American Indian Self-Determination Through Self-Governance:

The Only Policy That Has Ever Worked

THE HARVARD PROJECT ON
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Statement to

The Commission on Native Children

by

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I. Overview of Findings

For the last several decades, federal Indian policy in the U.S. has supported tribal self-determination through tribal self-government. While there are exceptions, the results have been (1) remarkable economic growth across most of Indian Country, and (2) concomitant expansions of the responsibilities and capacities of tribal governments. Hundreds of tribes across the other Lower 48 states now routinely serve their citizens with the full array of governmental functions and services that we expect from non-Indian state and local governments in the U.S., and increasing numbers of tribes are becoming the economic engines of their regions.

Poorly veiled attempts to take American Indian nations' collective political rights of sovereignty and self-rule away from the tribes, terminate the tribes' reservations, and thereby finally finish colonialism's pogrom, find fertile ground in stereotypes of perpetual poverty and dependence on the federal government.[2] The attempts are not surprising. To quote one that has found traction among the uninformed mainstream population, "reservations cover 2 percent of the United States, but they may contain about a fifth of the Nation's oil and gas, along with vast coal reserves."[3] Outsiders' long thirst for the resources of Indigenous people has not been quenched by dispossessing them of 98 percent of their lands.

To be sure, increasingly capable tribal governments – passing their own environmental codes, collecting their own taxes, running their own natural resource departments, and operating their own court systems – frequently are frustrating to those who would like to see tribal resources controlled by private interests under the jurisdiction of other than tribal governments. The reality, however, is that the onset of tribal self-determination *through self-government* in the late 1980s

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[2] See, for example, Riley 2021.

[3] Ibid., at xvi.

ushered in the only policy that has ever worked to improve economic and social conditions in Indian Country.

Earlier eras in which other governments' policies controlled reservation affairs produced starting points for most tribes that were shockingly low at the start of the Self-Government Era. This meant accumulated deficits of extremely low wealth and income, dilapidated infrastructure, poor education and human capital, and social conditions that were often distressing in the extreme. Overcoming these deficits is far from complete, but the overall progress is astounding: Since 1989, real (i.e., inflation-adjusted) per capita income of the average Native American resident of an American Indian reservation in the Lower 48 states has risen 61%.[4] The comparable figure for the average American in the U.S. is 17%. (See discussion of Figure 1 in Section II below.) Under tribal self-government, the proportion of families with children living in poverty on reservations has been cut from 47.3% in 1989 to 23.5% today. (Figure 2 in Section II below.) Similar progress has been made in housing and related living conditions.

Against this progress stand neo-colonial claims to the effect of "but there is still a great deal of poverty, poor health, distressing living conditions, and weak educational systems; the policies of the federal government must be failing the Indian people." The first of these two clauses ignores the deep hole that tribes have been clawing their way out of for the last 40+ years. The second of these clauses seems to reflect lack of knowledge (or willful distortion of the fact) that the federal government has (1) had a policy of self-determination through self-government for the last 30+ years, and (2) already tried the other three conceivable policy approaches – i.e., extermination, termination, and domination.

The first of these – extermination – was the dominant strategy of colonialists' governments' (Spanish, English, American) for centuries; and the United States tried termination (i.e., officially terminating tribal governments and what little political sovereignty tribes had over their people and lands and privatizing reservations) in the 1950s and 60s. Twentieth Century paternalistic domination (i.e., subjecting tribes to the policies, practices, programs, and even cultural edicts of the federal government) was interrupted by the Termination Era, but by the late 1960s the waves of colonial extermination, termination, and domination had dug the holes that made American Indians on reservations the poorest identifiable group in the United States. No matter how well cloaked in paternalistic expressions of concern for the well-being (but, tellingly, not the sovereignty) of Native Americans and professed outrage over "How Washington Is Destroying American Indians", today's ideological peddling of another round of termination of tribes, their territories, and their governments promises no better outcome than the documented devastation Indian communities and individuals caused by the Termination policies of 1953-68.[5]

As I lay out below, the research evidence is that it is local self-government by tribes – making their own decisions about everything from local taxes and appropriate business regulation to what

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[4] I focus here on the Lower 48 because the *sui generis* policy, geography, jurisdiction, and economies of Alaska Natives and Native Hawai'ians render them analytically distinctive for our analyses. For example, though Alaska Natives comprise a large fraction the total state population, there is only one Alaska reservation (the Annette Island Reserve).

[5] See, for example, Ulrich 2010, Perloff 1982, Lurie 1972, Burt 1982.

languages get taught in the schools and what days trash gets collected – that explains the sustained economic development that has finally taken hold over so much of Indian Country. Although incomplete and subject to a "two-steps forward, one step back" trajectory, tribal self-determination through self-government has enjoyed decades of bipartisan support.

For the left, tribal self-government not only improves the lives of people who have otherwise been so historically disempowered and impoverished for decades; but it also represents a retreat from imperialistic subjugation of multiple peoples' rights of self-rule. For the right, tribal self-government represents freeing up local government from overbearing federal hands and making real progress toward federal budget-helping economic development in poor, often rural, communities. Indeed, tribal self-government has its deep roots in the Nixon Administration's original support for the end of Termination. President Nixon's *Special Message to the Congress on Indian Affairs* in 1970 laid the groundwork for President Ford's stepping into Nixon's shoes to sign the Indian Self-Determination and Educational Assistance Act of 1975 (P.L. 93-638).[6] Most critically, the Reagan Presidency saw the passage and signing of the 1988 amendments to P.L. 93-638 that made self-*government* the centerpiece of federal Indian policy (see further below).

The fact that several hundred tribes across the United States have been operating for decades under federal policies recognizing and supporting tribal self-determination through self-government provides extensive evidence as to which policy approaches offer the best chances at improving the lives of Native peoples. We draw heavily on that evidence in Section II below. The overarching finding is that tribal self-government *works.* The attendant policy conclusion is that, so long as the federal government cares about the well-being of the Native citizens of the United States, its primary focus in Indian policy should be to support and expand tribes' rights to govern themselves and their lands. Section III below lays out what the frontiers of such an effort should be.

II. Analysis: Lessons from Indian Country[7]

A. Indian Country has experienced extraordinary economic growth in the Self-Determination Era

While there are exceptions, the overall pattern that has emerged for most tribes and Indian citizens on reservations in the Lower 48 states under the federal framework of tribal self-determination through local self-government is one in which that framework has produced sustained economic development. The Self-Determination Era has brought sustained economic growth across large numbers of communities that struggled for a hundred years or more to get *any* development.

To see these trends, we can look to U.S. Census data on income per person. Per capita income is certainly not the be-all, end-all measure of Native economic success. As with societies

[6] See *The American Presidency Project* 2022.

[7] This section draws heavily from and adopts portions of Kalt, Medford and Taylor 2022. I am deeply indebted to my co-authors for their contributions.

worldwide, matters such as family integrity, flourishing arts, health, safe and clean environments, long lives, and a host of other values combine to determine the quality of life. Nevertheless, per capita income does matter and provides a good approximation for “gross reservation product"—a foundational contributor to quality of life.[8]

Though the start of the Self-Determination Era is commonly demarcated by the 1975 passage of the Indian Self-Determination and Educational Assistance Act (see above), the economic effect of the federal change in stance from tribal termination policy (an approach that prevailed from WWII until then) to self-determination did not immediately register in Indian community life. As a preliminary matter, that initial legislation only meant that tribal governments could only start to take over another government’s (i.e., the federal government’s) programs. This was to be done by contracting with the federal government to become the mere administrators of functions long performed on reservations by federal agencies (such as the Bureau of Indian Affairs)—but still operating under the federal government’s priorities, procedures, and systems. The idea was that tribes could contract and receive roughly the same dollars as the federal provider for the same work, often by the same people.

