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Articles

The Legal Regimenting of Tribal Wealth: How Federal Courts and Agencies Seek to Normalize Tribal Governmental Revenue and Capital

David Kamper and Katherine A. Spilde

Historian Alexandra Harmon, who has provided the most comprehensive chronicle of American Indians' various individual and collective wealth accumulations and mainstream Americans' responses to them, notes an epistemic shift in the way that tribal gaming frames the American mainstream conversations about Native wealth.[1] Undoubtedly, this shift in part reflects the rapid spread of tribal governmental gaming across Indian country and American culture's conflicted views on whether governments should promote legal gambling as a way to raise revenue, as in the case of state-run lotteries. Noting, however, that the financial success of a few tribal governments with gaming is recent, Harmon points out that historically, whenever tribes appear to have achieved "economic mainstream status" by methods other than gaming, these other financial successes have also provoked questions about American Indian racial identity and tribal sovereignty. These questions from non-Native Americans center on whether wealth somehow transforms Indians.[2] Money, in these cases, is considered an assimilating force that makes individual Indians "more white" and normalizes tribal communities to such an extent that they no longer ought to demand the political rights of sovereignty. This settler-colonial attitude toward Indians and money can

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be seen in some of the earliest contact with indigenous people, yet the issue of tribal government gaming seems to intensify such feelings. As Harmon declares, "never had so many Americans engaged for so long in public debate about enterprising and affluent Indians."[3]

In addition to the unprecedented longevity of fiscal success of tribal governmental gaming, tribal nation-building activities have helped many tribal communities flourish in unprecedented ways that have led to increased interdependence between tribal and nontribal communities.[4] Tribal governments, both on their own initiative and in compliance with federal law, have directed gaming revenues toward vast civic and social services for tribal communities. These investments range from basic needs such as houses with plumbing or kitchens (long ago promised by the federal government through treaty obligations) to precious resources for cultural and linguistic maintenance and promotion.[5] Along with the improved economic and social status resulting from these nation-building activities, tribal governmental gaming has put tribes in power-brokering positions that differ significantly from those that Harmon chronicles. Some scholars and tribal leaders assert that this rise in political and economic status has prompted renewed attacks on tribal sovereignty that use these new markers of Indian wealth to imply notions of assimilation to American mainstream economy and political life.[6]

Most disturbing from the prospective of this article is that these attacks have gone beyond the popular media and political propaganda to become institutionalized by the US legal system. In the past, inaccurate images of Indians as obstacles to progress have been used to justify federal policies of removal and dispossession. Now, the "rich Indian" image appears in the form of judicial rulings, legislative mandates, bureaucratic policy interpretations, and public media that systematically chip away at tribal self-determination by appealing to non-Indian emotions about wealth and fairness that have little to do with any reality in Indian country.

Media attention and public fascination with the idea of individual American Indian wealth should not be surprising, since the media both guides and reflects what the general public finds noteworthy. However, that the spurious "novelty" of Native affluence is treated as newsworthy is an exception that proves the general rule. Philip J. Deloria's work underscores that marking a "non-poor" Native person as noteworthy further reinforces the idea that "real" Indians are expected to be poor. As Deloria might put it, wealthy Indians are considered an "anomaly" of mainstream "expectations" of Indianness—expectations that inherently link Native people to poverty, backwardness, and pre-capitalist societies.[7] More importantly, media reports and casual conversations inevitably lead to the more dangerous and subtle corollary that if a Native person is no longer "poor," then he or she is no longer an "authentic" American Indian.[8] Indeed, this line of thinking extends an existing and complicated set of historical, cultural, and political discourses about American Indian identity. Spilde has aptly labeled this "rich Indian racism" and warned of the way that it leads to aggressive efforts aimed at curtailing indigenous political rights.[9] And while media commentary and casual conversation do have social and cultural power to affect political change, they do not

have nearly the direct effect on tribal self-determination that the US court system and federal policymakers do.

This article highlights what happens when US courts and administrative bodies, rather than the court of public opinion, become the battleground for the relationship between tribal rights, tribal identity, and tribal revenue. In particular, we explore what happens when judges and administrators begin to apply rich-Indian logic to real-world problems and presume that the so-called "new wealth" of a few contemporary tribal governments and their market capital integration is accompanied by loss of "Indianness," and with this supposed loss, inherent rights of tribal sovereignty are attenuated. We first examine two court cases in which judges reframe tribal gaming revenues as "surplus" in attempts to determine how economic status achieved from gaming has transformed the political status of Native nations. At stake in both instances is the extent to which the federal magistrates act as an agent of US settler colonialism that, as Mark Rifkin points out, seeks to assimilate indigenous communities into a normalized, imperial nation-state.[10] By incorporating tribal governments into the nation-state model through a focus on revenue, these judges seek to avoid the fracturing threat posed by alternative political spaces: in these cases, the viable tribal nations that are within the nation-state. In varying degrees, implicitly or explicitly, each instance uses a strain of rich-Indian logic to argue for normalizing tribal economic activity, and therefore also to justify undercutting tribal sovereignty in general in order to assimilate indigenous political spaces into the jurisdiction of the US nation-state.

The second part of this article is more speculative and examines federal administrative rulings that control policy that affects tribal governments. Here we look specifically at the obstacles for tribal governments who seek to issue tax-exempt bonds in order to raise revenue for capital improvement on their reservations. Like the court decision making examined in part one, the bureaucratic policymaking explored in part two treats Native enterprises as mainstream businesses, rather than essential governmental activities of sovereign tribal nations. In this process, federal policymakers also rely on a rich-Indian logic. That is, they are unwilling to allow for an alternative space or more complicated understanding of the way that tribal governmental entities can engage in market economies *and* maintain a sovereign status without being absorbed into normative schemas. Rather, federal decision makers seek to conform tribal enterprises to uniform, settler-state administrative bureaucracies that, rather than apply a political, jurisdictional model, delimit tribal sovereignty on the basis of revenue. What these examples have in common is their increasing emphasis on tribal economics as a primary indicator of Native national identity, a framing that undercuts tribal nationhood status in favor of outdated notions of "authenticity" based on a rich/poor dichotomy.

The court cases that we discuss in part one come from two levels of the federal judicial systems. We focus on a 2007 case known as *San Manuel v. NLRB*, which came before the DC Circuit Court as an appeal of a National Labor Relations Board (NLRB) judicial panel ruling from 2004, *San Manuel Indian Bingo and Casino*, 341 NLRB 1055. In this NLRB case, a Southern California tribe sought to maintain its

right to regulate labor relations with unions seeking to represent employees of tribally owned enterprises. Critically, in these two cases the judges reversed nearly thirty-five years of precedent by extending the National Labor Relations Act (NLRA) to the activities of tribal enterprises operated on the tribe's reservation. The NLRA is silent on its application to tribal governments but clear that state governments were exempt. The judges argued, however, that the act ought to generally apply to all US companies regardless of political geography and therefore tribal government-owned companies, like tribal casinos, were no exception.[11] It is significant that, rather than treat the tribal-government-owned casino business on the reservation as "state-owned," the courts' premises for treating the tribally owned business like "any other company" were the casino's revenues and the nontribal identity of a majority of its workers.

In the second part of this article we move beyond the courtroom and examine federal bureaucratic bodies that make administrative decisions affecting the economic and political self-determination of tribes. Tribal efforts to nation-build often include efforts to reacquire their land base through real estate transactions and, like other governments, tribes prefer to access revenue by offering tax-exempt bonds. However, the administrative rulings of federal executive bodies such as the Internal Revenue Service have consistently blocked this strategy. We argue that these administrative decisions follow a settler-state pattern of forcing tribal governments to assimilate to a US nation-state model of political economy—rather than recognizing the exception in which a "corporate-appearing" enterprise like tribal governmental gaming really operates much more as a nationalized industry.

Linking these examples together is the presumption that the states of "Indianness" and "wealth" are mutually exclusive. Judicial and governmental bureaucratic systems have long been a tool of settler colonialism to deprive indigenous people of land and self-determination rights. The balance of this article discusses the way the explicit and implicit marshaling of rich-Indian logic threatens to be the most damning construction of Indianness and a threat to the meaningful expression and mobilization of tribal sovereignty.

The Rise of Rich Indian Racism

Both Harmon and Page Raibmon have cogently illustrated that throughout the history of settler colonialism in North America, Euro-Americans have long been unable to reconcile Indianness with wealth accumulation.[12] Harmon traces this line of thinking back to at least the early colonial period. What has been constant in various periods is that once American Indian individuals gained wealth, non-Native Americans and governmental officials created an opportunity to question their Indian identity and need for governmental support.[13] A "rich Indian" was a questionable Indian, or at the very least an "assimilable" Indian, in large part because Indian identity was, and in many instances still is, understood along a continuum from primitive to modern or uncivilized to civilized: whites occupy the pinnacle of modernity and civilization, while Indians represent the premodern, uncivilized past.[14] When this primitive-versus-modern dialectic is asserted in terms of economic complexity, American Indians are

thought to be stuck in a hunter-gatherer stage, incapable of participating in market-economy capitalism.[15] This economic understanding of Indianness portrays them as primitive savages or, at least, as the "white man's other."[16]

In various forms, two conceptualizations of prototypical Indianness—the "noble" and the "barbaric" savage—predominated art, literature, cinema, popular culture, and even public policy from the earliest contact through most of the twentieth century. However, since the rise of tribal governmental gaming, there has been a subtle shift in the discourse of Indianness, and arguably the barbaric and noble savages are being replaced by a contemporary racist stereotype, that of the rich (casino) Indian. Whereas in the past non-Native Americans would not connect indigeneity with wealth at all—despite the existence of economically prosperous Indians—the more recent popular trope of the rich Indian has become a strategic public policy tool to undermine tribal sovereign rights by deploying old images as accurate portrayals of contemporary Indianness.[17] This trope still expresses the same racist and anti-tribal-sovereignty sentiments that Harmon notes have always been a part of non-Indians' understanding of the relationship between indigeneity and wealth accumulation.[18]

For Indians and non-Indians alike, tribal government engagement with the broader US market economy through gaming has generated intense debate about Native peoples' relationship to capitalism. Much of this debate is concerned with patterns of distribution and consumption that might arise from American Indians' accumulation of wealth. Some indigenous and scholarly attention to these questions of distribution and consumption has advanced the idea that there might be a uniquely tribal form of capitalism that emphasizes communal and cultural accumulative goals, not individual ones.[19] Indeed, the Indian Gaming Regulatory Act (IGRA) requires that 100 percent of net gaming revenue be invested in tribal-government prerogatives rather than building individual wealth.[20] This focus on community investment reflects the federal goals of IGRA: to stimulate tribal economic development as a means to support the strengthening of tribal governments and tribal self-sufficiency. Yet in spite of tribal governments' communal investments, the two concerns embedded in rich Indian racism are tribal communal wealth distribution, and individual tribal member consumption; that is, many non-Indians continue to focus on how gaming money has been distributed throughout Native communities and the larger non-Indian communities that surround them, in addition to how tribal governments and individual tribal members spend their money on consumables.

