FINANCING NATIVE NATIONS: ACCESS TO CAPITAL MARKETS

JENNY SMALL*

> [E]very individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value . . . . He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it . . . . [H]e intends only his own security . . . only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention . . . . By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.[1]

I. Introduction

Based on Adam Smith's premise that a free market creates wealth, there is reason to believe that, given the proper access to free markets, Native Americans would be better equipped to address the crippling poverty that plagues their nations and to make significant economic contributions to wider society.[2] One-third of reservation-based Native Americans fall below the poverty line, and the nations governing these reservations, unable to spur economic development,

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* Boston University School of Law (J.D. 2013); Claremont McKenna College, Economics & International Relations (B.A. 2007). Ms. Small thanks Professor Jay Wexler for his review of her note and appreciates all the support and help of the *Review of Banking & Financial Law* staff and editors, including Ryan Mulvey and Matt Saldaña for their many suggestions. She would also like to thank her family for their support.

[1] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF WEALTH OF NATIONS IV.2.9 (Edwin Cannan ed., 5th ed. 1904) (1776), *available at* http://www.econlib.org/library/Smith/smWN13.html#B.IV.

[2] *Compare id., with* Nicholas D. Kristof, *Poverty's Poster Child*, N.Y. TIMES, May 10, 2012, at A29 (identifying lack of investment as one of the reasons for stagnating poverty); *see also* Robert J. Miller, *American Indian Entrepreneurs: Unique Challenges, Unlimited Potential*, 40 ARIZ. ST. L.J. 1297, 1298 (2008); Dao Lee Bernardi-Boyle, *State Corporations for Indian Reservations*, 26 AM. INDIAN L. REV. 41, 41 (2001).

struggle to provide even the most basic services.[3] According to a report published by the Board of Governors of the Federal Reserve in 2012, "insufficient access to capital," including loans and home equity, is a primary challenge to native nations' economic development.[4] This lack of access inhibits their ability to finance new projects, such as renewable energy, which would benefit both the native nations and the United States.[5] Yet, despite their difficulty in accessing capital markets, native nations harbor significant potential for economic growth due to their vast resources, land, and sovereignty;[6] so much so, in fact, that tribal finance expert Gavin Clarkson dubbed them "America's domestic emerging market."[7]

To achieve Adam Smith's ideal of wealth and prosperity, native nations must have the same free market tools that are at the

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[3] *Poverty and Possibilities in Indian Country*, INDIAN REP. (Friends Comm. on Nat'l Legislation, D.C.), Spring 2012, at 1, *available at* http://fcnl.org/assets/pubs/indian_report/IR_Spring_2012_d4.pdf (describing that one in three Native Americans on reservations live in poverty and Native Americans on such reservations struggle "to make a living."); *see also* Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 758–59 (2001).

[4] SUSAN WOODROW, GROWING ECONOMIES IN INDIAN COUNTRY: TAKING STOCK OF PROGRESS AND PARTNERSHIPS 4 (Bd. Of Governors of the Fed. Reserve, 2012), *available at* http://www.federalreserve.gov/newsevents/conferences/GEIC-white-paper-20120501.pdf.

[5] Rob Capriccioso, *Tribes Urged to Support Renewable Energy Legislation*, INDIAN COUNTRY TODAY (June 26, 2009), http://indiancountrytodaymedianetwork.com/mobile/ictarchives/2009/06/26/tribes-urged-to-support-renewable-energy-legislation-82389; *see also* Miller, *Economic Development in Indian Country*, *supra* note 3, at 837; Bernardi-Boyle, *supra* note 2, at 41.

[6] Richard J. Ansson, Jr. & Ladine Oravetz, *Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They Continue to Strive for Economic Diversity?*, 11 KAN. J.L. & PUB. POL'Y 441, 443 (2002) ("Sovereignty is best defined as the vested powers of self-government, self-control, self-determination, and self-actualization.").

[7] *See* Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285, 285 (2009); *see also* Miller, *American Indian Entrepreneurs*, *supra* note 2, at 1319 ("American Indians and nations have survived several hundred years of active political, social, and economic oppression, and even genocide; but they are still growing in population and strength everyday. Those facts tell me that the potential for Indian entrepreneurship and the improvement of Indian and tribal economic conditions is unlimited.").

foundation of the American economy.[8] Scholars have advocated gaming as Native Americans' entry to a free market.[9] Others have argued that the economic strife of native nations is partly the fault of "opportunistic" tribal governments.[10] This Note argues that there are many ways native nations can benefit from the free market beyond the confines and illusory benefits of gaming. A more widespread employment of tax-exempt bonds, as well as investment in native-owned banks that are specifically chartered to serve Indian Country, would be an optimal strategy for native nations to break into capital markets.[11] Tax-exempt bonds would open capital markets to each nation, while banking would open capital markets to individuals and businesses.[12]

This Note begins by addressing the causes of poverty and the evolution of barriers to the free market in Indian Country.[13] These barriers are a byproduct of the federal government's historical policies towards Native Americans that have resulted in debilitating poverty, limited liquidity of assets, and exclusion from certain high-return investments.[14] This Note then advocates for two solutions that native nations have begun to employ through the use of governmental bonds and the development of native-owned banking institutions.[15] Tax-exempt bonds could open the capital market to

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[8] *Cf.* Miller, *Economic Development in Indian Country*, *supra* note 3, at 798 (arguing that federal policies have fostered socialist-type economies in Indian Country and describing the need for small business development); *see also* Bernardi-Boyle, *supra* note 2, at 43.

[9] *See generally* Jess Green, *Economic Development and Gaming*, 9 ST. THOMAS L. REV. 149, 151 (1996) (citing 25 U.S.C. § 2701(1) (1994)).

[10] Terry L. Anderson & Dominic P. Parker, *Sovereignty, Credible Commitments, and Economic Prosperity on American Indian Reservations*, 51 J.L. & ECON. 641, 641 (2008) ("Because this poverty cannot be explained solely by natural resource, physical, and human capital constraints, institutions are likely to be part of the explanation. One of the institutional variables is the sovereign power of tribes, which allows tribal governments to act opportunistically.").

[11] 18 U.S.C. § 1151 (2006) (defining "Indian Country" as land within the boundaries of reservations, "Indian communities," and allotment lands); *see* discussion *infra* Parts III, IV.

[12] *See* discussion *infra* Parts III, IV.

[13] *See* discussion *infra* Part II.

[14] *See* discussion *infra* Part II.

[15] *See* discussion *infra* Parts III, IV.

native nations.[16] Under the Internal Revenue Service's ("IRS") interpretation of federal law, native nations can offer tax-exempt bonds only for undefined "essential governmental function[s]," a phrase described by one Congressional Conference Committee Report as including "schools, streets, and sewers."[17] This restrictive interpretation has long served as a barrier for native nations attempting to raise capital through the issuance of bonds.[18] This limitation may disappear now that the Department of the Treasury has offered an alternative, temporary program—the Tribal Economic Development Bonds program ("TEDB")—as part of the 2009 American Recovery and Reinvestment Act.[19] The experimental program does not have the same restriction of "essential governmental function[s]" and therefore, if successful, may lead to native nations' broader authority to utilize tax-exempt bonds.[20]

While increased bond issuance would help native nations initiate economic development, Native American owned banks could open capital markets to individual Native Americans and their businesses.[21] As of 2012, there were thirteen native-owned banks with federal or state charters.[22] These banks satisfy a need for

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[16] *See* discussion *infra* Part III.

[17] Indian Tribal Governmental Tax Status Act, 26 U.S.C. § 7871 (2006) (describing instances in which "Indian tribal governments [are] treated as states."); *see also* RAYMOND C. ETCITTY, I.R.S. ADVISORY COMM. ON TAX EXEMPT AND GOV'T ENTITIES, TRIBAL ADVICE AND GUIDANCE POLICY II-8 (2004), http://www.irs.gov/pub/irs-tege/act_rpt3_part2.pdf (citations omitted).

[18] *See* discussion *infra* Part II.

[19] *See generally* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (Section 1402 "Tribal Economic Development Bonds"); *see also* U.S. DEP'T OF THE TREAS., REPORT & RECOMMENDATIONS TO CONGRESS REGARDING TRIBAL ECONOMIC DEVELOPMENT BOND PROVISION UNDER SECTION 7871 OF THE INTERNAL REVENUE CODE 10 (2011), http://www.treasury.gov/resource-center/economic-policy/tribal-policy/Documents/Report%20to%20Congress%20-%20Tribal%20Economic%20Development%20Bonds%20-%20FINAL%2012.19.11.pdf (hereinafter *Report to Congress on Section 7871*).

[20] *See* discussion *infra* Part II.

[21] *See* discussion *infra* Part IV.

[22] *Minority Owned Banks,* FED. RESERVE BANK, (Sept. 30, 2012), http://www.federalreserve.gov/releases/mob/current/default.htm [hereinafter *Minority-Owned Banks*.].

banking services in the underserved Indian Country.[23] By creating their own points of entry to the free market with tax-exempt bonds and native-owned banking, native nations and Native Americans can overcome the poverty that enchains them.

II. Barriers to Access to Capital Markets

A. Past Governmental Policies

The eponymous "wall" of Wall Street was designed to protect New York City from "Indian" attacks.[24] Over time, the United States became less concerned about attacks, but still perceived Native Americans as an "economic problem" because they occupied land and consumed resources.[25] In the states' fledgling years, this problem served as a catalyst for a separation-of-powers struggle between the judiciary and the executive branches.[26] As the federal courts sought to assert their authority, Chief Justice Marshall penned three decisions, commonly referred to as the "Marshall trilogy," validating federal oversight of Native Americans.[27] The pivotal case of *Johnson v. M'Intosh* justified the federal

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[23] *See* discussion *infra* Part IV.

[24] Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 LEWIS & CLARK L. REV. 943, 943 (2008).

[25] *See* ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 15 (Thomson Reuters/West 2d ed. 2010) (quoting STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 6–7 (1988)).

[26] *See generally* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 642 (2006) ("As an aging Chief Justice whose Court was coming apart around him, he faced the prospect of losing the Court's legitimacy in cases of judicial review of state court decisions and statutes.").

[27] Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward A Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 664 (2009); *see generally* Worcester v. Georgia, 31 U.S. 515 (1832) (recognizing "Cherokee nation to be a sovereign nation."); Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (finding tribes are "domestic dependent nations," not "foreign nations."); Johnson v. M'Intosh, 21 U.S. 543 (1823) (declaring that Native American tribes do not have a right to sell land to private individuals).

government's invalidation of Indian land rights based on Marshall's "Doctrine of Discovery."[28] After examining international law, the Chief Justice explained that the "conqueror," and his rightful successors, could exercise the "exclusive right" to "extinguish [Indian] title."[29] The *M'Intosh* case defined the parameters of federal Indian law and served to justify the federal government's subsequent control over Indian property, rights, and wealth.[30] In the other two cases of the Marshall trilogy—*Georgia v. Worcester* and *Cherokee Nation v. Georgia*—Chief Justice Marshall determined that native nations should be considered "domestic dependent nations," a finding that led to the development of a trustee-beneficiary relationship between the federal government and native nations, while also limiting states' authority over Indian Country.[31]

During the same period of the Marshall trilogy, a broader national debate raged over the balance of powers between the state and federal government.[32] President Andrew Jackson rose to power with the help of the nascent, anti-federalist Democratic Party,[33] while Marshall continued to craft his decisions as a means of strengthening the federalist position.[34] Challenging these decisions, President Jackson famously trumpeted, "John Marshall has made his decision; now let him enforce it!"[35] Shortly thereafter, even though the Court had precluded Georgia's removal of Native Americans, Jackson defied the Court and ordered the removal of Native Americans from

[28] *Johnson*, 21 U.S. at 543.
[29] *Id.* at 586.
[30] *See id.* at 543.
[31] *See Cherokee Nation*, 30 U.S. at 1 (finding tribes are "domestic dependent nations," not "foreign nations."); *accord Worcester*, 31 U.S. at 515 (recognizing the "Cherokee nation to be a sovereign nation.").
[32] Hope M. Babcock, *The Stories We Tell, and Have Told, About Tribal Sovereignty: Legal Fictions at Their Most Pernicious*, 55 VILL. L. REV. 803, 810 (2010).
[33] *Id.*
[34] *Id.* at 805.
[35] *Id.*; Taylor Henderson, *Five Tribes' Water Rights: Examining the Aamodt Adjudications Mechem Doctrine to Predict Tribal Water Rights Litigation Outcomes in Oklahoma*, 36 AM. INDIAN L. REV. 125, 139–40 n.117 (2012) (quoting President Jackson) ("In response to the Court's decision in *Worcester v. Georgia,* President Jackson reportedly remarked, 'John Marshall has made his decision; now let him enforce it!'").

their homelands, an action that resulted in the infamous Cherokee Trail of Tears.[36]

In the wake of this power struggle, the federal government grappled with its role as trustee, oscillating between policies that rarely served Native Americans.[37] At times, policy-makers intended to help their wards, but did not recognize the inherent destructive effects of their programs until the damage had already been done.[38] Two policies, in particular, drastically marginalized native nations and their peoples: allotment and termination.[39]

At the end of the nineteenth century, Congress passed allotment acts to redistribute tribal lands to individual Native Americans with the intent of inculcating the notion of property ownership and abolishing tribal systems.[40] Allotment, however, severely eroded social stability, land-holdings, and wealth among Native Americans because it led to massive land loss and "fractionation."[41] The allotment program was based on the unfortunate premise that there were surplus lands that the federal government could open to white settlers.[42] It also led to a significant

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[36] Bradford D. Cooley, Note, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND RESOURCES & ENVTL. L. 393, 402 (2006); Henderson, *supra* note 35, at 137.