Unfortunately for tribes, this “step-into-the-federal-shoes” approach was limited by a fiscal retreat that saw federal budgets cut for tribal functions, whether performed by tribes who did contract to provide those functions or by federal agencies in their historic pre-self-determination roles. Federal budgets directed toward Indian matters peaked in the Carter Administration, and reductions in federal funding were accelerated under President Reagan (Walke 2000, 236). The budget declines in the second half of the 1970s and the Reagan years in the 1980s occurred when Indian reservation payrolls and expenditures were still dominated by federal agencies and programs (Trosper 1996). The result was an actual decline in the real (i.e., inflation-adjusted) per capita incomes of Indians living on reservations between the 1980 U.S. Census and the 1990 U.S. Census (see, Taylor and Kalt 2005). Economic and social progress had to wait for true tribal self-*government*—as opposed to mere administration of federal programs—to take hold.

The first phase of self-determination consisted primarily of tribal governments trying to administer the federal government’s programs by contracting with federal agencies to take over the budgets and responsibilities of historically federal operations. This effort ran into foot dragging by federal agencies whose budgets and employment had long depended on the federal government being the primary governmental actors on reservations. Responding to expressions of frustration by the tribes over constraints on their abilities to adapt programs to local needs by tribal governments who were trying or wanted to try to contract to run federal functions and encouraged by the success of some pilot efforts allowing greater scope for tribal government decision-making, Congress significantly amended the 1975 Self-Determination Act in 1988 (P.L. 100-472, 102 Stat. 2285). As Strommer and Osborne (2015) note:

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[8] Gross product is the sum of all value added in an economy, and we use *gross reservation product* to refer to the sum of all value added in Indian Country economies. In large, diversified economies such as the United States’, personal income is the lion’s share of gross product. Variation arises in smaller economies to the extent that other sources of value-added, such as proprietor income (e.g., profits and rents) and natural resource revenues, diverge from national patterns for idiosyncratic reasons. U.S. national income accounts do not record gross reservation product statistics for Indian Country.

> In crafting the 1988 Amendments, Congress expressed its outrage at the agencies' implementation of [the Indian Self-determination and Educational Assistance Act]. While recognizing '[t]he federal policy of self-determination is one of the most progressive federal Indian policies in our Nation's history,' the Senate decried the 'agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law.' For example, the Senate cited the growth of a 'contracting monitoring bureaucracy,' 'unduly burdensome reporting requirements, the failure of the agencies to fully fund indirect costs, end-runs around the statutory declination process, and other agency misbehavior.[9]

The 1988 self-government Amendments mandated more cooperation and aggression on the part of federal authorities in assisting tribes in taking over federal functions, and the Amendments mandated a pilot program of self-governance. This marked the start of a shift away from the exclusive dependence of tribes on the contracting model to the eventual use of "compacts" between tribes and the federal government, with negotiated compacts providing tribal governments with expanded leeway for determining priorities, designing programs, and allocating budgets.

Reflecting successes in the pilot efforts, self-governance and self-governance compacts became a wave—sustained through today—with the passage in 1994 of another set of major amendments to the 1975 Self-Determination Act (P.L. 104-413, 108 Stat. 4250). This wave has only been pushed onward over the years by scores of Congressional, presidential, and agency actions which have bolstered the powers of tribes to make their own decisions over their own affairs.[10] It is now *de rigueur*, for example, that federal legislation affecting states via allocations of monies and authorities provide blanket treatment of "tribes as states" (or TAS)—i.e., allocating funds and delegating federal powers to tribes equivalent to those enjoyed by the states.

By the end of the 1980s, economic development in Indian Country began to take root as tribes built enterprises in, for example, ski, golf and eco-tourism, light Defense Department manufacturing, forestry and wildlife management, livestock and crop agriculture, and retail services. And, to be sure, in one of the most apparent and economically potent examples of expanded tribal self-government and of Congress treating tribes akin to states in terms of governmental powers, the passage of the Indian Gaming Regulatory Act (IGRA 25 U.S.C. §2701, *et seq.*) in 1989 freed tribal governments—like their state counterparts with their state lotteries—to (substantially) control the decision over whether gaming enterprises would be allowed to operate within tribal nations.

With contracting and compacting providing training grounds for tribal officials and administrators, with improved performance and legitimacy created by shifting accountability from masters located in the federal government to tribal citizens in the local community,[11] and with doors opened to opportunities in the economic arena, a remarkable period of sustained economic

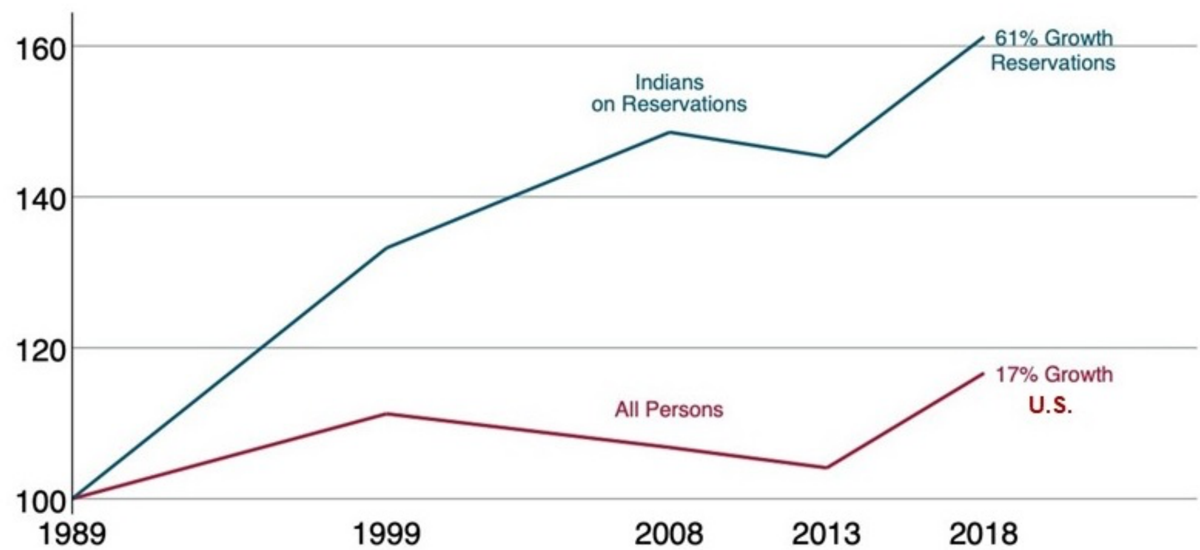
[9] Strommer and Osborne (1987).

[10] Ibid.