In regard to distribution, critics of tribal governmental gaming communities either question whether gaming's financial success is being shared equally throughout Native communities, or if it is creating economic stratification on reservations.[21] Often they also question whether tribal gaming enterprises should be "sharing the wealth" with non-Indian communities, primarily in the form of state taxes.[22] As for consumption, non-Native media has paid a great deal of attention to the luxury items that individual Indians have purchased with gaming revenues, such as cars and large houses, frequently insinuating that there is a certain amount of extravagance or frivolity in these purchases.[23]

In focusing on the consumption patterns of individual Indians who benefit from gaming, pop-culture media and news sources often imply that they are "reckless." For example, anthropologist Jessica Cattelino found that many news outlets featuring stories on the success of Florida Seminole high-stakes bingo mentioned the luxury automobiles Seminole tribal members began to drive once tribal gaming was well established in the community.[24] That stories about tribal economic success emphasize "fancy cars" reveals non-Indians' assumptions that Indianness conventionally equals poverty—otherwise, the make and model of the cars would not be newsworthy—as well as that individual accumulation is the most obvious and relevant outcome of tribal gaming. Alternatively, Cattelino noted that rather than being concerned about the consumption patterns of themselves and their peers, the Seminole people with whom she works emphasize how the money their casino creates is an opportunity to increase the wealth of their community as a whole by eradicating poverty and funding more social services, infrastructure, and cultural heritage activities.[25]

The public and media focus on individual accumulation and consumption implies that tribal members and communities do not know how to handle resources properly and as a result, these resources pose significant threats to tribal sovereignty. During California's 1998 referendum on tribal gaming compacts, for example, individual accumulation and consumption provided the main narrative for attacks on Native nations' right to gaming. Opponents of tribal gaming zeroed in on perceived individual accumulation from gaming, not its collective communal effects. One well-known political ad airing regularly on television across California showed aerial photographs of several large houses on the San Manuel Reservation while the voiceover cited these "mansions" as proof that tribal gaming was helping a few elite individuals and not the whole community. The voiceover stated:

> These are the Mansions of San Manuel, a tribe with 25 reservation members and a lucrative casino. They're spending over a million dollars each to pass Prop. 5 to guarantee a special deal that makes them even more money. . . . They'll pay no tax on casino profits. No property tax on their mansions. And the poor Indians? 85% of California's Native Americans get nothing. Five makes a few rich casino owners even richer (*No on* 5 website, 2013).[26]

This ad clearly emphasizes a notion of the "unbridled wealth" of a few elite San Manuel tribal members who are then distinguished from the majority, whom the ad codes as the "authentic" poor Indians. Moreover, this ad suggests that Proposition 5 is odious because it clears the way for these "elites" to become even wealthier. Ads such as this one not only significantly obscure tribal gaming's collective benefits for tribal communities, but also suggest that it is unfair to allow a system in which some individuals become wealthy at the expense of all Californians. This ad is most effective in combining two elements of the rich-Indian discourse: its fascination with Native consumption patterns and its logic that tribal government gaming revenues are unequally distributed between the so-called "real" Indians and the "rich" ones.

Rich Indian Racism and Financial Distribution

Political attacks on tribal governmental gaming such as the "Mansions of San Manuel" commercial use rich-Indian imagery to suggest that tribal gaming leads to an unequal distribution of wealth, both in and out of Native communities. Dating from the earliest major success of large-scale tribal casinos, non-Indians have frequently questioned how evenly tribal gaming's financial success is being spread throughout Native communities. Much of this criticism has come in the form of sensationalist journalism that suggests tribal members are being taken advantage of by non-Indian casino corporations; that individual tribal leaders do not share revenues equally with their community; or that some communities involved in gaming have spurious claims of indigenous identity and therefore of tribal sovereignty.[27] All of these criticisms of tribal gaming fundamentally rely on rich-Indian "logic." At the heart of this rhetoric are notions that Indianness is antithetical to economic success; it therefore follows that tribal members can be easily duped by outside members, or that engaging in a market economy necessitates a certain loss or erasure of Indianness.

This focus on the unequal distribution of gaming revenues across Indian country does not merely undercut the tribal innovation that tribal government gaming represents. It also confuses the tribal government gaming industry with a federal program intended to benefit tribes equally across Indian country. Instead, tribal governments are putting their civil regulatory authority to use in an industry (gaming) that would produce meaningful returns. Almost a decade after tribes began to enjoy financial success, IGRA created a regulatory structure for tribal gaming that requires a tribal government to use revenues for the general welfare of its citizens, but this federal law neither intends nor expects tribal governments to benefit equally. To deploy the idea that the goal of tribal government gaming is to create "equality" across Indian country simultaneously masks the tribes' role in creating the industry in order to survive federal cuts and shifts the blame for poor Indians from federal government failures to so-called rich Indians.

Rich-Indian Discourse and Settler Colonialism

Patrick Wolfe argues that settler colonialism's agenda critically distinguishes it from other kinds of colonialism. Settler "colonizers come to stay, expropriating the native owners of the soil . . . [and] introduce a zero-sum contest over land on which conflicting modes of production could not ultimately coexist." Wolfe argues this zero-sum contest requires the settler states to institutionalize what he calls a "logic of elimination," under which the colonizers feel a need to overwrite Native occupancy of the land in order to justify dispossession and to rationalize the ever-looming guilt that the remaining indigenous populations represent to purportedly democratic nation-states. This logic of elimination usually manifests itself in terms of various strategies to assimilate indigenous peoples and remove them from the land based on accusations that they use land improperly.[28] Speaking specifically of the United States, Mark Rifkin asserts that imperialism is such a deep-seated part of US nationalism that it almost unconsciously sits within policymakers and federal judges to the extent that "continued enforcement

of the policy of expropriating native lands has become too much of a sedimented 'expectation' for it to be reversed."[29] In this vein, we argue that settler colonialism's logic of extermination currently takes forms that are subtler than those from half a century ago.[30] Rather than taking the shape of federal policy pronouncements of removal and dispossession, these new strains appear in the form of judicial rulings, legislative mandates, bureaucratic policy interpretations, and public media that systematically chip away at tribal self-determination.

For purposes of maintaining the internal "coherence" and "contiguity" of its geopolitical space, US settler colonialism does not allow for islands of alternate sovereigns within its external borders and manufactures what Rifkin calls the "simulated consent" and "acquiescence" of indigenous populations to their incorporation into US nationhood.[31] As he argues:

> The grounding of the operations of the state apparatus in clearly demarcated political cartography was of particular importance in the wake of the American revolution and the ratification of the Constitution, as a way of mediating the competing jurisdictional claims within federalism coordination. The imagined map of the republic . . . serves as a cohesive icon through which to give shape to and manage the relation between various institutional discourses and imperatives.[32]

Nonetheless, while Rifkin argues that this particular political cartography of setter colonialism arises out of constitutional tensions and crises such as the Civil War, he contends it is also a through line that, running through American history, manifests in the way that US imperialism has dealt with racialized others, particularly American Indians. Settler-colonialist geopolitical mapping not only requires the simulated consent and manufactured acquiescence of Native peoples, but also is used to justify how the powers of the various sovereigns (federal, state, and tribal) of our federalism are balanced. It is in this context that tribal gaming and wealth accumulation explicitly challenge the notion of Native consent.

The recent economic success of tribal governmental gaming has, in most cases, translated into political successes, increased tribal self-sufficiency, and nation-building.[33] This strengthened foundation and increased political power has led tribal nations to stretch the limits of their sovereignty to an extent not seen since before the rise of manifest destiny. In response to this exercise of political clout and self-determination, the social and political anxiety felt by non-Native people increased, including concerns about indigenous self-determination's implicit challenge to the narrative of Native acquiescence to the geopolitical makeup of the US nation-state.[34] Since the advent of tribal governmental gaming, state governments and non-Indian neighbors have begun to show great concern about the kinds of activities that take place on reservations, in ways they never did before, often about events that have little to do with gambling. Rich-Indian rhetoric is employed by state and local governments as a vehicle to voice concern over a range of real or imagined issues, including crime, environmental management, labor relations, welfare reform, and cultural preservation. While often couched in terms of mitigating gambling impacts, state and local government interest in tribal government and community affairs has continued to increase as

tribes exercise self-determination and expand their authority over their own territories in meaningful ways.

