

## IMPOSING COMMUNISM

by  
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*It is a well known fact that gambling is the most successful business venture in Indian Country. What most people don't know is that in 1988 the United States government passed the Indian Gaming Regulatory Act (IGRA), which requires that casino operations in Indian Country be owned by tribes and not by private individuals. Today tribes struggle to reassume management of their lands and resources but tribal governments make it difficult for them by managing businesses for the Tribe as a collective whole, instead of purposefully facilitating and governing a private economy and a private property system within Indian Country. Under the General Allotment Act (GAA), the United States government attempted to promote a private economy on Native American land by allotting land for each Indian family, but it was inefficient in its management of individually owned assets. Tribes should amend their constitutions and create laws that re-organize their governments to correct the conditions created by the laws passed by the United States government.*

One day the United States imposes capitalism upon Tribes; the next it imposes communism.

It is no secret that gambling has become the single most successful commercial enterprise in Indian Country, but the success can only be imagined if the United States Congress had not interceded. In 1988 Congress imposed upon Tribes the Indian Gaming Regulatory Act (IGRA),<sup>1</sup> which, in an anti-American sort of way, requires that casino-style gaming operations in Indian Country be owned by Tribes, the way casino gaming would have been operated by the government in the former Soviet Union, or today in North Korea. For all we know, without IGRA, several Las Vegases might have popped up across the country on Indian lands.

Granted, Tribes, as governments, owned businesses long before the IGRA was enacted, but the pre-IGRA history of Tribe-owned businesses also has a checkered interpretation due to similarly broad and utterly inconsistent swings of American policy. In the first instance we are inevitably offered the romanticized and tired picture of Native Americans who do not believe in private property, and of Native Americans who do not separate from the pack in a way that capitalism requires.

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<sup>1</sup> Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701–2721 (2000).

Even if Native life was ever that way, it is not anymore.

A more likely reason for Tribes' collective business ownership—one the historical record actually supports—stems from the Department of the Interior's Bureau of Indian Affairs' (DOI/BIA) management of tribal assets as far back as the middle 1800s. Today, as Tribes fight to reassume management of their lands and resources through "638" contracts and the like,<sup>2</sup> tribal governments pick up where the Bureau of Indian Affairs leaves off, managing businesses for the Tribe as a collective whole, instead of purposefully facilitating and governing a private economy and a private property system within Indian Country.

Perhaps ironically, America's legal history is more familiar with the opposite swing of that property pendulum. The United States once used the General Allotment Act (GAA)<sup>3</sup> to carve Indian Country into private "allotments" for each Indian family, ostensibly to facilitate a private economy. However, the United States then indulgently usurped management of those private, individually Indian-owned assets, a practice which is now the subject of the infamous *Cobell v. Kempthorne* litigation.<sup>4</sup> The BIA is a governmental agency, after all, so one lesson for Tribes and Indians is that the inefficiencies of communism, or the risks of capitalism, are acceptable so long as someone else's assets are at stake. Indeed, the most exquisite irony in this analysis may arise in deciding which practice was least defensible in light of America's capitalism—the United States' management of individual Indian assets or its management of collective Tribe assets (a double dose of communism). Although America's policy of dividing Indian Country into individually held parcels of private property was designed ostensibly to destroy the tribal mass and to make individual Indians into regular private-property-holding citizens,<sup>5</sup> the United States' management—or mismanagement—of those assets served to keep Tribes intact not only governmentally, but also when it came to business activity, frustrating orderly development of the private economy and property in Indian Country.

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<sup>2</sup> Indian Self Determination Act, Pub. L. No. 93-638, 88 Stat. 2206 (codified as amended in scattered sections of 25 U.S.C.).