[11] See, for example, Krepps and Caves (1994), Jorgensen (2000).

development took hold in Indian Country in the late 1980s (Cornell and Kalt 2010). This economic development can be seen in Figure 1, which allows a comparison of the growth in per capita income of AIAN residents of reservations in the Lower 48 states from 1989 to the present to the growth in per capita income of average citizens across the United States.[12]

Figure 1: Relative Income Growth Since 1989 – Tribes v. U.S. as a Whole



Real (i.e., inflation-adjusted) population-weighted Indians on reservations per capita income (1989 = 100) in the lower forty-eight states. ACS 5-year averages are plotted at their middle years (2008, 2013, 2018). (FRED 2022; Taylor and Kalt 2005; Census 2010, 2015, 2020a)

As indicated in Figure , since 1989, the real (inflation-adjusted) income of the average U.S. resident has increased by 17%. Meanwhile, over the same period, the real income of the average AIAN resident of Lower 48 reservations has increased by more than 61%. Tellingly, over the decade prior to the 1990 Census (taken in 1989), real per capita Native incomes in Indian Country

[12] In Figure 1, as in several upcoming figures reliant on data from the U.S. Census Bureau, the bulk of the experience of the tribes of Oklahoma is not reflected. At least until the U.S. Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the citizens of most Oklahoma Indian nations were categorized as residing in what the Census calls Oklahoma Tribal Statistical Areas (OTSAs) rather than being categorized as residing on reservations (the Osage Nation being a prominent exception). OTSAs encompass the majority of the land areas of the state, including the historic reservations of the Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole Nations in eastern Oklahoma, which includes downtown Tulsa. As Taylor and Kalt observed, "Oklahoma tribes' governmental powers and the socioeconomic conditions in the "Indian areas" of Oklahoma often bear a closer resemblance to, say, downtown Duluth (in the case of Indians living in Tulsa) or rural Missouri (a state with no reservations) than they do to the more prototypical Crow, Gila River, or Pine Ridge reservations" (Taylor and Kalt 2005, x).

had actually declined.[13] The dawn of self-determination through self-government has launched a sustained economic boom—on average—for the tribal nations of the U.S.[14]

The effects of the economic boom going on in Indian Country are reflected not only in individuals' incomes, but in families and their children's well-being and living conditions. The economic development being spurred by federal policies of tribal self-government shows up clearly in the figures of family poverty. Figure 2 shows the U.S. Census data on the rates of families with children living below the poverty line (as defined by the Census) for all U.S. families, Caucasian families, African American families, all American Indians and Alaska Natives families, and American Indian and Alaska Native families on reservations in the Lower 48 states.

Figure 2: Percent of Families with Children Living Below the Poverty Line, 1969-2020

	1969	1979	1989	1999	2008	2018
Total U.S.	10.8	12.6	15.5	13.8	15.7	13.6
Caucasian Alone	7.9	9.2	11.8	10.9	13.0	11.5
African American Alone	32.3	33.5	35.4	28.9	29.6	25.0
American Indian / Alaska Native Alone	33.3	23.7	27.0	23.4	31.5	24.2
AIAN Alone on Reservations	57.0	43.0	47.3	35.7	32.2	27.0

Decennial Censuses 1970, 1980, 1990, and 2000. ACS 5-year averages for 2010 and 2020 are noted in their middle years (2008, 2018).

By far the most striking information in this data is the dramatic reduction in the rates of family poverty among American Indian and Alaska Native families on reservations. After a drop in the 1970s, but then a rise back up in the 1980s, AIAN family poverty in reservations has been steadily and substantially declining since 1989. Again, the hole that tribes are digging themselves out of started out shockingly deep – with just under one-half of AIAN reservation families living in poverty in 1989 (and 57% of families in poverty in 1969). That figure averaged just over one-quarter for the five years (2016-2020) centered on 2018. By 2020, the rate of AIAN families in poverty was down to 23.4%.[15]

The economic progress across Indian Country is also evident in data on housing and related living conditions. Figure 3 provides Census data on the crowding of families and children in housing, comparing the extent of crowded housing for AIAN on reservations in the Lower 48 states to the extent of crowded housing for the average U.S. family. Crowded housing for reservation families declined from 16.1% to 8.2% over 1990-2010. By the five years centered on

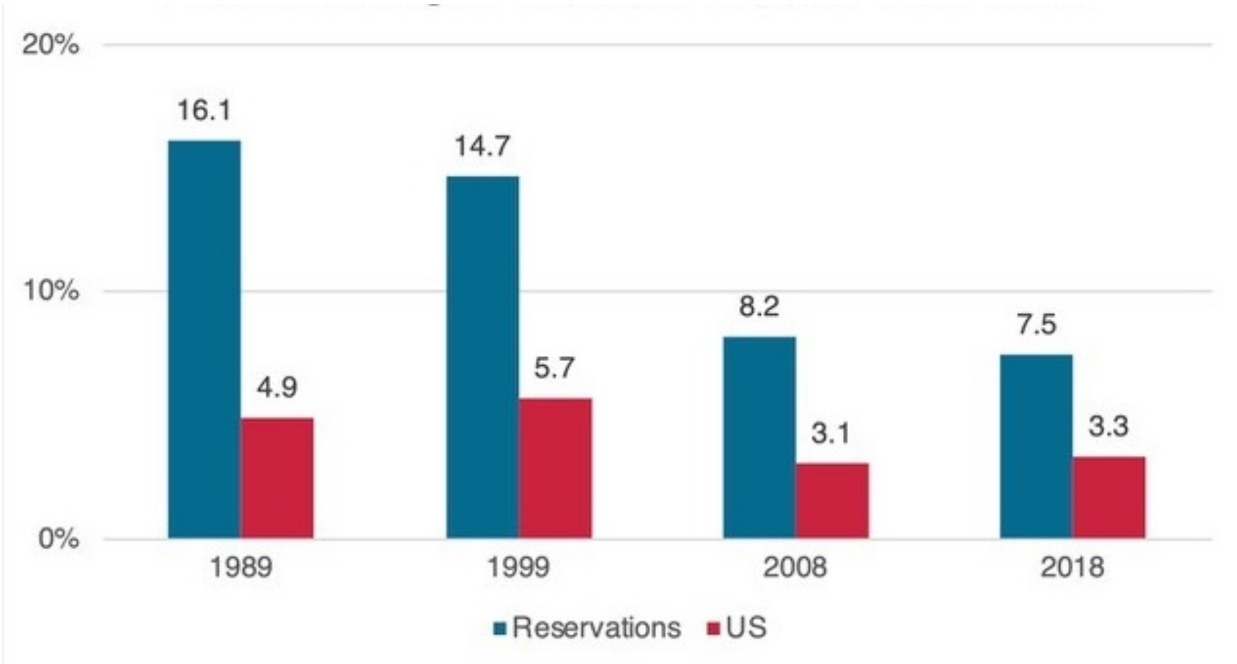
[13] See Kalt and Taylor 2005.

[14] As noted above, tribes in Alaska have been subject to a different federal policy regime and explicit rejection of the scope of rights of local self-government found elsewhere in the U.S. The Alaska Native villages have not experienced the economic growth to nearly the extent seen in the Lower 48 states.

[15] ACS data for 2020.

2018, the AIAN reservation crowded housing rate had declined to 7.5%, compared to 3.3% for the U.S. as a whole.

Figure 3: Percent of People Living in Crowded Housing, 1990-2020



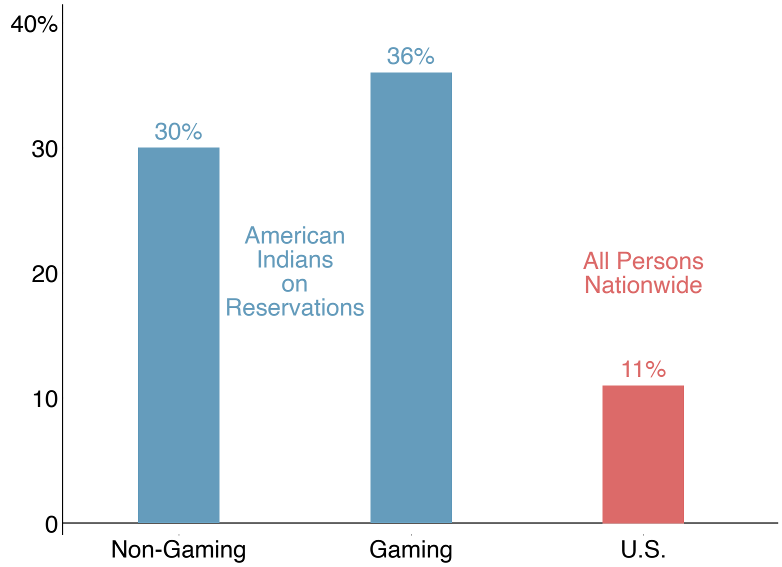
B. Is it all about casinos?