Rich-Indian discourse attempts to restore Native acquiescence to US settler-colonial logic by affirming that participating in market capitalism is necessarily an Americanizing activity and Indians must conform to the marketplace. Using an alternative logic, however, tribal governments organize their own individual and collective economic development projects in ways that highlight their tribal community benefits. The mission of the National Indian Gaming Association (NIGA), for example, is "Rebuilding Communities Through Indian Self Reliance." One of the many values forwarded by the National Center for American Indian Enterprise Development (NCAIED) is: "We affirm the vitality of Indian spirituality. In so doing, we acknowledge that economic progress is a means of giving expression to higher values in practical economic terms for individuals, families, communities, and tribes."[35] For scholar Duane Champagne, the goal of tribal capitalism—that is, how its surplus creation is understood and utilized—distinguishes it from other forms of American capitalism:

> This model of tribal capitalism enshrines the tribal government as manager of economic enterprise for the well-being of the tribal community. . . . individuals participate wholeheartedly because they too are contributing to the collective and future economic well-being of the community. Since the tribal government is in control of economic enterprise, community goals and values are protected, and accumulated wealth from capitalist enterprise is reinvested or redistributed with the well-being of the community in mind.[36]

Seen in this way, tribal corporations are extensions of tribal governments, and therefore participation in market capitalism is not as much about individual wealth accumulation as it is about building a strong and self-sustaining tribal community.[37]

This critical distinction is often overlooked when non-Indians interpret tribal governmental gaming as simply a sub-segment of the larger commercial gambling industry. In a small percentage of instances tribal capitalism might lead to individual accumulation, such as when tribal governments distribute a share of revenues to citizens. However, as Cattelino's ethnographic research with the Seminole Tribe of Florida illustrates, tribal members do not interpret the distribution of tribal gaming revenues to individual tribal citizens as dividends from a corporation. Rather, Seminoles are more likely to interpret individual payments in light of traditional views, which hold that redistributing resources to identified members throughout the community so that all can thrive is the appropriate role of responsible tribal leadership.[38] This model differs significantly from the metric of a simple return on investment. Rich-Indian discourse obscures these indigenous interpretations of revenue sharing by presuming that participation in a capitalist market necessitates an acquiescence to the normative, surplus-value order of US settler colonialism.

Rifkin and Elizabeth Povinelli, among others, illustrate that close readings of judicial rulings and administrative policy are key to revealing the power of settler states.[39] Attending to the ways in which US courts and administrative bodies have redefined *any* tribal governmental revenues as "surplus" reveals how rich-Indian discourse is bound up in the logic of US settler colonialism. We investigate two case study examples that originate in tribal governmental gaming. The first concerns regulation of labor relations of tribal casino employees, and the second, tribes' ability to issue tax-exempt bonds to build infrastructure that may or may not be related to tribal gaming. In this section we will focus on a group of administrative judges—whose expertise is labor law, not federal Indian law—to examine how they are able to assert jurisdiction over what is essentially a question of tribal governmental sovereignty and thus to exercise a disproportionate amount of power.

The 1998 and 2000 state referendums on Propositions 5 and 1A stipulate the terms of Class III tribal gaming in California, but tensions between labor unions and tribal governments began long before.[40] Arguably these tensions came to a head in the *San Manuel* cases, in which the Hotel Employees and Restaurant Employees union (HERE) filed an unfair labor practice claim against the San Manuel Band of Mission Indians in Highland, California, claiming it limited access for casino employees to the Communication Workers of America (CWA) and denied access to HERE. The question before the National Labor Relations Board (NLRB) was whether the National Labor Relations Act (NLRA), which would guarantee any unions equal access to employees, applied to this tribal gaming facility. The judges focused on whether tribes engage in market capitalism like any other US corporation when conducting tribal governmental gaming. In short, they asked, "Is the tribe operating as a government or as a business?" Opining that the NRLB was within its mandate to assert jurisdiction over Indian country in the context of tribal governmental gaming, both the NLRB and the DC Circuit Court judges essentially shifted labor relations jurisdiction from tribal governments to the NLRB. This action reversed the thirty-seven-year precedent of tribal governmental jurisdiction and significantly delimits tribal sovereignty by making tribes more beholden to local and state labor politics. Perhaps equally damaging, this case also institutionalizes a settler-colonial regime that seeks to assimilate Indian communities and deny them the right to occupy the unique, and powerful, alternative space of sovereign nations.

Since the judges in these cases defined tribal government activity as commercial activity, by almost any measure the *San Manuel* judgments create a clear deterioration of tribal self-determination. Before these decisions, federal courts and the NRLB did not assert regulatory control of labor relations over tribally run corporations operating in Indian country since they were treated as government enterprises.[41] *San Manuel Indian Bingo and Casino* ended this precedent, and thereby took away a certain right of self-governance, even if tribes were not widely exercising it before the spread of tribal gaming.[42] In both cases the judges' decisions rest on drawing a distinction between a tribal corporation acting in a "traditional" government fashion and a tribal casino

operating in a more "commercial" fashion. In order to reinforce this distinction and establish a bright line, when the NLRB handed down *San Manuel Indian Bingo and Casino* it also delivered a decision in a companion case known as *Yukon II*. *Yukon II* concerned a Native Alaska health-care corporation established and operated by a consortium of Native Alaskan villages. The indigenous health-care corporation at issue in *Yukon II* was used as a contrast to the casino operated by the San Manuel tribe, such that the health-care corporation was deemed to be a conventional function of a tribal government, or "Indian," while the casino was deemed to be fundamentally "commercial." Shamefully, the opinion provides little support for this assertion, but much of the NLRB's distinction seems to rely on the fact that the casino attracted non-Indians as customers, which conflicted with their idealized notions that "authentic" tribal government operations would in some way be inherently anti-corporate and noncommercial or serve only tribal members.

On the other hand, the companion *San Manuel* cases adjudicated before the NLRB and the DC Circuit did elaborate on how to make this distinction between governmental and commercial activities. In a rhetorical shift, these companion cases compare tribal gaming operations to nontribal gaming corporations, rather than corporate entities like tribal health-care facilities that are purportedly more "traditional." The NLRB case reasoned that tribal gaming is a commercial, not governmental, enterprise. It arrived at this conclusion by focusing on *how* gaming money is generated, which then becomes a vehicle for claiming that tribal casinos engage in interstate commerce. The NLRB ruling repeatedly declares that the San Manuel casino "is a typical commercial enterprise [because] it employs non-Indians, and it caters to non-Indian customers" and "when [tribal] businesses cater to non-Indian clients and customers, the tribes affect interstate commerce in a significant way."[43] Rather than focusing on the purpose and use of tribal gaming revenues—namely, as tribal governmental funds needed to replace federal funding shortfalls—the ruling directly compares San Manuel's casinos to casinos in nearby Nevada or to any other hospitality business in California. This reasoning reveals that, to outsiders, tribal gaming may appear to be a segment of the larger gaming industry. However, tribal gaming is properly positioned as a form of governmental revenue generation. Thus understood, it becomes clear that such revenue is not surplus, but rather a source of critical government funding.

Additionally, because it focuses on the nature of the employees and guests, rather than its ownership by tribal governments, the Board implicitly assimilates tribal businesses to a normative US capitalist marketplace. The NLRB claims the mandate from the National Labor Relations Act is to "protect and foster interstate commerce," and therefore they retain the authority to regulate tribal gaming facilities as any other "typical commercial" enterprise if they determine that they are involved in interstate commerce.[44] The companion *San Manuel* case in the DC Circuit Court avows that engagement in interstate commerce is not conventionally or critically governmental, and therefore not traditionally Indian, and thus reiterates this same rich-Indian logic. Notably, the DC Circuit judges' opinion follows nearly the same language as that of the NLRB:

> First, operation of a casino is not a traditional attribute of self-government. Rather, the casino at issue here is virtually identical to scores of purely commercial casinos across the country. Second, the vast majority of the Casino's employees and customers are not members of the Tribe, and they live off the reservation.[45]

The NLRB presumes that a tribe's engagement in gaming, including the hiring of nontribal citizens and catering to nontribal guests, amounts to an acquiescence not simply to federal labor law, but also to interstate commerce and the norms of the US marketplace. There is, apparently, no room for an alternate space wherein tribes might operate in ways that are analogous to other commercial enterprises, but also different—explicitly because they are tribal, operating in Indian country, and are trying to create a means to support their communities economically when previously there was no other substantial, realistic, or ecologically viable way to do so.

We again recall that the Indian Gaming Regulatory Act requires a tribal government to directly invest gaming revenues for the general welfare of its citizens. Hence, when judges equate tribal government gaming to the commercial gaming industry, it hurts tribes in at least two ways. First, it exposes tribal governments to additional outside regulation. Second, it engages in Rifkin's described process of "simulated consent," which states that if tribes want to engage in economic activity they must submit to the dominant, normative modes of commerce even though the commerce takes place on their land. By extending the NLRA onto tribal lands, the NLRB erased the key features of tribal gaming: ownership by tribal governments, location on sovereign tribal lands, and investment in tribal community priorities.

The judges interpreting laws in these courts are products of a settler-state system that cannot conceive of what indigenous scholars have termed "tribal capitalism": an economic form that may be similar to other kinds of commerce and corporations in the United States, and may even operate in the same marketplace, but nevertheless a form that has significantly different institutions, purposes, and goals. As John C. Mohawk argues, "Indian economic development may be less about creating wealth than it is about creating the conditions for political power in the context of socially responsible choices for the continued existence and cohesion of the Indian nation."[46]

The *San Manuel* cases construct a legal tipping point wherein outsiders define tribes' economic activity as so "commercial" that it can be judged to be ancillary to the goal of tribal self-determination and thereby outside of a "need" or "right" to sovereignty. As indigenous legal scholar Wenona Singel observes, this is faulty jurisprudence because "Congress has never pronounced a policy that tribal sovereignty does not extended to tribal commercial activities. On the contrary, the current congressional policy toward Indian tribes promotes tribal self-determination and recognizes that economic development is essential to this aim."[47] Instead, the *San Manuel* cases treat tribal reservation communities with successful gaming enterprises as merely "rich Indians"—like any other profitable American enterprise—rather than as innovative tribal nations with strategic and successful economic development plans. Hence tribes and tribal enterprises are forced to acquiesce to the normative regulatory schema of the US marketplace that not only establishes the simulated consent of tribes toward

US normative commerce, but also ensures a contiguity of geopolitical space—in terms of legal jurisdiction—that ensures safe passage for non-Indian economic interests and interstate commerce.

