indian

163. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 543 (1985) (holding that the distinction between essential and nonessential governmental functions is unworkable and that such a distinction cannot be given any “principled content”).

164. *See Helvering v. Powers*, 293 U.S. 214, 227 (1934).

165. *See Brush v. Comm’r*, 300 U.S. 352, 370–71 (1937). This case emphasizes that the notion of what is an essential governmental function is not a fixed set of public projects. Indeed, just as the Supreme Court recognized that many projects can become more “essential” to governments over time, some governments may deem certain projects more essential than other governments. This notion is particularly true in the case of Indian tribes, many of which are located in areas that simply do not enjoy the benefits of a vibrant and diverse private sector. Thus, while for most citizens of this country, their entertainment is provided by the private sector, for many Indians, their only option is to turn to the tribal government for entertainment outlets. Arguably, tribes should be granted a freer hand in the use of tax-free debt obligations because of the lack of private sector services; instead, as this Article demonstrates, they now have one hand tied behind their backs in utilizing tax-free debt.

166. *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980) (citing *New York v. United States*, 326 U.S. 572, 591 (1946) (Douglas, J., dissenting)); *see also Garcia*, 469 U.S. at 543.

167. *New York v. United States*, 326 U.S. at 580 (plurality opinion).

168. Aprill, *supra* note 30, at 351 (citing Letter & Memorandum from Fried, Frank, Harris, Shriver & Kampelman to Hugo Santora, Legislative Analysis Officer, Internal Revenue Serv. (June 28, 1983)).

169. 26 C.F.R. § 305-7871-1 (2006).

170. 25 U.S.C. § 13 (2000). This Act gives the Bureau of Indian Affairs broad authority to “expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States” for a broad set of purposes. *Id.*

Self-Determination Act.¹⁷¹ Because both acts fund a broad range of activities,¹⁷² tribal bond authority was also relatively broad. For instance, tribes could issue tax-free debt obligations to finance “[g]eneral support” activities and “industrial assistance and advancement.”¹⁷³

Despite the broad language, tribes issued very few bonds under the 1982 Act and the arguably generous (for tribes) regulations, as only seven tribal issuances had occurred by the time Congress revisited the legislation in January of 1988.¹⁷⁴ Of these projects, only one was a traditional governmental function on the reservation; six were “off-reservation leveraged buy-outs.”¹⁷⁵ For example, one of the reported issuances helped the Salt River Pima-Maricopa Indian Community in Arizona purchase a cement factory to be used primarily as an income-generating investment to help pay for other tribal services.¹⁷⁶

Despite the small number of reported transactions, this relatively broad bonding authority turned out to be short-lived as both the language of the statute and the IRS’s approach to enforcing it would soon become even more restrictive.

D. Congress Closes the Door: The 1987 Amendments to the Tribal Tax Status Act

Five years after the 1982 Act, Representative Gibbons sponsored a measure in the Omnibus Budget Reconciliation Act of 1987¹⁷⁷ to restrict the use of tribal bonds by clarifying the essential governmental function requirement.¹⁷⁸ The House Committee Report explained that in light of “recent reports of Indian tribal governments issuing tax-exempt bonds for what are substantively interests in commercial and industrial enterprises,” the “committee believes . . . [that] it is appropriate to reiterate the scope of bond

171. 25 U.S.C. §§ 450a–450n (2000).

172. See Aprill, *supra* note 30, at 351.

173. *Id.* (quoting 25 U.S.C. § 13).

174. See Aprill, *supra* note 30, at 357.

175. *Id.* at 358. A “leveraged buy-out” is a purchase of a company by investors who borrow a substantial portion of the purchase price. This arrangement is useful to tribes who often do not have the tax base to support large issuances of general obligation bonds. *Id.* at 348.

176. Joan Pryde, *Two Bond Issues Sold by Tribes May Face Review by Congress*, BOND BUYER, June 9, 1987, at 1, available at 1987 WLNR 279497.

177. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10632(a), 101 Stat. 1330-1, 1330-455 (1987) (codified at 25 U.S.C. § 7871(e) (2000)).

178. H.R. REP. NO. 100-391, at 1139 (1987), as reprinted in 1978 U.S.C.C.A.N. 2313-1, 2313-748.

authority granted to Indian tribal governments.”¹⁷⁹ The clarification measure thus limited essential functions for purposes of tribal tax-free bond authority to those functions that are “customarily performed by State and local governments with general taxing powers.”¹⁸⁰

In addition, on September 10, 1987, Gibbons wrote a letter to Treasury Secretary James Baker imploring the Department to investigate leveraged buy-outs by tribes.¹⁸¹ He also noted that such projects are a “far cry from schools, streets and sewers,”¹⁸² recalling the one line of the 1982 legislative history explaining the essential governmental function requirement.¹⁸³

Although it had passed the house, Gibbons’s amendment was not included in the Senate version of the 1987 Budget Act, as it was opposed by many in the Senate as too draconian. Twenty-two senators wrote a letter to the Chairman of the Senate Finance Committee to oppose the measure in conference.¹⁸⁴ Their concern was that the amendment would stifle tribes’ efforts to “decrease tribal unemployment, alleviate poverty, preserve natural or cultural resources of the tribe or contribute to tribal economic activity.”¹⁸⁵ As an alternative, this group proposed targeting potential abuses more precisely by eliminating bonding authority for projects that produced only passive income from investments in real estate or other off-reservation ventures.¹⁸⁶ This less restrictive alternative would have allowed tribes to utilize tax-free debt obligations much in the same manner as states. Unfortunately, as in 1982, Representative Gibbons again secured an appointment to the Conference Committee and

179. *Id.* One of the reports of commercial-based Indian bond activity was a clearly anti-Indian article appearing in *Forbes* magazine entitled “Smoke Signals.” Matthew Schifrin, *Smoke Signals*, *FORBES*, June 15, 1987, at 42. The Schifrin article incorrectly describes tribal bond authority as exempt from “the sharp restrictions placed by last year’s tax reform act on the volumes of underwriting that municipal bodies around the country can engage in.” *Id.* The characterization is false because the volume limitations applied to private activity bonds, an authority specifically denied to tribes by the 1982 Act. See Aprill, *supra* note 30, at 359 (discussing the inaccuracy of the *Forbes* article). Despite its inaccuracies, the *Forbes* article appears to have “sounded an alarm for Congress,” and Gibbons in particular, that clarifying legislation was needed to shut down tribal bond activity. *Id.* at 360.

180. Omnibus Budget Reconciliation Act of 1987, § 10632(a) (emphasis added).

181. Aprill, *supra* note 30, at 361.

182. *Id.*

183. H.R. REP. NO. 97-984, at 16–17 (1982) (Conf. Rep.), as reprinted in 1982 U.S.C.A.N. 4598, 4602.

184. John J. Doran, 22 *Senators Urge Bentsen To Oppose Legislation To Curb Indian Bond Power*, *BOND BUYER*, Dec. 14, 1987, at 6, available at 1987 WLNR 280533.

185. *Id.*

186. *Id.*

pushed through his stifling amendment with only one relatively insignificant carve-out for tribes.¹⁸⁷

While Aprill describes the amendment as a “measure to tighten the tribal bond measures by limiting essential governmental functions to those customarily financed with exempt bonds by state and local governments,”¹⁸⁸ the specific statutory language had the potential for a much more restrictive interpretation: limiting tribal tax-exempt bond authority to those projects typically financed with general tax revenue, a narrower set of projects than those typically financed through tax-free debt obligations.¹⁸⁹

E. The IRS Nails the Door Shut: Aggressive Enforcement of the Essential Governmental Function Requirement

In the wake of the 1987 amendment, one issue facing tribes seeking to utilize tax-free debt obligations is that Congress has provided little guidance, other than the limiting language in the 1987 Conference Report, as to what is and what is not an essential governmental function customarily performed by states.¹⁹⁰ As noted above, the uncertainty engendered by these terms provides little guidance for Indian tribes¹⁹¹ and much leeway for the IRS. As it turns out, the IRS has taken its cue from Representative Gibbons and has

187. *Id.*; Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10632(b), 101 Stat. 1330-1, 1330-455 to -457 (1987) (codified at 26 U.S.C. § 7871(e) (2000)). Tribes were permitted to issue industrial development bonds if the proceeds were used for tribally owned manufacturing facilities on tribal lands that employed tribal members. 26 U.S.C. § 7871(c)(3)(B) (2000). Aprill notes that the employment restriction is “particularly onerous.” Aprill, *supra* note 30, at 362 n.175. The requirement is that the aggregate amount of bonds outstanding at the end of each year may not exceed twenty times the wages paid to tribal members. 26 U.S.C. § 7871(c)(3)(D). Thus, if a tribe issues \$200 million in debt, it must pay tribal members \$10 million that year, effectively reducing the amount available for investment.

188. Aprill, *supra* note 30, at 361.

189. Indeed, as discussed *infra*, this distinction will surface in an IRS field service audit, much to the detriment of tribes.

190. A recent letter sent by Eric Solomon, the Treasury Department’s acting deputy assistant secretary for tax policy, seems to have only added to the uncertainty. See Alison L. McConnell, *Enforcement: Treasury Letter Leaves Lawyers Debating Tribal Bonds Issue*, BOND BUYER, Jan. 19, 2006, at 5, available at 2006 WLNR 1380557. While some have interpreted the letter as validating the IRS’s current enforcement stance, others argued that “Solomon’s juxtaposition of ‘essential governmental function’ with ‘customary’ activities of state and local governments . . . sustained tribes’ arguments for financing commercial facilities with tax-exempt bonds.” *Id.*

191. One author has noted the possibility that “tribes could be penalized for not complying with a dodgy definition.” Rebecca L. Adamson, *The Taxman Cometh*, INDIAN COUNTRY TODAY, Jan. 15, 2003, at A5 available at <http://www.indiancountry.com/content.cfm?id=1042547292>.

recently decided to aggressively enforce an extremely narrow interpretation of the essential governmental function requirement.

In a March 2005 *Bond Buyer* article, Charles Anderson, field operations manager for the IRS tax-exempt bond office, stated that the IRS intended to conduct “a dozen or more examinations of tribal bond issues within the next year or so.”¹⁹² In September 2005, Anderson stated that the IRS has challenged twelve tribal tax-exempt bonds, six tribal conduit bonds, and six direct tribal issues.¹⁹³ Christie Jacobs of the Office of Indian Tribal Governments at the IRS stated during February 2006 that eight to ten tribal tax-exempt issues were currently under audit.¹⁹⁴ Dale White, then general counsel for the Mohegan Tribe, stated to the author in April of 2006 that the IRS had audited or was auditing at least half of the tribe’s bonds. In a January 12, 2006, memorandum, several Dorsey & Whitney tax attorneys expressed the following opinion regarding the IRS’s enforcement practices:

We believe that, if the Service were forced to defend its positions before a court, the tribes should prevail on both of these issues [direct tribal issues and conduit issues]. Our concern is that, by initiating numerous audits against individual tribal issuers, the Service is (a) taking on the tribes one by one, (b) without the tribes being able to coordinate their analysis, research and arguments, (c) in a situation where it is very difficult to get the issues before a court for review.¹⁹⁵

Professionals in the field of tribal debt issuances generally believe that the percentage of tribal bonds audited is substantially greater than the percentage of non-tribal bonds audited,¹⁹⁶ and empirical evidence supports such a conclusion.

192. Emily Newman, *IRS Looking for Evidence of Arbitrage Abuse*, BOND BUYER, Mar. 16, 2005, at 1, available at 2005 WLNR 4432390.

193. See Alison L. McConnell, *IRS’s Anderson Says Attorneys at Fault for Tribal Bond Confusion*, BOND BUYER, Sept. 22, 2005, at 1, available at 2005 WLNR 15305410.

194. Telephone Interview with Christie Jacobs, Dir., Indian Tribal Gov’t Office, Internal Revenue Serv. (Feb. 14, 2006).

195. Memorandum from Mark A. Jarboe et al., Dorsey & Whitney, to Tribal Clients (Jan. 12, 2006) (on file with the North Carolina Law Review).

196. Having been a featured speaker at numerous tribal finance conferences, the author has had numerous conversations with a majority of the finance and legal professionals who have experience with tax-exempt bonds in Indian Country.

For the years 2002, 2003, and 2004, state and local governments issued an average of 14,038 tax-exempt bonds.¹⁹⁷ Over the same period, tribal governments annually issued an average of five tax-exempt bonds.¹⁹⁸ For the years 2002, 2003, and 2004, the Tax Exempt Bonds Office closed an average of 363 audits each year.¹⁹⁹ Although an exam typically takes two years to complete,²⁰⁰ assuming a constant rate of audit activity, the IRS audits approximately 2.59% of all state and local tax-exempt borrowings. Based on a survey of bond lawyers,²⁰¹ approximately 20% of all borrowings are issued under bond indentures and held by the capital markets. Thus, the approximate lifetime audit hazard rate for non-tribal municipal bonds issued under bond indentures is approximately 0.5%.