It might seem sensible to conjecture that the expansion of the tribal gaming industry since 1989 explains the quite strong growth trajectory of tribes that we see in Figure 1. This hypothesis is not borne out by the data.

It is undoubtedly true that the expansion of the tribal gaming industry has contributed substantially to improving the economic conditions experienced on hundreds of reservations (not to mention those experienced in neighboring non-Indian communities). The hypothesis that the growth of tribes' incomes seen since 1989 is simply the result of the appearance and growth of the tribal gaming industry overlooks two key factors: the experience of non-gaming tribes and the economic growth occurring in non-gaming sectors of tribal economies.

Concerning tribes lacking gaming enterprises, the decade of the 1990s provides a natural experiment by which to assess the contribution of gaming to tribes' economic development. The bookends of 1990 and 2000 U.S. Censuses (administered in 1989 and 1999, respectively) provide pertinent data. While gaming was expanding across Indian Country in the 1990s, by 1999, 47 percent of Native Americans residing on reservations lived on reservations whose tribe did not own and operate a casino (Taylor and Kalt 2005, 3). Nonetheless, as Fi indicates, those reservations experienced inflation-adjusted per capita income growth nearly three-fold greater than the U.S. did as a whole, compared to the slightly greater than three times performance of tribes with casinos.

Figure 4: Percent Change in Real Per Capita Income: 1990–2000



Lower 48 reservations outside Oklahoma. (Taylor and Kalt 2005, 11)

As Taylor and Kalt observed regarding Indian socioeconomic change in the 1990s, measured across per capita income, median income, and a dozen other indicators:

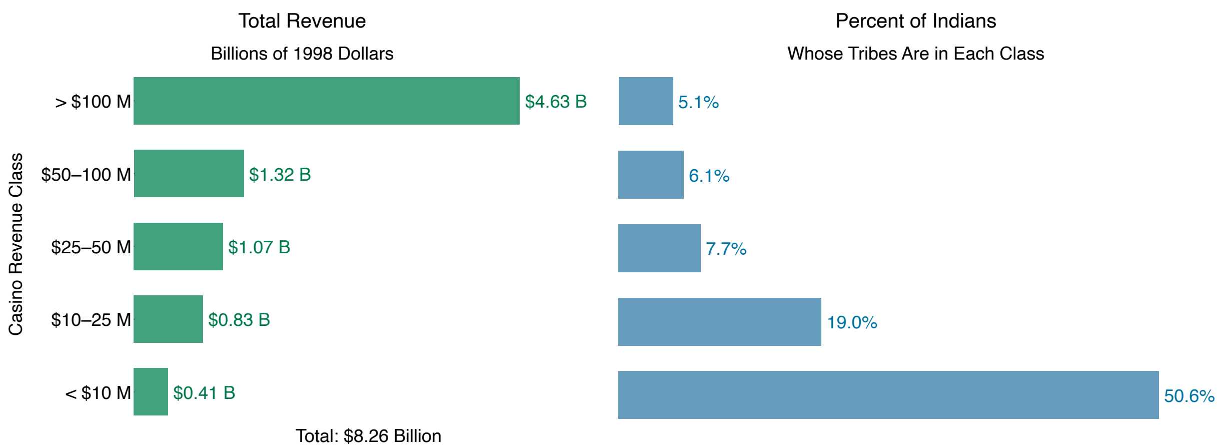
> …the progress [relative to the United States] evident among non-gaming tribes in the 1990s suggests that it is not so much gaming that is driving the socioeconomic changes evident across Indian America as it is a broader policy of Indian self-government. Jurisdiction over the gaming choice is part, but hardly the entirety, of that policy. (Taylor and Kalt 2005, xi)

The lesson is that gaming was but one manifestation of enhanced powers and opportunities for tribal self-government in the 1990s. As self-governance took root in the late 1980s, tribes fairly exploded with expansions of both their governmental and non-governmental (i.e., business) sectors—and the incomes and employment created by those sectors (see, e.g., HPAIED 2008c, sec. 2).

Today, the vast majority of tribes have opted to operate gaming enterprises. Even after 2000, however, the growth trajectory in Figure 1 cannot be adequately seen as a gaming phenomenon alone. If anything, reports of gaming markets being saturated, coupled with very rapid growth of non-gaming businesses in Indian Country, reiterate that it has been self-determination through self-government that has turned around the discouraging results of earlier decades—i.e., decades in which someone else (usually the federal government) was "in the driver's seat" when it came to running reservation affairs. Indeed, Indian Country today is increasingly diversified away from dependence on gaming, with numerous tribes operating tribal manufacturing, tourism, agricultural, extractive, retail, financial, construction, communications, and transportation enterprises that more than hold their own in competitive markets (see, e.g., HPAIED 2008c).

Further evidence that the initial 1980s' economic growth and the sustained growth since in Indian Country is a product of self-governance generally—rather than self-governance-manifested-through-gaming—is found in the distribution of Native reservation citizens across tribes with gaming operations. Data from 1998 collated by the Associated Press revealed that tribal populations and revenues of gaming operations were skewed in opposite directions (Fi)—meaning that large gaming operations were found in tribes with small populations and vice versa.

Figure 5: Distribution of Indian Gaming Revenues and Associated Tribal Populations, 1998

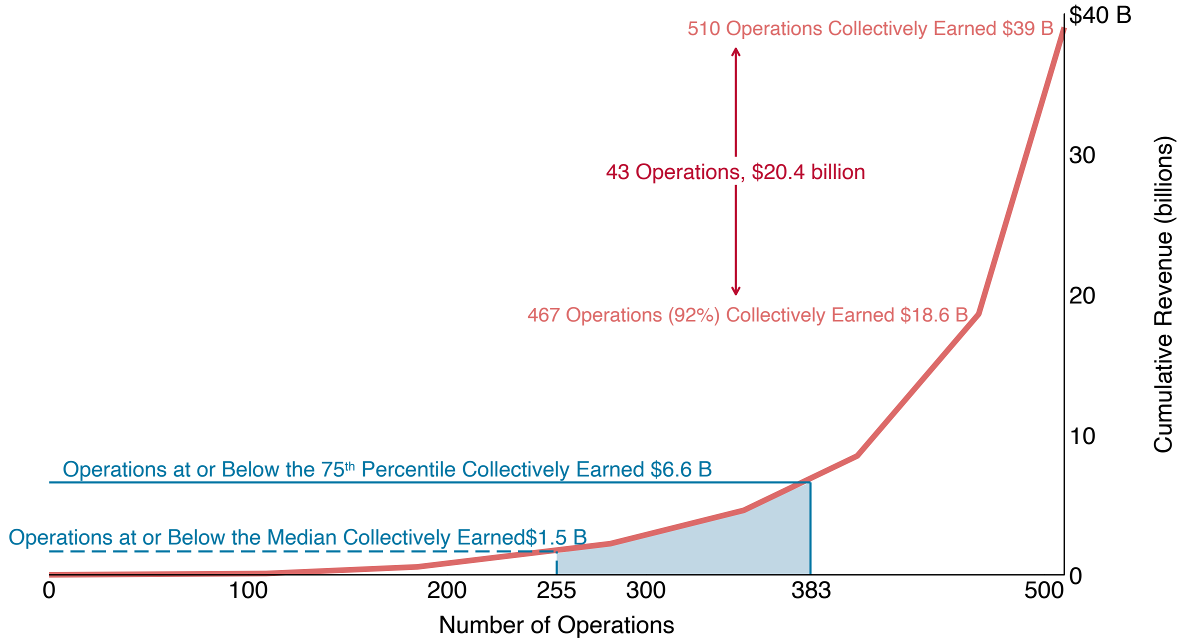


"Percentages do not sum to 100 percent because some tribes have gaming operations in more than one category." HPAIED (2008) citing the Associated Press (2000).