After the 2007 DC Circuit Court ruling on the *San Manuel* case, other tribes challenged the premise of the NLRB's assertion of jurisdiction over tribal labor relations. The most notable have been by the Saginaw Chippewa Indian Tribe of Michigan, the Little River Band of Ottawa Indians, and the Chickasaw Nation. First to challenge the ruling were the Saginaw Chippewa, doing so very soon after the DC Circuit opinion was published. Taking an aggressive legal stance, they argued that the *San Manuel* rulings were fundamentally flawed, and that moreover, even if the rulings did employ valid tests in asserting NLRB jurisdiction, the Saginaw Chippewa's own treaty exempted them from it. Armed with these two arguments they sought a remedy in the Sixth Circuit, a different appeals court.[48] The Little River Band also went to the Sixth Circuit seeking relief from the NLRB's insertion into their tribal regulation of labor relations, but instead based their case on the fact that they had legislated their own tribal labor relations code, an essential act of governance, and that an assertion of the NRLA would usurp this act of governance.[49] In comparison, the Chickasaw Nation's challenge to the NLRB's assertion of jurisdiction was based on the rights contained in its treaties with the federal government.[50]

These three cases had independently been winding their way through the administrative courts for five to seven years, but the opinions were issued in a very narrow window between June 4 and July 1, 2015.[51] Decided within a month of each other, with overlapping judges and opinions, these three cases potentially mark a sea change for how labor relations might be handled in Indian country, and even more importantly, for how judicial opinions apply rich-Indian logic. While filed at different times by different tribes in different locales, they are all actions by tribal governments seeking to maintain their authority over union activity and labor relations at their tribal governmental gaming enterprises. The Chickasaw Nation was successful in achieving exemption from NLRB jurisdiction due to treaty language that specified its own jurisdiction over all people and property within its land and that no state or territory could pass laws on behalf of the tribe. However, this victory for the Chickasaw Nation and its tribal self-determination only comes because of its unique treaty language, and crucially, the decision maintains the NLRB's authority to assert jurisdiction. That is, the NLRB remains able to determine federal Indian policy by being empowered to interpret treaties, and in this case exclusively the Board confirmed that the Chickasaw treaty's language preempted NLRB jurisdiction. The decision establishes no other limitations to the NLRB's claim to jurisdiction over tribal labor relations.

Only five days later, the decisive authority of the NLRB was driven home even more clearly by the Sixth Circuit's *Little River* decision. Despite the fact that the Little River Band already had its own tribal labor relations code, the court denied the importance of the Little River Band's treaties and used the same logic and "commercial nature v. traditional governmental" test as the *San Manuel* rulings to assert jurisdiction over tribal labor relations. But the last opinion, dispensed by the majority of the very same Sixth Circuit, is perhaps the most momentous, one that in the future might

reveal itself to be a pyrrhic victory for all tribes. Overall, the Saginaw tribal government lost the *Soaring Eagle* case: the Sixth Circuit ruled that because it could not go against its own precedent set in *Little River*, it could not overturn the NLRB's assertion of jurisdiction into tribal labor relations. Nonetheless, the justices condemned the logic of the *San Manuel* cases, particularly the distinction between commercial and governmental functions of tribal entities or operations. They asserted, "we believe this government-commercial . . . distinction distorts the crucial overlap between tribal commercial development and government activity that is at the heart of the federal policy of self-determination."[52] Moreover, the decision quotes a recent Supreme Court opinion on the *Bay Mills* case, authored by Justice Sotomayor, that similarly comments on the false dichotomy embedded in this distinction: "tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core government function."[53] Balancing workers' rights with well-established tribal rights of civil jurisdiction, *Soaring Eagle* makes sound legal arguments to rely on a series of Supreme Court cases that focus on the relationship between tribes and nontribal members working in Indian country and the kinds of jurisdiction tribes have over these workers.[54]

Rich Indian Racism and Tax-Exempt Bonds

In spite of the *Soaring Eagle* opinion's shift away from a business-government dichotomy, these cases on tribal labor relations can be read as part of a larger trend in federal Indian law, one in which judges and administrative lawmakers use inappropriate logic to undermine the legal foundations of tribal self-determination in order to extend policies that rightfully should not be applied in Indian country. This trend is expressed in two related ways: an expansion by federal agencies of what they consider laws of general applicability, thereby making a larger set of federal acts incumbent on the entire US geopolitical territory of Indian country; *and* a contraction of what is legally defined as solely Indian country, thereby exposing jurisdictions that were formerly under federal or tribal control to state or municipal regulations. These contractions of tribal sovereignty and expansions of jurisdiction over tribal territories have relied upon outdated assumptions that label a particular set of functions as "traditional" or "essential," while defining others as "commercial" or "ancillary." While the basis for this distinction is ethereal, over the past thirty years it has become institutionalized through repeated use in judicial and regulatory policy forums. Moreover, this growing juridical and administrative definition of a "traditional/essential" tribal governmental function is contingent upon (rich Indian) racist notions that revenue-producing enterprises cannot be "traditional" or "essential" to a tribal government. As in recent policy and legal discourse, the same logic applies here: traditional tribal activity is equated with subsistence or survival, while tribal economic development activity such as gaming is framed as creating an unnecessary "surplus" or resulting in waste or inequality.

Legally fabricated dichotomies such as "traditional versus commercial" and "essential governmental versus ancillary" reiterate and further codify a long-held, settler-colonial

matrix in which indigeneity cannot engage in modernity without losing authenticity. They also naturalize so-called common sense categories that are familiar and transparent to reasonable (jurisprudential and administrative) minds.[55] Consequentially, in negotiating issues that significantly affect tribal political and economic self-determination, the interpretation of federal law and policy is rarely viewed through a local or nuanced indigenous perspective. This oversimplified, "common sense" framework is perhaps most clearly revealed in tribal government engagement with bond markets. Just as rich-Indian logic is employed to justify the NRLB's authority to regulate labor relations in Indian country, the same logic underpins several arguments forwarded by the Internal Revenue Service (IRS) that thwart attempts by tribal governments to raise money by issuing tax-exempt bonds. For decades, tribal governments have sought to float tax-exempt bonds in order to generate capital for infrastructure improvements and economic development projects. Like most other US municipalities that employ this financial instrument, tribal governments seek access to tax-exempt bonds in order to facilitate access to capital as a way to expand and maintain their infrastructure without affecting their liquidity.

Tax-exempt bonds are attractive vehicles for raising governmental revenues for several reasons. First, they provide depositors a way to invest money without having to pay tax on the earnings of their investment. As bond issuers, tribes can set the interest rates lower than other kinds of equities, thereby minimizing the revenue streams that tribal governments need to pay back the investors. At the same time, investors recoup the loss from a lower interest rate through avoiding tax on the money earned from the interest on this investment.[56] Hence, tax-exempt bonds appeal to both non-Indian investors and tribal governments. Technically, tribal governments have had the option of issuing tax-exempt bonds for some time. Operationally, however, now that some tribes are beginning to pursue bond issues, the IRS has developed standards that limit tribes' ability to raise funds in this way. Much of this challenge arises from IRS bureaucratic administrators who evaluate tribal governments' ultimate use of the funds generated from tax-exempt bond issues.

The timing of new IRS policy challenges to tribal exempt bonds in the 1980s aligns closely with NLRB challenges to tribal sovereignty and similar assumptions appear to underpin the claim that tribes are acting commercially rather than governmentally. Initially, the IRS chose not to regulate tribal revenue, declaring in 1967 that "the tribe is not a taxable entity."[57] The IRS continued this hands-off approach to Indian country throughout much of the last quarter of the twentieth century: in 1981, the IRS issued Revenue Ruling 81-295 "conclud[ing] that the tribal corporation was coextensive with the tribe itself and that the federally chartered Indian tribal corporation shared the exempt tax status of the Indian tribe for income earned on the reservation."[58] Under this ruling and the attitude generally taken by the IRS, tribes were treated as other municipalities in the US, and consequently, a handful of tribal governments ventured into the bond market to raise revenue through issuing tax-exempt bonds.

In 1982, Congress passed the Indian Tribal Government Tax Status Act as a means to more uniformly institutionalize how the IRS handled federal taxation of tribes. Ultimately this bill became a compromise between political forces that

sought to ensure that tribes would be treated like states for taxing purposes and legislators concerned about abuses of tax-exempt bonds. Therefore, the bill sought to constrict tribes' avenues toward public finance through the bond market.[59] Instead of putting tribes on a par with municipalities, which can issue tax-exempt debt with few constraints, the Tax Status Act (and its 1987 amendment) allows tribal governments only to "issue tax-exempt debt if 'substantially all' of the borrowed proceeds 'are to be used in the exercise of any essential governmental function,' and 'the term "essential governmental function" shall not include any function which is not customarily performed by State and local governments with general taxing powers.'"[60]

It seems clear that Congress is moving to more strictly define the scope of projects for which tribal governments might gain tax exemptions. As legal scholar Gavin Clarkson points out, the parameters and bright lines sought by the Act and its 1987 revision are by no means transparent or self-evident.[61] Within the legislation there is only a vague sense of exactly what constitutes a "customary" activity or how to determine an "essential governmental function," leaving interpretation to future judges and regulators. Moreover, this distinction closely mirrors the one made by the *San Manuel* judges when determining whether the NLRB had the right to assert its jurisdiction over tribal labor relations. Just as in the case of labor relations and the San Manuel tribe, the specter of casino gaming dramatically changed the way the federal government attempted to discipline the assessment of surplus in Indian country.

Prior to its passage in 1982, the Tribal Tax Status Act was debated in congressional hearings and committees, just as tribal governmental gaming in Indian country was showing great promise. To most observers it was clear that tribal gaming, predominantly high-stakes bingo at the time, was significantly different than other kinds of economic development in Indian country. Perhaps one of the best illustrations that the dominant non-Indian society was taking notice of, and feeling threatened by, gaming's huge financial potential is that from 1979 to 1982, three separate states from geographically diverse regions of the US went to federal court seeking injunctions against the operation of tribal gaming facilities within what they saw as their geopolitical boundaries.[62] This generally hostile climate toward tribal gaming reflects settler-state logic that questions the legitimacy and compatibility of operating gaming and maintaining "authentic" Indianness.