[37] Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1117 (2004).

[38] *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1610 (2001) ("By 1934, when Congress passed the Indian Reorganization Act officially ending allotment of reservations, whites had obtained title to 86 million acres of Indian land, leaving Indians with only 52 million acres, less than 40 percent of what they had owned fifty years before.").

[39] *See infra* notes 40–60 and accompanying text.

[40] Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 6 (1995). *But see* Miller, *Economic Development in Indian Country*, *supra* note 3, at 812 ("This era in federal Indian policy also had the explicit goals of breaking up tribal ownership of land, ending tribal existence, and, most importantly, opening reservation lands to non-Indian settlement. In fact, the desire of non-Indians to own reservation lands and to open tribal lands and assets to the American economy may have been the prime motivation behind the allotment policy.").

[41] *See generally* Jered T. Davidson, Comment, *This Land is Your Land, This Land is My Land? Why the* Cobell *Settlement Will Not Resolve Indian Land Fractionation,* 35 AM. INDIAN L. REV. 575 (2010).

[42] Bobroff, *supra* note 38, at 1610–1611; Angelique EagleWoman, *Tribal Nations and Tribalist Economics: The Historical and Contemporary*

loss of lands because many Native Americans could not afford the land taxes and were left with no other option than to sell their land to white settlers.[43]

By the late 1920s, the federal government was beginning to recognize the abhorrent conditions that arose through the allotment program.[44] The Brookings Institution published the Meriam Report in 1928, describing the conditions plaguing Native Americans.[45] The report spurred reform and helped lead to the passage of the Indian Reorganization Act ("IRA").[46] The IRA stopped the division of lands under the allotment plan and provided for self-government through tribal corporations.[47] It also provided a means for native nations to

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Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States, 49 WASHBURN L.J. 805, 817 (2010) ("Through designation of 'surplus lands,' Native Americans lost over sixty million acres as the United States redistributed tribal lands.").

[43] Bobroff, *supra* note 38, at 1610–1611; EagleWoman, *supra* note 42, at 816–17 ("By 1934, approximately 27 million acres, or two-thirds of all the land allotted to tribal members, had passed by sale or involuntary transfer from the Indian fee owner into non-Indian ownership.") (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1042 (Nell Jessup Newton et al. eds., 2005 ed.)).

[44] *See* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 58 (W.W. Norton & Co., 2005) (describing the national interest in Indian affairs, which started up in the 1920s); Royster, *The Legacy of Allotment, supra* note 40, at 16 (describing issuance of the Meriam Report, which documented the harmful effects of allotment).

[45] WILKINSON, *supra* note 44, at 44; *see also* Davidson, *supra* note 41, at 585 ("[The Merriam Report was] a nine-hundred-page document recounting the plight of Native Americans, giving great detail on the effects of fractionation. The report, which was independent from the government, examined the 'economic, social, cultural, and physical well-being of the tribes.'").

[46] *See* WILKINSON, *supra* note 44, at 58–60; *see also* Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 N.M. L. REV. 273, 318 (1997) (describing the Meriam Report as "hint[ing] at the possibility of a new dawn in Indian policy"). *But see* Davidson, *supra* note 41, at 585 (explaining that John Collier's charge of the Department of the Interior "was equally momentous.").

[47] Keith Cable, Note, Rosebud v. South Dakota*: How Does Tribal Sovereignty Affect the Determination of State Jurisdiction on Reservation Highways?*, 36 S.D. L. REV. 400, 406 (1991); *see also* Miller, *Economic Development in Indian Country*, *supra* note 3, at 817; Christopher A. Karns, Note, County of Yakima v. Confederated Tribes & Bands of the Yakima

gain federal recognition for services to create economic development corporations.[48] Although certain challenges endure, the IRA provided a foundation that native nations can use today to develop their economies.[49]

Although the IRA represented progress after the allotment era, through the implementation of governmental policies such as termination, the federal government continued to fail native nations.[50] Following the Second World War, Congress terminated federal protection of Indians with House Concurrent Resolution 108.[51] And beginning in 1954, Congress enacted several pieces of legislation to terminate federal supervision of over 110 native nations.[52] Congress justified these programs as "emancipation" or as "freeing the Indian."[53] The cost of such freedom for many native nations, however, was complete economic collapse.[54] Prior to termination, the Menominee Nation, for example, successfully paid for most of the services provided to their members with revenue

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Indian Nation*: State Taxation As A Means of Diminishing the Tribal Land Base*, 42 AM. U. L. REV. 1213, 1223–24 (1993).

[48] Cable, *supra* note 47; *see also* Miller, *Economic Development in Indian Country*, *supra* note 3, at 818.

[49] *See* discussion *infra* Part D; *see also* Judith V. Royster, *Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures*, 31 STAN. ENVTL. L.J. 91, 111–12 (2012).

[50] *See generally supra* and *infra* notes 38–60 and accompanying text (describing allotment, termination, and other governmental policies which harmed Indians).

[51] Catherine M. Ovsak, Comment, *Reaffirming the Guarantee: Indian Treaty Rights to Hunt and Fish Off-Reservation in Minnesota*, 20 WM. MITCHELL L. REV. 1177, 1193 (1994).

[52] Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1186 (1983).

[53] WILKINSON, *supra* note 44, at 64, 66; *see also* H.R. Con. Res. 108, 67 Stat. B132 (1953) ("That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specifically applicable to Indians . . . ."); Lynn Huntsinger & Lucy Diekmann, *The Virtual Reservation: Land Distribution, Natural Resource Access, and Equity on the Yurok Forest*, 50 NAT. RESOURCES J. 341, 356 (2010).

[54] WILKINSON, *supra* note 44, at 82; *see also* Miller, *Economic Development in Indian Country*, *supra* note 3, at 817.

generated from their lumber mills.[55] Indeed, the Menominee were successful despite the federal government having negligently mismanaged many of their trust resources, including timber.[56] After termination, though, the Menominee faced such high taxes that they could not keep operating their mills at a profit.[57] The change in tax status forced them to sell their land just to "pay the bills."[58] Termination left the Menominee with high unemployment, widespread dependence on welfare, and a lack of basic services such as access to healthcare.[59] Many other native nations, including the Klamath, suffered the same crippling effects.[60]

Such erratic government policies have contributed to the disparate poverty levels of Native Americans living on reservations in the United States, with nearly one third falling below the poverty line.[61] Native Americans are the poorest group in the United States, with four out of the ten poorest U.S. counties being located within Indian reservations.[62] But poverty, of course, is not innate to Native Americans; instead, it is their penalty for being forced to coexist alongside "American civilization."[63] On some reservations, like Pine

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[55] WILKINSON, *supra* note 44, at 71.

[56] *Id.* at 71–72.

[57] *Id.* at 82; *see also* Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1046 (1981) ("It is reported that after 1967, county tax obligations amounted to twice the corporation's net income.").

[58] WILKINSON, *supra* note 44, at 82.

[59] *Id.; see also* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1179 (1990).

[60] WILKINSON, *supra* note 44, at 81; *see also* Ryan Sudbury, Case Note, *When Good Streams Go Dry:* United States v. Adair *and the Unprincipled Elimination of A Federal Forum for Treaty Reserved Rights*, 25 PUB. LAND & RESOURCES L. REV. 147, 154 (2004).

[61] *Poverty and Possibilities in Indian Country*, *supra* note 3; *see also* Duane Champagne, *Ramping Up Economic Development Policy for Tribes*, INDIAN COUNTRY TODAY (Feb. 15, 2012), http://indiancountrytodaymedianetwork.com/2012/02/15/ramping-up-economic-development-policy-for-tribes-97804; Jessica A. Shoemaker, Comment, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 739–40 (2003); EagleWoman, *supra* note 42, at 805.

[62] Miller, *American Indian Entrepreneurs*, *supra* note 2, at 1306; Miller, *Economic Development in Indian Country*, *supra* note 3, at 758–59.

[63] Miller, *American Indian Entrepreneurs*, *supra* note 2, at 1303.

Ridge, surrounded by South Dakota, more than half of the people are impoverished.[64] Based on these depressing statistics, commentators have designated native nations as the "fourth world."[65]

Such poverty limits a native nation's ability to generate financing for government services and economic development.[66] Specifically, it precludes a government from generating revenue through the levying of taxes.[67] Although the Supreme Court in *Washington v. Confederated Tribes of Colville Reservation* recognized that native nations have the authority to levy taxes, legal recognition alone cannot overcome the practical challenges that native nations face when attempting to raise significant funds via taxation.[68] High levels of poverty generally prevent native nations from "hav[ing a] viable tax base and . . . [instead they] need to develop creative ways to generate revenue."[69] This federally-engineered poverty impedes capital development.[70]

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[64] Kristof, *supra* note 2; *see also* EagleWoman, *supra* note 42, at 828.

[65] WILKINSON, *supra* note 44, at 271 ("However favorable the new legal and policy framework might be, every Indian tribe in the postwar years faced challenges befitting a third world nation—some have called aboriginal peoples the fourth world."); *see* Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 OR. REV. INT'L L. 131 (2012).

[66] Miller, *American Indian Entrepreneurs*, *supra* note 2, at 1306–07. *Cf.* Bradford E. Chatigny, *The Anadarko Dilemma: Can "Offshore" Banking Join Gambling in the Native American Arsenal of Economic Development?*, 32 COLUM. J.L. & SOC. PROBS. 99, 127–28 (1998–1999) ("On the other hand, allowing these banks would be an enormous boon to the tribes that own them . . . . Eradication of poverty on tribal reservations is either the foundation of, or in line with, the policy goals of nearly every article of federal legislation covering the Indian tribes.").

[67] Miller, *Economic Development in Indian Country*, *supra* note 3, at 833; *see also* EagleWoman, *supra* note 42, at 820 ("Property taxes cannot be assessed against trust land because there is no ability to seize the property.").

[68] *See* Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 156 (1980).

[69] Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300, 1314 n.21 (D.D.C. 1987).

[70] *See* Miller, *American Indian Entrepreneurs*, *supra* note 2, at 1306–08.

B. Present Challenges

Current governmental policies further perpetuate Native American poverty and barriers to capital markets.[71] Significant impediments for native nations' capital development include restrictive federal trust policy and the omission of native nations from favorable investment options.[72] In other words, native nations have few liquid assets because of trusts.[73] Meanwhile, the language of the Securities and Exchange Commission's interpretation of Regulation D, omits native nations, precluding them from investing whatever liquid wealth they do hold and preventing them from achieving any meaningful returns.[74]

In the aftermath of the Marshall trilogy, the federal government's treatment of native nations has been a delicate negotiation between their sovereignty and federal guardianship.[75] The most significant feature of federal protection has been the trust relationship over lands of native nations.[76] Due to the perceived

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[71] *See infra* notes 75–102 and accompanying text (discussing the federal government's trust relationship with Native Americans, the government's failure as a fiduciary, and the limited investment opportunities mandated by Regulation D).

[72] *See infra* notes 75–102 and accompanying text (discussing the negative impact of the trust relationship and of Regulation D on Native Americans).

[73] *See infra* notes 75–90 and accompanying text (discussing the implementation of the trust system and its prevention of Native American wealth maximization).

[74] *See infra* notes 92–102 and accompanying text (explaining how even if native nations had more liquid assets, Regulation D prevents them from maximizing those assets through high-return investments).

[75] Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290, 304 (2009); *see also* Sarah Washburn, Comment, *Distinguishing* Carcieri v. Salazar*: Why the Supreme Court Got It Wrong and How Congress and Courts Should Respond to Preserve Tribal and Federal Interests in the IRA's Trust-Land Provisions*, 85 WASH. L. REV. 603, 609 (2010) ("Under one theory, Congress's power arises directly from the dependent status of tribes and their relationship with the federal government; as wards of the government, tribes are subject to the overriding authority of Congress in handling Indian affairs and managing and protecting Indian land and assets.").