<sup>3</sup> Indian General Allotment Act (Dawes Act) of 1887, ch. 119, 24 Stat. 388 (current version at 25 U.S.C. §§ 331–358 (2000)). Enacted on February 8, 1887 and named after its sponsor, U.S. Senator Henry L. Dawes of Massachusetts, the Dawes Act was amended in 1891 and again in 1906 by the Burke Act, 24 Stat. 390 (codified as amended at 25 U.S.C. § 349). The Dawes Act remained in effect until 1934.

<sup>4</sup> *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006).

<sup>5</sup> By dividing reservation lands into privately-owned parcels, legislators hoped to complete the assimilation process by forcing the deterioration of the communal life-style of the Native societies and imposing western-oriented values of strengthening the nuclear family and economic dependency strictly within the small household unit. See Arrell M. Gibson, *Indian Land Transfers*, in 4 HANDBOOK OF NORTH AMERICAN INDIANS: HISTORY OF INDIAN-WHITE RELATIONS 226–29 (Wilcomb E. Washburn & William C. Sturtevant, eds. 1988).

By 1934 the GAA had wrought havoc upon Tribes and individual Indian landholdings, and Congress once again felt compelled to save Indians from a prior experiment by imposing a new and improved experiment.<sup>6</sup> Of course, in 1934 the entire country was emerging from the Great Depression, and Congress had already settled on a new tool for salvaging bankrupt corporations: “reorganization.”<sup>7</sup> So perhaps not surprisingly Congress foisted a similar model upon Tribes—the Indian Reorganization Act (IRA).<sup>8</sup> While the single most notable vehicle for the United States’ mismanagement of Indian land will forever remain the GAA, the IRA is the culprit for the prevailing confusion in tribal governments over public versus private activity. The IRA had one primary objective: to bring a measure of order to society in Indian Country, just not necessarily the order that the Tribes themselves might have wrought. The IRA sought to accomplish this broad social objective by two primary means: (1) halting the loss of Indian land; and (2) coaxing Tribes into reorganizing their social structures, especially their governments.<sup>9</sup>

The IRA offered Tribes two models for reorganization. Section 16 of the Act offered reorganization as a government, while section 17 offered reorganization as a federally chartered corporation.<sup>10</sup> While the

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<sup>6</sup> “The election of 1932, with the prospect of a new commissioner of Indian affairs and a new initiative in Indian policy, brought a semblance of unity to the reform movement which lasted long enough to provide the impetus for the passage of the Indian Reorganization Act, the major achievement of the Indian New Deal. This act marked a major departure from previous government policies toward the American Indian, and constituted a bold *experiment* to revive traditional tribal institutions and integrate them with a program for the economic rehabilitation of the Indians.” GRAHAM D. TAYLOR, *THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934–45*, 17 (1980) (emphasis added).

<sup>7</sup> See Act of July 1, 1898, Pub. L. No. 73-296, ch. 424, 48 Stat. 911 (1934).

<sup>8</sup> Indian Reorganization Act (Wheeler Howard Act) §§ 1–19, 25 U.S.C. §§ 461–479 (2000).

<sup>9</sup> *Id.*

<sup>10</sup> “Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as the original constitution and bylaws”. Indian Reorganization Act § 16, 25 U.S.C. § 476, as cited in *Atkinson v. Haldane*, 569 P.2d 151, 170–71 n.69 (Alaska 1977). Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws. 25 U.S.C. § 476(a) (2000).

“In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of

differences between these two sections remain important for Tribes and Federal Indian Law, the similarities between them help illustrate what ails Tribes today. Some Tribes reorganized under section 16, others under section 17, and some under both.<sup>11</sup> That practice of reorganizing under both sections provides the best illustration for the point of this paper: that today's Tribes act as both governments and businesses, often without a great degree of organizational clarity between them.

Some of the differences between sections 16 and 17 have crystallized since 1934, especially for Tribes that reorganized under section 17 as a corporation. The most obvious example is that governments have

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counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal counsel of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and Congress." 25 U.S.C. § 476 as cited in *Atkinson*, 569 P.2d at 171 n.69.