To empirically determine the audit hazard rate for tribal bonds, in April 2006, the author and his tribal finance research team from the University of Michigan met with officials and analysts from the tax-exempt bond division of the IRS to discuss the issue of tribal tax-exempt bonds and develop a research plan to examine whether tribal governments were subject to a disproportionate audit rate for their bonds. For this work, the IRS suggested examining a particular form that is filed by all governments, including tribal governments, whenever they issue a tax-exempt debt obligation of any kind. When governments enter into debt obligations, if the interest paid to the

197. See Letter from Lisett Rodriguez, Thomson Fin., to Gavin Clarkson, Assistant Professor, Univ. of Mich. Sch. of Info. (May 12, 2006) (on file with the North Carolina Law Review) [hereinafter Thomson Financial Data Extract].

198. *Id.*

199. TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEP'T OF THE TREASURY, STATISTICAL PORTRAYAL OF THE TAX EXEMPT BONDS OFFICE'S ENFORCEMENT ACTIVITIES FROM FISCAL YEAR 2002 THROUGH FISCAL YEAR 2004, at 5 (2005), available at <http://www.treas.gov/tigta/auditreports/2005reports/200510186fr.pdf>.

200. The length of a bond audit is variable, and recent reports detail means to shorten the audit cycle. See ADVISORY COMM. ON TAX EXEMPT & GOV'T ENTITIES, AUDIT CYCLE TIME AND COMMUNICATIONS: EMPLOYEE PLANS AND TAX EXEMPT BONDS, at IV-23 to -24 (2004), available at http://www.irs.gov/pub/irs-tege/act_rpt3_part4.pdf. For the purposes of this Article, two years is believed to be representative of the average cycle time. Even if the average cycle time is more or less than two years, the underlying point of disparate treatment between state and local and tribal tax-exempt issuances remains true.

201. The author conducted a brief survey of members of the National Association of Bond Lawyers, both prior to and during their annual convention in 2006. Only two questions were posed to the respondents: (1) what percentage of municipal bonds requiring an IRS form 8038G filing are issued under a bond indenture, and (2) what percentage of tribal tax-exempt bonds requiring an IRS form 8038G filing are issued under a bond indenture. The sample was weighted heavily towards those with experience issuing bonds for Indian tribes, but all of the respondents indicated that the bulk of their practice was still in non-tribal municipal bond work. This sample did, however, provide the opportunity for direct comparison between tribal and non-tribal bond activities.

lender is tax-exempt, then a form 8038 needs to be filed with the IRS. If the obligation is for an amount greater than \$100,000, then a form 8038G is filed; otherwise a form 8038GC is filed.

In collaboration with the University of Michigan researchers, IRS analysts determined that eighty-eight tribes had filed one or more such informational returns between January 1, 2002, and December 31, 2005 (note that this data reflects direct tribal issues only; conduit issues are not included in these figures):

Form 8038G	136
Form 8038GC	169

On either form, line 20 allows the tribe to check a box to indicate whether the obligation is a lease or installment purchase. The data was then broken down into the following:

	Form 8038GC	Form 8038G
Leases or Installment Sales	105	46
Bank Loans or Bond Indentures	64	90

The following was also determined, however, in the course of the research:

- While some tribal debt examinations were initiated from referrals, the majority of tribal debt examination cases were initiated by the IRS through its normal case selection process.
- The total dollar amount of debt issued during this time period is around \$700,000,000.

Although a greater level of detail would of course be desirable, the IRS is limited in its ability to disclose based on rather strict confidentiality requirements. Thus, the remaining data analysis and conclusions in this section do not necessarily reflect the views of the IRS.

The preliminary survey of bond lawyers²⁰² indicates that for every bond indenture requiring an 8038G filing, four to five bank loans are also closed that require an 8038G filing. Thus, for the ninety form 8038G filings from 2002 through 2005, assuming that 20%

202. *See id.*

were for bond indentures, tribes issued eighteen bonds under bond indentures, or an average of 4.5 per year. Municipal bonds of less than \$100,000 would never be issued under bond indentures,²⁰³ so the 8038GC filings have been excluded. If those are not excluded, the average number of bonds is six per year; however, data from Thomson Financial on tribal bonds issued between 2002 and 2005 indicates that there were twenty bonds issued.

Based on information from tribes and tribal bond attorneys for tribes currently being audited, all of the audits for debt obligations issued between 2002 and 2005 were for bond indentures; none was for bank debt.

Using the IRS data, the three audits for bond indentures issued between 2002 and 2005 represent 16.6% of all tribal bond indentures issued during that same period, more than thirty-three times the 0.5% hazard rate for state and local bonds during the same period.²⁰⁴ Using the Thomson data generates a tribal hazard rate of 15%, or thirty times the 0.5% hazard rate for state and local governments. In either case, the audit hazard rate for tribal bonds in only their first four years after issuance is substantially more than an order of magnitude greater than the lifetime hazard rate for state and local government bonds.

The instances of tribal audits appear even more disturbing when one considers the fact that tribal tax-exempt issues make up only 0.1% of the tax-exempt bond market.²⁰⁵ For the years 2002 to 2004, state and local governments issued on average \$363.6 billion of tax-

203. The transaction costs and legal fees would likely be more than the bond, and such a small amount would be insufficient to create an active market for the bond.

204. This disparity can be measured even more precisely if the IRS can determine the total number of 8038G and GC forms that were filed between 2002 and 2005. Such a number would provide the total number of bonds, which could be compared with the Thomson Financial Data Extract, *supra* note 197, for capital market bond indentures.

205. The IRS has recently reported that a further examination of the data provided to the Michigan tribal finance research team indicates that 12% of the outstanding tribal debt was under examination. See Facsimile from Clifford Gannett, Dir. of Tax Exempt Bonds, to Gavin Clarkson, Assistant Professor, Univ. of Mich. Sch. of Info. (on file with the North Carolina Law Review). Note that the IRS's 12% audit rate is based on dollar amounts outstanding and not on the number of bonds issued under bond indentures that are being audited. Furthermore, on a panel at a February 2007 tribal finance conference (moderated by the author), IRS tax exempt bond director Clifford Gannett admitted that the audit rate was "quite high." Cliff Gannett, Dir. of Tax Exempt Bonds, Internal Rev. Serv., Remarks at the Sixth Semiannual Native American Finance Conference, IRS Update: The Impact on Indian Country (Feb. 21, 2007).

exempt debt²⁰⁶ while tribal governments issued on average only \$202 million of tax-exempt debt.²⁰⁷ The focus of significant IRS resources on issuances making up merely 0.1% of the total market by itself raises a presumption of improper IRS practices toward tribes.

One example of adverse treatment of a tribe is the case of the Las Vegas Paiute Tribe. This particular tribe was never going to be a major competitor in the gaming market, but they did have sufficient land to develop a golf course thirty miles north of the Las Vegas Strip. The Paiutes used proceeds from a tax-free bond issuance to finance construction of a public golf course with a clubhouse, a retail store that sells golf-related items, and a restaurant, all of which were open to the public.²⁰⁸ The tribe had good reason to believe that construction of a public golf course would qualify as an essential governmental function “customarily performed by State and local governments,”²⁰⁹ given that “as of 1998 there were 2,645 publicly owned, municipal golf courses in the United States.”²¹⁰

In August of 2002, however, the IRS advised the Las Vegas Paiutes that construction of a public golf course is “other than an essential governmental function within the meaning of section 7871(e).”²¹¹ Although the IRS acknowledged that “it is likely that construction and operation of golf courses are customary governmental functions,”²¹² it nonetheless decided to deny the tax exemption based on its reading of the essential government function requirement added by the 1987 amendment.

206. Facsimile from Clifford Gannett, *supra* note 205. For 2002, 2003, and 2004, state and local governments issued \$355.5 billion, \$379 billion, and \$356.5 billion of tax-exempt debt, respectively. *Id.*

207. *Id.* For 2002, 2003, and 2004, tribal governments issued \$194.4 million, \$233.3 million, and \$178.4 million of tax-exempt debt respectively. *Id.*

208. I.R.S. Field Serv. Adv. Mem. 20,024,712, at 2 (Nov. 22, 2002) (on file with the North Carolina Law Review) [hereinafter FSA]. The FSA was originally released with significant portions redacted. The IRS later released a second version which indicated that the chief counsel’s office at the IRS had recommended against challenging the tax-exempt state of the Paiute bonds. See Alison L. McConnell, *Bond Lawyers: IRS Out of Order on Tribal Financings*, BOND BUYER, Nov. 3, 2005, at 5, available at 2005 WLNR 18127583. The IRS then reversed itself and re-redacted the official version. See Alison L. McConnell, *IRS Investigating Full Release of Tribal Deal FSA*, BOND BUYER, Nov. 23, 2005, at 44, available at 2005 WLNR 19226583; Alison L. McConnell, *Controversial Paragraphs Removed from IRS Advisory Memo on Tribal Bonds*, BOND BUYER, Nov. 30, 2005, at 64, available at 2005 WLNR 19625871. All references are made to the FSA with the least amount of redaction, which is on file with the North Carolina Law Review.

209. 26 U.S.C. § 7871(e) (2000).

210. FSA, *supra* note 208, at 2.

211. *Id.* at 1.

212. *Id.*

The argument set forth by the IRS was that the golf course was not “intended to meet the recreational needs of [the] Tribe.”²¹³ Although the IRS considers other public golf courses essential governmental functions, the service took the position that the Paiutes could not utilize tax-free debt to construct golf courses and an accompanying club house because, in its opinion, the courses were not of the type that would be used by tribal golfers. The Field Service Advice Memorandum (“FSA”) admits that all publicly built and operated golf courses “are developed to enhance the lifestyle of both golfing and non-golfing citizens of the community and perhaps to create jobs,”²¹⁴ and the IRS’s own in-house counsel recommended not litigating the bond exemption because it would “be difficult to argue that Golf Course is so commercial in nature that state and local governments would not own and operate similar enterprises.”²¹⁵ Additionally, the FSA acknowledged that “some courts, including the Tenth Circuit, have adopted the principle that federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.”²¹⁶ In short, the IRS’s position was untenable based on existing public practices and judicial rulings, but it denied the tax exemption anyway.

In a sharp contrast to its approach in the 2002 FSA to defining an essential governmental function as excluding any commercial activity, the IRS has reasoned elsewhere that a state investment fund for cash balances constituted an essential governmental function because

it may be assumed that Congress did not desire in any way to restrict a state’s participation in enterprises that might be useful in carrying out those projects desirable from the standpoint of the state government which, on a broad consideration of the question, may be the function of the sovereign to conduct.²¹⁷

Thus, for purposes of § 115 of the Tax Code, the IRS has, without intervention by Congress, defined as an essential governmental function any activity that makes or saves money for a non-tribal government. This definition encompasses the very purpose of the Las Vegas Paiute Golf Course, which the IRS has reasoned does not qualify as an essential governmental function.²¹⁸

213. *Id.* at 5.

214. *Id.*

215. *Id.*

216. *Id.* at 8.

217. *See* Rev. Rul. 77-261, 1977-2 C.B. 45.

218. FSA, *supra* note 208, at 5.

The Las Vegas Paiute case is merely one example of differential treatment of tribal governments by both the Tax Code and the IRS enforcement regime.²¹⁹

F. Is the IRS Blocking a Fire Escape? Uncertainty Regarding Tribal Conduit Financing

Constricted by the essential governmental function requirement, some tribes have chosen to finance projects such as hotels on a taxable basis; however, a small handful of tribes have attempted to overcome the “inequities in the tax code”²²⁰ by using an alternative tax-exempt mechanism referred to as a conduit financing. In a conduit financing the tax-exempt security is actually issued by a local government agency (referred to as the conduit issuer) to finance a project for a third party (referred to as the conduit borrower) in situations when the conduit borrower cannot issue tax-exempt debt on its own for the project. The security for this type of issue either is the credit of the conduit borrower or pledged revenues from the project itself rather than the credit of the conduit issuer. Such securities are not general obligations of the conduit issuer because the conduit borrower is liable for generating the pledged revenues. If the conduit issuer is not subject to the “essential governmental function” test,²²¹ the conduit mechanism should enable a tribe to finance projects with tax-exempt bonds that it might otherwise have to finance on a taxable basis.²²²

Additionally, conduit financing is an established form of public finance typically utilized by 501(c)(3) (nonprofit) organizations, such as charity hospitals. Conduit financing has also won the endorsement of the Tax Court. In *Fairfax County Economic Development Authority v. Commissioner*,²²³ the Tax Court held that the development authority was the real issuer of industrial development bonds used to build a facility, a portion of which would be leased to the U.S. Government Printing Office.²²⁴ It reached this conclusion despite the fact that the federal government was the obligor of the bonds because the credit of the government as a lessor of the retail

219. See *infra* Part V.B.

220. Merrill Lynch Municipal Credit Research, *supra* note 48.

221. If the conduit issuer is not a tribal government, then the “essential governmental function” test of § 7871 should not apply, since the test is only applied to the issuer of a bond. Note that the test is never applied when neither conduit issuer nor conduit borrower are tribal entities.