[76] *See* Miller, *Economic Development in Indian Country*, *supra* note 3, at 804 ("This fiduciary or guardian relationship springs from the duties the United States owes to tribes and individual Indians. In regard to this duty,

"inferiority" of native nations, the federal government created trusts to regulate and oversee a variety of native nations' affairs.[77] The federal government has construed its trust duties so as to prevent the alienation of native lands.[78] With the advent of the IRA, Congress stipulated that Indian lands could not be transferred to non-heirs.[79] While this policy may prevent the type of harm that resulted during termination, when non-members gained control of valuable lands at low prices, it also excludes Native Americans from a powerful wealth maximizing opportunity.[80]

The free market of land allows the transfer of wealth to the next generation and provides a valuable asset that an individual can mortgage or sell to generate funds.[81] In an article citing native

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the United States has 'charged itself with moral obligations of the highest responsibility and trust.'").

[77] *See* Rodina Cave, Comment, *Simplifying the Indian Trust Responsibility*, 32 ARIZ. ST. L.J. 1399, 1400 (2000) ("The traditional guardian-ward trust doctrine is based on notions of Indian inferiority, which should not be accepted by the courts."); *see also* Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831) (comparing the Indians' relationship with the United States as that of a "ward to his guardian.").

[78] United States v. Mitchell, 445 U.S. 535, 544 (1980) ("It is plain, then, that when Congress enacted the General Allotment Act, it intended that the United States 'hold the land . . . in trust' . . . simply because it wished to prevent alienation of the land . . . ."); *see also* Jason Stone, Case Note, Ubi Jus Incertum, Ibi Jus Nullum*: Where the Right Is Uncertain, There Is No Right:* United States v. Navajo Nation, 27 PUB. LAND & RESOURCES L. REV. 149, 161 (2006) ("With regard to the United States' policy of holding Indian lands in trust, the Court pointed to the congressional record and determined that Congress's intent was merely to prevent alienation of the Indian lands and immunize the land from state taxation."); Washburn, *supra* note 75, at 605 ("As a part of the historical federal-tribal trust relationship, the federal government has protected Indian land, including taking land into trust for tribes to protect against encroachment by states or private citizens.").

[79] Davidson, *supra* note 41, at 586.

[80] *See* Miller, *Economic Development in Indian Country*, *supra* note 3, at 804–06; *supra* notes 49–60 and accompanying text; *see also* EagleWoman, *supra* note 42, at 815 ("To begin, a basic tenet of economics is that there must be a resource to develop to gain capital. Although many Tribal Nations can identify resources to develop, the United States has a stronghold on those resources.").

[81] *See* Davidson, *supra* note 41, at 575; *cf.* EagleWoman, *supra* note 42, at 819–20 ("Trust land is inalienable and cannot be sold, taxed, mortgaged, or used for collateral. However, trust-land restrictions effectively limit a tribe's

nations as the poorest one percent of America, *Forbes Magazine* attributes high levels of poverty on the roughly three hundred reservations to a lack of property rights.[82] In the article, Manny Jules, former chief of the British Columbia first nation, Kamloops Indian Band, articulated the struggle that so many native nations face:

> "Markets haven't been allowed to operate in reserve lands," says Jules. "We've been legislated out of the economy. When you don't have individual property rights, you can't build, you can't be bonded, you can't pass on wealth. A lot of small businesses never get started because people can't leverage property [to raise funds].[83]

The trust relationship prevents land from being a property right in fee simple absolute and as a result, Native Americans lose a primary means to access capital markets.[84]

Compounding the tragedy of property in trust, the federal government has failed in its fiduciary duties to Native Americans.[85] As mentioned with regard to the Menominee's timber trusts, this guardian-ward relationship has at times resulted in federal mismanagement of native resources.[86] Even though several decades

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revenue base and limit the ability for either a tribe or an individual to utilize the primary asset—land and resources derived from the land.").

[82] John Koppisch, *Why Are Indian Reservations so Poor? A Look at the Bottom 1%*, FORBES (Dec. 13, 2011, 07:32 PM), http://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/.

[83] *Id.*

[84] *See* Blake A. Watson, *The Doctrine of Discovery and the Elusive Definition of Indian Title*, 15 LEWIS & CLARK L. REV. 995, 1021–1022 (2011) (arguing against the construction of Indian title as "analogous" to a fee simple property right); Davidson, *supra* note 41, at 577; EagleWoman, *supra* note 42, at 824 ("United States capitalism requires fundamental property ownership as a building block. To enter into the contemporary economic flow of commerce, capital assets are required, with the most fundamental asset for wealth creation being land ownership.").

[85] *See* Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 TULSA L. REV. 313 (2003–2004); *see also* EagleWoman, *supra* note 42, at 815–16.

[86] *See supra* notes 51–60 and accompanying text (discussing how the government "negligently mismanag[ed] many of their trust resources").

have passed since the Bureau of Indian Affairs ("BIA") mismanaged the Menominee's timber, the BIA has continued to neglect its fiduciary duties.[87] In 1996, Elouise Cobell, the treasurer for the Blackfeet Nation, waged a class action legal battle against the Department of the Interior and the Department of the Treasury because many Native Americans had not received their money from land leases.[88] The agencies could not account for the funds.[89] Accordingly, the court awarded the claimants $3.4 billion, "represent[ing] the largest settlement ever approved against the United States government."[90]

Even if native nations and Native Americans had more liquid assets, omissions in current government regulations limit their ability to benefit from one of the most profitable investment vehicles.[91] Regulation D of the Securities Act of 1933 appears to preclude native nations from acting as accredited investors.[92] The regulation prevents native nations from investing their money in one of the highest-return vehicles and, therefore, it partially "inhibit[s] capital

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[87] *See* Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3497 (2010); *see also* United States v. White Mountain Apache, 537 U.S. 465 (2003); Sisk, *supra* note 85, at 313 (discussing Supreme Court decisions on the government's breach of trust to Indian tribes); *see generally* EagleWoman, *supra* note 42, at 822 ("Despite revelations about inefficiency, by 1994 only an estimated twenty cents of each dollar received by the BIA actually reached the Indians for whom it was intended.") (quoting WENDELL H. OSWALT, THIS LAND WAS THEIRS: A STUDY OF NORTH AMERICANS 41 (8th. ed., 2006)).

[88] *Cobell*, 573 F.3d at 808; *see also* EagleWoman, *supra* note 42, at 822–23; *see generally* Valerie J. Nelson, *Elouise Cobell Dies at 65; Native American Activist*, LOS ANGELES TIMES, Oct. 17, 2011, http://articles.latimes.com/2011/oct/17/local/la-me-elouise-cobell-20111018.

[89] *Cobell*, 573 F.3d at 810.

[90] *Judge Approves $3.4 Billion in Indian Royalties Settlement*, ASSOCIATED PRESS, June 20, 2011, *available at* http://www.nytimes.com/2011/06/21/us/politics/21indian.html?_r=0.

[91] *See generally infra* notes 92–102 and accompanying text (discussing how Regulation D prevents Native Americans from participating in high-return vehicles and thus limits economic growth).

[92] *See* Clarkson, *Accredited Indians*, *supra* note 7, at 285; *see also Accredited Investors*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/answers/accred.htm (last visited Jan. 25, 2013).

formation and investment in Indian Country."[93] Normally, under the Securities Act of 1933, a company can sell its own securities to about eight different categories of investors.[94] These categories include banks, trusts, charities, or even individuals with a net worth of over one million dollars.[95] These categories, however, do not include language that could even be interpreted as implying native nations.[96] Accredited investors benefit from being able to invest in a variety of vehicles, including some that are known for including high pay-offs like hedge funds.[97] Because hedge funds can offer risky investments, preclusion of native nations may be yet another example of the United States exercising its guardianship over native nations.[98]

Although such preclusion may have been an oversight, the United States has not seized at least one opportunity to correct it.[99] In April 2012, Congress enacted the Jumpstart Our Business Startups Act ("JOBS Act").[100] The JOBS Act amended Regulation D, further

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[93] *Policy Briefing: Native American Tribes Require Reg. D Change*, NATIVE AM. CAPITAL, LP, at 1, *available at* http://www.sec.gov/rules/other/265-23/nac020306.pdf.
[94] *Accredited Investors*, *supra* note 92.
[95] *Id.*
[96] *See id.*
[97] *See* Jasmin Sethi, *Another Role for Securities Regulation: Expanding Investor Opportunity*, 16 FORDHAM J. CORP. & FIN. L. 783, 800 (2011) ("Historically, the SEC has permitted certain financial institutions, such as hedge funds, to escape regulation. In order to protect unsophisticated, individual investors from the market imperfections of the unregulated world of hedge funds, the SEC restricts who can invest in a hedge fund."); *see also* So-Yeon Lee, Note, *Why the "Accredited Investor" Standard Fails the Average Investor*, 31 REV. BANKING & FIN. L. 987, 992 (2012) (explaining why the current "Accredited Investor" standard is less effective).
[98] *See* Clarkson, *Accredited Indians, supra* note 7, at 291 ("While some of the current federal regulations and policies that harm tribal economies are a result of overt hostility towards tribes, this Article suggests that the exclusion of tribes from the category of accredited investors results from mere oversight, or 'benign neglect."'); *see also* Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).
[99] *Compare* Clarkson, *Accredited Indians, supra* note 7, at 291 *with* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).
[100] Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012); David H. Oden & Christina W. Marshall, *The JOBS Act: Significant Changes for Raising Private Capital*, HAYNES AND BOONE'S NEWSROOM (Apr. 16, 2012), http://www.haynesboone.com/jobs_act_private_capital/.

enabling accredited investors greater investment opportunities.[101] Congress, however, did not amend Regulation D to include native nations.[102] In sum, historical and current federal policies have left many native nations poverty-stricken with few liquid assets and few opportunities to generate high-returns on their investments.[103] Yet, despite these barriers to capital, native nations are finding points of access to the free market through tax-exempt bonds and native-owned banks.[104]

III. Bond Issuance

A. Utility of Bonds

Burdened with illiquid assets and barriers to high-return investments, native nations must find other means to access capital markets and develop their economies.[105] Tax-exempt bonds offer native nations the opportunity to access much-needed capital.[106] Although native nations face regulatory challenges with tax-exempt bonds, their continued advocacy and a temporary Treasury program will aid them in broadening their market access with bonds. Many state governments use tax-exempt bonds to develop their economies.[107] Native nations do not have the same opportunity because the IRS interprets the 1982 Indian Tribal Government Tax Status Act (the "Tax Act"), codified at the Internal Revenue Code

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[101] Oden & Marshall, *supra* note 100.

[102] *Id.*

[103] *See generally supra* notes 75–102 and accompanying text (discussing the U.S. policies that have further impoverished Native Americans, including control over property rights and mismanaged fiduciary duties).

[104] *Compare* discussion *supra* Part B (Barriers to Access to Capital Markets), *with* discussion *infra* Parts C (Bond Issuance), D (Native-Owned Banks).

[105] *See* discussion *supra* Part B (detailing the barriers keeping native nations from capital markets).

[106] *See* Clarkson, *Accredited Indians, supra* note 7, at 291,

[107] STEVEN MAGUIRE, CONG. RESEARCH SERV., RL 30638, TAX-EXEMPT BONDS: A DESCRIPTION OF STATE AND LOCAL GOVERNMENT DEBT 1–2 (2012), *available at* http://www.nabl.org/uploads/cms/documents/2012-13313-1.pdf.

§ 7871, more narrowly.[108] The Tax Act sought to empower native nations by providing them some of the same resources that states have for raising revenue.[109] Nonetheless, Congress did not provide express parity with states and deferred to the IRS to provide additional guidance.[110]

The IRS determined that native nations could only use tax-exempt bonds if their projects constituted "essential governmental functions" that a state "customarily" would do.[111] Yet, it is unclear which activities constitute an "essential governmental function."[112] In many circumstances, where a state has utilized a tax-exempt bond, the IRS has denied native nations the same opportunity for the same purposes.[113] For example, in 2002, the IRS evaluated whether the Las Vegas Paiute Tribe's operation of a golf course conformed to the criteria for the issuance of a tax-exempt bond, i.e., whether the golf course served an "essential governmental function."[114] After admitting that the term "essential governmental function" is ambiguous and that governing court precedent requires that statutes should "be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit," the opinion

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[108] Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009, 1015 (2007); *see* 26 U.S.C. § 7871 (2006).

[109] *See* 26 U.S.C. § 7871 (2006); *see also* 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, 339 (1985) ("According to its sponsors, the Tribal Tax Status Act is intended to 'strengthen tribal governments significantly by providing additional sources of financing and by eliminating the unfair burden of taxes Indian tribal governments must now pay.'").

[110] Williams, *supra* note 109, at 339 (describing how tribal attempts to capitalize on the favorable status given to them by Congress were stunted by their treatment by the IRC); *see also* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 146 (2006–2007).

[111] Clarkson, *Tribal Bonds, supra* note 108, at 1009; *see also* Letter Rulings, *Tribe's Use of Bond Proceeds for Other than Essential Government Function Precluded Exempt Interest*, 106 J. TAX'N 252, 253 (2007).