"The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress." Indian Reorganization Act § 17, 25 U.S.C. § 477 as cited in *Atkinson*, 569 P.2d at 170 n.67.

<sup>11</sup> A tribe organized under section 16 of the IRA may also be incorporated under section 17 of the IRA. *See, e.g., Atkinson*, 569 P.2d at 170-72. If a tribe is incorporated under section 17, it will have a charter issued by the Secretary of the Interior in addition to its constitution under section 16. However, an Indian Tribe organized pursuant to section 16 of the IRA and an Indian tribe incorporated under section 17 of the IRA are regarded as two different legal entities even though they may constitute the same people. *See id.* at 172 (citing the Opinion of the Solicitor, Department of Interior, No. M-36515 (Nov. 20, 1958)). The section 16 entity is a political body or governmental entity and possesses sovereign immunity. The section 17 entity is a business corporation and may lack sovereign immunity if it has been waived in the charter establishing the business corporation. *Id.* at 171-72; *Maryland Cas. Co. v. Citizens Bank of West Hollywood*, 361 F.2d 517, 520-22 (5th Cir. 1966), *cert. denied* 385 U.S. 918 (1966); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 21.02 (LexisNexis/Matthew Bender 2005) (1941). "Thus, incorporation creates a separate legal entity with respect to which the powers to contract, to pledge assets, and to be sued may differ from the governmental entity established under the constitution." CHARLIE C. JONES, YVETTE HARJO & SUSAN ANDERSON, *DOING BUSINESS WITH INDIAN TRIBES* 3 (2004), <http://www.sbaer.uca.edu/research/ssbia/1994/pdf/05.pdf>.

inherent sovereign immunity; corporations do not.<sup>12</sup> Several Tribes that reorganized under section 17 have learned that lesson the hard way.<sup>13</sup> As the court held in *Padilla v. Pueblo of Acoma*, “[F]ederal courts generally have held that the ‘sue and be sued’ proviso of a tribal corporate charter under section 17 of the Act constitutes a waiver of immunity for the tribe as a corporate entity, although it does not waive the sovereign immunity of the tribe as a political entity.”<sup>14</sup> This can lead to a particularly difficult conundrum—if it is unclear whether a tribal council is taking a particular action as a tribal government or as a corporation, then sovereign immunity bumps up against a section 17 “sue and be sued” clause which could abrogate immunity. Often, current tribal governmental structures do not make clear which would apply, and things can get even more complicated if the Tribe is organized under both sections 16 and 17 simultaneously.

Another example is that corporations are voluntary, and thus govern only their “members.” Meanwhile, governments generally govern anyone within their territories. This is what Chief Justice Rehnquist meant when he wrote that “[t]ribes . . . are a good deal more than ‘private, voluntary organizations.’”<sup>15</sup> Of course, corporations do not govern territory at all.<sup>16</sup> So a legitimate question arises why a Tribe would reorganize, or remain reorganized, under section 17 at all.

The similarities between sections 16 and 17 present even more complexity for Tribes. In the years following 1934, the United States (acting through the DOI/BIA) went from Tribe to Tribe, playing no small role in determining under which section each Tribe would reorganize.<sup>17</sup> Then, even if the Tribe chose to reorganize as a government under section 16, the DOI/BIA helped the Tribe to draft and adopt a new constitution.<sup>18</sup> As a result, and despite the “government” nomenclature, section 16 as implemented has adopted a corporate model similar to section 17 corporations.

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<sup>12</sup> “Sovereign immunity is inherent for *governmental entities* that are sovereigns. The immunity recognizes the legal superiority of the sovereign over the legal rights of private citizens.” Terance J. Centner, *Discerning Immunity for Governmental Entities: Analyzing Legislative Choices*, 24 REV. POL’Y RES. 425, 425 (2007) (emphasis added).

<sup>13</sup> See *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 293–94 (Minn. 1996).

<sup>14</sup> *Padilla v. Pueblo of Acoma*, 754 P.2d 845, 848 (N.M. 1988).