As Figure 5 indicates, 56 percent of the revenues ($4.63B) were earned by tribes accounting for only 5.1% of Indian Country's citizens, and 5 percent of the revenues ($0.41B) were earned by casinos of tribes that accounted for more than half the tribal citizen population. In addition, "Approximately 32 percent of Indians are members of tribes that do not have any gaming operations" (HPAIED 2008c, 150). With the majority of tribal citizens being on reservations with little or no gaming revenues, the growth in the average tribal citizen's income we see in the 1990s cannot be attributed to gaming.

The pattern of concentration seen in 1998 continues to hold today. Fi shows the gaming revenue distribution reported by the National Indian Gaming Commission (NIGC) in 2021. The top 43 facilities (8%) collectively earned more revenue ($20.4 billion) than the other 467 combined. The smallest three-quarters of facilities collectively earned $6.6 billion, and the smallest half of facilities earned $1.5 billion collectively. Figure 6 below displays the evolution of this quartile—the blue shaded region between the 50th (median) and 75th percentiles.

Figure 6: Cumulative Gaming Revenue Distribution, 2021



The cumulative revenues for the percentiles are estimated from the adjacent data by log-linear interpolation. (NIGC 2021)

This concentration of gaming revenues undermines the hypothesis that gaming is driving the overall growth of the income of the average reservation Native citizen. The per capita income reported for Indians living on reservations in Figure and 4 is the population-weighted average of per capita Indian income. As such, it reports how much income the average Indian living on a reservation earned. All else equal, if a small tribe located in the top tier in Figures 5 or 6 experienced a vast increase in per capita income, it would not move the Indian Country average much because much larger on-reservation Native populations per the Census (such as those of the White Mountain Apache Tribe, pop. 15,000; the Oglala Sioux Tribe, 17,000; or the Navajo Nation, 166,000) would tend to dominate the weighted average (Census 2020a). In other words, the good fortunes of a small number of tribes cannot explain the growth trajectory in Figure 1.

C. Is it all about increased dependence on federal funding?

Could it be that the income growth going on in Indian country is not the result of growth in actual productive activity, but has been sparked instead by some rekindled largess on the part of the federal government that might raise incomes but raises dependence on federal funding in the process? It is true that the poorest tribes are quite notably marked by the failure to adopt effective self-governance strategies and concomitantly effective institutions of local self-rule.[16] In fact, in their dependence on *effective* self-government, the American Indian nations in the Self-Government Era are like the nations elsewhere in the world – from Eastern and Central Europe to

[16] Cornell and Kalt (2000, 2007).

Africa and Latin America – who face the challenges of colonial powers pulling back, but leaving deep holes to dig out of. Some perform well, while others continue to struggle mightily. This is what makes it so easy for popular writers to cherry-pick the worst cases in Indian Country and decry their continued dependence on federal dollars and programs while ignoring that the overall trend is the opposite.[17]

What the data tell us is that, far from being abundant and propelling growth in reservation incomes, federal funding continues on a long path of *underfunding* compared to federal spending on the general non-Indian population and the states. What is happening is, as economic development has taken hold across so much of Indian Country, tribe after tribe increases their self-funding and reduces their dependence on the federal government.

Consider, for example, the federal Bureau of Indian Affairs (BIA). As economic development took hold in Indian Country over 1990-2000, the budget of the BIA declined by 3% in real, inflation-adjusted dollars.[18] By comparison, federal grants to state and local governments have been steadily and rapidly expanding since the 1970s (Lawhorn 2019). More generally, the federal government's Commission on Civil Rights 2003 report, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, "documented the federal government's historic failure to carry out its promises and trust obligations [to tribes]. These failures included longstanding and continuing disregard for tribes' infrastructure, self-governance, housing, education, health, and economic development" (Berry et al. 2003, 6).

Overall, federal spending per person on Native American U.S. citizens was only two-thirds of the spending on the average U.S. citizen. In health, the comparable figure was 50%; in education, tribal funding was only 50%-60% of the federal total spent on mainstream education. In the criminal justice arena, federal expenditures on law enforcement in Indian Country were only 80% of the level devoted to demographically comparable non-Indian communities. In the Commission on Civil Rights' update of its 2003 report in 2018, the Commission found that:

> Since 2003, funding for Native American programs has mostly remained flat, and in the few cases where there have been increases, they have barely kept up with inflation or have actually resulted in decreased spending power. (Lhamon et al. 2018, 4)

As noted, the evidence from tribes in the other Lower 48 states indicates that their economic development in case after case has been accompanied and supported by improvements in tribal government performance. These improvements and their sources of funding are captured in a data for the *Honoring Nations* awards program of the Harvard Project on American Indian Economic Development. Making awards since 1999, *Honoring Nations* recognizes and documents best practices and outstanding performance by American Indian tribal governments.[19]

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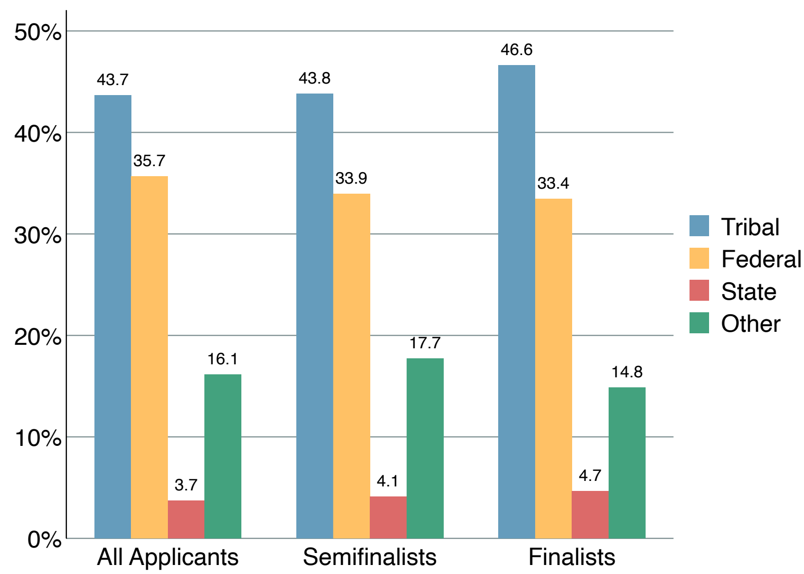
[17] See, for example, Riley (2021), op. cit.

[18] The Bureau's budget in 2000 was $2.1 billion (Bureau of Indian Affairs 2000), compared to $1.499 billion in 1990 (Bureau of Indian Affairs 1990). Over the period from Q1 1990 to Q1 2000, the GNPP Deflator rose 23.4% (FRED 2022, GNPP).

[19] See https://hpaied.org/honoring -nations/.

Figure 7 shows the sources of funding for a select group of tribal programs from across the United States.[20] Specifically, the figure shows the average shares of funding provided by tribal government, federal government, state government, and 'other' (including private and user fee sources) for the 925 applicant programs reviewed by the *Honoring Nations* program over 1999-2018. This program seeks to identify, document, and disseminate the stories of excellence in tribal self-government through a competitive process of nomination and review. A process involving reports by site visitors, applicant presentations, and ultimately review and voting by a panel of more than a dozen independent experts who are leaders in Native affairs narrows applicants down to semifinalists and then finalists. The panel's selection criteria include "significance to sovereignty, effectiveness, cultural relevance, transferability, and sustainability" (HPAIED 2022).

Figure 7: The Funding of Excellence in Tribal Governance *Honoring Nations* Programs, 1999-2018



The Harvard Project on American Indian Economic Development, Honoring Nations Program, 925 applications representing tribal government programs from 215 federally recognized tribes (HPAIED 2022).