[112] Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 639 (2004); *see also* 26 U.S.C. § 7871(e) (defining "essential governmental function").

[113] *See generally* Clarkson, *Tribal Bonds*, *supra* note 108, at 1050 (discussing the "presumption of improper IRS practices toward tribes").

[114] *Id.*

disappears into redacted information.[115] It is not clear why the IRS redacted the sentences, nor is it clear how the opinion resulted in a limited interpretation of the phrase.[116] Tribal finance expert Gavin Clarkson, however, highlighted the fact that when the IRS denies a project as having an "essential governmental function," it bases its understanding of the phrase on an evaluation of whether the activity in question "makes or saves money" for non-tribal state or local governments.[117]

With such restrictions and unreliability, native nations have struggled to benefit from tax-exempt bonds like state and local governments do.[118] From 1987 to 2010, native nations issued "less than one-tenth of one percent of the total" of tax-exempt bonds in the United States.[119] In addition to regulations, native nations face heightened practical difficulties with government bonds such as the risk of IRS audits.[120] The IRS audits tribal tax-exempt bonds thirty-three times more than it does other governmental tax-exempt bonds.[121] Together, the Tax Act and the subsequent IRS interpretation exclude native nations from a source of funding that typically empowers states.[122]

B. A New Program: Tribal Economic Development Bonds

Recognizing that regulations were crippling native nations' ability to issue bonds, Congress included a provision for native

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[115] *Id.*; *see also* U.S. DEP'T OF THE TREASURY, MEMORANDUM: INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE 8 (Aug. 12, 2002), *available at* http://www.tribalfinance.org/Documents/IRS_FSA_20024712.pdf.

[116] Clarkson, *Tribal Bonds*, *supra* note 108, at 1050; *see also* U.S. DEP'T OF THE TREASURY, *supra* note 115.

[117] Clarkson, *Tribal Bonds*, *supra* note 108, at 1051.

[118] *Id.* at 1050–1051.

[119] *Report to Congress on Section 7871*, *supra* note 19, at 1

[120] Clarkson, *Tribal Bonds*, *supra* note 108, at 1017.

[121] *Id.* at 1018 ("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.").

[122] *Id.* at 1015–16.

nations as part of the American Reinvestment and Recovery Act of 2009.[123] TEDB authorizes the U.S. Department of the Treasury to "allocate . . . $2 billion" in interest-bearing loans to native nations for economic development projects.[124] The Internal Revenue Code's limitations do not apply to these funds and native nations can use them for projects beyond "essential governmental function[s]," even to make payments on previously issued bonds.[125] These allocations parallel the authority that state and local governments have to issue tax-exempt bonds.[126]

Although TEDB greatly expands native nations' ability to raise capital, it is not an open market enterprise guided by an "invisible hand."[127] The $2 billion limit is insufficient to meet the significant demand of native nations with seventy-six projects sharing the funding.[128] Relying on TEDB also puts native nations at the mercy of politics.[129] In August of 2011, Senator Coburn of Oklahoma led a campaign to eliminate the program.[130] Although the initiative was unsuccessful, native nations still would be better

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[123] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (Title V); *Treasury Issues Notice of Applications for Tribal Economic Development Bonds*, INDIAN L. UPDATE (Quarles & Brady LLP, Milwaukee, Wis.), July 2009, at 1 [hereinafter *Treasury Issues Notice*], *available at* http://www.quarles.com/files/Publication/efa14332-6314-4221-a099-011c693658d8/Presentation/PublicationAttachment/aea1c067-8b05-4900-96be-04d5343a2787/6_25_09%20Addressing.pdf.

[124] *Treasury Issues Notice*, *supra* note 123, at 1; *see also* TOWNSEND HYATT, ORRICK, TRIBAL ECONOMIC DEVELOPMENT BONDS IN PLAIN ENGLISH (2009), *available at* http://www.orrick.com/Events-and-Publications/Pages/tribal-economic-development-bonds-in-plain-english-2094.aspx.

[125] *Treasury Issues Notice*, *supra* note 123, at 1.

[126] Richard A. Helde et al., *IRS Announces Allocation Procedures for Tribal Economic Development Bonds*, DORSEY & WHITNEY LLP (June 26, 2009), http://www.dorsey.com/tribal_bond_alert/.

[127] *See generally* Smith, *supra* note 1.

[128] *See* Greg Guedel, *Second Billion-Dollar Tribal Economic Development Bond Allocation Announced*, FOSTER PEPPER NATIVE AM. LEGAL UPDATE (Feb. 12, 2010), http://www.nativelegalupdate.com/2010/02/articles/second-billiondollar-tribal-economic-development-bond-allocation-announced/.

[129] *See* Gale Courey Toensing, *Coburn Proposes Ending Tribal Tax Exempt Bonds, CDFI Funding, Tax Credits*, INDIAN COUNTRY TODAY (Aug. 4, 2011), http://indiancountrytodaymedianetwork.com/2011/08/04/coburn-proposes-ending-tribal-tax-exempt-bonds-cdfi-funding-tax-credits-45799.

[130] *Id.*

served by changes in the Internal Revenue Code or changes in the IRS interpretation, rather than be at the mercy of a debate regarding controversial stimulus funds. Native nations do not need a temporary loan program; they need the permanent ability to issue tax-exempt bonds like any other government has.[131]

Although only a temporary loan program, TEDB has provoked Congress to reevaluate the Tax Act.[132] In May of 2012, the Senate Finance Committee held a hearing on tax reform, discussing the ramifications for native nations.[133] The hearing followed a Department of the Treasury report that recommended native nations have parity with states for issuing tax-exempt bonds without the burdensome and vague requirement of fulfilling an "essential governmental function."[134] In its report, the Treasury Department also evaluated various comments on credit challenges for native nations and rejected one suggestion to provide "[f]ederal guarantees to support Indian tribal tax-exempt bond financings" because it felt the guarantees would undermine U.S. treasury bonds.[135] The Treasury report contains substantial support for tribal bond parity with states, even if Congress has yet to recognize the suggestions.[136]

Despite the limitations and the uncertainty about whether reform will occur, some native nations have forged ahead, financing innovative projects emblematic of the potential that could happen with reform.[137] For example, the Navajo Nation has undertaken a new bond project to develop jobs and its economy.[138] It represents the largest economic development project not using loans or gaming funds for a native nation in over a decade.[139] Because of the IRS

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[131] *See* Clarkson, *Tribal Bonds*, *supra* note 108.
[132] *Tax Reform: What It Could Mean for Tribes & Territories Before the S. Comm. on Fin.*, 112th Cong. 2 (2012) (statement of Lindsay G. Robertson, Professor of Law, University of Oklahoma), *available at* http://www.finance.senate.gov/imo/media/doc/Robertson%20Testimony.pdf.
[133] *Id.* at 1.
[134] *See Report to Congress on Section 7871, supra* note 19.
[135] *Id.* at 3–4.
[136] *See generally id.*
[137] *See infra* notes 138–144 and accompanying text.
[138] Amanda J. Crawford, *A Bond Offering from the Navajo Nation*, BLOOMBERG BUSINESSWEEK MAGAZINE (Nov. 10, 2011), http://www.businessweek.com/magazine/a-bond-offering-from-the-navajo-nation-11102011.html.
[139] *Id.*

constraints, only some of the bonds will be tax-exempt.[140] Standard and Poor issued the Navajo bond an A rating, which even California bonds do not receive.[141] The Nation proposes using the funding for roughly fifty projects, including construction of a tourist center.[142]

On a smaller scale, in 2009, the Oneida Nation sought and received IRS permission to issue tax-exempt bonds to raise money for an energy project.[143] In a private letter ruling, the IRS found that the proposed operation of power utilities constituted an "essential governmental function," and that the Oneida Nation could issue tax-exempt bonds.[144] These projects are but a sampling of the development native nations can achieve through bond-issuance and are indicative of their potential should native nations be given the authority to issue tax-exempt bonds.[145]

The 2009 recovery program represents a gradual shift to empowering native nations to develop their economies with alternative means of financing.[146] If TEDB is successful, the experimental program may help to change the IRS interpretation of section 7871's "essential governmental function."[147] Even if the IRS resists updating its interpretation, Congress may recognize the wisdom in amending the statute to obviate the IRS interpretation.[148] Better access to capital markets would allow native nations to

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[140] *Id.*

[141] Amanda J. Crawford, *Billionaire Navajos Rated Above California Plan First Bonds: Muni Credit,* BLOOMBERG, (Nov. 1, 2011, 12:00 AM), http://www.bloomberg.com/news/2011-11-01/billionaire-navajos-rated-above-california-plan-first-bonds-muni-credit.html.

[142] *Id.*

[143] Greg Guedel, *IRS Ruling Provides Good News for Tribal Energy Bonds*, FOSTER PEPPER NATIVE AM. LEGAL UPDATE (Mar. 17, 2009), http://www.nativelegalupdate.com/2009/03/articles/irs-ruling-provides-good-news-for-tribal-energy-bonds.

[144] I.R.S. Priv. Ltr. Rul. 200911001 (Mar. 13, 2009), *available at* http://www.irs.gov/pub/irs-wd/0911001.pdf.

[145] *See* Clarkson, *Tribal Bonds*, *supra* note 108.

[146] *See supra* notes 123–145 and accompanying text (discussing the new TEDB program and the congressional response to it).

[147] *See* 26 U.S.C. § 7871(e).

[148] *See supra* notes 132–136 and accompanying text (summarizing the congressional hearings on reforms to the tax code to improve tribal tax-exempt bond financing).

achieve wealth creation and, perhaps, the sovereignty that has long eluded them, yet was once theirs since "time immemorial."[149]

IV. Native-Owned Banks

A. The Need for Native Banking

If bonds are instrumental for governments in accessing capital markets and developing wealth, then banking plays a similar role for businesses and individuals.[150] Native-owned banking will provide greater market access for Native Americans through increased credit opportunities and by creating a competitive edge for the banks that can strategically benefit from the sovereign status of their native nations. For years, Native Americans on reservations had to drive at least thirty miles to access an ATM, giving rise to a barrier known as the "buckskin curtain."[151] This "buckskin curtain" pegged Native Americans as easy targets for predatory lenders, who exploited them by imposing high interest rates and fees.[152] Predatory lending weakens the borrower's ability to accumulate wealth, perpetuating his or her vulnerability to predatory lending.[153]

In a 2012 paper, the Federal Reserve identified the shortage of banking institutions located near native communities as a primary

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[149] Worcester v. Georgia, 31 U.S. 515, 559 (1832).

[150] *Compare* discussion *supra* Part C, *with* discussion *infra* Part D.

[151] Ronald A. Wirtz, *Breaching the "Buckskin Curtain,"* THE REGION (The Fed. Reserve Bank of Minneapolis, Minneapolis, Minn.), Sept. 1, 2000, http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3506.

[152] *See* FIRST NATIONS DEV. INST., BORROWING TROUBLE: PREDATORY LENDING IN NATIVE AMERICAN COMMUNITIES, 18 (2008), *available at* http://www.aecf.org/~/media/Pubs/Topics/Special%20Interest%20Areas/Other/BorrowingTroublePredatoryLendinginNativeAmeri/borrowing%20trouble.pdf.

[153] *Predatory Lending in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 20 (2008), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110shrg44213/pdf/CHRG-110shrg44213.pdf ("The effect of having a tribal population unbanked and subject to predatory financial firms is that it strips an already vulnerable population of the opportunity to advance by preventing them from building assets, equity and wealth.").

barrier to accessing capital markets.[154] Even native businesses that have "adequate collateral and good credit histories" struggle to obtain financing.[155] Large loans of more than $100,000 tend to be difficult for Native Americans and native nations to obtain.[156] Meanwhile, even Native Americans who are relatively affluent have difficulty financing a home.[157]

One possible partial solution to the "buckskin curtain" is to incentivize non-native banks to provide the needed services to native nations.[158] For example, in 2006, the Office of the Comptroller of the Currency ("OCC") encouraged banks to provide financial services to Native Americans as part of the Community Reinvestment Act ("CRA").[159] Enacted in 1977, the CRA encourages banks to meet all

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[154] WOODROW, GROWING ECONOMIES IN INDIAN COUNTRY, *supra* note 4, at 4; *see also* Ansson, Jr. & Oravetz, *supra* note 6, at 462 ("In general, banking institutions have even failed to establish banking facilities within Indian country. For instance, the Navajo reservation, which has a population of more than 200,000 individuals, only has several banking facilities. Meanwhile, a border town, such as Gallup, New Mexico, with a population of 20,000, has almost three times as many as banks.").

[155] WOODROW, GROWING ECONOMIES IN INDIAN COUNTRY, *supra* note 4, at 4.