<sup>15</sup> *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

<sup>16</sup> Indeed, one of the more fascinating developments in American law is the separation of business and state that occurred in the “company town.” See *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>17</sup> COHEN, *supra* note 11, at § 1.05 (“On occasion, Commissioner Collier was accused of using strong BIA pressure, bordering on coercion, to secure tribal compliance with administrative goals and policies.”).

<sup>18</sup> *Id.* (“While some constitutions were individualized, many were standard ‘boilerplate’ documents drafted by the Bureau of Indian Affairs and based on United States constitutional and common law notions rather than historic Native regulations and tribal customs.”).

For example, IRA section 16 “governments” generally lack a separation of powers, both within the government itself, such as between legislative and executive branches, and outside the government, such as separating church and state or, the point of this piece, business and state. Rather, IRA section 16 generally established one hierarchical pyramid, a corporate-like structure. At the top of the structure is one discrete body—usually called the “Tribal Council”—often with no express delegation of law-making authority; rather, IRA constitutions generally cast the Council as an administrative agency regulating certain areas, or as a corporate board making business decisions via a voting procedure.<sup>19</sup> Some Tribes even refer to their Council as the “Board of Directors,” entirely obfuscating the function of law-making within the Tribe.<sup>20</sup>

Also, IRA constitutions generally call the chief executive a “chairman,” much like the corporate “chairman of the board.”<sup>21</sup> And since the entire council votes to make executive-style business decisions, the chairman often is limited to the role of presiding over meetings of the council. In fact, usually the only indication in an IRA constitution that the chairman may be an executive at the helm of a government structure is an innocuous statement that the chairman is empowered with

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<sup>19</sup> Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 966–73 (1972).

<sup>20</sup> See, e.g., CONST. AND BY-LAWS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, art. IV, § 1, available at <http://narf.org/nill/Constitutions/saultconst/saultconsttoc.htm> (“The governing body of the Sault Ste. Marie Tribe of Chippewa Indians shall consist of a board of directors.”).

<sup>21</sup> What can be readily dismissed as mere semantics should not be taken lightly, especially regarding the status of Tribes under international law and policy. The nuances in meaning when it comes to America’s legal lexicon regarding Indians is similar to the ongoing debate whether the United States wants the United Nations to refer to Native Americans as “people” or “peoples,” which have decidedly different denotations under international legal norms. When Yasser Arafat was the head of the Palestinian Liberation *Organization*, the United States referred to him as “Chairman Arafat”; but as the PLO gained a measure of recognized sovereignty, becoming the Palestinian Authority, he became known as “President Arafat.” Ami Isseroff, *Biography of Yasser Arafat* (2004), <http://www.mideastweb.org/bio-arafat.htm>. When the Baltics were under Soviet control the United States referred to them as the *Baltic Nations*, but when the United States made its dramatic recognition of their sovereignty it referred to them as the *Baltic States*. See *Nationmaster Encyclopedia*, <http://www.nationmaster.com/encyclopedia/Baltic-states>. Also, there has always been a Jewish Nation, but only since 1967 a “Jewish State.” See Jay Cristol, *When did the US and Israel Become Allies? (Hint: Trick Question)*, GEORGE MASON UNIVERSITY’S HISTORY NEWS NETWORK, May 27, 2002, <http://hnn.us/articles/751.html> (“Following Israel’s stunning victory in the Six Day War, a euphoria set in around the world and strong support for the state of Israel developed in the United States. American public opinion swung dramatically in favor of Israel and for the first time in history, a majority of American Jews became Zionists, that is they supported the concept of a Jewish state.”). In short, the legal lexicon of IRA constitutionalism is not without meaning and purpose.