Applicants to *Honoring Nations* submit their funding profiles with their applications. Fully 215 tribal nations are represented in the data of Figure 7 (HPAIED 2022). There is likely to be some overweighting of the data in Figure 7 toward high-performing tribal governments, because the applicants to the *Honoring Nations* program would be expected to self-select based on reasonable expectations of being awarded—and publicly recognized—for their achievements when and if becoming program finalists. Certainly, the processes of finding and soliciting applicant programs, as well as the review panel's criteria of selection, tilt the semifinalist and finalist applications toward the high-achieving tribal programs. Indeed, some of these tribal operations are high achieving by any measure. Thus, for example:

[20] Data are from forthcoming research by, and have been graciously provided by, Dr. Laura Davidoff Taylor. Dr. Taylor is a postdoctoral research scholar in the Division of Humanities and Social Sciences at the California Institute of Technology and a Research Affiliate of the Harvard Project.

- The Tohono O'odham Nation's Archie Hendricks Skilled Nursing and Hospice Facility put in place state of the art technology *and local culture* to become the first five-star Medicaid nursing facility in the state of Arizona (HPAIED 2008a). The 60-bed center has received awards for merit from not only *Honoring Nations* in 2008, but also from McKnight's Excellence in Technology Awards (Newman 2014), the Wall Street Journal's Small Business Awards program, and the National Indian Health Board (Hansen 2018).
- 2008 *Honoring Nations* awardee, the Muscogee (Creek) Nation Reintegration Program (RIP) was established by the Muscogee (Creek) Nation in Oklahoma to combat the challenges of reintegrating its citizens into mainstream community life and work upon their release from prison. The Reintegration Program cut the criminal recidivism rate among its clients to 10%, compared to the 30% rate experienced by the state of Oklahoma as a whole. In response to this performance by RIP, the state of Oklahoma undertook to share jurisdiction and programming for corrections with the Muscogee (Creek) Nation (HPAIED 2008b).

What we can say from Figure 7 is that high-performing tribal government programs in the era of Self-Determination derive the largest portions of their budgets from their tribal governments—i.e., tribes are self-funding at levels averaging approximately 45%. The noted tribal operations do make substantial use of federal funding, generally in the range of approximately 35% or somewhat less. This reflects the enduring trust responsibility of the federal government to tribes (Bureau of Indian Affairs 2017). Based on data from the Tax Foundation, fully 35 of the fifty U.S. states' had more than 35% of their general revenues coming from the federal government as of 2019. (Fritts 2020).

In a growing number of instances, tribes' own revenue sources now dwarf federal sources in their tribal government budgets. For example, in Washington State, 23 tribes collectively derived more than three-quarters of tribal government funding in 2019 from enterprise distributions, tribal taxes, leases, stumpage, and other tribally controlled or owned sources. Only 18 percent came from federal grants and contracts and 4 percent came from Washington-funded grants or contracts (Taylor 2022, 22). And tribes no longer look to the federal government for approval of every major decision they wish to make. The result of this is that self-governing tribes can often streamline decision-making and respond to community needs faster and more efficiently than the federal government or state and local neighbors. Scores of such cases across hundreds of tribes have been well documented (HPAIED 2022).

While there is no available data comparable to the *Honoring Nations* data for tribes and tribal programs that did not apply to *Honoring Nations*, anecdotal evidence from extensive fieldwork suggests as noted above, that markedly underdeveloped tribes are markedly dependent on federal funding. The default mode for tribes who lack substantial self-governing capacity is to fall back on federal services and federal funding. In any case, *state* government funding of tribes across the country is quite insignificant: For the high-performing programs represented in Figure 7, for example, state funding is generally less than 5% of program budgets (a level similar to the previously mentioned Washington tribes' 4% state funding).

D. Diversification and the growth of non-gaming economic activity

As suggested above, a further reason that the "it's-all-gaming" hypothesis misses the mark in explaining three decades of economic growth in Indian Country is that it overlooks evidence of reservation economies' non-gaming business and governmental activity. For decades, Indian tribes have earned revenues from coal, oil, gas, timber, hydropower, and other natural resources. As tribes grow in sophistication, their economies diversify—not just from a gaming starting point (e.g., casino-adjacent restaurants, hotels, spas, entertainment venues, and golf courses are all part of diversification), but also in industries unrelated to gaming (e.g., healthcare, distilleries, fish processing, and home construction). Prominent among these non-gaming businesses are tribal companies selling goods and services to the federal government under the terms of Section 8(a) Business Development program of the Small Business Act (15 U.S.C. §631 *et seq.*). Federal procurement data shows tribal 8(a) contracting revenues to be about $560 million in 2005. By 2011, these had grown to about $2.88 billion (Taylor 2007, 2012).[21]

Figure 8 picks up from Figure 6, extending the blue-shaded third quartile (between the median and the 75th percentile) back through time to show the total revenues collectively earned by facilities at or below those demarcations. Consistent with the growth in the number, size, and amenities of Indian casinos in the late 1990s and early 2000s, the blue region expands in that period. Casino closures due to the COVID pandemic in 2020 are visible in the revenue drop on the right, and the overall pattern suggests that tribal gaming revenues may have peaked around 2008. Overlaid on the gaming data are the two point estimates of tribal 8(a) revenues (in green, plotted on the left axis). By 2011, tribal 8(a) revenue had grown to be larger than the revenues collectively earned by the gaming facilities below the median—i.e., larger than the combined revenues of the smallest 50% of all tribal gaming facilities. 8(a) business has probably grown since then.[22]

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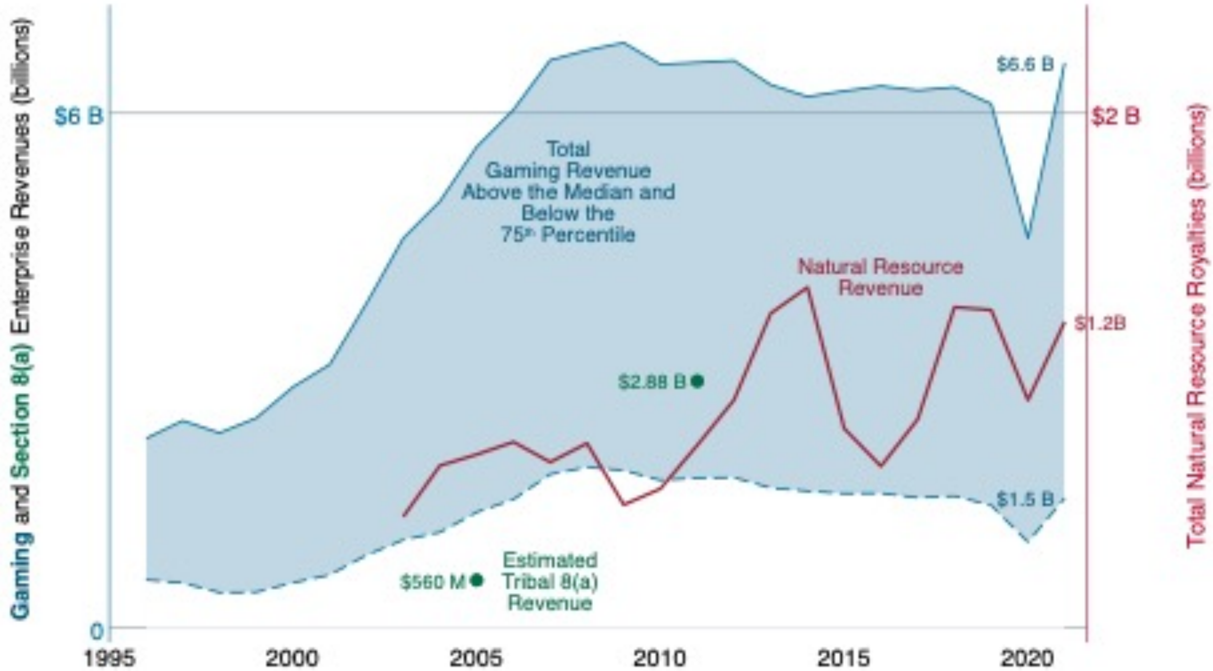
[21] *Tribal* 8(a) contracting revenues here exclude the revenues of Alaska Native Corporations, many of which are dominant players in Section 8(a) procurement. Some Native Hawaiian Organization and Alaska Native Village Corporation 8(a) revenue may be included in the *Tribal* totals, but their shares were very small in the indicated years.