[156] OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMMERCIAL LENDING IN INDIAN COUNTRY: POTENTIAL OPPORTUNITIES IN AN EMERGING MARKET 3–4 (2006), *available at* http://www.occ.gov/topics/community-affairs/publications/insights/insights-commercial-lending-indian-country.pdf [hereinafter COMMERCIAL LENDING IN INDIAN COUNTRY] ("Similarly, nearly 70 percent of tribal respondents in the same study noted that larger-sized loans (defined as loans greater than $100,000) to businesses operated by tribes or individual tribal members and private equity capital (both start-up financing and venture capital investments) were 'difficult to obtain' or 'impossible to obtain.' Bankers and tribal representatives specifically cite the lack of operating capital as a critical gap in tribal development projects.").

[157] Aaron Drue Johnson, Comment, *Just Say No (To American Capitalism): Why American Indians Should Reject the Model Tribal Secured Transactions Act and Other Attempts to Promote Economic Assimilation*, 35 AM. INDIAN L. REV. 107, 117 (2010–2011) ("In fact, 'even middle and upper income Indians on reservations are confronted by inadequate housing, a situation aggravated by a lack of access to home mortgages.'").

[158] *See* Wirtz, *supra* note 151.

[159] COMMERCIAL LENDING IN INDIAN COUNTRY, *supra* note 156, at 4.

of their community's credit needs.[160] Prior to 1977, banks were not investing in poorer communities, but instead engaged in "redlining," which consists of either denying banking services (e.g., loans and mortgages) or discriminately charging higher prices for those services.[161] The CRA imposes an "affirmative obligation" on banks to provide services on reasonable terms to low-income communities, which regulators enforce through regular bank examinations.[162] The OCC explains that by providing loans to Native Americans, banks can "receive favorable consideration" by the regulating agency during the CRA performance evaluation.[163]

Similarly, the Indian Financing Act of 1974 authorizes the Department of the Interior to guarantee almost the entire value of the loan, reducing the risk that banks would face should Native American borrowers default.[164] These programs and others have provided paths through the buckskin curtain, but have not yet torn it down.[165]

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[160] Ren S. Essene & William C. Apgar, *The 30th Anniversary of the CRA: Restructuring the CRA to Address the Mortgage Finance Revolution*, REVISITING THE CRA: PERSPECTIVES ON THE FUTURE OF THE COMMUNITY REINVESTMENT ACT (Fed. Reserve Banks of Bos. and S.F., 2009), at 15, *available at* http://www.frbsf.org/publications/community/cra/revisiting_cra.pdf.

[161] *Id.* at 14.

[162] *Id.* at 15.

[163] COMMERCIAL LENDING IN INDIAN COUNTRY, *supra* note 156, at 4 ("Many of the commercial lending activities that banks undertake in Indian Country may receive favorable consideration under CRA . . . .").

[164] 25 U.S.C. § 1451 (2006); *see also* United Nat. Bank v. U.S. Dept. of Interior, 54 F. Supp. 2d 1309, 1311 (S.D. Fla. 1998) (summarizing that the DOI can "(a) guarantee up to 90 per cent of the unpaid principal and interest due on any loan made to approved organizations of Indians and individual Indians; and (b) in lieu of such guaranty, . . . insure loans under an agreement approved by the Secretary whereby the lender will be reimbursed for losses not to exceed 5 per cent of the aggregate of the loans made by it, but not to exceed 90 per cent of the loss on any one loan").

[165] *See infra* notes 151–164 and accompanying text (discussing how such programs weaken the buckskin curtain).

B. Traditional Private Lenders Largely Fail to Provide the Needed Services

Despite federal incentives, non-native private lenders still fall short in providing the needed banking services.[166] Because many native nations are sovereign entities with their own legal systems, many banks find loans to be too risky.[167]The risk is two-pronged, involving both issues of sovereign immunity and limited collateral options due to trust restrictions on land alienation.[168]

The sovereign immunity of native nations deters banks from providing loans because banks worry about enforcing loan contracts.[169] Even when native nations waive their sovereign immunity, courts may subsequently deem the waiver invalid.[170] For example, an investment group engaging in business with the Lac du Flambeau tribe was unaware of the requirement that the National Indian Gaming Commission must approve any loan secured by gaming money.[171] Although the tribe had waived its sovereign

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[166] *See* Susan Woodrow & Fred Miller, *Lending in Indian Country the Story Behind the Model Tribal Secured Transaction Law*, 15 BUS. L. TODAY 39, 39 (2005).

[167] *Opportunities and Challenges for Economic Development in Indian Country: Hearing Before S. Comm. on Banking, Hous., and Urban Affairs*, 112th Cong. 52 (Nov. 10, 2011) [hereinafter *Opportunities and Challenges*] (statement of Susan M. Woodrow, Community Development Advisor, Federal Reserve Bank of Minneapolis) ("[L]enders and others face confusing and uncertain rules, and thus risky legal environments, that either deter them from doing business in Indian Country or raise the costs of doing business in tribal jurisdictions."); s*ee also* Woodrow & Miller, *supra* note 166, at 39.

[168] *See infra* notes 169–219 and accompanying text.

[169] DEAN B. SUAGEE, RENEWABLE ENERGY POLICY PROJECT, RENEWABLE ENERGY IN INDIAN COUNTRY: OPTIONS FOR TRIBAL GOVERNMENTS 16 (1998), http://www.repp.org/repp_pubs/pdf/issuebr10.pdf; Jon Swan, *Native American Banking: Banking the Unbanked*, 19 COMMUNITIES & BANKING 20, 22 (Summer 2008), *available at* http://www.bos.frb.org/commdev/c&b/2008/summer/swan_native_american_bank.pdf.

[170] Cary Spivak, *Suit Filed in Tribal Bond Deal*, J. SENTINEL (Jan. 20, 2012), http://www.jsonline.com/business/suit-filed-in-tribal-bond-deal-5d3sj17-137801053.html; *see also* Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp., 677 F. Supp. 2d 1056, 1057 (W.D. Wis. 2010), *aff'd sub nom.*, 658 F.3d 684 (7th Cir. 2011).

[171] Spivak, *supra* note 170; *see* 25 U.S.C. § 2701 (2006) ("Federal courts have held that section 81 of this title requires Secretarial review of

immunity, a federal court held that the waiver agreement was void because the tribe used gaming money to secure the bonds without the required approval.[172] While sovereignty issues could likely be resolved through better drafting of agreements and additional due diligence, the uncertainty could potentially increase the cost for banks doing business with native nations and peoples.[173]

Similarly, sovereignty means that many native nations have their own laws that could govern business transactions and disputes, deterring some banks.[174] Usually, state law governs business disputes and transactions.[175] Nonetheless, the Supreme Court has carved out exceptions to state jurisdiction and clarified that states have little jurisdiction when they do not have a strong interest in the conflict.[176] Accordingly, the Court's recognition of tribal sovereignty under a narrow set of circumstances could compel tribal jurisdiction over certain banking transactions.[177]

Three cases have established the criteria for determining jurisdiction for a civil action involving either Native Americans or

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management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts"); *see also* 25 U.S.C. § 81(b) ("No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.").

[172] Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp., 658 F.3d 684, 702 (7th Cir. 2011).

[173] *See* Graham, *supra* note 112, at 633; *see also Capital Investment in Indian Country: Hearing Before the Subcomm. on Fin. Inst. of the S. Comm. on Banking, Hous., & Urban Affairs*, 107th Cong. 26 (2002); Raymond I. Orr, *Liberal Defaults: The Pending Perception of "Special Financial Rights" Among American Indian Nations*, 47 TULSA L. REV. 515, 520 (2012).

[174] *See* Graham, *supra* note 112, at 630.

[175] *Opportunities and Challenges*, *supra* note 167, at 51–52 (statement of Susan G. Woodrow) (citing Federal Reserve Bank of Minneapolis President Narayana Kocherlakota).

[176] *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) ("When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.").

[177] *See infra* notes 181–198 and accompanying text.

native nations.[178] Each case not only illustrates the complexities of jurisdiction that could deter banks from engaging in business in Indian Country but also imposes a burden on banks to consider jurisdictional issues as they negotiate.[179] The three cases set forth the potential adaptations banks may be forced to make while doing business in native nations, ranging from minor adjustments to their business practices to the comparatively higher burden of understanding tribal law.[180]

First, in *Strate v. A-1 Contractors*, the Supreme Court elaborated that when a state's interest is strong and tribal interest is weak, the state will likely have governing authority.[181] On a public highway that traversed the Fort Berthold Reservation, but which was maintained by North Dakota, two drivers crashed, giving rise to a personal injury lawsuit.[182] While neither driver was a member of the native nation, one party had children who were tribal members and the other driver took the highway to perform landscaping services on the reservation pursuant to a subcontract. Due to these various connections, the case grappled with issues dealing with tribal jurisdiction.[183] The Court balanced these interests and determined that the native nation did not have a strong interest in the case.[184] Thus, when the federal government and native nations' interests are minimal, the state will likely have jurisdiction.[185] Accordingly, a bank's cost of business would only be minimally higher in its due diligence to determine if *Strate* would apply.[186]

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[178] *See* Strate v. A-1 Contractors, 520 U.S. 438 (1997) (holding that "when an accident occurs on a public highway maintained by the State . . . absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers driving on the State's highway, tribal courts may not exercise jurisdiction in such cases"); *see also White Mountain Apache Tribe*, 448 U.S. at 136; Montana v. United States, 450 U.S. 544, 565 (1981).
[179] *See* Bernardi-Boyle, *supra* note 2, at 41.
[180] *See infra* notes 181−197 and accompanying text.
[181] *Strate*, 520 U.S. at 446 (1997) (holding that "activity that directly affects the tribe's political integrity, economic security, health, or welfare" is an exception to the general rule that "absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation").
[182] *Id.* at 442–43.
[183] *Id.* at 443.
[184] *Id.* at 446–59.
[185] *See id.*
[186] *See supra* notes 181−184 and accompanying text.

Second, in *White Mountain Apache v. Bracker*, a non-Indian logging company entered into a contract with the tribe.[187] The tribe cut down, transported, and delivered trees to a sawmill; all conduct occurred on tribal land.[188] The State of Arizona attempted to tax these activities.[189] The Supreme Court, however, held that because the federal government had enacted comprehensive laws governing timber production, state taxation would interfere with the "federal regulatory scheme."[190] The case shows that the federal government's interest, articulated through comprehensive regulation, will preempt a state's authority.[191] Accordingly, a bank's preparation for a deal would involve research into federal regulations that could alter the jurisdiction should a dispute arise.[192]

In the final pivotal case, *Montana v. United States*, the Court analyzed the reach of tribal jurisdiction over non-members.[193] The Crow Tribe of Montana wished to regulate hunting and fishing activities of non-members on their lands.[194] The Supreme Court recognized a degree of "inherent sovereign power."[195] Native nations have the authority to regulate non-members who consent to engage in activity on their lands.[196] Therefore, although *Montana* held that there was no "tribal civil jurisdiction" over the hunters and fishers, it clarifies that contractual agreements with tribes on tribal land often result in tribal jurisdiction.[197] Therefore, in a case arising from a contractual dispute between a native nation and a lender about business occurring on Indian land, the native nation would likely have jurisdiction unless the contract provided otherwise.[198]

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[187] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 137–38 (1980).
[188] *Id.* at 139.
[189] *Id.*
[190] *Id.* at 148.
[191] *See id.*
[192] *See supra* notes 187–191 and accompanying text.
[193] Montana v. United States, 450 U.S. 544, 565 (1981).
[194] *Id.* at 557.
[195] *Id.* at 565 ("To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.").
[196] *Id.* ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").
[197] *See id.* at 565–66.
[198] *See supra* notes 193–197 and accompanying text.

Accordingly, banks may find developing the expertise to navigate tribal law to be too costly.[199]

The legal precedent of these three foundational cases on civil Indian law requires banks to understand Indian law when they structure their transactions with native nations so as to avoid winding up in tribal court.[200] Tribal jurisdiction can be particularly daunting because it involves tribal law, which may impose an additional transactional cost.[201] With more than 500 federally recognized nations, the diversity of laws likely serves as another deterrent for banks considering doing business in Indian Country.[202] Some nations, like the Navajo Nation, have rather clear codes and offer non-members the opportunity to join the nation's bar association.[203] Other nations have not provided such a clear rulebook.[204]

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[199] *See supra* notes 174–197 and accompanying text; *see also Capital Investment in Indian Country*, *supra* note 173, at 36 (statement of Franklin D. Raines, Chairman and Chief Executive Officer, Fannie Mae); Heidi McNeil Staudenmaier & Metchi Palaniappan, *The Intersection of Corporate America and Indian Country: Negotiating Successful Business Alliances*, 22 T.M. COOLEY L. REV. 569, 592 (2005) ("If the parties to the contract go to the tribal court for dispute resolution, and tribal law governs, parties should undertake sufficient due diligence to understand the structure and process.").

[200] *See supra* notes 181–197 and accompanying text.

[201] *See Capital Investment in Indian Country*, *supra* note 173, at 21 (statement of William V. Fischer, President, American State Bank, Pierre, South Dakota); *see also* Bernardi-Boyle, *supra* note 2, at 41–42.