Ellen Aprill and Gavin Clarkson have both chronicled the drafting and early implementation of the Tribal Tax Status Act, including the role tribal gaming played as the backdrop for this legislation and how one activist legislator attempted to use federal tax law to stem the success of tribal gaming.[63] Our analysis adds to Aprill and Clarkson by reading against the grain of this legislative history to more clearly illuminate the role rich Indian racism played in the development of federal policy for tribes seeking to raise funds through bonds. In detailed research, both Aprill and Clarkson reveal the outsized role that Florida Congressional Representative Sam Gibbons played in fashioning the Tribal Tax Act and its 1987 revision and the ethos behind both pieces of legislation, describing a lawmaker who undermines tribal sovereignty and verges on being anti-Indian.[64] A powerful congressman, Gibbons rose to chair the

House Ways and Means committee, and along the way had the ear of the Treasury Department, Treasury Secretary James Baker, and IRS administrators.

In the two years prior to the passage of the Tribal Tax Act, Representative Gibbons was involved in a land transaction in his home district that appears to have soured him on casino gaming as an acceptable economic venture for tribal governments.[65] In 1979, Gibbons leveraged his congressional power to help solve an ongoing dispute in his district between Tampa Bay area land developers and the Seminole Tribe. The land developers had unearthed several Seminole burial remains while building a parking garage, thereby halting the construction until a solution could be found for the disturbed remains. Gibbons helped broker a deal between the private developers and federal, state, and tribal governments that expedited putting land into trust that Seminoles had purchased near Tampa—making it legally Indian country, reservation land—so that they could reinter their ancestors' remains and the land developers could continue to build their parking lot.[66] This solution seemed to satisfy the parties until it became clear that the Seminoles had contracted with a private company to build a smoke shop and 1,400-seat bingo hall on this newly granted trust land. Gibbons interpreted the Seminole Tribe's proposed land use as an illegitimate use of Native land and an unfair betrayal of the deal, so much so that he helped the State of Florida file a lawsuit to nullify the trust status of the land. The Seminoles ultimately prevailed in the federal court,[67] but it is clear that Gibbons carried this distrust of tribal governance into other areas of policymaking and embarked on a mission to curtail the powers and purview of tribal governance.

This perspective is borne out when we examine Gibbons' involvement with the Tribal Tax Act. In a congressional conference on the bill Gibbons pushed for language that would have restricted tribal usage of tax-exempt bonds to ventures that were "customarily" provided by governmental entities.[68] In fact, according to Robert Williams, Gibbons originally opposed the legislation altogether because an early draft had a key provision allowing tribal governments to issue what are known as Industrial Development Bonds, and Gibbons strongly objected to the potential use of these bonds for building gaming facilities.[69] After the Tribal Tax Act passed in 1982, several tribal governments were able to successfully float tax-exempt bonds since the IRS took its cues for interpreting the law from lawyers representing tribal governments.[70] However, when Gibbons learned that tribes were able to participate in bond markets in spite of the legislation, he implored the Secretary of Treasury to rein in the IRS, and sponsored the Revision of the Tribal Tax Act that passed after being added to the 1987 Omnibus Budget Reconciliation.

Between the establishment of the Tribal Tax Act in 1982 and its legislative revision in 1987, only seven tax-exempt bonds were issued by the more than 450 federally recognized tribes that were eligible to do so.[71] Only one of these bonds was used for an on-reservation enterprise, a health-care facility for the Fond du Lac Band of Lake Superior Chippewa Indians in Minnesota. Among the others were bonds issued by the Salt River Pima-Maricopa and Passamaquoddy tribes to purchase off-reservation cement factories in order to create revenue streams for their respective tribal governments.[72] Despite the fact that very few tribes issued bonds, Rep. Gibbons was not

only unhappy with what he saw as illegitimate tax-exempt bonds, but also with the role that tribal attorneys played in persuading the IRS to interpret the Tribal Tax Act's ambiguities in favor of indigenous interpretations, rather than test tribes' use of bond revenue for "customary" or "essential functions" of government. Consequently, he sought a way to redirect these administrators and force them to regulate the way he saw fit.

One of Gibbons's most vociferous protests was a letter to Treasury Secretary Baker urging him to investigate the issuing of all seven of these tax-exempt bonds, in which he clearly stated that a commercial enterprise owned and operated by a tribal government did not perform any essential governmental function. Gibbons declared, "cement plants and mirror factories are far a cry from schools, streets, and sewers."[73] Furthermore, in order constrain IRS regulators' flexibility in applying the tax code to tribal bonds, Gibbons used the committee report on the Revision of Tribal Tax Act to establish a legislative history that would institutionalize his position. According to Aprill, Gibbons's public statement included unusually exacting language proclaiming that

> the committee wishes to stress that only those activities that are *customarily* [emphasis in original] financed with governmental bonds (e.g. schools, roads, government buildings, etc.) are intended to be within the scope of this exception [that allows tribes to issue tax-exempt bonds], notwithstanding that isolated instances of a State or local government issuing bonds for another activity may occur. Further, the fact that the Bureau of Indian Affairs may provide Federal assistance for Indian tribal government to engage in commercial and industrial ventures as tribal government activities is not intended to be determinative for purposes of the Internal Revenue Code (Any existing Treasury Department regulations that may infer a contrary result are to be treated as invalid).[74]

This report directs IRS regulators and others toward a specific notion of what does and does not qualify as an authentic tribal governmental economic venture. Under this formulation, tribal governments are not afforded opportunities to raise revenue in a way that is commensurate with the sovereignty they are entitled to under other principles of federal Indian Law. It is when the financial stakes are high that a settler state arbitrarily asserts its power to intervene in and regulate tribal self-determination.

Trying to account for this arbitrary quality, Clarkson argues that Gibbons's attitudes and actions likely come from a generalized anti-Indian racism that influenced him while he was growing up and attending law school in Florida in the first half of the twentieth century.[75] Yet Gibbons's expression of rich Indian racism seems direct and explicit. At the time Gibbons took his opportunity to influence federal Indian policy, his greatest objection was that tribal governments were raising large sums of money and financing their governmental operations in ways that were at odds with his notion of Indianness. It is highly significant that he uses the term "customarily" in proximity to discussions of indigenous peoples, a word is nearly synonymous with "traditionally." This implies the notion that Indians are a people of "tradition," an appeal to the past that is reinforced further when Gibbons discusses the "customs"

of normative American local governments and municipalities. This word choice also implicitly links and limits tribal governmental functions to the past, and thereby posits modern "commercial" acts like engaging in the bond market as exceeding what is allowed under the Act.[76] Under Gibbons's framework, customary tribal economic development would be limited to basic infrastructure development or service provision to tribal government citizens. Clearly the limited view of tribal government and community activities advanced by Gibbons and codified in this legislation creates an uneven playing field for tribes with regard to access to bond markets.

Gibbons's insistence on the distinction between commercial and customary government functions as a test for the legality of tribal bond issuance is perhaps most odious because similar bright lines are not drawn for governments outside of Indian country. Aprill points out that this distinction is so vague for tax purposes that the IRS has exempted almost all revenue-raising activities of states and municipalities.[77] Moreover, in 1985 the Supreme Court also concluded that assessing whether a function was "essential" or "integral" to a government was untenable for deciding taxation. In *Garcia v. San Antonio Metro Transit Authority* the justices ruled that such a distinction was "unsound in principle and unworkable in practice . . . [because] [a]ny such rule leads to inconsistent results . . . and . . . breeds inconsistency."[78] Clarkson reports that states and municipalities regularly issue tax-free bonds for "airports, docks, community facilities, utilities, mortgages, public golf courses, and even state lottery buildings and horse race tracks."[79] Although these activities would be considered "commercial" in Indian country, they are classified as "customary" for nontribal governments. Once again, the standards for Indianness have created an uneven playing field in the name of "preserving tribal tradition."

Despite the Supreme Court's acknowledging the fallacy of this distinction in its 1985 ruling, only two years before the Revision of the Tribal Tax Act, and multiple examples of nontribal governments issuing tax-exempt bonds for commercial activity, the IRS did not apply the same reasoning in regard to Indian country. This inconsistency was justified by the rich-Indian rhetoric that Gibbons used to frame the debate. By naturalizing the distinction between "rich Indians" and "real Indians," Gibbons and others have undermined how tribal governments engage in market capitalism by claiming that any commercial activity is akin to acquiescence to the norms and laws of these markets. In this context, Native acquiescence to the settler state is presumed to exist on a scale so large that not only are indigenous constitutional rights or treaty-based sovereignty rights obscured, but the notion of a *tribe as government* is entirely erased. As Rifkin illustrates, the settler state cannot allow for alternate, interior geopolitical spaces to change its uniformity and dominance.[80] Now enshrined in the methods used by the IRS to apply the standards in the Revision to the Tribal Tax Act, this kind of rich Indian racism—one that both marks Indian economic activity as anti-modern and tries to divorce indigeneity from contemporary tribal economic development—can be seen as Gibbons's legacy.