222. See HYATT ET AL., *supra* note 27, at 21.

223. 77 T.C. 546 (1981).

224. *Id.* at 546–49.

space backed the bonds.²²⁵ The Tax Court reasoned that form governs substance in § 103 cases and held that the development authority be respected as the issuer of the bonds, even though the federal government was the real obligor.²²⁶

Despite the criticism of the IRS's aggressive approach in the 2002 FSA, however, the Service is taking an even more hostile enforcement stance against conduit financing by tribes. The IRS has now challenged every single tribal attempt to issue conduit bonds²²⁷ and has recently taken the position that "bonds issued by a state entity where an Indian tribal government is a conduit borrower are private-activity bonds, even if the proceeds are used for an essential government function."²²⁸ This most recent position apparently contradicts an IRS position taken barely twelve months earlier that

225. *Id.*

226. *Id.*

227. A total of five tribal conduit bonds appear to have been issued: three by the Seminole Tribe of Florida, see Alison L. McConnell, *Seminole Tribe Receives Negative IRS Rulings*, BOND BUYER, Dec. 8, 2006, at 1, available at 2006 WLNR 21588882 (discussing IRS audits of \$345 million of 2002 conduit bonds, \$74 million of 2003 conduit bonds, and \$50 million of 2004 conduit bonds, each issued on behalf of the tribe by the Capital Trust Agency), one by the Cabazon Band of Mission Indians, see Susanna Duff Barnett, *\$145.5M Cabazon Deal Under Scrutiny; IRS Steps Up Probes of Indian Tribes*, BOND BUYER, Aug. 6, 2004, at 1, available at 2004 WLNR 1252400 (discussing IRS examination of \$145.5 million in tax-exempt bonds issued by the California Statewide Communities Development Authority on behalf of Cabazon's East Valley Tourist Development Authority), and one by the Santa Ana Pueblo, see Alison L. McConnell, *N.M. County To Redeem Tribal Bonds After IRS Memo Triggers Redemption*, BOND BUYER, Nov. 28, 2005, at 44, available at 2005 WLNR 19438399 [hereinafter McConnell, *N.M. County*]. A sixth bond issued by the Yakima Nation has been identified as a conduit by the *Bond Buyer*, see Alison L. McConnell, *Washington Tribe's \$9.3M Sawmill Deal Taxable, IRS Says*, BOND BUYER, May 25, 2006, at 40, available at 2006 WLNR 9340795, but the bond was a direct issue and not a conduit. So, when Charles Anderson, field operations manager for the IRS tax-exempt bond office, stated that at least six tribal conduit bonds are currently being challenged by the IRS, see Alison L. McConnell, *IRS' Anderson Says Attorneys at Fault for Tribal Bond Confusion*, BOND BUYER, Sept. 22, 2005, at 1, available at 2005 WLNR 15305410, he apparently overstated the number of conduit audits. He may also have been thinking of the bonds issued by the Morongo Band of Mission Indians, which were originally to be issued as conduit bonds but were subsequently issued as a mix of tax-exempt and taxable bonds, see Rich Saskal, *IRS Takes Closer Look at Calif. Tribal Deal's Tax-Exempt Status*, BOND BUYER, Aug. 30, 2005, at 1, available at 2005 WLNR 13911589 (discussing IRS examination of \$51 million in tax-exempt bonds issued on behalf of Morongo Band of Mission Indians in 2004 for water and waste water system improvements). In any event, at least two senior officials at the IRS have confirmed that the 100% audit rate for conduit bonds is correct.

228. See Alison L. McConnell, *IRS: All Tribal Conduit Deals Are Private Activity*, BOND BUYER, Nov. 28, 2006, at 1, available at 2006 WLNR 20922469 (quoting an as-yet unpublished technical advice memorandum).

stated that tax-exempt conduit bond proceeds could be used to finance essential governmental functions.²²⁹

IV. THE ECONOMIC RATIONALE FOR EXPANDING TRIBAL TAX-EXEMPT BONDING AUTHORITY

The economic arguments are straightforward. First, tax-exempt bonds are being used for a whole host of commercial and economic development activities that are providing benefit to non-tribal governments, and Indian tribes should be able to take advantage of those same opportunities. The economic need for expanded tribal tax-exempt bonding authority is particularly acute given that upwards of \$50 billion in estimated annual capital needs go unmet in Indian Country,²³⁰ in part because the debt service required to finance the projects to meet those needs is too expensive at taxable rates. Second, there is empirical evidence that the restrictions in § 7871 are having a significant negative impact on the market for tribal tax-exempt bonds. Finally, maintenance of these discriminatory provisions in the Tax Code has a negative impact on federal revenues. Conversely, expansion of tribal tax-exempt bonding authority would produce a revenue-enhancing result.

A. Customary Use of Tax-Exempt Bonds by Non-Tribal Governments for Commercial Activities

Although municipal bonds were traditionally issued to fund infrastructure projects, today a significant number fund clearly commercial activities, including economic development. Tourism, for example, is a major economic force for many municipalities and is vital to the economic prospects of several communities, and post-Katrina New Orleans is almost wholly dependent on a rebound in tourism for its long-term economic viability. Congress even passed the Gulfcoast Opportunity Zone Act to allow private businesses in Louisiana, Mississippi, and Alabama to issue tax-exempt private activity bonds.²³¹ Note, however, that while private businesses are allowed to use tax-exempt “GO Zone” bonds to finance not only

229. I.R.S. Tech. Adv. Mem. 200,603,028, at 4 (Jan. 20, 2006), available at <http://www.irs.gov/pub/irs-wd/0603028.pdf>.

230. See HENSON ET AL., *supra* note 44, at 120.

231. Gulf Coast Opportunity Zone Act, Pub. L. No. 109-135, § 101(a), 119 Stat. 2577 (2005) (to be codified in scattered sections of 26 U.S.C.). Louisiana businesses were authorized to issue up to \$7.9 billion in tax-exempt private activity bonds, while Mississippi and Alabama businesses were authorized to issue \$4.8 billion and \$2.1 billion respectively. *Id.* § 101(a), 119 Stat. 2581 (to be codified at 26 U.S.C. § 1400N(b)(4)).

reconstruction projects but also projects that would normally be considered private activity bonds, the legislation does not contain any provision for tribes to finance reconstruction projects, let alone private activity bonds, with such bonds, even though several tribes were hit hard by either Katrina or Rita.

Tourism and tourism-related economic development can include hotels, golf resorts, convention centers, and even racetracks and casinos. In particular, the IRS has acknowledged that several thousand municipal golf courses have been financed with tax-exempt debt,²³² and non-tribal governments have issued billions of dollars in tax-exempt bonds to finance hotels and convention centers.²³³ The IRS has even issued recent rulings to permit tax-exempt financing for new baseball stadiums for the New York Yankees and the New York Mets, citing an earlier Revenue Ruling which held that the promotion of tourism was an “exclusively public purpose.”²³⁴ Nevertheless, tourism and tourism-related economic development cannot be financed by tribes with tax-exempt debt. Wholly apart from tourism, there are thousands of other “commercial” projects that have been financed by state and local governments with tax-exempt bonds, but which tribes cannot similarly finance because of the § 7871 restrictions.

Hotel projects, involving tax-exempt issuances of hundreds of millions of dollars, have commenced in a number of municipalities, including the following:

- The Austin City Council approved the authorization of up to \$275 million of tax-exempt bonds to finance an 800-room hotel near the city’s newly expanded convention center.²³⁵
- Baltimore issued \$305 million to build a Hilton convention hotel in downtown Baltimore.²³⁶

232. See FSA, *supra* note 208, at 6.

233. See *supra* Part III.C.2.

234. See I.R.S. Priv. Ltr. Rul. 20,064,001 (July 11, 2006); I.R.S. Priv. Ltr. Rul. 20,064,210 (July 19, 2006) (holding that “[m]oney expended by a State in promoting tourism in the State is for an exclusively public purpose” (quoting Rev. Rul. 72-194, 1972-1 C.B. 94)). These rulings are wholly inconsistent with the position the IRS has been taking with respect to the operation of tribal golf courses and hotels, which the IRS argues are not essential governmental functions. See FSA, *supra* note 208, at 1.

235. Elizabeth Albanese, *Austin City Council Approves Bond Authorization for Hotel Financing*, BOND BUYER, Mar. 14, 2001, at 5, available at 2001 WLNR 858405.

236. Andrew Ackerman, *Baltimore Convention Hotel Plan Gets Second Nod from City Council*, BOND BUYER, Aug. 17, 2005, at 5, available at 2005 WLNR 13268342.

- The Chicago Metropolitan Pier and Exposition Authority issued \$133 million of tax-exempt hotel revenue bonds for a Hyatt hotel.²³⁷
- The City of Omaha Convention Hotel Corporation sold \$103.5 million of tax-exempt bonds for a 450-room hotel to be managed by Hilton.²³⁸
- The Denver Convention Center Hotel Authority issued \$349 million in revenue bonds to build a 1,100-room hotel managed by the Hyatt Corporation.²³⁹
- The South Carolina Jobs-Economic Development Authority issued \$64.3 million in bonds to fund construction of a 404-room hotel to be operated by Radisson Hotels International.²⁴⁰
- The Indianapolis Local Public Improvement Bond Bank issued \$18.2 million in tax-exempt bonds to help fund a 230-room luxury Hilton hotel.²⁴¹
- Overland Park, Kansas, issued \$87 million in bonds to build a 412-room, full-service convention center hotel operated under a fifteen-year contract by Sheraton Operating Corporation.²⁴²
- The city of West Palm Beach, Florida, issued \$55 million in tax-exempt revenue bonds to finance infrastructure and a parking garage for CityPlace, a \$550 million mixed-used development downtown.²⁴³

237. See Karen Pierog, *Chicago Hotel Revenue To Back Exposition Authority Bond Sale*, BOND BUYER, Feb. 26, 1996, at 1, available at 1996 WLNR 752315.

238. See Elizabeth Carvlin, *Deal in Focus: City-Backed Omaha Hotel Granted Rare Insurance Coverage*, BOND BUYER, Apr. 10, 2002, at 34, available at 2002 WLNR 1140306.

239. See Elizabeth Albanese, *Deal in Focus: Denver Selling \$349 Million for Convention Center Hotel*, BOND BUYER, June 17, 2003, at 27, available at 2003 WLNR 1719390.

240. See Christine Albano, *Big Entrance: Hotel Deals Set Off Frenzied Buying, Earn High Yields*, BOND BUYER, June 6, 2001, at 1, available at 2001 WLNR 855705.

241. See Elizabeth Carvlin, *Indianapolis Bond Bank Plans \$28M for Hotel, with Moral Obligation*, BOND BUYER, May 4, 2004, at 4, available at 2004 WLNR 1264451.

242. Christine Albano, *High Yield Focus: Kansas Hotel Deal's Revised Structure Eases Buy-Side Concerns*, BOND BUYER, Dec. 20, 2000, at 7, available at 2000 WLNR 852840.

243. Shelly Sigo, *West Palm Beach, Fla., Still Has All-Stars in Its Eyes*, BOND BUYER, July 20, 2001, at 37, available at 2001 WLNR 856726.

- The city of Staunton, Virginia issued \$10 million in tax-exempt bonds to renovate the Stonewall Jackson Hotel, which contains 124 deluxe guest rooms.²⁴⁴
- The District of Columbia Council approved a measure authorizing the redevelopment of the Washington Convention Center site, which could eventually lead to up to \$1.3 billion in tax-exempt bond issuances.²⁴⁵

Private activity bonds are still widely used as an important tool for state and local economic development.²⁴⁶ A similar practice involves the issuance of tax-exempt bonds to build hotels in economically depressed areas eligible by their empowerment zone status. Such was the situation in the following instances:

- Little Rock, Arkansas, voters approved the issuance of \$19 million in tax-exempt empowerment zone revenue bonds to renovate the Little Rock Hilton.²⁴⁷
- San Antonio issued \$130 million of tax-exempt empowerment zone bonds to finance a new Hyatt Corporation 1,000-room convention center hotel.²⁴⁸
- The St. Louis Industrial Development Authority issued \$98 million of tax-exempt federal empowerment zone bonds to partially fund the construction of a convention center hotel.²⁴⁹

Golf courses and resorts are another example of economic activity funded by tax-exempt bonds.

- In the late 1990s, the city of North Charleston, South Carolina, issued \$11.1 million in mortgage revenue bonds to build a twenty-seven-hole municipal golf course. “In 2003 the city refunded the outstanding golf-related bonds

244. Matthew Vadum, *VIRGINIA: Hotel Gets Facelift*, BOND BUYER, Oct. 27, 2005, at 35, available at 2005 WLNR 17725081.

245. Matthew Vadum, *Old D.C. Convention Center Site Gets Go-Ahead for Redevelopment*, BOND BUYER, June 8, 2005, at 4, available at 2005 WLNR 9426916.