[202] *See What We Do,* U.S. DEPARTMENT OF THE INTERIOR—INDIAN AFFAIRS, http://www.bia.gov/WhatWeDo/index.htm (last visited Jan. 25, 2013) (identifying 566 federally recognized tribes).

[203] NAVAJO NATION BAR ASS'N INC., http://www.navajolaw.org/ (last visited Jan. 25, 2013).

[204] *See* Ansson, Jr. & Oravetz, *supra* note 6, at 450 ("By and large, if a non-Indian corporation does business on Indian land, tribal courts will be the only judicial forum whereby disputes can be resolved. In general, with the exception of a small percentage of tribes, most tribes fail to have commercial and business regulatory laws, and if they do, odds are that the tribes have not published their laws. Additionally, when most tribal courts adjudicate decisions, their opinions are unreported and, thus, not accessible to most."); Staudenmaier & Palaniappan, *supra* note 199, at 591 ("Tribal laws also include traditional practices, including commercial customs, that are based on oral history but may not be codified."); Lucinda Hughes-Juan, *How Tribes Can Support Economic Growth Through Uniform Commercial Codes*, INDIAN COUNTRY TODAY (Aug. 16, 2012), http://

To reduce some of the uncertainties and increase the efficiency of lending, the Uniform Law Commission promulgated the Model Tribal Secured Transactions Act ("MTSTA") to govern borrowing.[205] This act "encourage[s] the harmonization of state and Indian law."[206] In 2006, the Crow Tribe adopted the MTSTA, translating key ideas into Crow.[207] The Crow Tribe's example might compel more nations to adopt the MTSTA and reduce one of the barriers to banking.[208] Nonetheless, one scholar writing for the *American Indian Law Review* warned that adopting the MTSTA could "signal to [a nation's] inhabitants and to off-reservation businesspeople that it intends to amalgamate into the larger American economic system."[209] Such assimilation raises concerns because of the historically misguided federal policies that led to many of the problems that continue to plague native nations today.[210]

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indiancountrytodaymedianetwork.com/article/how-tribes-can-support-economic-growth-through-uniform-commercial-codes-129385.

[205] *Indian Country Currents*, THE FED. RESERVE BANK OF MINNEAPOLIS http://www.minneapolisfed.org/indiancountry/ (last visited Jan. 25, 2013); *see also* Ansson, Jr. & Oravetz, *supra* note 6, at 451 ("If tribes adopt the UCC, many businesses will feel more comfortable doing business in Indian country. Moreover, more banks will probably be willing to lend monies to tribal businesses and individual tribal members.").

[206] WILLIAM H. HENNING, A HISTORY AND DESCRIPTION OF THE MODEL TRIBAL SECURED TRANSACTIONS ACT PROJECT 1 (2007) *available at* http://www.iaca.org/iaca/wp-content/uploads/MTSTA_Article.pdf; *see also* Hughes-Juan, *supra* note 204 ("[I]t was drafted by a special committee that included an advisory group of Indian tribes from: The Cherokee Nation, the Navajo Nation, the Chitimacha Nation, the Oneida Nation, the Crow Nation, the Confederated Tribes of Warm Springs, the Chickasaw Nation, the Little Traverse Bay Bands of Odawa Indians, the Sac and Fox Nation, and several California Rancherias.").

[207] *Opportunities and Challenges*, *supra* note 167, at 53.

[208] *See* Sue Woodrow, *Tribal Update: Nation Building in the Ninth District*, COMMUNITY DIVIDEND (May 1, 2007), http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=1910; *see also* Ansson, Jr. & Oravetz, *supra* note 6, at 442.

[209] Johnson, *supra* note 157, at 107–08.

[210] *Id.* at 108 ("There is no doubt that the plight of the American Indians was caused and has been perpetuated by European invaders. They must shield themselves from exploitation by the same group."); *see also* Miller, *American Indian Entrepreneurs*, *supra* note 2, at 1301 ("One law professor stated that for 'many Indians development is the road to cultural ruin' as it

Although stakeholders, like banks, should be sensitive toward assimilation concerns, these concerns should not outweigh the potential of improving banking services for Native Americans.[211]

Banks also hesitate to provide needed services because native nations and Native Americans often cannot provide the required collateral of land.[212] Although an executive for Wells Fargo recognized that the impediments to native banking are comparable to doing business with other regulated industries or international companies, the regulations governing business transactions in native nations are different enough to be of significant concern for banks.[213] For example, federal law controls trust property and precludes native nations from using their lands as collateral.[214] The trusts increase the difficulties of providing the collateral because the native nation must lease the land to a tribal entity, which in turn can "grant a leasehold mortgage interest."[215] The BIA must approve each lease, adding yet another level of complexity to a normally routine transaction.[216] One scholar wryly mused, "[g]iven the lack of home ownership in Indian Country, it is difficult to imagine the items of value that desperately poor Indians would pledge as collateral."[217]

In an effort to reduce the bureaucracy, the Helping Expedite and Advance Responsible Tribal Homeownership ("HEARTH") Act will authorize native nations to enact their own regulations about land leases.[218] This development aims to "streamline" the process for

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may amount to 'a further walk down that non-Indian road to assimilation and 'civilization.'").

[211] *But see supra* note 210 and accompanying text (noting that Native Americans have strong historical reasons to avoid assimilation).

[212] Wirtz, *supra* note 151.

[213] *See On the Trail: The Market in Financial Services for Native Americans is Growing, Thanks Not Least to Indian-owned Banks*, ECONOMIST (Feb. 17, 2005), http://www.economist.com/node/3675617.

[214] Suagee, *supra* note 169; Wirtz, *supra* note 151.

[215] *See* COMMERCIAL LENDING IN INDIAN COUNTRY, *supra* note 156, at 10.

[216] *Id.*

[217] Johnson, *supra* note 157, at 122.

[218] H.R. 205, 112th Cong. (2012) (enacted) ("[A]ny lease by the Indian tribe for the purposes authorized under subsection (a) . . . shall not require the approval of the Secretary, if the lease is executed under the tribal regulations approved by the Secretary under this subsection."); *President Obama Signs HEARTH Act*, INDIAN COUNTRY TODAY (July 31, 2012), http://indiancountrytodaymedianetwork.com/2012/07/31/president-obama-signs-hearth-act-126837.

Native Americans seeking to obtain loans through the Housing and Urban Development and other federal agencies.[219] However, HEARTH merely addresses a peripheral problem Native Americans face when navigating the bureaucracy attendant to leasing their lands, and it does not address the primary market-access question of alienable land for collateral purposes.[220] Despite the uniform tribal code and federal incentives to increase banking services in Indian Country, Native Americans still simply do not have adequate access to credit or capital.[221]

C. Native Banking Today

Despite all odds, Native American-owned banks are now filling the vacuum, and Native Americans are beginning to reap the benefits.[222] Native American-owned banks represent a means for native empowerment without Native Americans needing to "assimilate" in the manner that has been demanded of them throughout history.[223] For native banks, the venture may be worthwhile because it fills a gap in the market while contributing to the public interest.[224]

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[219] Tristan Ahtone, *HEARTH Act Passes U.S. Senate, could expedite land transactions on Wind River*, WYO. PUB. MEDIA (July 19, 2012, 5:58 PM), http://wyomingpublicmedia.org/post/hearth-act-passes-us-senate-could-expedite-land-transactions-wind-river.

[220] *See generally* H.R. 205 (providing "for Indian tribes to enter into certain leases without prior express approval from the Secretary of the Interior").

[221] *See supra* notes 205–219 and accompanying text; Woodrow, *Growing Economies in Indian Country, supra* note 4, at 4–5 (listing the "challenges related to insufficient access to capital").

[222] *See infra* notes 225–256 and accompanying text.

[223] Johnson, *supra* note 157, at 112 ("Where the typical third-world country would clamor for an opportunity to be integrated within the Western global economy, American Indians display an understandable resistance toward assimilation and integration."); *see supra* notes 210–211 and accompanying text (discussing assimilation concerns).

[224] B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 514 n.30 (1998) ("There are tribal codes that attempt to articulate in written form the cultural and normative basis for Indian law. . . . The theory of law of the Non-Removable Mille Lacs Band of Chippewa Indians is based upon a high regard for the concept of sha wa ni ma. It is one of our ways of life according to custom. The purpose of sha

In 2000, there were seven native-controlled banks.[225] By March of 2012, the Federal Reserve identified thirteen banking institutions affiliated with Native Americans.[226] Despite the progress of minority-owned banks in the U.S., Native American ownership is still among the lowest, slightly below the fifteen banks owned by Hispanic individuals and slightly above the seven banks owned by Caucasian women.[227] Eight of the thirteen banks are located in Oklahoma, and the majority of the banks received charters under state law.[228] In addition, eleven of the banks are part of bank holding companies.[229]

Only two of the banks were originally established with Native American ownership: the Lumbee Guaranty Bank and the Native American Bank.[230] Lumbee Guaranty Bank began in 1971 and represents the oldest still-existing bank with Native American ownership.[231] Native American Bank is one of the few entirely native-owned banks, with twenty native nations as its owners.[232] It originated from a merger of Elouise Cobell's Black Feet National Bank with additional investment from several other nations.[233] While native-owned banks represent a small percentage of the banking

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wa ni ma is to keep the people together as one. This purpose is good for all people. It serves to balance the forces of life and brings stability to all the people. To achieve this way of life, the laws of the Band shall be construed to balance the rights of the individual with the need to continue to co-exist in peace and harmony with one another."); *see generally* Smith, *supra* note 1.

[225] Wirtz, *supra* note 151.

[226] *Minority-Owned Banks*, *supra* note 22.

[227] *See id.*

[228] *See id*.

[229] *See id.*

[230] *See id.*

[231] *See id.*

[232] *About Native American Bank,* NATIVE AM. BANK, http://www.nabna.com/about.shtml (last visited Jan. 25, 2013) (describing the history and mission of the Native American Bank).

[233] FED. RESERVE BD., ORDER APPROVING THE FORMATION OF A BANK HOLDING COMPANY AND THE ACQUISITION OF A BANK 1 n. 1 (2001), *available at* http://www.federalreserve.gov/boarddocs/press/bhc/2001/20010928/attachment.pdf. Elouise Cobell was also the force behind the lawsuit against the United States for breaching its trust duty for Indians.

industry, they have an instrumental role in facilitating the economic development of the native nations they serve.[234]

D. The Role of Native-Owned Banks in Native Nations

Many native-owned banks are as motivated by profit as they are by making access to capital markets affordable for Native Americans.[235] Native-owned banks aim to improve banking services for Native Americans and develop their respective economies.[236] For example, they can set appropriate criteria such as accepting collateral other than land.[237] As previously discussed, the trust arrangement with the Department of the Interior makes the use of land as collateral a significant logistical problem for native persons attempting to obtain loans.[238] Native-owned banks are more receptive to accepting other forms of collateral for the loans they make.[239] In an effort to find another source of collateral, the Woodlands National Bank collaborated with its owner, Mille Lacs Band, and bought certificates of deposit to serve as collateral for individual loans.[240]

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[234] *Compare Key Statistics,* FED. DEPOSIT INS. CORP., http://www2.fdic.gov/idasp/ (last visited Jan. 24, 2013) (indicating that 7,092 banks in the United States are part of the federal deposit insurance corporation) *with Minority-Owned Banks*, *supra* note 22 (demonstrating that native-owned banks represent a drastically small number than FDIC-member banks). *See also On the Trail*, *supra* note 213 (observing the growing trend of native-owned banks).

[235] *About Native American Bank*, *supra* note 232 ("At NAB 'Our primary mission is to assist Native American and Alaskan Native individuals, enterprises and governments to reach their goals by providing affordable and flexible banking and financial services. To accomplish this we concentrate on pooling Indian economic resources to increase Indian economic independence by fostering a climate of self-determination in investment, job creation and sustainable economic growth.'").

[236] Wirtz, *supra* note 151 ("For those tribes taking the more traditional path of banking, there is a twofold strategy: to provide what tribes believe is improved and customized bank service to tribal members on the reservation, and to help tribes diversify their investments and promote more broad-based economic development beyond gaming.").

[237] *See id.*; *see also* Ansson, Jr. & Oravetz, *supra* note 6, at 463.

[238] *See* Wirtz, *supra* note 151.