[22] Forthcoming data from the Center for Indian Country Development at the Federal Reserve Bank of Minneapolis promise to extend and improve these 8(a) revenue snapshots into a comprehensive time series. Chances are good that it will show more recent 8(a) revenues to be comfortably in the blue shaded region.

Figure 8: Gaming and Section 8(a) Revenues and Natural Resource Royalties



NOTE: Right scale magnified 3x. (Taylor 2007, 2012; DoI 2021)

Also overlaid in Figure 8 above are the natural resource revenues from Indian trust lands held by the United States on behalf of tribes and individual Indian allottees. These revenues predominantly reflect royalties, rents, and bonuses paid by fossil fuel production companies to the tribal and individual Indian owners of mineral rights. The vast bulk of this revenue is properly considered bottom-line net income—value added in reservation economies—rather than top-line revenue (as measured on the left axis). Accordingly, it is plotted on its own axis, and the right axis is magnified by a factor of three to make it roughly comparable to the top-line revenues of the left axis.[23] The position of the red line shows that natural resources are a driving force of reservation economies. They are as big as 8(a) contracting and more influential than all the casinos below the median. Energy prices are famously volatile, but natural resources earn tribes more bottom-line revenue than all the casinos smaller than the median facility.

Of course, Section 8(a) procurement revenues and mineral royalties display concentration, too. For example, the Section 8(a) subsidiaries of the Winnebago Tribe of Nebraska's Ho-Chunk, Inc. make it a Lower 48 procurement powerhouse. The Southern Ute economy benefits from sizable San Juan Basin oil and gas royalties and its successful Red Willow (energy) Production Company payroll and profits. Until recently, the Crow, Hopi, and Navajo economies have benefitted from substantial royalties, taxes, and tribal employment in coal mining.

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[23] Tribes are protective of competitively sensitive information related to the margins of their gaming and 8(a) businesses. That said, anecdotal information suggests that casino margins may be in the vicinity of 35%—lower in regions of heavy competition and higher where economic geography permits drawing from a large population that is not well served by other casinos. Thus, a three-to-one ratio of top-line to bottom-line figures offers rough comparability in Fi.

Under self-governance, economic diversification takes on many flavors. For example:

- The Tulalip Tribes' upscale outlet shopping mall and "big box" stores at their Quil Ceda Village north of Seattle generate large (relative to tribal population) lease and tax revenues, as well as provide tribal and non-tribal employment in the municipal departments that support the retail operations (HPAIED 2003a).
- The Hualapai Tribe's Grand Canyon West venture hosts more than one million sightseeing tourists annually at its famous Skywalk attraction overlooking the Grand Canyon (Kalt 2017c).
- Fort Belknap's Island Mountain Development Group's six for-profit construction and financial services companies generate combined annual revenues well into nine figures and support close to 500 jobs (IMDG 2021).
- The Salish and Kootenai Tribes of the Flathead reservation own and operate at least eleven companies in the electronics, aerospace, and defense contracting sectors, supporting hundreds of direct and indirect jobs in rural Montana—where it is commonly thought that economic development is nearly impossible (S&KT 2022).

Examples like these, and many others simply did not exist before tribes took the self-determination reins. Instead, before self-determination, development efforts tended to follow a so-called "standard model" in which tribes chased—sometimes desperately—whatever the federal government was funding in a particular budget cycle. Moreover, project management was typically vested in the tribal councils by federal authorities, who usually seemed unable to imagine tribes being able to create their own business laws and businesses. In the same vein, federally funded development projects were often undertaken upon meeting bureaucratic criteria rather than through consideration of underlying economic feasibility or management and staffing capacities. Research finds that tribal economic enterprises built on the "standard model" have been about five times more likely to fail than when they are founded on tribes' adopting modern models that provide insulation from politics and performance measures (Cornell and Kalt 2007).

The point of Figure 8 is not to fully characterize the variation and diversity of tribal economic sectors, but rather to highlight that—once we exclude the juggernaut casinos—national data make clear that gaming is not the only driver of reservation economies. Tribal economies are further bolstered by sectors for which national data do not exist. Health clinics not only use federal and tribal government funding to meet tribal citizen healthcare needs but also routinely end up serving non-Indian clients and become profit centers in their own right via third-party billing, especially in underserved rural areas. Tribal convenience stores, malls, liquor stores, and other retail businesses earn profits and pay wages. And, of course, the net income of all tribally owned businesses goes to support the payrolls and expenditures of what had been, before the Self-Determination Era, chronically underfunded tribal governments (Berry et al. 2003; Lhamon et al. 2018).

E. Increasing the capacity of tribal governments

Federal policies of self-determination through self-government have themselves, directly spurred reservation economic development. As discussed above, the 1988 and 1994 amendments to the Self-Determination Act of 1975 permit tribes to go beyond merely *contracting* on-reservation federal functions and instead *compact* multiple federal programs in a quasi-block-granting arrangement. Arguably, the most notable consequence of federal policy in the Self-Determination Era has been to give tribes the opportunity to—and the responsibility for—providing services to their citizens. Improved economic conditions under self-determination (see below) have resulted in tribes heavily augmenting their governmental budgets with their own funds (typically from resource revenues, enterprise earnings, and in a growing number of cases, tribal taxes). After fits and starts in from the mid-1970s into the 1980s, by 2015 more than 50% of all tribal programs were being carried out by tribes rather than federal agencies.[24] Although precise data are not provided by the federal government, the evidence gathered through the *Honoring Nations* program of the Harvard Project on American Indian Economic Development (discussed below) indicates that that number is much higher and still climbing.

Today, especially where economic development has progressed sufficiently, tribal governments commonly supply (or pay neighboring governments to supply) the full range of services and functions that are expected of any competent state and local system. This means everything from fire departments, police officers, courts, and incarceration facilities to trash collection, water and sewer, roads, parks, housing, education, environmental protection, resource stewardship, substance abuse and violence prevention, and myriad other services.

The Citizen Potawatomi Nation is a case in point. Starting with $500 in the bank, two-and-a-half acres of land, and a house trailer as its tribal government headquarters, today the Citizen Potawatomi Nation (CPN) has built a highly diversified economy which generates GDP that is approaching $1 billion annually. Even ignoring the thick sector of private member-owned enterprises, the government of the Nation employs more than 2000 individuals and is the largest employer in the Shawnee, Oklahoma region. CPN's resident citizens' average income now surpasses that of the state of Oklahoma (Citizen Potawatomi Nation 2022). The process of self-determined development that has generated such results for Citizen Potawatomi has quite intentionally been founded upon: (1) early constitutional reform that created Potawatomi separations of power and solidified the rule of law; and (2) the continuous development of a tribal government that provides the full scope of local administrative and service infrastructure that any contemporary economy requires (Kalt 2016). The Appendix below provides a snapshot of CPN's structure and operations. Under federal policies of self-government, the development of the capacity for such full-fledged local self-rule is the path that hundreds of tribes are now on.