246. Aprill, *supra* note 30, at 342.

247. Elizabeth Albanese, *Little Rock Voters Approve Hotel Bond Issue*, BOND BUYER, July 11, 2002, at 3, available at 2002 WLNR 1164284.

248. See Elizabeth Albanese, *San Antonio Deal for Hyatt Hotel Empowered with Tax-Exemption*, BOND BUYER, Apr. 26, 2005, at 1, available at 2005 WLNR 6861053.

249. Yvette Shields, *St. Louis' Hotel Financing Deal Wins Investment-Grade Rating*, BOND BUYER, Nov. 15, 2000, at 3, available at 2000 WLNR 854355.

by issuing \$11.7 million in mortgage revenue bonds, for an estimated \$1.6 million in debt service savings.”²⁵⁰

- “[T]he Maryland Economic Development Corporation (MEDCO) has issued about \$176 million limited-obligation revenue bonds to build two resorts that feature a hotel, a conference center, and a golf facility. MEDCO owns the Hyatt Regency Chesapeake Bay Conference Center, with 400 hotel rooms, 35,000 square feet of meeting and banquet space, an 18-hole championship golf course and a 150-slip marina.”²⁵¹
- The Maryland Board of Public Works, in 1996, approved the sale of \$26 million in tax-exempt revenue bonds as partial funding for a golf resort in western Maryland.²⁵² State officials indicated that the state-owned golf resort would include a 220-room hotel and a public golf course, designed by Jack Nicklaus, on the grounds of Rocky Gap State Park “and is a long-planned economic development project for Allegany County.”²⁵³

Tax-exempt bonds have not only been used to build hotels and convention centers but also to finance casinos and horse tracks owned by counties or municipalities, as well as other facilities related to commercial gaming activities.

250. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 50, at 19. At the same time the golf course bonds were issued, the city also issued \$4.6 million in general obligation bonds “to finance the construction of roads and infrastructure improvements in the surrounding area” In 2005, the municipal golf course had a \$1 million operating loss, but the city expects that the course’s situation in the center of a residential and commercial development eventually will contribute over \$200 million in taxable property value. *Id.*

251. *Id.* at 19. The study also noted that, according to municipal finance experts,

[s]tate and local governments can also provide indirect support to private golf courses through lower taxable property values. Private golf courses may be subject to agricultural assessment rules, which provide a tax break on property taxes, given that golf courses also provide an open space. They also noted that there may be other cases where land apportioned off by state and local governments near residential property is transferred to private companies in order to build golf courses.

Id.

252. Amy B. Resnick, *Golf Resort Debt Proposal Passed by Maryland Works Board*, BOND BUYER, May 2, 1996, at 11, available at 1996 WLNR 759237; see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 50, at 19 (“MEDCO also owns the Rocky Gap Golf Course and Hotel/Meeting Center, with an 18-hole Jack Nicklaus signature golf course, a 243-acre lake, and a resort lodge.”).

253. *Id.*

- In 1987, Polk County, Iowa, officials issued \$40 million in tax-exempt bonds to build the Prairie Meadows Racetrack & Casino.²⁵⁴
- The racetrack at Retama Park near San Antonio was financed with \$75 million in tax-exempt debt.²⁵⁵ Retama Development, the nonprofit organization set up by the city of Selma, Texas, to construct and equip the racetrack, subsequently issued \$93.9 million in refunding bonds.²⁵⁶
- The Grand Prairie Sports Facilities Development Corporation refinanced “one of the most successful horse racing tracks in Texas” in part by issuing \$15.2 million of tax-exempt debt.²⁵⁷
- California’s Del Mar Race Track Authority issued \$50.7 million in tax-exempt bonds in 2005 to refund existing debt and improve facilities at the San Diego County Fairgrounds.²⁵⁸

The GAO Study notes that several “municipalities have provided tax-exempt and taxable financing to build transportation infrastructure in localities that depend on private gaming enterprises to generate employment and gaming revenues to finance basic government functions.”²⁵⁹ Examples include:

- New Jersey’s Casino Reinvestment Development Authority issued \$93 million in tax-exempt hotel room fee revenue bonds in 2004 “to finance Atlantic City casino expansion projects and provide funds to the New Jersey Sports and Exhibition Authority for horse racing purse enhancements.”²⁶⁰
- The Las Vegas monorail was financed with a combination of tax-exempt and equity funds and provides seven stations: MGM Grand, Bally’s/Paris, Flamingo,

254. Tammy Williamson, *Plans for Sale of Polk County, Iowa, Casino and Racetrack Falls Through*, BOND BUYER, June 25, 1998, at 38, available at 1998 WLNR 881131.

255. Janin Friend, *Lone Star Racetrack Is Set To Issue Debt, but Some in Industry Say Deal Is Risky*, BOND BUYER, July 7, 1994, at 1, available at 1994 WLNR 656492.

256. Emily Newman, *Tax Enforcement: IRS: Texas Development Corp.’s \$171M of Debt May Be Taxable*, BOND BUYER, Jan. 12, 2005, at 5, available at 2005 WLNR 697822.

257. Darrell Preston, *Deal in Focus: Texas Town Cleans Up at the Track with Recent Refunding*, BOND BUYER, Mar. 30, 1999, at 22, available at 1999 WLNR 892224.

258. See Jackie Cohen, *CALIFORNIA: Mulling a Track Expansion*, BOND BUYER, July 21, 2006, at 35, available at 2006 WLNR 12991537.

259. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 50, at 22.

260. *Id.* at 23.

Harrah's/Imperial Palace, Las Vegas Convention Center, Las Vegas Hilton, and the Sahara.²⁶¹

Although it could not determine an exact number, the GAO study also suggested that of the forty-one states that have ongoing lottery operations, many have probably financed their facilities with tax-exempt bonds.²⁶²

A number of states are also in the liquor business. Most states have some level of involvement in liquor sales, distribution, or other regulations,²⁶³ and in many states the only source for retail or wholesale distribution of wine and distilled spirits is the state itself.²⁶⁴ Many of the governmentally operated liquor stores in those jurisdictions have been financed with tax-exempt debt.²⁶⁵ Under existing IRS revenue rulings,²⁶⁶ stores operated by the state are considered political subdivisions and not subject to income tax. As such, under § 103 of the Tax Code, interest paid on bonds issued by these entities is tax-exempt.²⁶⁷

In light of the expansive scope of commercial activities funded by state and local governments using tax-exempt bonds, the Supreme

261. *Id.*

262. *See id.* at 22.

263. Jackie Cohen, *Washington Liquor Control Board Tapping Market for \$17M*, BOND BUYER, Oct. 11, 2006, at 3, available at 2006 WLNR 18070408.

264. RICHARD MCGOWAN, GOVERNMENT REGULATION OF THE ALCOHOL INDUSTRY: THE SEARCH FOR REVENUE AND THE COMMON GOOD 52 (1997) (listing Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming); see also Lawrence Zelenak, *The Puzzling Case of the Revenue Maximizing Lottery*, 79 N.C. L. REV. 1, 10 nn.39-43 (2000).

265. *See, e.g.*, Cohen, *supra* note 263 (quoting bond analyst as saying that the state agency “controls the licensing and distribution of liquor so that it’s under state control and it doesn’t get out of hand. And P.S., they own a building—what’s the cheapest way to finance that?”). The Cohen article also highlights a bond issued on behalf of the Utah Department of Alcoholic Beverage Control, which “turned to the state’s Building Ownership Authority to issue \$8.4 million of lease revenue bonds this past January. The proceeds of the bond sale financed three renovations and building of state-operated liquor stores located throughout Utah.” *Id.* For numerous notices over the past decade of Minnesota Municipal Liquor Revenue Bond sales, see *Results of Negotiated Sales*, BOND BUYER, Nov. 8, 2006, at 22, available at 2006 WLNR 19776469; *Results of Negotiated Sales*, BOND BUYER, May 1, 2002, at 22, available at LEXIS; *Results of Negotiated Sales*, BOND BUYER, Nov. 24, 1999, at 20, available at 1999 WLNR 894788; *Results of Negotiated Sales*, BOND BUYER, Aug. 31, 1999, at 15, available at 1999 WLNR 878182; *Results of Competitive Sales*, BOND BUYER, Aug. 19, 1997, at 22, available at 1997 WLNR 839710.

266. *See* Rev. Rul. 71-131, 1971-1 C.B. 29 (holding that income derived from the operation of liquor stores by a state is not subject to federal income tax); Rev. Rul. 71-132, 1971-1 C.B. 29 (same).

267. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 93-27-072 (Apr. 12, 1993).

Court's view of economic development as an essential governmental function bears repeating:

Promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized.²⁶⁸

Unfortunately, the Supreme Court was not opining on an Indian law case but was instead discussing economic development in the municipal context.

B. The Restrictions on Tribal Tax-Exempt Bonding Authority Are Significantly Damaging the Market for Tribal Bonds

Another argument for expanding tribal tax-exempt bonding authority is that the current restrictions have a significant negative impact on the market for tribal tax-exempt bonds. The deleterious impact of these restrictions can be seen in the relative paucity of tribal tax-exempt financings. For the years 2002, 2003, and 2004, state and local governments issued an average of 14,038 tax-exempt bonds.²⁶⁹ Over the same period, tribal governments annually issued an average of five tax-exempt bonds.²⁷⁰ In dollar terms, for the years 2002 to 2004, state and local governments issued on average \$363.6 billion of

268. *Kelo v. City of New London*, 545 U.S. 469, 470 (2005) (syllabus).

269. Thomson Financial Data Extract, *supra* note 197. For 2002, 2003, and 2004, state and local governments issued 14,056, 14,752, and 13,306 tax-exempt short- and long-term bonds, respectively. *See id.* (providing bond data and treating public universities and public utilities as governmental instrumentalities); *see also* Bond Buyer Online Archives, Annual Municipal Debt Sales, Long-Term Bonds, Number of Issues (on file with the North Carolina Law Review); Bond Buyer Online Archives, Annual Municipal Debt Sales, Short-Term Bonds, Number of Issues (on file with the North Carolina Law Review) (stating that for 2002, 2003, and 2004, state and local governments issued 12,517, 13,251, and 11,993 tax-exempt long-term bonds, respectively, and for 2002, 2003, and 2004, state and local governments issued 3,435, 3,300, and 3,172 tax-exempt short-term bonds, respectively).

270. *See* Thomson Financial Data Extract, *supra* note 197. For 2002, 2003, and 2004, tribal governments issued four, six, and five tax-exempt short- and long-term bonds, respectively. *Id.*; *see also* Bond Buyer Online Archives, Long-Term Bonds, *supra* note 269; Bond Buyer Online Archives, Short-Term Bonds, *supra* note 269. For the years 2002, 2003, and 2004, tribal governments issued six, nine, and five long-term bonds, respectively. For the years 2002, 2003, and 2004, tribal governments issued zero, zero, and one short-term bonds, respectively. (These Bond Buyer tribal bond statistics likely include some taxable bonds, and therefore the Thomson figures provide a more accurate picture of tribal tax-exempt debt issuances).

tax-exempt debt²⁷¹ while tribal governments issued on average only \$202 million of tax-exempt debt.²⁷²

Given the relative numbers of municipal and tribal issuers,²⁷³ the expected number of tribal tax-exempt issues should be more than an order of magnitude higher. American Indians account for more than 1.5% of the national population, yet tribes issue less than 0.1% of the tax-exempt bonds each year.²⁷⁴

	2002 Issues	2002 Par Amount (US\$ mil)	2003 Issues	2003 Par Amount (US\$ mil)	2004 Issues	2004 Par Amount (US\$ mil)
State authority	1,943	125,595.7	1,978	119,013.3	1,884	102,837.4
Local authority	2,109	59,156.1	2,141	62,572.7	1,837	57,197.4
District	4,351	54,509.7	4,613	56,560.5	4,298	58,235.3
City, Town or Village	4,062	46,948.4	4,330	54,526.9	3,782	53,368.7
State	272	34,042.4	262	48,401.7	241	47,042.6
County/Parish	1,047	23,325.1	1,146	24,479.3	961	23,182.0
College or University	199	7,045.9	226	8,929.4	235	8,860.1
Direct Issuer	69	3,991.1	56	4,244.1	68	5,781.3
Co-op Utility	4	930.0	-	-	-	-
Total	14,056	355,544.4	14,752	378,727.9	13,306	356,504.8
Indian tribes	4	194.4	6	233.2	5	178.4

If tribes had expanded tax-exempt bonding authority, they could successfully pursue many projects similar to those listed in Part IV.A, but they could also undo some of the harms caused by the misguided federal policies such as allotment.²⁷⁵ For example, repurchasing previously allotted ancestral homeland would be a potential use for tax-exempt bonds, yet statutory restrictions and the extreme interpretation by the IRS have resulted in some highly unfortunate

271. Thomson Financial Data Extract, *supra* note 197. For 2002, 2003, and 2004, state and local governments issued \$355.5 billion, \$379 billion, and \$356.5 billion dollars of tax-exempt debt, respectively. *Id.*

272. *Id.* For 2002, 2003, and 2004, tribal governments issued \$194.4 million, \$233.3 million, and \$178.4 million dollars of tax-exempt debt, respectively. *Id.*

273. As of November 2005 there were 561 federally recognized Indian tribes and Alaskan native villages that could potentially issue municipal debt, as compared to 87,575 state, county, and local governmental entities. See Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 70 Fed. Reg. 71,194, 71,194 (Nov. 25, 2005); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2002 CENSUS OF GOVERNMENTS, VOL. 1, NO. 1, GOVERNMENT ORGANIZATION (2002), available at <http://www.census.gov/prod/2003pubs/gc021x1.pdf>. In 2002, these non-tribal governmental entities issued 14,056 tax-exempt bonds. Thomson Financial Data Extract, *supra* note 197. Assuming the same ratio of issuers to bonds, the expected number of tribal issues would have been ninety, significantly more than the four tribal bonds issued that year.