As with any federal policy, IRS application of the Tribal Tax Act becomes even more contentious when it involves tribal government gaming. In nearly all cases where a tribal nation has pursued gaming, its revenues represent the bulk of the tribal

government budget.[81] Despite this reality, the IRS has been unwilling to define tribal governmental gaming operations as "essential" to the tribal government. For example, from 2002 to 2006, the IRS scrutinized tax-exempt bond deals of two prominent gaming tribes, the Morongo Band of Mission Indians in California and the Seminole Tribe of Florida.[82] During this time, both Native nations pursued tax-exempt bond deals to expand their gaming properties. The IRS field agents continued to employ Gibbons's outdated framework distinguishing commercial from governmental activity. For example, IRS field manager Chris Anderson, when commenting on the Morongo Tribe's plan for a $145 million bond for hotel/casino construction, asserted, "the use of the financing for commercial facilities was not intended to be within the scope of [Tribal Tax Act] . . . It's our position that clearly tax-exempt bonds for things like restaurants, resorts, casinos, and things related to that function were not an essential government purpose."[83] Under Anderson's field leadership, any tribal economic development related to tribal government gaming was automatically classified as commercial, not essentially governmental, in spite of the fact that the Indian Gaming Regulatory Act limits tribal gaming ownership to tribal governments and explicitly directs all tribal gaming revenues investments toward the general welfare of the tribe.[84]

In a similar move, the IRS denied tax-exempt status to $345 million in bonds issued by the Seminole Tribe of Florida to build a new Hard Rock Hotel and Casino that included a convention center in Hollywood, Florida. In rejecting its tax-exempt status, the IRS claimed that the construction of the Seminole Tribe's hotel would be unlike the customary actions of state or municipal governments outside of Indian country.[85] This analysis overlooks that state and local governments have the power to tax and raise revenues in ways that do not include operating a business. Anticipating this denial, the Seminoles provided the IRS with fifteen examples of tax-exempt bonds issued by states or municipalities to fund urban hotels associated with convention centers. They also identified several lodges located in state parks that were funded with tax-exempt bonds. Yet the IRS memorandum rejected the tax-exempt status of the Seminoles' bond offerings in spite of this evidence, using flawed logic to distinguish the project as commercial: "although . . . there are a small number of state park lodges with considerably more guest rooms, very few approach the size and amenities of the [Seminole] project. . . . According, we do not find the [Seminole] project comparable."[86] Judged to have more amenities than comparable state park lodges, the perceived luxury and comfort of the Seminole Tribe's proposed property (and likely its brand name "Hard Rock") is used to undermine its status as a governmental project.

In another example of questionable reasoning, the Morongo Tribe of California made several adjustments to their bond proposal in order to preempt IRS objections. First, the Morongo Tribe lowered the price of its tax-exempt bonds by nearly $100 million and narrowed the focus to infrastructure improvements, including redeveloping the water supply and waste facilities and expanding on-reservation public roads and parking.[87] The IRS, however, chose to focus on the construction of a new parking lot. Its analysis questioned whether a parking lot for 7,000 vehicles constituted an essential governmental function for a tribe with approximately 1,000 members.[88] To the IRS, any use of the parking lot by nontribal members or residents could be

deemed commercial. Of course, states and municipalities outside of Indian country provide access to amenities such as parking lots for both residents and nonresidents. The same is true for municipal golf courses which generate revenue by catering to residents and nonresidents alike. Yet when IRS field manager Anderson made the case to deny tax-exempt bonds to the Las Vegas Paiute Tribe for tribal golf course development, he again invoked rich-Indian rhetoric: "If there are more golf holes than tribal members it is probably commercial and intended solely for tourists. If no tribal members work there and they all collect a dividend, it is probably commercial . . . I don't think Congress ever anticipated several dozen people getting six-figure checks due to a resort financed by tax-exempt bonds."[89]

As Clarkson accounts, there are more than one hundred state or municipal golf courses built with the aid of tax-exempt bonds and several thousand golf courses in the United States that are owned and operated by state and municipal governments.[90] However, the IRS has rebuffed efforts to support construction of tribal golf courses with tax-exempt bonds on the grounds that golf courses are something "other than [an] essential governmental function."[91] The key argument to the IRS's denial of a bond to the Las Vegas Paiute was that the golf course would not be "intended to meet the recreational needs of" the tribe.[92] Like the rejection of tax-free funding for the Morongo's parking lot, this reasoning holds tribal governments to a higher standard when determining either commercial use or essential governmental function.

Rich-Indian logic is employed so tribal governmental enterprises can be judged differently than nontribal governmental activities when granting tax-exempt status for bonds. Paradoxically, IRS field agents and federal lawmakers argue in favor of treating tribal ventures as commercial, not essentially governmental, because they see these ventures to be the same as any other commercial venture in the United States and therefore want normative commercial economic laws to apply. Yet in refusing to see tribal ventures as analogous to those of other governments, they produce idiosyncratic exceptions for why tribal enterprises are not like other governmental enterprises, such as claiming that their facilities serve too many non-citizens or are too luxurious. This flawed reasoning reflects an inability to understand tribal economic development success—not simply subsistence—as a part of tribal community tradition.

As part of the 2009 American Recovery and Reinvestment Act, the Treasury Department temporarily relaxed its attitude towards tribes and tax-exempt bonds. In response to the economic crisis, the IRS expanded the definition of "essential government function" to allow tribal governments access to $2 billion of tax-exempt economic development bonds. As part of this stimulus, Treasury approved 134 applications for approximately eighty tribal projects.[93] Prior to this stimulus package, these projects were subject to great scrutiny and generally rejected by the IRS for being "not essential." The stimulus instituted by the Treasury Department resulted in an examination of "whether to 'eliminate or otherwise modify' the essential governmental function standard for Indian tribal tax-exempt bond financing."[94] In a 2011 report, the Treasury Department recommended to cease using notions of "customary" and "essential" governmental functions, due both to their vagueness and the fact that states and municipalities do not have these restrictions. However, key to the recommendations

was an assertion for "a restriction against financing certain gaming facilities" with tax-exempt bonds.[95] Yet nowhere does the department define the scope of this limit on "certain gaming facilities." For example, does the restriction apply only to gaming facilities themselves? Does it include hotels associated with gaming? Convention centers? Golf courses? What about the ancillary services such as parking lots, water-treatment plants, or power-generating facilities that support tribal communities, but may also service the gaming facility?

The department did acknowledge that a "large majority" of tribal comments on the finding disagreed with this restriction on gaming facilities.[96] But the potential for a positive change in attitude toward tribal economic development financing was discouraging when a June 17, 2015 Senate Committee on Indian Affairs Oversight hearing reported that nearly four years later, these Treasury recommendations had not resulted in any policy changes. The language of "essential governmental function" is still enshrined in the tax code; and due to the short-term nature of the Recovery and Reinvestment Act and other restrictions, tribal government access to funds under the Act remains limited or nonexistent.[97] It is clear that biased notions of tribal governments' economic development and wealth, including how Indians ought to relate to wealth, continue to provide the foundation necessary to justify policies that limit tribal access to services and exemptions that other governments and entities enjoy.

Conclusions

Few American Indian scholars have articulated a more sophisticated understanding of the role of Indians and Indianness in developing American modernity than Philip J. Deloria. Through his chronicling of American (Indian) modernity, Deloria has advanced some very useful theoretical tools to try to understand the ways Native people can carve out indigenous modernities and actively self-determine narratives of indigeniety. [98] Of course, an essential part of American modernity is the form of market capitalism practiced in the United States. Subsequent research by Cattelino and Kamper have employed Deloria's theoretical frameworks to try to parse settler-state responses to the most recent, and most financially successful, indigenous engagement with market capitalism and the shaping of American modernity: tribal governmental gaming.[99] In particular, Cattelino and Kamper have gravitated toward Deloria's formulation of expectations, the anomaly, and the unexpected.

In brief, "expectations" are the set of meanings normatively accepted as defining Indianness in relation to modernity.[100] That is, in settler-colonial America, indigeniety is characterized by a set of representational expectations that define it as anti-modern. Deloria's contribution is a framework for understanding moments when Indianness doesn't meet Anglo American normative expectations—fundamentally because they are engaging modernity. This he argues can happen in two ways: the "anomaly" and the "unexpected." The anomaly runs counter to expectations, but does so in a way that reinforces rather than subverts expectations; it is the exception that proves the rule. The unexpected is distinguishable from an anomaly because it unsettles expectations by "resist[ing] categorization," thereby clearing the way for changes in categories of

race, class, and nationhood.[101] Kamper has used this framework to look at the way rich Indian racism, in its various manifestations, has positioned tribal governmental gaming as an anomaly of Native life. This anomaly is interpreted by most Americans as a form of "reparations" granted to tribal governments and communities to atone for poor treatment. Importantly, this narrative obscures the fact that tribal government gaming is a tribal economic development innovation that was developed by sovereign tribal actors to express and mobilize tribal self-determination.[102]

Similarly, Cattelino employs Deloria's framework to help better understand the double bind for indigenous communities in settler states in which their self-determination is often diminished when it is redefined as "need-based" sovereignty. In the way that Deloria argues that the unexpected poses the potential for new kinds of transformative categories, Cattelino asks us to question ways in which tribal gaming can be an anomaly or an example of unexpected success.[103] As she notes, "proposals occasionally pop up in U.S. Congress to assess the federal obligation to individual tribes not on the basis of treaty rights or sovereign recognition but, rather, by 'means-testing,' whereby federal allocations would be measured by an indigenous group's financial 'need.'"[104] For many gaming tribes, this kind of misapplied means-testing results in loss. Moreover, to suggest that treaty rights and sovereignty not be respected because a few tribes can now afford to support themselves expresses a rich Indian racism on the part of both legislators and the constituents whom they fear to alienate. This settler-colonial view is a key aspect of the contemporary casino era that, as Cattelino asserts, hems indigenous people into a double bind "in which it is only a short step from wondering whether Indians with gaming are losing their culture to skepticism over whether indigenous people with economic power can and should remain legitimately indigenous and sovereign."[105]

Like Deloria and Cattelino, we have explored in this article what is at stake for tribal political economies in the legal categories that circulate around tribal governmental gaming. In particular, we have shown that the arbitrary labels and categories imposed on tribal economic activity—ranging from "commercial," to "essential," "traditional," "customary," or "governmental"—are essentially value judgments created by outsiders that can be used to make juridical, legislative, and bureaucratic decisions about the proper uses of tribal self-determination. While we have focused on how these frameworks are used in labor relations and tax policy, overall the continued deployment of rich-Indian logic undercuts tribes' ability to fully engage in market capitalism while maintaining their sovereignty as indigenous communities. Herein lies the transformative potential of tribal governmental gaming: its ability to generate new political and economic categories that challenge the settler state to reconcile Indianness with modernity. Native communities themselves have been forced to adapt to changing geographies, economies, and political environments while maintaining their own sense of Indianness in relationship to the contemporary world. Tribal gaming produces anxiety because nontribal governments, communities, and individuals are now being forced to adapt their attitudes about contemporary Indianness as well.