general supervision over all employees.<sup>22</sup> Another executive position, generally called the “secretary/treasurer” is, like the chairman, just another officer within the council, whose duties are generally written such that it acts as the treasurer of the council only, rather than of the entire Tribe as a government, a polity, or a society.<sup>23</sup> Moreover, IRA constitutions generally were accompanied with a document, also drafted by the BIA, called “by-laws,” as is common in corporations.<sup>24</sup> Generally, IRA constitutions had no provision for a judiciary whatsoever. After all, disputes in a private corporation are resolved internally and summarily through the hierarchy; courts are for external disputes only. In other words, sections 16 and 17 of the IRA illustrate how the mindset of depression-era corporate reorganization helped coax Tribes into acting as both businesses and governments. For good measure, in implementing the IRA, the United States ensured that this chaotic model of Tribe government would persist by putting a provision right into their constitutions that required DOI/BIA approval of all amendments to the constitution and all laws enacted by the Tribes.<sup>25</sup>

As a result, perhaps the most perplexing and persistent issue confronting Indian Tribes today is this notion of acting as both government and as business, and the GAA and the IRA are not the only

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<sup>22</sup> See, e.g., CONST. OF THE KICKAPOO TRADITIONAL TRIBE OF TEXAS, art. IV, § 1, available at <http://thorpe.ou.edu/constitution/kickapoo/index.html> (“The Chairman of the Traditional Council shall preside over all meetings of the Traditional Council and the Annual General Membership Meeting and shall have general responsibility for the business of the Tribe and shall perform all duties delegated to him by the Traditional Council.”).

<sup>23</sup> See, e.g., CONST. OF THE CITIZEN POTAWATOMI NATION, art. VI, § 4, available at <http://thorpe.ou.edu/constitution/potawatomi/potawatconst.html> (“The Secretary/Treasurer shall correctly record the proceeding of all meetings. He shall make out the order of the business for Chairman, shall notify all committees of their appointments, shall have custody of the records and all papers of the Council, which records and papers shall be open to inspection during business hours, in his presence, by any member of the Council desiring to read them. He shall keep a correct list of all members of the Council and a correct list of all the enrolled members of the Tribe, shall authenticate all accounts or orders of the Council and in the absence of the Chairman and Vice-Chairman, shall call the meetings to order until a Chairman Pro Tem is selected. He shall render a written report at the annual meeting, and at the expiration of his term of office, the records and all papers in his possession shall be turned over to his successor. He shall issue notices of all meetings and conduct all general correspondence, as directed by the Council or Business Committee.”).

<sup>24</sup> For a thorough list of Tribal Constitutions with by-laws, visit <http://thorpe.ou.edu/IRA.html>.

<sup>25</sup> See COHEN, *supra* note 11, at § 1.05 (“The supervising authority of the federal Indian bureaucracy continued to require secretarial approval of almost all Indian actions, seriously limiting the emergence of tribal autonomy. For example, proposed tribal constitutions and corporate charters were subject to detailed federal review.”).

federal laws that exacerbate the confusion.<sup>26</sup> For example, the United States Internal Revenue Code's section 7871 includes a section entitled "Indian tribal governments treated as States for certain purposes."<sup>27</sup> While several federal statutes have provisions that call for treating Tribes as states, or "TAS," such as the well known and controversial environmental statutes, revenue's treatment is more telling: here the coin has a discernible flipside.<sup>28</sup> When a Tribe's revenue is not treated as governmental revenue, it is, after all, still revenue, raising the kinds of issues that corporate or individual revenue raise—especially taxation. For example, one provision in the revenue code is particularly driven by the government versus business conundrum: the code allows Tribe-issued tax exempt bonds only if the proceeds are used for an "essential governmental function."<sup>29</sup> Otherwise, the government argues that it is taxable revenue.

Two current areas of contention in Indian Country—income taxation and labor relations—illustrate the confusion between government and business, and it is no surprise that both are arising in the gaming arena. With a nod to the federal tax code's bond provisions, the IGRA requires that gaming revenue first be used for essential governmental services, the remainder available for non-governmental purposes.<sup>30</sup> Without question, Tribes exercise many services that the United States agrees are essentially governmental, including social services for their members. But Tribes have also exacerbated the problem by issuing corporate dividend-style, equally distributed "per capita" payments, making the casinos seem more private than public.