274. Clarkson, *supra* note 1, at 1.

275. See *supra* Part I (discussing allotment).

outcomes. In one instance, a tribe was interested in repurchasing some ancestral homeland adjacent to land that it already owned.²⁷⁶ Unfortunately, the land in question was farmland with an existing crop of corn nearing maturity. The tribe wanted to issue tax-exempt bonds to purchase the land but was advised that if they harvested the corn, the tax-exempt status of their bonds could be jeopardized. The tribe was forced to let the corn rot in order to preserve the tax-exempt status of the bonds.

In another case, a tribe had the opportunity to repurchase 23,000 acres of ancestral homeland for approximately \$5.5 million.²⁷⁷ Most of the land in question had been over-forested, but a small section containing harvestable timber remained that would help the tribe afford the land purchase. Again, the restrictions in the Tax Code meant that the tribe would not be able to harvest timber on the land, and they could barely afford the interest payments even at tax-exempt rates. Fortunately, the author, along with another colleague, was able to develop a structure that allowed the tribe to afford the necessary debt service, and the tribe was able to purchase the land.

C. Expanding Tribal Tax-Exempt Bonding Authority Will Actually Increase Federal Revenues

In addition to the economic rationale for expanding tribal tax-exempt bonding authority, a stronger argument suggests that such an expansion would actually increase federal tax revenues. Given the high levels of unemployment throughout Indian Country, labor market constraints do not exist, and thus presently unemployed individuals will likely fill any jobs created because of projects funded with tax-exempt bonds. Those individuals will pay income and social security taxes, and their employers will contribute additional payroll taxes. Even without factoring in the reduction in welfare transfer payments that result from increased employment and increased per capita income, a sound economic model should clearly demonstrate the positive federal revenue impact of increased tribal bonding authority.

Conversely, the maintenance of the current restrictions on tribal tax-exempt bonding authority has a negative impact on federal tax revenues. Since these restrictions keep otherwise viable projects from

276. Telephone Interview with Robert Burpo, President, First Am. Fin. Advisors (Mar. 9, 2005).

277. See Memorandum from Bad River Band of Lake Superior Chippewa on Variable Rate Demand Bonds (Sept. 30, 2003) (on file with the North Carolina Law Review).

being funded, the federal treasury is losing out on tax revenues that would otherwise be generated in the absence of these restrictions. Sound fiscal logic and the obvious policy imperative strongly suggest that Congress should eliminate restrictions on tribal tax-exempt bonding authority.

As an illustration, consider a fictional golf course that a tribe would like to develop as part of an overall economic development plan.²⁷⁸ The tribe would need to borrow \$5 million to develop a golf course that would generate more than \$200,000 per year in federal income taxes from employees and return a modest \$25,000 per year to the tribe in profits, assuming that the tribe could finance the project at tax-exempt rates.²⁷⁹ By themselves, the additional federal income taxes generated would more than offset the \$175,000 federal tax-exempt “subsidy.” The positive federal revenue impact would be even greater if the increased level of employment also resulted in a reduction in welfare transfer payments.

If, however, the tribe cannot obtain tax-exempt financing rates (as appears to be the case in the current environment), then the project would generate a \$150,000 annual loss, and most tribes would not be able to afford the project. The wages would not be generated, and the concomitant increase in federal revenues would never materialize. Given the number of tribes that would pursue similar projects if given expanded tax-exempt bonding authority, the lack of such authority costs the federal government millions each year.²⁸⁰

278. This model was first presented to the Senate Finance Committee during a hearing on May 23, 2006. See Clarkson, *supra* note 1, at 9–11. Based on information from a 2002 report from the University of Georgia, annual payroll is estimated at \$1,350,000 and other operating expenses are estimated at \$300,000. See GA. AGRIC. EXPERIMENT STATIONS, COLL. OF AGRIC. AND ENVTL. SCIS., UNIV. OF GA., REVENUE PROFILE OF GOLF COURSES IN GEORGIA 12–13, available at <http://pubs.caes.uga.edu/caespubs/ES-pubs/RR687.pdf>.

279. Assume the same tax-exempt and taxable rates as the example in note 23, *supra*. At 6.5%, interest expense would be approximately \$325,000 per year (simple interest without a principal payment is also assumed in order to simplify the model).

280. Using the expected number of projects based on the figures in note 273, *supra*, the annual federal tax revenue loss alone would be \$2.4 million dollars, assuming that all of the remaining eighty-six projects each year would be identical golf course developments. If the ratio of tax revenue to project size from the golf course model can be applied to the average project size for all bonds issued in 2004, however, then the annual federal tax revenue loss is more than \$80 million. These figures do not include other federal revenue savings, such as those associated with reductions in federal entitlement payments resulting from increased employment levels.

V. APPLICATION OF THE MEMMI TYPOLOGY SUGGESTS AN ALTERNATE RATIONALE

Although the economic arguments in favor of expanded tribal tax-exempt bonding authority should be sufficient, additional moral arguments exist. Elucidating those arguments, however, requires forging headlong into an inevitable discussion of racism, a significantly less comfortable conversation. The legitimate concern exists that leveling the charge of racism might cause some to dismiss the underlying merits of the arguments presented in this Article. On the other hand, noted Indian law scholar Robert Williams argues that “Indian rights will never be justly protected by any legal system or civil society that continues to talk about Indians as if they are uncivilized, unsophisticated, and lawless savages.”²⁸¹ Thus, although the economic rationale for expanding tribal tax-exempt bonding authority provides ample justification on its own, an analysis of the discriminatory and hostile treatment of tribal tax-exempt bonds may also prove persuasive.

Referring to a practice of adverse and differential treatment as racism is not a charge to be levied lightly, however, as an accusation of racism is one of the most incendiary charges that can be leveled in our society. To do so armed with empirical evidence, however, falls directly in line with Professor Williams’s strategy of “direct confrontation that challenges the continuing use of racial stereotypes [and imagery] . . . in thinking and talking about Indian rights by the Court [and] the U.S. Congress.”²⁸² As Williams notes, the use of such empirical evidence was also a strong component of the successful strategy employed in *Brown v. Board of Education*.²⁸³ One challenge in discussing racism, however, is that the precise meaning of “racism” is often not agreed upon.²⁸⁴ In order to clarify the charge, this Article will use an objective definition of racism based on the writings of Albert Memmi.²⁸⁵ Various scholars have attempted to define racism,

281. See WILLIAMS, *supra* note 71, at xxviii. In comparing the struggle for Indian rights with the successful strategies employed by Thurgood Marshall in arguing *Brown v. Board of Education*, Williams argues that “the legal history of racism in America teaches us that the most successful minority rights advocates of the twentieth century recognized that the real waste of time was trying to get a nineteenth-century racist legal doctrine to do a better job of protecting minority rights.” *Id.* at xxxii.

282. *Id.* at xxviii.

283. *Id.* at 209–10 n.58.

284. See Kwame Anthony Appiah, *Forward* to ALBERT MEMMI, *RACISM* vii, ix (Steve Martinot trans., Univ. of Minn. Press 2000) (1982) (noting that “careful attempts at [a] definition [of racism] are surprisingly rare”).

285. See, e.g., MEMMI, *supra* note 284.

but many of these attempts have been cast in terms of black-white interactions.²⁸⁶ When dealing with issues involving Indian tribes, entities with both racially and politically defining characteristics, Memmi's typology of racism provides a framework for defining racism that has significant utility in examining the actions and perceptions of dominant society relative to Indian tribes.²⁸⁷

Memmi was a Tunisian Jew whose perception of racism was heavily influenced both by his membership in a group that had a long history of being subjected to European racism and imperialism as well as his experience of being a Jew in a predominantly Arab country. Memmi also personally suffered under the power of European colonialism and racism, particularly when the Nazis imprisoned him in a work camp during World War II. Based on these and other experiences, Memmi proposed the following definition of racism: "a generalizing definition and valuation of differences, whether real or imaginary, to the advantage of the one defining and deploying them . . . , and to the detriment of the one subjected to the act of definition . . . , whose purpose is to justify (social or physical) hostility and assault"²⁸⁸

His analysis also discusses four essential "moments" of racism:

1. "[A]n insistence on difference, whether 'real or imaginary.'" The perceived difference can be "somatic, cultural, religious, etc.;" the emphasis is on "the discernment of its existence, rather than its nature or content."
2. The imposition of a negative valuation "upon those seen as differing, implying (by the act of imposition) a positive valuation for those imposing it."

286. See, e.g., JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COST OF BEING BLACK IN AMERICA* 19 (1997) (defining racism in the context of violence as "a belief in the genetic predisposition of Blacks towards greater violence, from uncritical acceptance of the Black cultural stereotype, or from personal racial animus"); JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* 10 (1970) (explaining the history of white-black racism in America).

287. See generally WILLIAMS, *supra* note 71 (discussing the racial discourse of the Supreme Court's opinions); Williams, *supra* note 77 (providing an "account of an early nineteenth century discourse of tribal sovereignty").

288. MEMMI, *supra* note 284, at 100 (emphasis omitted). Memmi's original definition was quite similar: "the generalized and final assigning of values to real or imaginary differences, to the accuser's benefit and at his victim's expense, in order to justify the former's own privileges or aggression." ALBERT MEMMI, *DOMINATED MAN: NOTES TOWARD A PORTRAIT* 185 (1968).

3. This differential valuation rendering the “difference unignorable” is made absolute by generalizing to an entire group that “is then deprecated in turn.”
4. “[T]he negative valuation imposed upon that group becomes the legitimization and justification” for present or possible hostility, aggression, or privilege.²⁸⁹

The power of Memmi’s typology of racism lies in the fact that his definition does not require that the perceived differences be only biological in nature, as (real or imaginary) cultural differences could just as easily be used to justify aggression or privilege as could biological differences. Such has been the case with Indian tribes, as many of the policies directed towards them were based on a hostile perception of tribalism²⁹⁰ while others were based on negative perceptions of biological differences.²⁹¹

Noted postcolonial theorist Homi Bhabha posits a similar notion of “colonial discourse,” suggesting that its use is “an apparatus of power . . . that turns on the recognition and disavowal of racial/cultural/historical differences”²⁹² and that the “objective of colonial discourse is to construe the colonized as a population of degenerate types on the basis of racial origin, in order to justify conquest and to establish systems of administration and instruction.”²⁹³

Just as Professor Williams clearly demonstrates the racism inherent in the legal discourse of the removal period²⁹⁴ using the Memmi typology,²⁹⁵ the next two subsections will use that same typology to explore whether the final version of the Tribal Tax Status Act was shaped by perceptions of difference that were generalized to a broader group and to determine how the negative connotations of the perceived difference were used to justify the hostility or aggression against the broader group, either during the legislative process or in subsequent IRS enforcement actions. When analyzed within Memmi’s typology, the actions of Representative Gibbons and the ultimate acquiescence of his legislative colleagues provide just

289. Steve Martinot, *The Double Consciousness, Introduction to MEMMI*, *supra* note 284, at xvii–xviii.

290. *See supra* Part III.

291. *See id.*

292. HOMI K. BHABHA, *THE LOCATION OF CULTURE* 100 (Routledge Classics 2004) (1994).

293. *Id.* at 101.

294. *See supra* notes 73–81 and accompanying text (discussing Indian removal).

295. *See Williams, supra* note 77, at 239–58.

such evidence. Details of the IRS enforcement actions provide further evidence.