[239] *See id.*

[240] *See id.*

Without native banking and creative collateral, the common wisdom is that the only way for Native Americans to have nice homes is to move away from native lands to other communities where they may have a better chance of securing a mortgage.[241] According to the 2010 census, only 22% of self-identified Native Americans lived on native lands.[242] Some Native Americans have been determined to build their homes in their communities, even if it means a decade of construction because loans are unavailable.[243] In 1998, the *Washington Post* chronicled Chester Carl's incremental construction of his home over eight years by using his paychecks to slowly buy building supplies.[244] Native banking can provide a means for Native Americans, like Chester Carl, to get loans to build their homes despite not having land to offer as collateral.[245]

Similarly, the "American Dream" seemed to be out of reach for Native Americans seeking to establish small businesses.[246] As of 2002, there were only about 200,000 native-owned small businesses in the United States, a number exceeding only the number of small businesses owned by Hawaiians and Pacific Islanders.[247] According to 2007 census data, native-owned businesses accounted for less than 1% of all businesses in the United States.[248] Furthermore, native-

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[241] Rob Capriccioso, *Native Home Ownership Bill Passes Congress Committee*, INDIAN COUNTRY TODAY (Nov. 21, 2011), http://indiancountrytodaymedianetwork.com/2011/11/21/native-home-ownership-bill-passes-congress-committee-64048; *see also* EagleWoman, *supra* note 42, at 829 ("Owning a house is the typical asset for a family in the United States, however, Native Americans have been forced into being 'lifelong renters' because of the federal trust status of tribal and individually owned lands that bars a normal mortgage to build and purchase a home.").

[242] *American Indian and Alaska Native Heritage Month: November 2011*, U.S. CENSUS BUREAU (Nov. 1, 2011), https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff22.html.

[243] *See* William Claiborne, *On Indian Reservations, Little Hope for Home Loans*, WASH. POST, Nov. 25, 1998, at A03, *available at* http://www.washingtonpost.com/wp-srv/national/frompost/nov98/homeloan25.htm.

[244] *Id.*

[245] *See id.*; *see also supra* notes 235–240 and accompanying text.

[246] *See infra* notes 247–255 and accompanying text.

[247] U.S. SMALL BUS. ADMIN.'S OFFICE OF ADVOCACY, SMALL BUSINESS PROFILES FOR THE STATES AND TERRITORIES 1 (2009), *available at* http://archive.sba.gov/advo/research/profiles/09profilestot.pdf.

[248] *See* U.S. CENSUS BUREAU, 2007 SURVEY OF SMALL BUSINESS OWNERS 1 (2011) [hereinafter 2007 Survey], *available at* http://www2.

owned businesses represented less than 5% of minority businesses in the United States.[249] This scarcity of native-owned business has economic ramifications for each and every native community.[250] Small businesses help promote economic welfare because they compel local spending, create jobs, increase money circulation, and provide a tax base.[251]

Native American businesses must find alternative collateral; without it, they have difficulty obtaining even the smallest of loans.[252] One café owner of the Sisseton Wahpeton Oyate could not even get a loan for $5,000.[253] However, because native banking presents creative lending solutions for businesses, the café owner was able to secure a loan from the Four Bands Community Fund, a community development financial institution.[254] Char's Café opened

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census.gov/econ/sbo/07/final/tables/cosum_table7.pdf; *see also* Miller, *Economic Development in Indian Country*, *supra* note 3, at 828.

[249] *See* 2007 Survey, *supra* note 248, at 1.

[250] *See* Miller, *Economic Development in Indian Country*, *supra* note 3, at 830; *see also* Ansson, Jr. & Oravetz, *supra* note 6, at 462 ("For any economy to grow, banking institutions must be available to help provide individual with standard loans, and provide small businesses and industries with the necessary amount of capital to pay for wages, materials, and other developmental costs").

[251] *See* Miller, *Economic Development in Indian Country*, *supra* note 3, at 830.

[252] *See id.* at 841–42 ("Most private non-Indian businesses are started with family money, oftentimes accumulated over several generations, by borrowing money through normal credit avenues or by using home equity. Indians as a group, however, have very little access to these three prime ways of raising funds to start a new business."); *see also* Ansson, Jr. & Oravetz, *supra* note 6, at 462 ("In general, most banks and small business administrators are skeptical of doing business in Indian country, as they perceive Indian country as a place where debts cannot be collected.").

[253] Michael Neary, *Native Americans Strive for Homemade Businesses on- or Near- the Reservations*, CAPITAL J. (S.D.) (Feb. 16, 2012, 01:00 AM), http://www.capjournal.com/news/native-americans-strive-for-homemade-businesses-on-or-near-the/article_473bb938-585a-11e1-abd4-001871e3ce6c.html.

[254] *See id.*; *see also* Miller, *Economic Development in Indian Country*, *supra* note 3, at 840–41 ("In 1999, the Cheyenne River Sioux Tribe recognized the value of these types of training programs and assisted in creating the private non-profit Four Bands Community Fund with a grant from the First Nations Development Institute. Four Bands provides business training classes and assistance for reservation residents to secure start-up loans.").

in April of 2012 and has received mostly good reviews from the community on Yelp and Urban Spoon.[255] Native-owned banks have quickly responded to the financial needs in Indian Country; with further development, they could drastically transform the lending landscape.[256]

E. Challenges for Native-Owned Banks

The native-owned banking model is not without risks and regulatory challenges. In 2011, the Navajo Nation lost its $1.25 million collateral for a loan from the Native American Bank to a small business for an unsuccessful egg farm.[257] An audit revealed that the egg farm's operations were "questionable."[258] This type of experience should serve as a warning that native nations must develop practices to effectively evaluate the viability of the companies in which they invest.[259]

Meanwhile, native banks must also navigate regulatory compliance.[260] After the financial crisis, all banks became subject to heightened regulation.[261] Although native banks were hardly responsible for instigating the crisis, the response to the 2008 financial crisis was comprehensive, and regulators have demanded stronger capital requirements, regardless of bank size.[262] For example, in 2008, the OCC issued a cease-and-desist order to the

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[255] *Char's Café*, YELP, http://www.yelp.com/biz/chars-cafe-kenosha (last visited Jan. 25, 2013); *Char's Café*, URBANSPOON, http://www.urbanspoon.com/r/208/1054651/restaurant/Michigan/Chars-Cafe-Bruce-Crossing (last visited Jan. 25, 2013).

[256] *See supra* notes 235–255 and accompanying text.

[257] *Failed Egg Farm Cost Navajo Nation $1.25 Million*, INDIAN COUNTRY TODAY (Mar. 18, 2011), http://indiancountrytodaymedianetwork.com/2011/03/18/failed-egg-farm-cost-navajo-nation-1-25-million-23543.

[258] *Id.*

[259] *See id.*

[260] *See infra* notes 261–264 and accompanying text.

[261] *See* AM. BANKERS ASS'N, DODD-FRANK AND COMMUNITY BANKS: YOUR GUIDE TO 12 CRITICAL ISSUES 3 (2012), *available at* http://www.aba.com/aba/documents/dfa/dfguide.pdf.

[262] *See* Miles Moffeit, *7 Colorado Banks Rebuked for Risky Practices*, DENVER POST (Mar. 4, 2009, 12:30 AM), http://www.denverpost.com/ci_11830129; *see also* MORRISON & FOERSTER, THE DODD-FRANK ACT: A CHEAT SHEET (2010), *available at* http://www.mofo.com/files/Uploads/Images/SummaryDoddFrankAct.pdf.

Native American Bank in Colorado.[263] Bauer Financial, which evaluates banks, found Native American Bank to be "troubled" based on the number of loans in default, the bank's income, and its weak capital under the new standards.[264] Native banking, therefore, can be a profitable venture for banks with a niche market and beneficial for individuals and businesses, but it carries risks.[265]

F. Formation & Organization of Native Banks

Native nations can establish banks either under a national charter granted by the OCC or through a state regulator.[266] If native nations are looking for a more flexible banking form, they can also explore organizing a bank holding company as a native corporation under IRA section 17.[267] Native nations, however, should avoid starting a bank as a tribally chartered entity because federal regulators do not recognize such entities and depositors may not trust them.[268]

Currently, there are at least three tribal banks: the Glacier International Depository, owned by the Blackfeet Tribe, and two entities in Oklahoma.[269] The OCC, however, has often refused to recognize these entities because they hesitate to waive their sovereign immunity when requested by the OCC.[270] Tribally chartered banks, characterized as "off-shore banking . . . on shore,"

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[263] *See* Moffeit, *supra* note 262.
[264] *See id.*
[265] *See supra* notes 225–264 and accompanying text.
[266] *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, A GUIDE TO TRIBAL OWNERSHIP 3 (2002) *available at* http://www.occ.gov/publications/publications-by-type/licensing-manuals/tribalp.pdf [hereinafter A Guide to Tribal Ownership] ("Financial institutions that engage in interstate commerce must comply with applicable federal and state banking laws, including chartering requirements. Given the nature of the United States financial system, all banks operating in this country are engaged in interstate commerce. Therefore, any Indian tribe that plans to create a depository institution must obtain a federal or state charter."); Wirtz, *supra* note 151.
[267] COMMERCIAL LENDING IN INDIAN COUNTRY, *supra* note 156, at 1.
[268] *See* Wirtz, *supra* note 151; *see also* Tom Lowry, *Offshore Comes Onshore Banks' Pledges of Secrecy Sound Alarms*, USA TODAY, May 7, 1998, at 1B.
[269] Wirtz, *supra* note 151.
[270] *See id.*

escape federal and state banking regulations because of their sovereignty.[271] While avoiding some of these regulations may be beneficial to tribal banks, the arrangement also deprives them of federal deposit insurance because the Federal Deposit Insurance Corporation Act is silent on tribal institutions.[272] Even though it may be legally feasible for tribal banks to set up their own deposit insurance, as states did prior to the creation of the Federal Deposit Insurance Corporation in 1933,[273] depositors simply may not have confidence in those systems and may be uncertain about their rights in the case of a bank failure.[274] The lack of a deposit safety net is cause enough to alienate customers.[275]

Tribal banks without federal recognition also stoke consumers' and regulators' fears about shell banks and other similar scams.[276] In the late 1990s, a tribally chartered bank in Anadarko, Oklahoma represented a means for off-shore banking within the boundaries of the United States.[277] The Delaware Tribe of Oklahoma established First Lenape Bank in December of 1996 and began Swiss-like banking practices, purposefully failing to disclose information to the IRS and refusing to comply with civil enforcement actions, such as garnishments.[278] The owners exploited a loophole in banking and federal Indian law because there were no explicit restrictions on this type of banking.[279] Nonetheless, state and federal regulators issued alerts to potential banking partners and engaged the bank in discussion.[280]

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[271] Lowry, *supra* note 268.
[272] *See* 12 U.S.C. § 1811 *et seq*. (2006).
[273] *History of the FDIC,* FED. DEPOSIT INS. CORP., http://www.fdic.gov/about/history/index.html (last visited Mar. 22, 2013).
[274] *See* FED. DEPOSIT INS. CORP., A BRIEF HISTORY OF DEPOSIT INSURANCE IN THE UNITED STATES 12 (1998), *available at* http://www.fdic.gov/bank/historical/brief/brhist.pdf.
[275] *See generally* Reid A. Horovitz, Note, *Prohibiting Secondary Boycotts Against Banks: Protecting the Public's Interest*, 9 ANN. REV. BANKING L. 611, 623 (1990).
[276] *See* Chatigny, *supra* note 66, at 101.
[277] Melanie Warner, *Who Needs the Cayman Islands? The Sovereignty Loophole: How to Bypass Banking Law*, FORTUNE, June 23, 1997, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/1997/06/23/228071/index.htm.
[278] *Id.*
[279] *Id.*
[280] *Id.*

In 1997, it appeared the federal government would have little leverage over First Lenape because of the Delaware nation's sovereignty.[281] By 2005, however, the Tenth Circuit was lambasting the bank in a criminal proceeding against the founders of an investment fund.[282] It appears that First Lenape Bank was not even a legitimate tribal bank, but rather was a "shell," part of a scheme to swindle depositors out of their money.[283] In order to avoid the specter of First Lenape Bank, native nations who wish to assure investors and depositors of their credibility should opt for organizing with a federal or state charter.

Alternatively, native nations looking for a unique means to organize may opt to organize as a section 17 bank holding company.[284] While most native banks have state or federal charters from the OCC, the holding company of Eagle Bank, Salish and Kootenai Bancorporation, is organized under section 17 of the Indian Reorganization Act ("IRA").[285] The IRA authorizes native nations to create tribal organizations under sections 16 and 17.[286] Native nations use Section 16 to organize as tribal corporations.[287] Typically, section 16 serves for native nations to operate as constitutional

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[281] *Id.*

[282] United States v. Dazey, 403 F.3d 1147, 1156 (10th Cir. 2005) ("The four defendants were implicated in a fraudulent investment company called Wealth–Mart. Wealth–Mart styled itself as an investment fund with a highly lucrative international 'bank debenture' investment program that traded in secret overseas markets in accordance with Christian and humanitarian investment principles. Wealth–Mart promised investors very high returns within a few months.").

[283] *Id.* at 1158 ("To receive the investors' money, Wealth–Mart set up a bank called First Lenape Nation Bank. First Lenape appeared to be a functioning tribal bank. In reality, it was just a shell, and investors' money was commingled and passed upstream to two accounts at established Oklahoma banks.").