Notes

1. Alexandra Harmon, *Rich Indians: Native People and the Problem of Wealth in American History* (Chapel Hill: University of North Carolina Press, 2010).

2. In addition to Harmon, also see Page Raibmon, *Authentic Indians: Episodes of Encounter from the Late-Nineteenth-Century Northwest Coast* (Durham: Duke University Press, 2005) for an excellent discussion of this issue.

3. Harmon, *Rich Indians*, 249.

4. Jessica R. Cattelino, *High Stakes: Florida Seminole Gaming and Sovereignty* (Durham: Duke University Press, 2008); Katherine A. Spilde, "The Unfair Argument: How Indian Gaming has Provided Benefits for California," *Global Gaming Business Magazine* 3, no. 12 (2003).

5. Katherine A. Spilde and Jonathan Taylor, "Economic Evidence on the Effects of the Indian Gaming Regulatory Act on Indians and Non-Indians," *UNLV Gaming Research and Review Journal* 17, no. 1 (2013), http://digitalscholarship.unlv.edu/grrj/vol17/iss1/2; Randall Akee, Katherine A. Spilde, and Jonathan Taylor, "The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development," *Journal of Economic Perspectives* 29, no. 3 (2015), doi: 10.1257/jep.29.3.185.

6. Katherine A. Spilde, "Acts of Sovereignty, Acts of Identity: Negotiating Independence through Tribal Government Gaming on the White Earth Reservation" (PhD diss., University of California, Santa Cruz, 1999); David Kamper, "Introduction: The Mimicry of Indian Gaming," in *Indian Gaming: Who Wins?*, ed. Angela Mullis and David Kamper (Los Angeles: UCLA American Indian Studies Center, 2000); Eve Darian-Smith, *New Capitalists: Law, Politics, and Identity Surrounding Casino Gaming on Native American Land* (Boston: Wadsworth, 2003).

7. Philip J. Deloria, *Indians in Unexpected Places* (Lawrence: University of Kansas Press, 2004), 11.

8. Almost any non-Indian who does research with tribal communities engaged in gaming has experienced this kind of conversation at least once with other non-Indians who, when they discover the researcher's topic, inevitably reveal implicitly or explicitly "rich Indian" attitudes (in moments of purported white "racial solidarity" with you). We have had many of these experiences. See Cattelino's *High Stakes* for examples from her own research experiences.

9. Spilde, "Acts of Sovereignty." See also Alexander T. Aleinikoff, *Semblance of Sovereignty: The Constitution, the State, and American Citizenship* (Cambridge: Harvard University Press, 2002), chapters 5–6; Jeff Corntassel, with Lindsay G. Robertson and Richard C. Witmer II, *Forced Federalism: Contemporary Challenges to Indigenous Nationhood* (Norman: University of Oklahoma Press, 2008).

10. Mark Rifkin, *Manifesting America: The Imperial Construction of U.S. National Space* (New York: Oxford University Press, 2009), chapters 1–3.

11. Importantly, enterprises run by other governments, such as states, are exempt from the NLRA.

12. Harmon, *Rich Indians*; Raibmon, *Authentic Indians*.

13. Harmon, *Rich Indians*.

14. Of course there has been a vast amount of scholarship on this point in regards to Europeans and the colonized others that they created throughout the world, not just in North America. However, on the notion of primitive v. modern or uncivilized v. civilized it is particularly worth pointing out the work of Johannes Fabian, *Time and the Other: How Anthropology Makes Its Object* (New York: Columbia University Press, 1983) and Marianna Torgovnick, *Gone Primitive: Savage Intellects, Modern Lives* (Chicago: University of Chicago Press, 1991), which explains how Europeans needed the notion of the primitive/uncivilized to exist and therefore created them in the colonized "other" in order to maintain a conception of themselves as civilized. "Whiteness" could not stand as civilized without a projection of "primitiveness" by way of comparison.

15. Raibmon, *Authentic Indians*.

16. Robert F. Berkhofer, *The White Man's Indian: Images of the American Indian from Columbus to the Present* (New York: Vintage Books, 1979). These representations of Native American savagery almost always took one of two forms of prototypic "savage": either "barbaric savages" who were always lurking, ready to attack innocent pioneers, usually women and children, and to impede the progress of the inherently just mission to settle the West; or "noble savages" who were subservient and cooperative, willing to accept their inferior place and, without putting up a fight, give their land for whites to settle. The noble savages' stoic honor in accepting their subservience thus earned nostalgic respect from whites.

17. Spilde, "Acts of Sovereignty"; Cattelino, *High Stakes*; Corntassel, *Forced Federalism*.

18. Harmon, *Rich Indians*; see also Tanis Thorne, *The World's Richest Indian: The Scandal over Jackson Barnett's Oil Fortune* (New York: Oxford University Press, 2005).

19. See Duane Champagne, "Tribal Capitalism and Native Capitalists: Multiple Pathways of Native Economy," in *Native Pathways: American Indian Culture and Economic Development in the Twentieth Century*, ed. Brian Hosmer and Colleen O'Neill (Boulder: University of Colorado Press, 2004).

20. While a small percentage of tribal governments distribute payments to individual members, these "per capita" payments are only allowed once the collective needs of the community have been demonstrably satisfied per IGRA. As of 2009, 120 tribes had filed revenue allocation plans with the Bureau of Indian Affairs, a prerequisite under the Indian Gaming Regulatory Act for tribes allocating revenue per capita in this way; see William A. Taggart and Thaddieus W. Conner, "Indian Gaming and Tribal Revenue Allocation Plans: A Case of 'Play to Pay,'" *Gaming Law Review and Economics* 15, no. 6 (June 2011), doi: 10.1089/glre.2011.15605. Moreover, given that these 120 tribes represent just under 50 percent of all the tribes with governmental gaming, the fact that individual per capita payments receive an inordinate amount of attention illustrates our point further that the non-Indian public is disproportionately fixated on the wealth accumulation of Indians.

21. Jeff Benedict, *Without Reservation: How a Controversial Indian Tribe Rose to Power and Built the World's Largest Casino* (New York: Perennial Books, 2001).

22. See National Gambling Impact Study Commission, *National Gambling Impact Study Commission Final Report* (June 1999), http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html; John M. Broder, "Deal Is Near on Casinos in California," *New York Times*, June 17, 2004, http://www.nytimes.com/2004/06/17/national/17california.html; Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.–Indigenous Relations* (Minneapolis: University of Minnesota Press, 2007).

23. Interestingly, this is not unlike the same thinly veiled racist criticism leveled at Natives' purchases of automobiles in the early twentieth century. Like Harmon's *Rich Indians*, Philip J. Deloria's *Indians in Unexpected Places* documents early versions of rich Indian racism in which Natives' purchase and use of automobiles was characterized by non-Indians as either (1) a waste of money, suggesting that Indians could not understand modern, Euro-American systems of value; or (2) as a sign of assimilation, suggesting that participating the act of owning an expensive luxury item signified a loss of Indianness.

24. Cattelino, *High Stakes*.

25. This is not to say that a high-end model car does not have social status significance among Florida Seminole, but that the ability to buy a new car is not the most important result of Seminole gaming, certainly not as much of the non-Indian media would have one believe.

26. "Mansions of San Manuel," *No on 5*, Coalition Against Unregulated Gambling, http://digital.library.ucla.edu/websites/1998_999_007/vmansion.htm.

27. For an example of the sensational journalism see Jeff Benedict, *Without Reservation: The Making of America's Most Powerful Indian Tribe and Foxwoods, the World's Largest* Casino (New York:

HarperCollins Publishers, 2000). Compare the accounts like Benedict's with more the reputable and thorough research of Darian-Smith, *New Capitalist*; John J. Bodinger de Uriarte, *Casino and Museum: Representing Mashantucket Pequot Identity* (Tucson: University of Arizona Press, 2007); Renée Ann Cramer, *Cash, Color, and Colonialism: The Politics of Tribal Acknowledgement* (Norman: University of Oklahoma Press, 2008); and Cattelino, *High Stakes*.

28. Patrick Wolfe, "Land, Labor, and Difference: Elementary Structures of Race," *The American Historical Review* 106, no. 3 (2001): 868, doi: 10.2307/2692330.

29. The case Rifkin discusses is *City of Sherill v. Oneida Indian Nation of N.Y.* (03-855) 544 U.S. 197 (2005). Rifkin, *Manifesting America*, 4. While the most blatant strategies of settler colonialism toward American Indians in the United States occurred in the nineteenth and first half of the twentieth centuries through policies such as the Indian Removal Act of 1830, the General Allotment Act of 1887, and the Termination Era of the 1950s, to name only a few, the logic of elimination has never left the ethos of US nation-state projects.

30. Admittedly, this may be a bit of temporal bias, and it may only be hindsight that makes the settler-colonial strategies of 50, 100, and 150 years ago seem like such blatantly obvious land grabs rather than more subtle forms of imperialism. In the context of the nineteenth century, the Indian Removal and General Allotment Acts may have been just as indirect as the forms of settler colonialism we see today. On the other hand, certainly there is evidence that important figures of the day publicly spoke out against nineteenth- and mid-twentieth-century policies, but whether they represented general sentiment is not easy to tell. Such questions of historiography are beyond the scope of this article.

31. Rifkin, *Manifesting America*, 5.

32. Ibid.

33. Katherine Spilde, "Creating a Political Space for American Indian Economic Development," *Local Actions: Cultural Activism, Power and Public Life in America*, ed. Maggie Fishman and Melissa Checker (New York: Columbia University Press, 2002), 71–88; Randall Akee, et al., "The Indian Gaming Regulatory Act."

34. Laurie Arnold, "Indian Gaming, American Anxiety," UNLV Center for Gaming Research, UNLV Gaming Podcast 66, March 18, 2015, https://www.library.unlv.edu/center_for_gaming_research/2015/03/unlv-gaming-podcast-66-laurie-arnold.html.