A. *Examining the Actions of Representative Gibbons*

1. The Strategy of Difference

Professor Williams has carefully documented the discourse of difference regarding Indians from the moment of first contact between Europeans and the indigenous inhabitants of North America.²⁹⁶ By the time a thirty-three-year-old Sam Gibbons was first elected to the Florida legislature in 1953, Indian tribes were already well entrenched as different in the minds of many Florida politicians. Having grown up in the 1920s and 1930s, Gibbons was almost certainly familiar with the dominant view of Indians as anachronistic savages, wholly separate from civilized society.²⁹⁷ Having attended all-white institutions for his undergraduate and legal education,²⁹⁸ the rhetoric and practice of segregation likely influenced Gibbons. As a practicing lawyer, Gibbons might possibly have taken note of the negative language used to describe Indian tribes in the 1950s, including language used by the Supreme Court in *Tee-Hit-Ton Indians v. United States*:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.²⁹⁹

Although they were probably a source of campfire stories during Gibbons' schoolboy years, the Florida Seminoles were recognized as a sovereign tribe in 1957 and were thus governed by separate laws

296. See *id.* at 262–65; see generally WILLIAMS, *supra* note 71 (examining racist rhetoric by the Supreme Court in its Indian law decisions).

297. See generally ROBERT F. BERKHOFFER, *THE WHITE MAN'S INDIAN* (1979) (discussing white images of Indians).

298. Gibbons attended the University of Florida as an undergraduate and graduated from the University of Florida Law School in 1947. See Biographical Information on Gibbons, Sam Melville, Biographical Directory of the United States Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000153> (last visited Apr. 8, 2007). The University of Florida did not admit black students until 1955. See University of Florida History, <http://www.ufl.edu/history/1948.html> (last visited Apr. 8, 2007).

299. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289–90 (1955). Note that this opinion came the year after *Brown's* repudiation of such racist discourse as applied to African Americans. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

and regulations than other Floridians, such as title 25 of the U.S. Code and title 25 of the Code of Federal Regulations. Even if Gibbons was not overtly racist, Williams notes that a substantial body of empirical and theoretical research exists “demonstrat[ing] that the cognitive biases that can give rise to prejudice and racist attitudes can operate in an unconscious, automatic, uncontrolled fashion.”³⁰⁰

Gibbons was probably not alone, however. After centuries of overt and covert hostility by the United States and the tribe’s weakened economic state, the Florida Seminoles probably did not resemble a sovereign government in the minds of most Floridians, either. Even after they were acknowledged as a sovereign entity, the likely perception was that the tribal government did not provide services itself, but instead relied on the federal government. At a minimum, the “savage” existence of the Florida Seminoles during his childhood and continuing through his election to Congress would certainly have entrenched the idea of the tribe as being different in Gibbons’ mind, although such an assumption is based on a combination of speculation by the author and conversations with those who interacted with Gibbons on the Ways and Means Committee.

2. The Assignment of Negative Values to Difference

A long-running dispute between the Florida Seminole Tribe and Representative Gibbons illustrates the imputation of negative values to difference. By all accounts, Gibbons harbored a lingering hostility toward Indian interests stemming from his involvement in a tribal land deal in which trust land was reportedly exploited for private benefit in the construction of a 1400-seat bingo hall and a cigarette shop.³⁰¹

During excavation for a city parking garage in Tampa in 1979, bones of 140 Seminole Indians were unearthed on the site.³⁰² The discovery threatened to bring the parking garage project to a halt, but the Seminoles proposed to move their ancestors’ remains to new land as a solution if they could obtain the necessary space.³⁰³ Tampa and Florida officials accepted the offer, and federal officials, including Gibbons, helped the tribe obtain new trust land for this purpose. The Seminoles did, in fact, rebury the bones and erect a museum above

300. WILLIAMS, *supra* note 71, at 164.

301. John MacCormack, *New Riches Grow from Old Burial Ground*, MIAMI HERALD, May 31, 1983, at 6A.

302. *Id.*

303. *Id.*

the tomb.³⁰⁴ They also, however, constructed a cigarette shop and large bingo parlor on the land, both financed by a private partnership that in exchange received 47% of the proceeds from the two operations.³⁰⁵

In 1979, bingo was already established as a legitimate municipal function, since municipal fire departments had long generated operational revenues from bingo. In a similar fashion, commercial gaming on Indian reservations in the United States began modestly as a response to a 1975 fire on the Oneida Indian reservation in Verona, New York, that destroyed two trailers and killed several people.³⁰⁶ The reservation had neither a fire department nor fire-fighting equipment, and two Oneidas perished in the blaze. To prevent such tragedies in the future, reported a tribal representative, the Oneidas decided “to raise money for [their] own fire department . . . the way all fire departments raise money: through bingo.”³⁰⁷

By the time the facility in Tampa opened, the Seminoles were already operating a separate high-stakes bingo facility in Hollywood, Florida.³⁰⁸ The Seminole Tribe contracted with a non-Indian organization to build and manage its bingo hall. The agreement called for the managers to receive 45% of the profits after repayment of a \$1 million construction loan. The enterprise was a success, and the Seminoles repaid the loan in less than six months.³⁰⁹ The Seminoles also fought the State in the courts when Florida authorities tried to close the Seminoles’ bingo hall in 1981. The tribe argued that Florida did not have the authority to prohibit gaming on the Seminole reservation. Ultimately, the Fifth Circuit agreed³¹⁰ and affirmed the right of the Seminoles to run their bingo game and pay out unrestricted prizes without interference from the State of Florida.³¹¹

Although the Seminoles had always indicated to officials that they planned to use their new land for economic development projects, Gibbons and other officials were “incensed” and “accused

304. *Id.*

305. *Id.*

306. See Gavin Clarkson & James Sebenius, *Leveraging Tribal Sovereignty for Economic Opportunity: A Strategic Negotiations Perspective* 26 (Dec. 2003) (unpublished manuscript, on file with the North Carolina Law Review).

307. Dennis McAuliffe, Jr., *Casinos Deal Indians a Winning Hand*, WASH. POST, Mar. 5, 1996, at A1.

308. *Id.*

309. *Id.*

310. See *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 316–17 (5th Cir. 1981).

311. *Id.* at 316.

the tribe of hiding its true intentions about the use of the land.”³¹² With its negative view of commercial activity by the Seminoles, and with Gibbons’ support, Florida unsuccessfully sued to halt the activities of the tribe by challenging the trust status of the land in Tampa.³¹³ By all available accounts Representative Gibbons held a lasting hostility toward Indian interests as a result of the Seminole burial ground episode.³¹⁴

3. Generalization

Representative Gibbons’ reported hostility is not limited to the tribe in his district, however, as he held a particular suspicion that Indians anywhere could not be trusted and would use any opportunity to finance undesirable gambling operations.³¹⁵ In his letter to Treasury Secretary James Baker, he insinuated that the tribes were not really acting as governments and used the leveraged buyouts as exemplars, all the while ignoring that the revenue generated by those projects went to fund essential governmental functions.³¹⁶ If not the first, Gibbons was certainly one of the early congressional leaders to put forward the generalized notion that any commercial or revenue-generating activity was somehow less “governmental” if conducted by a tribe, as that would make it a “far cry from schools, streets, and sewers.”³¹⁷ This generalization clearly privileged, to the detriment of the tribes, the commercial elements of many state and local governmental enterprises funded with tax-exempt debt.³¹⁸

Various accounts have confirmed that Gibbons’s grudge prompted him to join the Tribal Tax Status Act Conference Committee to deny tribes meaningful bond authority.³¹⁹ Emma Gross

312. Aprill, *supra* note 30, at 346 (citing MacCormack, *supra* note 301).

313. Fla. Dep’t of Bus. Regulation v. U.S. Dep’t of Interior, 768 F.2d 1248, 1250–51 (11th Cir. 1985)

314. See Aprill, *supra* note 30, at 346 n.77 (“Whether or not true, [Gibbons’ reputation] has come to be accepted and believed.”).

315. *Id.*; see also Williams, *supra* note 30, at 368 n.146.

316. Aprill, *supra* note 30, at 361.

317. *Id.* (referring specifically to cement plants and mirror factories).

318. This hostility towards tribal governments that engaged in any sort of commercial or revenue-generating activity would only get worse as Indian gaming revenues increased. See Clarkson & Sebenius, *supra* note 306, at 32. For a discussion of ERISA, see also *infra* note 384.

319. Aprill writes that “[t]his experience prepared Representative Gibbons to object to the tribal bond provision in the Senate bill.” Aprill, *supra* note 30, at 346. The Bond Buyer reported that Gibbons “wage[d] a campaign in 1987 against bonds issued by Indian tribes.” Joan Pryde, *Meet Sam Gibbons: Rostenkowski’s Stand-In Is Not an Admirer of Private Activity Bonds*, BOND BUYER, Aug. 13, 1993, at 1, available at 1993 WLNR 550956.

wrote in 1989 that Gibbons's "disillusionment with his Indian constituency is supposed to be the reason that he currently opposes Indian interests."³²⁰ Although Representative Gibbons developed an accepted reputation as hostile toward tribal interests in his district, his animosity extended to tribal interests everywhere.

4. Justification of Hostility

Gibbon's belief that Indians in general are not trustworthy issuers of public debt coupled with his powerful position in the House led to the adverse outcomes in 1982 and again in 1987. Is it possible that Gibbons based his justifications for hostile treatment of tribal tax-exempt debt on something other than a negative perception of difference between tribal governments and other state and local governments? Gibbons did have a reputation as an active opponent of private activity bonds. He has been described in various reports as "a longtime opponent of tax-exempt, private-activity bonds,"³²¹ as having "maintained a steady opposition to private-activity bonds,"³²² and as "traditionally . . . an antagonist toward public finance."³²³ Thus, it might be reasonable to argue that Gibbons opposed broad tribal bonding authority not necessarily because he was hostile to Indian interest but, rather, because he was hostile toward broad tax-based public finance authority in general.

This argument fails for two reasons. First, Gibbons not only increased his opposition to tax-exempt bond authority in the case of the Tribal Tax Status Act, but also supported "tax-exempt financing when it would benefit his [non-Indian] constituents."³²⁴ Gibbons's effort to create a new category of tax-exempt bonds to finance the construction and improvement of space centers in Florida³²⁵ indicates that he was perfectly willing to support broad-based bonding authority when Indian tribes were not the beneficiaries. Second, the record is clear that the limitations on tribal bond authority *not applicable to states or municipalities* have been enacted "largely at Gibbons' urging."³²⁶ Thus, the efforts of Representative Gibbons, albeit with the consent of the other conferees, imposed a drastic

320. EMMA R. GROSS, CONTEMPORARY FEDERAL POLICY TOWARD AMERICAN INDIANS 84 (1989).

321. Craig Ferris, *Foe of Private-Activity Debt To Leave Congress*, BOND BUYER, Mar. 5, 1996, at 5, available at 1996 WLNR 742958.

322. Pryde, *supra* note 319.

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

limitation on tribes that, to this day, gives them access to only a narrow sector of the tax-free capital market. It is undeniable that Gibbons largely created what today remains a blatant discrepancy between tribes' and states' bonding authority.

The timing of Gibbons's legislative efforts as well as his 1987 letter to Treasury Secretary James Baker complaining about tribal tax-exempt bonds³²⁷ is also telling. In 1986, the Supreme Court denied certiorari in the litigation regarding the Seminole's land-into-trust application for the Tampa property,³²⁸ so having lost in the effort to fight tribal economic development in his own district, Gibbons expanded his efforts in 1987 to thwart economic development throughout Indian Country.

The results of Gibbons's actions are obvious. Because of the additional restrictions imposed on Indian tribes that do not apply to state and local governments, tribes cannot issue private activity bonds similar to those issued by state and local governments,³²⁹ nor can they issue tax-exempt debt unless "substantially all" of the borrowed proceeds pass the ill-defined essential governmental function test.

B. Examining the IRS's Enforcement Activity

Through its enforcement activities, the IRS continues to propagate this discrimination in the Tax Code. The IRS has chosen to pursue the most restrictive interpretation possible in its enforcement, exacerbating the discriminatory effect. In fairness to the IRS, however, it does not have the freedom to ignore or fail to enforce a statute. On the other hand, the enforcement actions of the IRS suggest that it is further exacerbating the impact of § 7871 by pursuing an extremely narrow, and arguably incorrect, interpretation of the statute.

1. The Strategy of Difference

Although the stated congressional intent of the Tribal Tax Status Act was to treat tribes like states, the actions of Representative Gibbons resulted in portions of the statute that specifically differentiated tribes from states. Thus, the IRS cannot be faulted for applying § 7871 only to tribes, as that is its statutory obligation. The important question to consider, however, is whether the IRS views

327. April, *supra* note 30, at 318.

328. Fla. Dep't of Bus. Regulation v. U.S. Dep't of Interior, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1186 (1986).

329. *See supra* note 33.

tribal activities as different, and somehow less governmental, when compared to identical activities performed by state and local governments.