As a result, every Congress for years now seems to entertain a bill, or several, to impose a tax on Tribe-owned casino profits.<sup>31</sup> I say "Tribe-owned" to help make the point. Judging by a Congress which, after all,

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<sup>26</sup> To be sure, many states own and operate lotteries—directly analogous in some ways to Tribe-owned gaming. But even prior to the gaming boom, Vermont and Virginia owned the off-sale liquor establishments in those states. See Dayton E. Heckman, *Contemporary State Statutes for Liquor Control*, 28 AM. POL. SCI. REV. 628, 630 (1934). North Dakota owns The Bank of North Dakota, the largest bank in the State. Bank of North Dakota, <http://www.banknd.nd.gov/bndhome.jsp>. State ownership of business enterprises is common enough that constitutional law has long recognized a separate doctrine for when a state acts as a "market participant." See, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980). In fact, how these states have handled the relationships—tensions—between their government and businesses might give Tribes a set of models to work from.

<sup>27</sup> 26 U.S.C. § 7871 (2000).

<sup>28</sup> Including the Clean Air Act, 42 U.S.C. § 7601(d) (2000), Clean Water Act, 33 U.S.C. § 1377(e) (2000), Safe Drinking Water Act, 42 U.S.C. § 300j-11 (2000), and Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136u (2006).

<sup>29</sup> 26 U.S.C. § 7871(c).

<sup>30</sup> Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2710 (2000).

<sup>31</sup> Mark J. Cowan, *Leaving Money on the Table(s): An Examination of Federal Income Tax Policy Towards Indian Tribes*, 6 FLA. TAX REV. 345, 349, 388–91 (2004).

reacts to popular whim, the term “Indian gaming” gives America a false impression of individual Indian ownership, or at best ownership by some organization of “Indians.” Contrary to yet another tired misperception, individual Indians and their privately-owned corporations are subject to federal and local taxes as any other similar American person or corporation. Indeed, if the term were not so unwieldy, the term “Tribe-government-owned” casinos should be used just to emphasize the point. After all, if all casino profits are required to go to the tribe, is it not fair to say that all the Tribe-owned casino revenue is taxed by the local government—the Tribe?<sup>32</sup> Likewise, labor issues illustrate the public/private dichotomy for Tribes. Federal labor laws, as well as most state labor laws, treat public/government employees differently from private/business employees. Thus, under the IGRA, the issue has quickly crystallized: are the employees of Tribe-government-owned casinos, whose income must be used for essential governmental services, public or private? The result has been a classic “Federal Indian Law” battle, with Tribes arguing first that federal labor laws do not apply at all to them and their casinos, and second, that their employees, even casino employees, are public rather than private employees. So far, the Tribes are losing the labor battle, fanning the flames to treat casinos generally as private.<sup>33</sup> Next in line: Tribe governments themselves.

Thus, the main point is that today the Tribes can and do play a vital role—including if they do nothing. In fact, in the blame-game that is often Indian affairs, in today’s era of “638” self-determination and self-governance, one could reasonably say that the Tribes are equally at fault, by failing to acknowledge the obvious—that federal policy, along with acculturation by proximity, has germinated private economy and private property under their noses, and yet they evidently refuse to re-structure their governments or enact comprehensive commercial and property laws to take control as any other sovereign would.