35. See website for National Indian Gaming Association (NIGA) at www.indiangaming.org, and website for National Center for American Indian Enterprise Development (NCAIED) at www.ncaied.org.

36. Champagne, "Tribal Capitalism," 323.

37. See also Vicki J. Limas, "Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights," *Denver University Law Review* 70, no. 2 (1992–1993); William Buffalo and Kevin J. Wadzinski, "Application of Federal and State Labor and Employment Laws to Indian Tribal Employers," *University of Memphis Law Review* 25, no. 4 (1994–1995); G. William Rice, "Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship," *North Dakota Law Review* 72, no. 2 (1996).

38. Cattelino, *High Stakes*; Jessica Cattelino, "Fungibility: Florida Seminole Casino Dividends and the Fiscal Politics of Indigeneity," *American Anthropologist* 111, no. 2 (2009), doi: 10.1111/j.1548-1433.2009.01112.x.

39. Rifkin, *Manifesting America*; Elizabeth A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002).

40. For a more detailed history see David Kamper, *The Work of Sovereignty: Tribal Labor Relations and Self-Determination at the Navajo Nation* (Santa Fe: School of Advanced Research Press, 2010).

41. See Limas, "Employment Suits;" Wenona T. Singel, "Labor Relations and Tribal Self-Governance," *North Dakota Law Review* 80, no. 4 (2004).

42. Only a small percentage of tribes have labor relations regulations because it takes a level of tribal legislative and jurisprudential development, and financial ability, to enact and sustain tribal law based labor relations. However, these institutional requirements do not diminish the fact that *San Manuel v. NLRB* deprived tribes of their right of self-governance even if they were not actively or were not currently able to exercise it. For a more thorough discussion of the *San Manuel* case and tribal labor relations in general see Kamper, *Work of Sovereignty*.

43. 341 NLRB no. 138, 1063, 1062.

44. Ibid., 1062.

45. *San Manuel v. NLRB* 2007, 1315.

46. John C. Mohawk, "Indian Economic Development: An Evolving Concept of Sovereignty," *Buffalo Law Review* 39, no. 2 (1991), 499.

47. Singel, "Labor Relations," 702.

48. *Soaring Eagle Casino and Resort v. NLRB* (2015).

49. *NLRB v. Little River Band of Ottawa Indians Tribal Government* (2015).

50. *Chickasaw Nation d/b/a/ Winstar World Casino* 362 *NLRB* (2105). In June of 2015 the NLRB chose to decline assertion of its jurisdiction based on the Chickasaws' treaty rights. However, at this point it is unclear if the Teamsters will try to appeal this decision to a federal circuit court or to the Supreme Court.

51. A significant part of the delay was because some of President Obama's NLRB administrative judicial appointments were legislatively and legally challenged causing long logistic delays in the NLRB's ability to do its judicial work.

52. *Soaring Eagle Casino v. NLRB* (2015), 34.

53. Ibid.; internal quotations omitted.

54. Singel's superb law review article "Labor Relations," which was developed and published over ten years before the Sixth Circuit court's 2015 opinion, relied on *Montana v. United States* (1981) and related cases to create this new direction for understanding employment and labor relations jurisdiction.

55. For similar arguments, see also Spilde, "Acts of Sovereignty;" Elizabeth A. Povenilli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press, 2002); Katherine Spilde, "Creating a Space for American Indian Economic Development: Indian Gaming and American Indian Activism," in *Local Actions: Cultural Activism, Power and Public Life in America*, ed. Melissa Checker and Maggie Fishman (New York: Columbia University Press, 2004); Raibmon, *Authentic Indians*; Catellino, *High Stakes*.

56. See Gavin Clarkson, "Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development," *North Carolina Law Review* 85, no. 4 (May 2007) for thorough and excellent explanation of the various kinds of tax-exempt bonds, how to structure them, and how their financial metrics work.

57. Revenue Ruling 67-284, quoted in Ellen P. Aprill, "Tribal Bonds: Indian Sovereignty and the Tax Legislative Process," *Administrative Law Review* 46, no. 3 (1994), 337.

58. Quoted in Aprill, "Tribal Bonds," 339.

59. Aprill, "Tribal Bonds;" Clarkson, "Tribal Bonds."

60. Clarkson, "Tribal Bonds," 1016.

61. Ibid.

62. *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d (5th Cir. 1981); *Oneida Tribe of Indians of Wis. v. Wisconsin*, 518 F. Supp. (W.D. Wis. 1981); and *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d (9th Cir. 1982). For a similar discussion see also Kevin K. Washburn, "The

Legacy of *Bryan v. Istaca County*: How an Erroneous $147 County Tax Notice Helped Bring Tribes $200 Billion in Indian Gaming Revenue," *Minnesota Law Review* 92, no. 4 (2008).

63. Aprill, "Tribal Bonds;" Clarkson, "Tribal Bonds."

64. See Aprill, "Tribal Bonds" for the former, and Clarkson, "Tribal Bonds" for the latter.

65. Aprill, "Tribal Bonds;" Clarkson, "Tribal Bonds."

66. John MacCormack, "New Riches Grow from Old Burial Ground," *Miami Herald*, May 31, 1983, 6A; Aprill, "Tribal Bonds;" Clarkson, "Tribal Bonds."

67. *Florida Department of Business Regulation v. U.S. Department of Interior*, 768 F.2d (11th Cir. 1985).

68. Aprill, "Tribal Bonds;" Clarkson, "Tribal Bonds."

69. Robert A. Williams, Jr., "Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Government Tax Status Act of 1982," *Harvard Journal on Legislation* 22, no. 2 (1985).

70. Aprill, "Tribal Bonds."

71. Ibid.

72. Ibid.

73. Ibid., 361. The mirror factory Gibbons referred to was another tribal acquisition for which one of the seven tax-exempt bonds was used.

74. Ibid.

75. Clarkson, "Tribal Bonds," following Robert Williams Jr.'s thesis about the inherent racism in federal Indian policy and jurisprudence in *Like a Loaded Weapon: The Renquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005).

76. It could be argued that what "counts" as traditional can only be determined by group (in this case tribal) members. When outsiders label certain aspects of governance exclusively "traditional" and others "commercial," this categorization fulfills the settler-colonial mission of denying indigenous people their indigeneity in the contemporary/modern world. Perhaps T. V. Reed put it best when commenting on the mastery of Leslie Marmon Silko's *Storyteller*: "traditional rituals have always changed to meet the needs of the present, rather than being lodged in an impossible-to-return-to-past." T. V. Reed, "Old Cowboys, New Indians: Hollywood Frames the American Indian," *Wicazo Sa Review* 16, no. 2 (2001), 82, doi: 10.1353/wic.2001.0030.

77. Ellen P. Aprill, "Excluding the Income of State and Local Governments: The Need for Congressional Action," *Georgia Law Review* 26, no. 2 (1992); Aprill, "Tribal Bonds."

78. *Garcia v. San Antonio Metro Transit Authority* (1985), 547.

79. Clarkson, "Tribal Bonds," 1034.

80. Rifkin, *Manifesting America*.

81. Akee, et al., "Indian Gaming Regulatory Act."

82. Rich Saskal, "IRS Takes a Closer Look at California Tribal Deal's Tax-Exempt Status," *The Bond Buyer* 353 (August 29, 2005); Allison L. McConnell, "Seminole Tribe Receives Negative IRS Rulings," *Bond Buyer* 358 (December 8, 2006).

83. Quoted in Saskal, "IRS Takes a Closer Look," 2.

84. It is worth noting that the Morongo Band worked collaboratively with the neighboring city of Banning to issue what is known as a conduit bond. In this arrangement, Banning would issue the bond to the market and then loan the proceeds to the tribe. The strategy was employed to take advantage of the fact that cities could issue tax-exempt bonds to build hotels. Because the tribe was involved, the IRS applied the same restrictive conceptualization of "essential" governmental function to the Morongo Band's conduit financing and denied their tax-exempt status nonetheless. See Saskal, "IRS Takes a Closer Look," and Clarkson, "Tribal Bonds."

85. McConnell, "Seminole Tribe."

86. Ibid., 3.

87. This second financing attempt was not only smaller in scope, but also was no longer part of a conduit bond issued through the City of Banning; rather, it was a governmental bond issued directly by the Morongo tribal government.

88. Saskal, "IRS Takes Closer Look."

89. McConnell, "Seminole Tribe," 2.

90. Clarkson, "Tribal Bonds."

91. Ibid., 41.

92. Ibid.

93. Department of Treasury, *Report and Recommendations to Congress Regarding Tribal Economic Development Bond Provision under Sections 7871 of the Internal Revenue Code* (December 2011), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Tribal-Bonds-2011.pdf.

94. Ibid., 1.

95. Ibid., 2.

96. Ibid., Appendix C.

97. Dante Desiderio, "Access to Capital," written testimony, Senate Committee on Indian Affairs Oversight Hearing, June 2015, http://www.indian.senate.gov/sites/default/files/upload/files/6.17.15%20Desiderio%20Testimony.pdf.

98. Deloria looks at how American modernity has been defined against and through Anglo settler-colonial notions of Indianness, as well as how representations of Indianness (Anglo and self-representations) develop a complex set of sociopolitical expectations of what is modern American civilization and what is antithesis. Philip J. Deloria, *Playing Indian* (New Haven: Yale University Press, 1998); Deloria, *Indians in Unexpected Places*.

99. Jessica Cattelino, "The Double Bind of American Indian Need-Based Sovereignty," *Cultural Anthropology* 25, no. 2 (2010), doi: 10.1111/j.1548-1360.2010.01058.x; Kamper, *Work of Sovereignty*.

100. See Deloria, *Indians in Unexpected Places*, for an explanation of how he develops these concepts.

101. Ibid., 11.

102. Kamper, *Work of Sovereignty*.

103. Deloria, *Indians in Unexpected Places*; Cattelino, "Double Bind."

104. Cattelino, "Double Bind," 248.

105. Ibid.