2. The Assignment of Negative Values to Difference

In the eyes of the IRS, if a tribe is involved with a commercial activity, it is somehow less of a government, even if the activity is one commonly conducted by states or if revenues from that activity fund basic governmental functions. The IRS does not seem to take the same position with states that are involved with commercial activities, such as state-run liquor stores; state-operated hotels, resorts, and convention centers; or public golf courses. Thus, the perception of difference between tribal commercial activity and state commercial activity is a false difference. Nonetheless, the IRS continues to insist that such a difference is meaningful relative to tribes. For example, Charles Anderson of the IRS's tax-exempt bond enforcement program, speaking about the Paiute golf course, recently stated:

[A]nyone other than the law firm issuing an unqualified opinion and maybe being sued by a tribe would concede that a hypothetical golf complex—having multiple prestige courses in a resort town with a website advertising planned hotels and casinos, and who has marketed the courses in partnership with travel promoters—is essentially commercial in nature.³³⁰

Anderson continued:

If there are more golf holes than tribal members it is probably commercial and intended solely for tourists. If no tribal members work there and they all collect a dividend, it is probably commercial. . . . I don't think Congress ever anticipated several dozen people getting six-figure checks due to a resort financed by tax-exempt bonds.³³¹

Anderson's words are clearly unencumbered by knowledge of the myriad of publicly financed resorts, hotels, and golf courses,³³² and they strongly suggest an imposition of a negative value on tribal commercial activities.

An August 9, 2006, advance notice of proposed rulemaking from the IRS reflects a similar negative imputation of value. In that notice,

330. McConnell, *supra* note 208.

331. *Id.*

332. *See supra* Part IV.A.

the IRS suggests that tribal bonds would only be tax exempt if there are

(1) numerous State and local governments with general taxing powers that have been conducting the activity and financing it with tax-exempt governmental bonds, (2) State and local governments with general taxing powers have been conducting the activity and financing it with tax-exempt governmental bonds for many years, and (3) the activity is not a commercial or industrial activity,

even if states and local governments routinely engage in such activities for commercial purposes.³³³

Apparently, the IRS did not even wait for the comment period to end before making the proposed rules its official position. In a Technical Advice Memorandum (“TAM”)³³⁴ issued two weeks before comments were due, the IRS declared that the proposed standards were already the law. In fact, according to Howard Jacobsen of Akin Gump, the IRS has issued multiple adverse determinations based on the proposed standards rather than waiting for the regulatory comment process to conclude.³³⁵ Clearly, the IRS has a strongly negative view of tribal commercial activity relative to state and local governmental commercial activity.

3. Generalization

Since the Tax Code applies to all tribes equally, the generalization of the negative view of tribal commercial activity is automatic. Tribes throughout the United States have been victims of this aggressive enforcement of an arguably racist statute that effectively stifles tribes’ tax-free bonding authority. The communications from some at the IRS seem to give the impression that the IRS believes that all tribes are wealthy tribes engaged in gaming and are thus not entitled to tax-exempt treatment, since they would merely be receiving a subsidy for commercial activity. This generalization of tribal economic status is particularly harmful to poorer tribes, as these restrictions on the scope of what can be financed with tax-exempt debt in particular deny poor tribes the

333. 71 Fed. Reg. 45,474, 45, 475 (Aug. 9, 2006) (to be codified at 26 C.F.R. pts. 1 & 602).

334. I.R.S. Tech. Adv. Mem. 146957-05 (Jan. 26, 2007), *available at* http://www.irs.gov/pub/irs-tege/tam_200704019.pdf.

335. See Letter from Howard E. Jacobsen, Akin Gump Straus Hauer & Feld, to Donald Korb, Chief Counsel, Internal Revenue Serv. (Feb. 1, 2007) (on file with the North Carolina Law Review).

opportunity to address their glaring infrastructure and economic development needs. Tribes with substantial natural resources or significant gaming operations have the option of financing certain activities on a taxable basis even if, absent a restrictive Tax Code, they would be able to finance those activities on a tax-exempt basis. As mentioned earlier, however, poorer tribes do not have that luxury.

The IRS's generalization of the restrictive provision of § 7871 to all tribes has also meant a substantially higher audit risk for tribal bonds, as tribal governments are also victims of a demonstrably disproportionate number of IRS enforcement actions. Less than 1% of the tax-exempt municipal offerings are audited by the IRS each year, but direct tribal tax-exempt issuances are thirty-three times more likely to be audited within four years of issue,³³⁶ and 100% of tribal conduit issuances have been or are currently being challenged by the IRS.³³⁷ In all of these cases, the tribes financed activities that had previously been financed by state and local governments without any challenge from the IRS.

In the specific instance of the Paiute golf course audit, in arguing that that the golf course was not “intended to meet the recreational needs of [the] Tribe or that it is anything other than a commercial enterprise of [the] Tribe,”³³⁸ the IRS is apparently making another generalization that Indians do not play golf, and if they do play golf, they only play at courses that are too ugly to attract a non-Indian golfer.

4. Justification of Hostility

In a 2005 TAM,³³⁹ the IRS justified its apparent hostility towards tribal conduit financing by suggesting that allowing tribes to use the conduit mechanism “would run counter to Congressional intent.”³⁴⁰ Even though the legislative history cited in the TAM suggests that water treatment plants fall squarely within the definition of an essential governmental function,³⁴¹ the IRS is nonetheless challenging the tax-exempt bonds issued by the Morongo Tribe for “water and

336. *See supra* Part III.E.

337. *See supra* Part III.F (discussing IRS enforcement); *supra* note 227.

338. FSA, *supra* note 208, at 5.

339. I.R.S. Tech. Adv. Mem. 142470-05 (Oct. 11, 2005), available at <http://www.irs.gov/pub/irs-wd/0603028.pdf>.

340. *Id.* at 6.

341. H.R. REP. NO. 97-984, at 16-17 (1982) (Conf. Rep.), as reprinted in 1987 U.S.C.C.A.N. 4580, 4601 (noting that tribes are tax-exempt if proceeds are directed at public utilities).

wastewater system improvements, roadway improvements, and public parking facilities.”³⁴²

As discussed earlier, the IRS’s most publicized enforcement of the essential governmental function test occurred in August of 2002 when the IRS advised the Las Vegas Paiutes that construction of a public golf course is “other than an essential governmental function within the meaning of section 7871(e).”³⁴³ The IRS advised that it would deny the tax exemption based on its reading of the “customarily performed” standard provided by the 1987 amendment.³⁴⁴ The IRS acknowledged that “it is likely that construction and operation of golf courses are customary governmental functions,” but nonetheless concluded that the admittedly commercial nature of the project rendered it outside the scope of the tribe’s tax-free bond authority as limited by § 7871(e).³⁴⁵ The IRS reasoned that Congress did not define “customarily” in the statute and that “there is an argument” that such commercial ventures cannot be considered within § 7871(e).³⁴⁶ Section 7871(e) simply defines “essential governmental function” as excluding projects “not customarily performed by State and local governments,” saying nothing of the commercial or noncommercial nature of those activities.³⁴⁷ Mary J. Streitz of Dorsey & Whitney explains that

[o]ver-relying on selected portions of the legislative history, the FSA suggested that tribal governments may not finance “commercial or industrial facilities” with tax-exempt bonds *even where such facilities satisfy the customary performance test*. Although the House Ways and Means Committee had indicated a concern about tribal governments financing commercial and industrial activities with tax-exempt bonds, the committee chose to adopt only the customary performance test to address its concern.³⁴⁸

342. Rich Saskal, *IRS Takes Closer Look at Calif. Tribal Deal's Tax-Exempt Status*, BOND BUYER, Aug. 30, 2005, at 1, available at 2005 WLNR 13911589.

343. FSA, *supra* note 208, at 1.

344. *Id.*

345. *Id.*

346. *Id.*

347. 26 U.S.C. § 7871(e) (2000).

348. Letter from Mary J. Streitz, Dorsey & Whitney LLP, to Timothy L. Jones, Internal Revenue Serv. 2 (Nov. 26, 2002) (on file with the North Carolina Law Review) [hereinafter Streitz Letter].

Streitz concludes that “[t]he entire legislative history reinforces that the statutory test turns on the frequency of a government practice, not on any other requirement.”³⁴⁹

The argument set forth by the IRS is that the golf course was not “intended to meet the recreational needs of [the] Tribe” and that it was nothing more “than a commercial enterprise of [the] Tribe.”³⁵⁰ Although other public golf courses can be considered essential governmental functions, in this case the IRS maintains that “the probable role of the Golf Course in the community contrasts with that of the more typical golf course developed by a state or local government.”³⁵¹ Given the IRS’s perceived unlikelihood that tribal members would use the course for recreational uses, the “Golf Course could be seen as disproportionate when viewed as a community amenity, making the balance between community recreation and commercial implications more significantly tilted toward the latter than is likely to be typical.”³⁵² Mary Streitz counters that, in this analysis, the FSA overlooks the fact that “many state and local government golf courses are destination golf courses intended to attract visitors from *outside* the community in which the golf course is located, thereby promoting economic development in the community and raising revenues for the state or local government.”³⁵³ Therefore, the FSA essentially says that Indian tribes cannot utilize tax-free debt to construct golf courses and accompanying clubhouses if the courses pass a subjective line of being “too nice for tribal members.” One wonders if the public courses in places like Palm Beach or Torrey Pines would encounter these same difficulties. The FSA admits that all publicly built and operated golf courses “are developed to enhance the lifestyle of both golfing and non-golfing citizens of the community and perhaps to create jobs,” but nonetheless denies the tribe’s admitted effort to “further the economic development of [the] Tribe and to reduce [the] Tribe’s dependence on” its limited available resources,³⁵⁴ because these are commercial rather than recreational pursuits.

349. *Id.* at 2.

350. FSA, *supra* note 208, at 5.

351. *Id.*

352. *Id.*

353. Streitz Letter, *supra* note 348, at 3.

354. I.R.S. Field Serv. Adv. Mem. 200247012 (Nov. 22, 2002), available at <http://www.irs.gov/pub/irs-wd/0247012.pdf>. Note that this sentence was blacked out where the quote ends. See *id.* This remaining portion is the author’s interpretation of this part of the FSA.

The FSA stated that “[t]he legislative history of § 7871(e) indicates that Congress meant not to include commercial or industrial facilities as essential governmental functions even if such functions were *commonly financed* with tax-exempt bonds by state or local governments.”³⁵⁵ Indeed, the legislative history indicates that tribes were faced with a more limited authority than states and municipalities. As noted above, the House Committee Report on the 1987 amendment stated that only customarily publicly financed projects are intended to be within the tribes’ authority, “notwithstanding that *isolated instances* of a State or local government issuing bonds for another activity may occur.”³⁵⁶ Thus, the IRS acknowledged that “there were at least 2,645 public golf courses in 1998 . . . and it is probable that the number has grown,”³⁵⁷ yet in the same FSA memorandum, the IRS relied on legislative history deeming projects that may be financed by states with tax-free bonds “in isolated instances” as being beyond tribal authority.

The FSA finally recommended not litigating the Paiute’s bond exemption because it would “be difficult to argue that Golf Course is so commercial in nature that state and local governments would not own and operate similar enterprises.”³⁵⁸ Additionally, it acknowledged that “some courts, including the Tenth Circuit, have adopted the principle that federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.”³⁵⁹ In short, the FSA concluded that the IRS’s position was untenable based on existing public practices and judicial rulings, but the IRS nonetheless proceeded with hostile enforcement actions.

The 2002 FSA has inspired a number of criticisms, most recently in the form of a report issued by the Advisory Committee to the Internal Revenue Service on Tax Exempt and Government Entities (“ACT”).³⁶⁰ The ACT report is harshly critical of the FSA, emphasizing that public golf courses are in fact customarily owned

355. *Id.* (emphasis added).

356. H.R. REP. NO. 100-391, at 1139 (1987), as reprinted in 1987 U.S.C.C.A.N. 2313-1, 2315-749 (emphasis added).

357. FSA, *supra* note 208, at 6.

358. *Id.* at 7; see also *supra* note 208 and accompanying text.

359. FSA, *supra* note 208, at 8.

360. See ETCITY, *supra* note 4, at II-13; LENOR A. SCHEFFLER & ROBERT L. GIPS, ADVISORY COMM. ON TAX EXEMPT & GOV’T ENTITIES, SURVEY AND REVIEW OF EXISTING INFORMATION AND GUIDANCE FOR INDIAN TRIBAL GOVERNMENTS 12 (2005), available at <http://www.irs.gov/pub/irs-tege/p4344.pdf> (noting that the FSA has caused “consternation and a sense of bias” in the tribal government community).

and operated by state and local governments. The ACT report further requests that the IRS cease any new audits and enforcement initiatives, withdraw the 2002 FSA memorandum, and, most importantly, clarify that essential governmental functions for purposes of § 7871 be construed in accordance with the term “essential governmental function” as it is used in § 115 of the Internal Revenue Code for benefits accruing to state and local governments.³⁶¹

Section 115 provides that “[g]ross income does not include . . . income derived from any public utility or the exercise of any essential governmental function and accruing to a State or any political subdivision thereof.”³⁶² The IRS takes a broad view of what is excludable under § 115.³⁶³ In determining whether the entity can exclude its income from federal income tax liability, the IRS employs a three-part test: (1) whether the entity makes or saves money for a state or local government, (2) whether its assets revert to the state upon dissolution, and (3) whether there is any private benefit.³⁶⁴ In a sharp contrast to its approach in the 2002 FSA to defining an essential governmental function as excluding any commercial activity when conducted by a tribe, the IRS has reasoned that a state investment fund for cash balances constitutes an essential governmental function.