[284] *See generally infra* notes 285−304 and accompanying text.

[285] *Opportunities & Challenges for Econ. Dev. in Indian Country: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs,* 112th Cong. 2 n.3 (2011) (statement of Martin M. Olsson, President of Eagle Bank), *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=0bfbb431-e950-4e28-9e84-87a34defad98.

[286] *See* Thomas H. Shipps, *The Non-Intercourse Act and Statutory Restrictions on Tribal Resource Development and Contracting* (Rocky Mountain Mineral Law Found., Working Paper No. 2, 2005).

[287] *Id.*

governments if they do not have a supporting treaty or executive order.[288]

Congress later added section 17 as a buffer between governmental functions and economic activities, authorizing native nations to operate as corporations.[289] According to the Department of the Interior's interpretation, section 17 charters are only available to "tribes," not native businesses or individuals.[290] Born in an era in which policymakers considered native nations incompetent at handling their own affairs, section 17 includes a section that requires the Secretary of the Interior to approve any charter.[291]

Only the Salish and Kootenai Bancorporation has chosen to organize this way, with its primary bank, Eagle Bank, chartered under state law.[292] Because so few entities have chosen this type of structure, the advantages and disadvantages are still unclear but likely include beneficial tax treatment and the remote possibility that an entity might escape regulations that would normally apply to bank holding companies.[293]

Native banks can gain a competitive advantage over other banks by organizing their operations to limit their tax exposure.[294] Because section 17 represents an alternative way for native nations to organize their governments, corporations share the same sovereignty status of the native nation.[295] Accordingly, section 17 corporations do

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[288] *Id.*
[289] *Id.*
[290] OFFICE OF INDIAN ENERGY & ECON. DEV., TRIBAL BUSINESS STRUCTURE HANDBOOK III-12 (2008), *available at* http://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf ("Section 17 corporations are tribal in character, they must be wholly-owned by the tribe and are essentially alter egos of the tribal government. They share the same privileges and immunities as the tribal government.").
[291] *See* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 812 (1996).
[292] *Opportunities & Challenges for Econ. Dev. in Indian Country*, *supra* note 285; *About Us*, EAGLE BANK, http://www.bankeagle.com/home/about/history (last visited Mar. 22, 2013).
[293] *See infra* notes 295–304 and accompanying text.
[294] *See infra* notes 295–298 and accompanying text.
[295] Kathleen M. Nilles, Esq., Presentation on Tribal Business Formation—Legal and Structural Options at the Tribal Renewable Energy Business Development and Financing Conference in Denver, Colo. (Aug. 23–25, 2011) *available at* http://apps1.eere.energy.gov/tribalenergypdfs/tribal_business/tribal_business_formation_0811.pdf.

not have to pay federal income tax under IRS guidelines.[296] The advantage is limited only to corporations controlled by a native nation because native nations are sovereign entities.[297] Because banks normally pay federal income tax, a bank that avoids such a tax can distribute the benefit to its customers, further increasing access to capital markets.[298]

A native bank can further benefit from sovereignty under section 17 by exploiting an omission in the Bank Holding Company Act that fails to expressly extend holding company regulations to this type of entity.[299] In 1996, the Federal Reserve Board issued guidance on the application of the Bank Holding Company ("BHC") Act to native-owned banks.[300] The opinion resulted in two fundamental conclusions: First, a native nation is not subject to the BHC Act because the Federal Reserve has recognized native nations as sovereigns not companies.[301] Second, the opinion concluded that, were "a company or similar organization [a] Tribe controlled owned or controlled Bank, that organization would be a 'company' under the BHC Act."[302] The opinion, however, is silent on section 17 entities.[303] The term "company" may include such organizational structures, yet these types of companies arguably could receive favorable tax status because they are considered equivalent to a native nation and the BHC Act expressly exempts native nations from being regulated as companies.[304] Thus, perhaps section 17 corporations can also escape the BHC Act regulations. The core considerations for organizing a bank—including deposit insurance, consumer confidence, and regulatory framework— still guide native-owned banks' founders, but these banking entrepreneurs also have

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[296] Shipps, *supra* note 286.
[297] *See* Nilles, *supra* note 295, at 24 ("Corporation has same privileges and immunities as the tribe—including immunity from suit."); *see also* OFFICE OF INDIAN ENERGY & ECON. DEV., *supra* note 290, at I-5.
[298] *See* HYATT, *supra* note 124.
[299] Letter from Scott G. Alvarez, Associate General Counsel, The Federal Reserve Board, to Stephen M. Klein, Attorney, Graham & Dunn (Aug. 13, 1996), *available at* http://www.federalreserve.gov/boarddocs/legalint/BHC_ChangeInControl/1996/19960813/.
[300] *Id.*
[301] *Id.*
[302] *Id.*
[303] *See id.*
[304] *See supra* notes 295–298 and accompanying text.

some additional flexibility in the structure they choose because of each native nation's sovereign status.[305]

G. The Future of Native Banking: Regulatory Opportunities

Regardless of how native banks organize themselves, they have great potential to continue to help native nations and Native Americans access capital markets. Their sovereign status engenders opportunities to shape their regulatory landscape with proposed amendments and exploitation of ambiguities in regulations.[306]

Native banks will continue to develop by attempting to influence legislation.[307] For example, Native American Bank would like to be able to set up branches on or near reservations.[308] Yet, the McFadden Act, and its subsequent modification under the Riegle-Neal Interstate Banking and Branching Efficiency Act, precluded interstate branching without a state's permission.[309] Native nations and banks lobbied Congress to amend the McFadden Act once again to remove this restriction.[310] In 2007, the Native American Bank submitted an amendment to Congress that would allow native-owned banks to operate on Indian land even if they received their charter from another state.[311] Similarly, the Rosebud Sioux Tribe hired Holland & Knight to lobby Congress to amend the McFadden Act in 2009.[312] In that same year, Hawaii Senator Daniel Inouye introduced

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[305] *See supra* notes 295–304 and accompanying text.
[306] *See infra* notes 308–328 and accompanying text.
[307] *See* Renee McGaw, *Native American Bank Eyes Unique Growth Plan*, DENVER BUS. J. (Apr. 15, 2007, 10:00 PM), http://www.bizjournals.com/denver/stories/2007/04/16/story6.html.
[308] *Id.*
[309] William T. Coleman, Jr., Speech, *A Brief History of Banking and Investment Regulation in the US and A Challenge to Remain the Greatest Nation in the World*, 99 KY. L. J. 1, 2 (2011) ("The McFadden Act, enacted in 1927, prohibited branch banking in an effort to level the playing field between the national and state banks."); *see also* 12 U.S.C. § 36 (f)(1)(A) (2006).
[310] McGaw, *supra* note 307.
[311] *Id.*
[312] *See Senate Lobbying Disclosure Electronic Filing System*, *available at* http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=D5EB2E5C-C28A-4B21-9110-2CEE291396D3 (providing a copy of the 2009 Congressional lobbying report for the Rosebud Sioux Tribe).

the Indian Reservation Bank Branch Act of 2009 to achieve this goal.[313] The bill "died," but the push for interstate branching became a reality with the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[314] Under section 613 of the Dodd-Frank Act, any national bank will have the opportunity to open a branch in another state.[315] As the provision takes effect, native-owned banks will surely seize the opportunity.

Even without amendments, native nations can continue to gain ground in banking by collaborating with regulators to encourage favorable statutory interpretation, such as with the Federal Reserve Act.[316] Federal regulators have yet to provide clear guidance as to whether a native nation constitutes an affiliate of a native-owned bank under sections 23A and 23B of the Federal Reserve Act.[317] In 1933, Congress passed the Federal Reserve Act in response to the Great Depression.[318] Congress was concerned about preferential loans, in which banks were providing loans with better terms to affiliates.[319] The regulations mandated secured collateral for lending to affiliates and, in 1987, Congress also demanded arms-length transactions between banks and their affiliates.[320] The regulation enumerates a definition of "affiliate" including "companies."[321] Yet, native nations and their subdivisions do not constitute companies.[322]

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[313] Indian Reservation Bank Branch Act of 2009, S. 1316, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bills/111/s1316.

[314] *See id.*; *see also* 12 U.S.C. § 36(g)(1)(A); Mick Grasmick, *The Dodd-Frank Act Will Open All States to Interstate De Novo Branching*, MANATT JONES GLOBAL STRATEGIES NEWSLETTERS (Manatt Jones Global Strategies LLC L.A.), July 10, 2012), *available at* http://www.manatt.com/BankingLaw@manatt/_BankingLaw_07_01_10.aspx.

[315] *Grasmick*, *supra* note 314; *see also* 12 U.S.C. § 36(g)(1)(A).

[316] *See infra* notes 317–328 and accompanying text.

[317] A Guide to Tribal Ownership, *supra* note 266, at 30 ("Because Indian tribes and their political/governmental subdivisions enjoy a unique legal status, the FRB has determined that they are not 'companies' for purposes of the BHCA. Therefore, a tribe's status as an 'affiliate' of the bank for purposes of sections 23A and 23B is unclear.").

[318] Saule T. Omarova, *From Gramm-Leach-Bliley to Dodd-Frank: The Unfulfilled Promise of Section 23a of the Federal Reserve Act*, 89 N.C. L. REV. 1683, 1683 (2011).

[319] *Id*. at 1693.

[320] *Id.* at 1693.

[321] A Guide to Tribal Ownership, *supra* note 266, at 29.

[322] *Id.* at 30.

Although federal regulators recommend that native banks voluntarily agree to follow the regulation, it is not clear whether there is an incentive to do so.[323]

Similarly, any native-owned bank holding company faces different regulations than other bank holding companies.[324] Native nations with any type of bank holding company do not need to divest their other non-banking activities, which typically the BHC Act mandates for bank holding companies.[325] Usually, a bank holding company cannot own non-banking entities.[326] This regulation aims to prevent the moral hazards arising from commingling commerce and banking.[327] Although the regulation strives to prevent financial disaster, regulators have apparently determined that the risk of such disaster does not warrant its application to native nations.[328] Native-owned banks have many opportunities and different ways to organize themselves to increase access to capital for their communities.

IV. Conclusion

Years of poorly devised governmental policies, including allotment and termination, have left many native nations impoverished.[329] Although native nations lack the opportunity to realistically tax their populations, have only limited access to much of their real wealth, face restrictions on investing in some of the best market-instruments like hedge funds, and struggle to secure loans, they are innovating unique entry points into capital markets.[330] For the most part, the success of their projects derives from strategic uses of tax-exempt bonds and banking institutions.[331]

The likely successes from the experimental American Recovery Act TEDB will support arguments for removing restrictions from native nations so they can have parity with state

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[323] *See id.*
[324] *See infra* notes 325−328 and accompanying text.
[325] A Guide to Tribal Ownership, *supra* note 266, at 14–15.
[326] Saule T. Omarova & Margaret E. Tahyar, *That Which We Call A Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L. 113, 183 (2011).
[327] Rob Tammero, *Private Equity Investment in Failed Banks: Controlling Risks to the Federal Safety Net*, 11 J. BUS. & SEC. L. 53, 60 (2010).
[328] *See generally id.*
[329] *See* discussion *supra* Part II.
[330] *See* discussion *supra* Parts II, III, IV.
[331] *See* discussion *supra* Parts III, IV.

governments in their ability to issue governmental bonds.[332] The "essential governmental function" requirement unfairly inhibits native nations' ability to pursue needed projects.[333] Yet, because the term is vague, native nations can argue for favorable interpretations to promote projects that states already pursue.[334]

Meanwhile, establishing banks with tailored lending methods provides individuals, businesses, and communities with access to capital markets and development.[335] If traditional banks were providing the needed services as encouraged by the CRA, native nations would not need their own banks and could use their initial capital for other needed development.[336] Nonetheless, native nations have shown that they are prepared to develop their own means to access capital markets.[337] In order to maximize the potential of operating banking entities, native nations should establish bank holding companies under section 17 and continue to seek amendments to other regulations like the McFadden Act.[338] Although there are uncertainties in how regulations would apply to some native banking entities, the time is ripe to shape the laws.[339] With some ingenuity, native nations can have the key to accessing capital markets, and in so doing, preserving their sovereignty and wealth.

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[332] *See* discussion *supra* Part III.
[333] *See* discussion *supra* Part III.
[334] *See* discussion *supra* Part III.
[335] *See* discussion *supra* Part IV.
[336] *See* discussion *supra* Part IV; *see also* Ansson, Jr. & Oravetz, *supra* note 6, at 441–42 ("Even if a tribe has little money, it needs to appropriate some of it for business expansion. This can be difficult for smaller tribes that are recognizing a low level of profitable returns because for these tribes the question becomes whether they should spend money on needed tribal programs or whether they should spend money on the formation of new tribal business ventures.").
[337] *See* discussion *supra* Part IV.
[338] *See* discussion *supra* Part IV.
[339] *See* discussion *supra* Part IV.