One opinion by the United States Supreme Court in the 1980’s stands sentry amidst the confusion over government versus business in Tribe governments. In that case a Tribe had entered into a lease with a major coal mining company. The lease, as was often the case, turned out

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<sup>32</sup> One argument against the conclusion that Tribe-owned casinos are entirely public or that their revenue is entirely taxed is that the Tribes generally distribute some casino revenue “per capita” in equal shares to their members—like a corporate dividend. Again, the language can be paramount. The State of Alaska also gives what is essentially a “per cap” to all its citizens on a regular basis, but as a rebate of taxes rather than as dividend—an exercise of government rather than business. *See* Welcome to the Department of Revenue Permanent Fund Dividend Division, <https://www.pfd.state.ak.us>. Obviously, if Tribe-owned casino revenue were deemed 100% taxed per the IGRA, then the “per cap” would be less a corporate dividend and more a tax rebate. Granted, this argument may be one of semantics, but meaningful semantics over which Tribal governments have a measure of control.

<sup>33</sup> *See* *San Manuel Indian Bingo & Casino v. Nat’l Labor Relations Bd.*, 475 F.3d 1306, 1308–09 (D.C. Cir. 2007).

to be not so favorable to the Tribe. So, the Tribe took off its tattered business cap and donned its government cap, imposing a severance tax on the extraction of mineral resources. In other words, the Tribe not only participated in the business venture as an owner, but also, after the fact, acted as a government by regulating the business activity. Of course, the mining company cried foul, and the case wound up in the United States Supreme Court. In *Merrion v. Jicarilla Apache Tribe*, the Court, speaking through Justice Thurgood Marshall, pointedly addressed the issue, holding that the Tribe's participation as an owner did not preclude it from also acting as a government, even after-the-fact as any other government might do.<sup>34</sup> For better or worse, the opinion clarified that Tribes can and do act as both businesses and governments.

Shortly after *Merrion*, a similar development occurred which helps to round out the picture. In *Merrion*, the Court's opinion upholding the severance tax rested partly on the reasoning that Jicarilla was an IRA Tribe, and so the Secretary of the Interior had approved the Tribe's coal severance tax law.<sup>35</sup> However, unlike Jicarilla, their neighbors to the west did not accept the IRA, did not have an "IRA Constitution," and all its laws were not reviewed and approved by the DOI/BIA.<sup>36</sup> Like Jicarilla, the Navajo also imposed a severance tax on coal extraction within its boundaries.<sup>37</sup> Because Navajo's coal extraction tax provision did not have the Secretarial review and approval that was key in *Merrion*, a mining company filed suit against the Tribe. In *Kerr-McGee Corporation v. Navajo Tribe*, the Supreme Court ruled that DOI/BIA approval was not required in order to uphold the severance tax, instead holding that the Tribe acted as both a business and a government based on its inherent sovereignty, not on the basis of some federally delegated or approved power.<sup>38</sup> Thus, *Kerr-McGee* illustrates that (1) Tribes can act as both business and government, and (2) they do so as a matter of inherent sovereignty, meaning, to remake the point, they retain significant control of how the business/government distinction is structured within their own societies.<sup>39</sup>

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<sup>34</sup> 455 U.S. 130, 138 (1982).

<sup>35</sup> *Id.* at 135.

<sup>36</sup> *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 198 (1985).

<sup>37</sup> *Id.* at 196-97.

<sup>38</sup> *Id.* at 200.

<sup>39</sup> Shortly thereafter, in *Cotton Petroleum v. New Mexico*, the United States Supreme Court held that federal statutes authorized the States to also impose a severance tax, at least upon a non-Indian owned mineral extraction company extracting minerals within Indian Country. 490 U.S. 163, 186 (1989). The result is a step back from the clarity of *Merrion*, resurrecting the impression that the State is the real governor in Indian Country. While *Cotton Petroleum* acknowledges that Tribes could also impose such a tax, such a tax would subject a mineral company to double taxation. *Id.* at 189. Therefore, the Tribe's only viable option would be to act as a private entity by entering into a lease agreement while leaving taxation to the State.