As mentioned earlier, several states have even issued tax-exempt bonds in support of their gaming operations such as casinos, lotteries, and horse racing.³⁶⁵ Similarly, a number of municipalities have financed hotels and convention centers with tax-exempt bonds.³⁶⁶ Given the uncertainty as to whether these activities have reached a level of “customary” occurrence, tribes have thus far been unable to borrow directly on a tax-exempt basis to finance their own gaming or hotel facilities.³⁶⁷ For purposes of § 115, however, the IRS has, without intervention by Congress, effectively defined *any* activity that makes or saves the government money as an essential governmental function. This definition encompasses the very purpose of the Las

361. ETCITY, *supra* note 4, at II-11.

362. 26 U.S.C. § 115 (2000).

363. *See* Rev. Rul. 77-261, 1977-2 C.B. 45; *see also* John F. Theberge & Diana A. Imholtz, *Tax-Exempt Financings Involving Indian Tribal Governments*, 41 EXEMPT ORG. TAX REV. 181, 182, 185 (2003).

364. Theberge & Imholtz, *supra* note 363, at 182 (citing Ellen P. Aprill, *The Integral, the Essential, and the Instrumental: Federal Income Tax Treatment of Governmental Affiliates*, 23 J. CORP. L. 803, 814 (1998)).

365. *See supra* Part IV.A.

366. *See id.*

367. *See* HYATT ET AL., *supra* note 27, at 19.

Vegas Paiute golf course, which the IRS has reasoned does not qualify as an essential governmental function.³⁶⁸

Despite the arguably racist heritage of the essential governmental function test, the IRS is also using an extreme interpretation of that test to justify its apparent hostility to tribal conduit financing. Despite the formal legality of the conduit arrangements, the IRS has challenged any and all conduit borrowing engaged in by Indian tribes,³⁶⁹ arguing that “[i]n general, any transaction done indirectly that cannot be done directly is troubling.”³⁷⁰ As noted earlier,³⁷¹ however, each conduit financing—tribal or non-tribal—involves doing indirectly that which cannot be done directly, but the IRS has not challenged any non-tribal conduit financings on that basis.

Of the conduit bonds challenged by the IRS, three involve the hotel and casino complexes in Florida built by the Seminole Tribe. These projects together utilized \$345 million in tax-exempt bonds.³⁷² The conduit issuer for these projects was the Capital Trust Agency, an entity created by the city of Gulf Breeze and the town of Century, both in Florida.³⁷³ Another challenged conduit borrowing involves the Cabazon Band of Mission Indians in which the California Statewide Communities Development Authority issued \$145 million in tax-exempt bonds.³⁷⁴ In the Cabazon case, the tribe received a letter from the IRS indicating that the tribe “‘may have issued an obligation . . . substantially all of the proceeds of which were not to be used in an exercise of an essential governmental function of the tribe.’”³⁷⁵ The final conduit bond under scrutiny was issued on behalf of the Santa Ana Pueblo of New Mexico for a hotel development.³⁷⁶

In 2005, the IRS issued a different TAM taking the position that tribal proceeds from conduit financings are subject to the “essential

368. See FSA, *supra* note 208, at 5.

369. See *supra* note 227 (discussing conduit bond audits).

370. See Susanna Duff Barnett, *\$145.5M Cabazon Deal Under Scrutiny: IRS Steps Up Probes of Indian Tribes*, BOND BUYER, Aug. 6, 2004, at 1, available at 2004 WLNR 1252400 (quoting Charles Anderson, manager of field operations for the IRS tax-exempt bond division).

371. See Part III.F (discussing IRS enforcement against conduit bonds); *supra* text accompanying note 222.

372. See Shelly Sigo, *IRS Suggests Private-Letter Rulings to Casino-Building Tribes*, BOND BUYER, May 14, 2004, at 3, available at 2004 WLNR 1265069.

373. *Id.*

374. See Barnett, *supra* note 370.

375. *Id.* (quoting a July 29 letter from the IRS).

376. McConnell, *N.M. County*, *supra* note 227.

governmental function” test.³⁷⁷ Mark A. Jarboe of Dorsey & Whitney criticized this memorandum as an instance of the IRS taking “‘a results-oriented approach to creating an ambiguity because of what they think Congress meant rather than what Congress said.’”³⁷⁸ To make matters worse, however, the IRS has now taken the more extreme position that “[b]onds issued by a state entity where an Indian tribal government is the conduit borrower are private-activity bonds even if the proceeds are used for an essential government function,”³⁷⁹ even though this most recent position clearly contradicts the position stated in the earlier TAM that conduit bonds would be permissible if they satisfied the essential government function test.³⁸⁰

Aside from the IRS’s inconsistent and incoherent enforcement positions on this method of tribal financing, conduit financing itself is a far less efficient method of accessing tax-free debt than direct issuance by a tribe. Consider the Seminole case, where issuance costs amounted to 9.2% of the bond proceeds.³⁸¹ These fees cut into the amount available for investment in the tribal enterprise, making the tribe’s income-generating effort less effective and certainly far less efficient than a direct issuance. Clearly, the source of this method of debt-financing, untoward in the eyes of the IRS, and expensive for tribes, is an outgrowth of the stifling effect of the essential governmental function requirement on tribes’ direct access to the tax-free market. The conduit approach would be altogether unnecessary, however, if the discriminatory aspects of § 7871 were eliminated.

VI. A PROPOSAL FOR EXPANDING TRIBAL TAX-EXEMPT BONDING AUTHORITY

Having established economic, fiscal, and moral justifications for expanded tribal tax-exempt bonding authority, it should be clear that tribes ought to, as a matter of both policy and equity, enjoy a status identical to the states under the Tax Code in terms of the broad ability to issue tax-free debt. Indian tribes have for centuries existed

377. I.R.S. Tech. Adv. Mem. 142470-05 (Oct. 11, 2005), available at <http://www.irs.gov/pub/irs-wd/0603028.pdf>.

378. Alison L. McConnell, *IRS: ‘Essential Governmental Function’ Needed for Conduit Debt*, BOND BUYER, Jan. 23, 2006, at 5, available at 2006 WLNR 1521595 (quoting Mark A. Jarboe of Dorsey & Whitney).

379. See McConnell, *supra* note 228 (quoting an unpublished technical advice memorandum).

380. I.R.S. Tech. Adv. Mem. 142470-05 (Oct. 11, 2005), available at <http://www.irs.gov/pub/irs-wd/0603028.pdf>.

381. Sigo, *supra* note 372.

in a kind of dual world where they are sovereigns for some purposes but treated as if their governmental responsibilities are not real for other purposes. The Tax Code's restriction on tribal tax-free bonding authority is an example of the latter. This restriction is an unjustifiable discrimination against Indian tribes by Congress in the enacting legislation and by the IRS in its enforcement actions.

While legislative proposals have been offered in the past that would rectify the inequities in § 7871 and put tribal debt on an equal footing with municipal debt for tax law purposes, such legislation has yet to pass.³⁸² Although commentators have described the failed effort in 1975 to place tribes on equal footing with states in the Tax Code as an attempt at promoting self-determination,³⁸³ Congress chose not to consider alternatives that would address the deeply rooted obstacles facing tribes when it did pass the Tribal Tax Status Act. Despite the rhetoric paid to recognizing tribes as governments and equalizing their tax treatment with that of states, Congress gave tribes a limited authority to utilize tax-free debt obligations that effectively limited the tribes to their general obligation bonding capabilities, which, as noted earlier, is largely illusory for economically strapped Indian tribes.

Given the level of "commercial" activity funded with tax-exempt debt by states and local governments, the expanding hostility towards revenue-generating activity by tribal governments is indefensible in any intellectually honest manner. Congress itself has recently passed legislation that acknowledges that tribally sponsored commercial activities can nonetheless be essential governmental functions.³⁸⁴ This

382. See, e.g., S. 1637, 108th Cong. (2004); H.R. 2253, 107th Cong. (2001). Senate Bill 1637 was passed by the Senate, but its tribal tax-exempt bond provisions were eliminated by the Conference Committee in its effort to reconcile with H.R. 4520, which did not contain the tribal provisions.

383. See April, *supra* note 30, at 343 (describing the 1975 lobbying effort as part of the greater Indian effort to achieve "economic independence").

384. See Pension Protection Act of 2006, H.R. 4, 109th Cong. (2006). Among the sweeping changes to ERISA contained in the Act, section 906 "clarifies" the applicability of the "governmental plan" exemption from ERISA to employee benefit plans of tribal governments and related entities, such as vesting and funding rules. *Id.* § 906. Although several earlier pieces of legislation attempted to make clear that the governmental plan exemption to ERISA and related Code provisions should be available to tribal government plans, see, e.g., H.R. 331, 109th Cong. (2006); H.R. 2830, 109th Cong. (2006); S. 673, 109th Cong. (2006), what emerged from the Conference Committee and was ultimately enacted into law appears to almost completely remove the availability of the exemption for tribes and related entities. Interestingly, however, section 906 of the Act provides that a

governmental plan [will include] a plan which is established and maintained by an Indian tribal government . . . a subdivision of an Indian tribal government . . . or an

recent pronouncement provides an opening for Congress to act on the issue of tribal tax-exempt bonds. To continue to deny tribal governments the ability to issue tax-exempt debt on the same basis as state and local governments is to continue to expose the Tax Code as vulnerable to the charge of racism.

Under the status quo, the Tax Code and the IRS are systematically discriminating against tribal governments relative to state and local governments. Congress has the opportunity to rectify this differential treatment simply by rewriting § 7871 to treat tribes as states for all tax purposes, without qualification. Therefore, subsections (c), (d), and (e) of § 7871 should be repealed, and subsection (b) should be amended to read as follows:

(b) Treatment of subdivisions of Indian tribal governments as political subdivisions. For the purposes specified in subsection (a), a subdivision of an Indian tribal government shall be treated as a political subdivision of a State if such subdivision has been delegated the right to exercise one or more of the governmental functions of the Indian tribal government.

CONCLUSION

The authority to supplement tax revenue by issuing tax-free debt obligations is clearly a major part of any state's efforts to develop and maintain its infrastructure and economy. The policy of self-determination, along with the legal recognition of tribes as governments with responsibilities to their constituent populations, necessitates tax-free bond authority.

Yet tribes, to this day, and as a direct consequence of the essential governmental function requirement in § 7871, do not enjoy such authority to any meaningful degree. Not only are these

agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are *in the performance of essential government functions but not in the performance of commercial activities (whether or not an essential government function)*.

H.R. 4 § 906(a)(1) (emphasis added). This statutory language states that a revenue-generating activity, although commercial in nature, can still be an essential government function, thus eviscerating the basis upon which the IRS has generally opposed tax-exempt bond financings under the "essential governmental function" test. Section 906 itself is clearly discriminatory, as pension plans for employees of state-run enterprises such as the liquor store employees of the New Hampshire State Liquor Commission are still able to enjoy the "governmental plan" exemption from ERISA, but a single employee of a tribal gift shop for a tribe with no other commercial activities would deny the entire tribe the ability to have their pension treated as a governmental plan.

restrictions discriminatory against Indian tribes, inconsistent with the federal policy of self-determination, and contrary to the legal recognition of tribes as governments, but also they repress the efforts of the historically most impoverished, isolated, and disaffected minority group in the nation to improve their daily lives. Indeed, although the law now technically grants all tribes tax-exempt bonding authority, for most tribes the essential governmental function test renders this power one that exists in theory only.

In response, this Article makes several arguments for expanding tribal tax-exempt bonding authority. First, state and local governments use tax-exempt bonds for a wide range of commercial and economic development activities, and Indian tribes should be able to take advantage of similar opportunities. Second, the restrictions in § 7871 constrict the market for tribal tax-exempt bonds such that the actual number of tribal tax-exempt bonds issued is an order of magnitude lower than it should be. Third, denying meaningful tax-exempt bonding authority to tribes costs the federal government millions of dollars each year and expanding tribal tax-exempt bonding authority would increase federal tax revenues as well as reduce welfare transfer payments to Indian Country.

This Article also identifies a significant moral justification for expanding tribal tax-exempt bonding authority: the elimination of discriminatory practices that, according to an objective typology, fit the description of racism, both in terms of the statute and its legislative history as well as hostile enforcement activity by the IRS. Ultimately, either rationale should be sufficient to justify amending § 7871, as both are supported by empirical evidence, some of which has never been made available before. For the sake of consistent federal policy toward Indian tribes, for the sake of tribes' right to economic independence, and for the sake of eliminating a harmful and discriminatory law, Congress should act to equalize tribal bond authority with that of states.