The *Merrion* line of cases and developments in gaming law regarding taxation and labor illustrate how the business versus government distinction affects Tribes in their external relations. Equally important, if not more so, is how the confusion over the distinction impacts the Tribe's internal relations with its own citizens. Recent scholarship has cultivated a distinction between "Federal Indian Law" and "Tribal law."<sup>40</sup> While the two are hopelessly intertwined, the federal versus tribal law distinction leads to the ultimate point of this work: while federal law offers many opportunities to analyze the government versus business distinction in Tribes, future developments can and should be dictated by the Tribes themselves. And no better mechanism exists to exact governmental change than the people over whom this confusion reigns.

Governments and businesses have distinct sets of interests and objectives, and they have different gauges of success. Governments are generally more concerned with social benchmarks, and businesses are concerned with the accounting ledger. Government, including one that owns a business, is more likely to be concerned with employing the greatest number of people, especially in historically impoverished communities; business is more likely to offset employment against the bottom line—the profit margin. Anecdotes are legion in Indian Country where Tribal governments have used their businesses as "employment agencies" for political patronage or to shore up political support, leaving the Tribe's company without necessary capital to re-tool or reinvest, bankrupting the company.<sup>41</sup> Government, at least in a self-proclaimed democracy wherein an informed electorate is paramount, requires transparency. Business, on the other hand, is custodian to proprietary information, requiring not transparency, but privacy. Disclosing certain information, even the amount of money to be invested, can give an

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<sup>40</sup> "The field of federal Indian law involves a distinct body of law that regulates the legal relationships between Indian tribes and the United States. In turn, notions of federalism dictate a unique relationship limiting the reach of state laws over tribes. The tribes, their members, and lands held by both are dramatically affected by federal Indian law. Tribal law, as found in modern-day tribal constitutions and codes, and in tradition and custom as interpreted by tribal courts, affects and in turn is affected by federal Indian law." DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 1 (5th ed. 2005).

<sup>41</sup> During the 1989 Senate Hearings on allegations of corruption on Indian Reservations, then-Senator Dennis DeConcini (D-Ariz.) said that a yearlong investigation by his panel had found that "many of the Federal Indian programs are fraught with corruption and fraud; most of the others are marred by mismanagement and incompetence." See Philip Shenon, *Indian Leader Charges 'Rampant Graft'*, N.Y. TIMES, Jan. 31, 1989, at A14, available at <http://query.nytimes.com/gst/fullpage.html?res=950DE7DD173CF932A05752C0A96F948260#>. While I personally do not ascribe to his views, Russell Means, the noted Indian actor and activist, also spoke at the hearings. He stated that "[he] now know[s] that tribal governments do not want economic development unless graft is a major ingredient." He further stated that "while a number of tribal leaders were 'honest and sincere men and women with good hearts,' the majority were 'parasites.'" *Id.*

unfair advantage to a business competitor. For a Tribe-owned business, that money, whether it is labeled business or governmental, is *the people's money*.

In conclusion, tribes can and must amend their constitutions—even IRA constitutions. Granted, because it generally requires DOI/BIA approval, amending an IRA constitution can be a difficult affair, especially when amendments are anything but routine. Tribes can and must also make laws that re-organize their governments to take account of the havoc that doing nothing has wrought.

One of the more imperative changes that needs to be made is the implementation of a checks-and-balances system within Tribal governments. Each Tribe must identify the important functions in its society and decide whether the function belongs in its government at all—such as the practice of business in general. Then each Tribe must carefully infuse some of the specifically identified social functions into its government. In the process, Tribes must at least account for the law-making, law-administering, and law-interpreting functions that every society has in order to survive. When all three functions are carefully identified and fused into government with a measure of independence and checked by each other, the risk of corruption will wane and the relationship between government and government-owned business will improve. Each Tribe, whether acting as government or business, will be less likely to impede its own people's due process rights and more likely to see its government act and function like a government and its government-owned businesses act and operate like businesses. Coupled with *transparency* for its people, Tribes will have a more solid foundation, and will be more able to weather the turbulence inevitably caused by internal struggle or the often fickle policy-shifting juggernaut of the United States Congress and courts.