The improvement in economic conditions on reservations is showing up as improvements in the everyday quality of life, as tribes like CPN invest in long-neglected infrastructure, improve their wildlife management systems, take care of streets, roads, and parks, and produce other public goods, services, and amenities that, in the process, benefit the non-tribal public, as well as tribal citizens. Exemplary cases make the point:

- Tribes such as the Confederated Salish and Kootenai Tribes of the Flathead Reservation, for example, were the first tribe to become a 100% self-governance tribe (i.e., entirely eschewing service provision by federal agencies (HPAIED 2003b)).

[24] Strommer and Osborne, op. cit.

- The Kalispel Tribe's Camas Center for Community Wellness contains a medical and dental clinic, daycare, fitness center, basketball gymnasium, pool, rock climbing wall, and business meeting rooms. The Camas Center opens its doors not just to Kalispel citizens but to members of the surrounding community as well (Kalispel 2022).
- The attractive wages, benefits, organizational culture, and career ladders of the Prairie Band Potawatomi Nation cause it to routinely rank high in the *Topeka Capital-Journal's* lists of "Best Employer" to work for. The Band's casino revenues help it underwrite a full-time emergency response system serving remote northeast Kansas well beyond its reservation borders—a relative rarity in rural Kansas.
- The Citizen Potawatomi Nation handles overnight 911 dispatch in the Shawnee, OK region and is the primary water service provider to predominantly non-Indian neighboring towns (Kalt 2016).
- The Tulalip Tribes north of Seattle are regional providers of broadband services and have helped orchestrate—and pay for—upgrades to two highway interchanges on Interstate 5 which give access not only to its reservation, but also to non-tribal communities (Kalt 2017a).

For those who show little awareness of the policy revolution brought on by Self-Government, the maturation of tribal government is missed. Yet, this maturation directly supports employment and wages. All told, these amount to substantial impulses to gross reservation product. The aforementioned pre-pandemic survey of 23 Washington tribes sheds light on the shares of gaming, non-gaming, and governmental economic activity. In that state, those 23 tribes reported 16,735 gaming employees, 3,606 employees in non-gaming businesses, and 7,152 tribal government employees. As is common across Indian Country, the economic development of these tribes outpaces the ability of tribes to staff operations with Native employees. In the case of the Washington tribes, approximately 70% of the jobs supported by their economies are held by Non-Indians (Taylor 2022).

In addition, as tribal nation economies become more diversified, growth tends to build its own momentum. For example, Indian Country growth is starting to loosen tribal liquidity constraints, thanks to enterprise profits and royalties. For example, gaming cashflows helped lower the Squaxin Island Tribe's cost of borrowing from many points above prime to one point above prime (Taylor 2006). Early in the self-determination process, Citizen Potawatomi took control of its financial assets and increased the return earned on those assets by more than 300% (GAO 2019). Reductions in financing costs and improved asset returns of these types can turn the net present values of marginal investment opportunities from negative to positive, making even more economic development attractive.

Human capital accumulation from work experience also adds momentum to reservation economies. If a tribe builds a La Quinta Inn and its citizen-employees learn from the franchisor how to manage staff, manage procurement, and conduct the night audits, that experience can later be redeployed in the tribe's 8(a) defense manufacturing company or the tribal government's roads department. Such virtuous cycles encompass tribal governments as well. The Winnebago Tribe's tribal government-owned conglomerate Ho-Chunk, Inc., for example, not only pays a dividend to its owner-government and pays tribal taxes; critically for the reservation economy; it also makes downpayment assistance available to middle-class families who want to own a house on the reservation and work in tribal enterprise or government (Goss and Strain 2019). Fort Belknap's tribal council's wise creation of a politically independent corporate board to govern its Island Mountain Development Group laid the groundwork for not only highly successful economic development, but also created the organizational and human capital needed for the tribal takeover and major expansion of reservation health services and the jobs that those services support.

Conversely, restrictions on tribes' abilities to govern their own local affairs historically generated vicious cycles. These lay at the heart of why pre-Self-Determination Era policies led to American Indians on reservations becoming the poorest group in the nation: Severely limited self-governing powers thwarted and distorted efforts at economic development; lack of economic wherewithal emaciated tribes' meager governing capacities; economic conditions deteriorated further; and so on downward.

Success under self-determination through self-government is not guaranteed. This is true not only for tribes, but for self-governing societies everywhere. Not all states are high performers, and not all nations around the world are high performers. In the case of self-governing Indigenous nations, the root causes of persistent economic underdevelopment and attendant social strains do not generally appear to be external factors often thought to hinder tribal development—i.e., factors such as geographic size or isolation, access to natural resources, the size or spatial density of the tribal population, or even education (Cornell and Kalt 2000). While attributes such as being closer to markets, better resource endowments, and more education can help a tribe, for each such ostensible obstacle there are numerous instances of tribes that have broken the backs of long-standing problems of poverty and social stress in the era of self-determination despite (at least initially) poor access to markets, weak natural resource bases, low educational attainment. To cite just a few:

- The Mississippi Choctaw Tribe pulled itself up from the least likely of conditions in central Mississippi to become a major manufacturing center employing thousands of Indian and non-Indian workers (Cornell and Kalt 2007).
- The Hualapai Tribe, mentioned above and with approximately 2400 citizens, was seemingly forever trapped in very rural, desolate Arizona and in economic desperation until it adopted self-governing policies and structures that have allowed it to now become the second largest employer in Mohave County, Arizona (after the County, itself) (Kalt 2017b).
- A similar story is told by Fort Belknap (see above), which has proceeded with economic development and concomitant improvement in social services in a setting of extreme geographic isolation, only modest natural resources, and historically weak educational attainment.
- The Winnebago Tribe's Ho-Chunk, Inc., a very successful conglomerate manufacturing-construction-financial-distribution-consulting company, emerged out of the cornfields of rural Nebraska from being virtually nothing in the late 1980s (HPAIED 2000a). It now generates approximately $400 million in revenue annually.

Where we do see some examples of stark underperformance of tribes otherwise able to exercise broad powers of self-government under current federal policies of self-determination, the root cause most often emanates from underperforming institutions of self-government (Cornell and Kalt 2000). Like states trying to serve their citizens' local needs, sovereign tribes have responsibilities to build their own capacities to govern, prioritize the needs of their citizens, and fund and efficiently deliver services. Meeting these responsibilities requires leadership, organizational capacity, and resources. But these steps require firm foundations.

For many tribes in the Self-Determination Era, the laying of their governmental foundations started with constitutional reform. Simply continuing to operate under federally drafted constitutions of the type effectively imposed on or adopted by hundreds of tribes as a result of the Indian Reorganization Act (IRA) of 1934 (P.L. 73-383) has not suited most tribes. These "boilerplate" systems were marked by a structure consisting of: (i) a one-house legislature; (ii) no separation of powers between the tribal chief executive and the tribal council; (iii) no provisions for stable court systems; and (iv) little anticipation of Self-Determination Era powers of taxation, law enforcement, enterprise ownership, and other core governmental functions (Kalt 2007).

Upon finding their initial efforts at self-governance floundering (or worse) under constitutions that were not of their own making, many tribes ended up pursuing constitutional reform. Research on tribal constitutions finds that tribal economic success (and even positive governmental program performance) is strongly related to constitutional structures. Systems marked by separations of legislative and executive powers, independent court or dispute resolution systems, and staggered and longer terms for elected officials, for example, are associated with tribal economic growth and high-performing tribal government programs (Kalt 2007; Cornell and Kalt 2000).

Lest quintessentially Western terms such as "separations of powers" and "independent court system" suggest the solution to good governance for tribes is to Westernize their governments, Indian Country is teaching the world that sound governance, indeed, requires the noted attributes but does not have to look Western. Decidedly non-Western, even theocratic, structures with the noted characteristics of independent dispute resolution, separations of powers, etc. are undergirding thriving Native communities. What is required is that such structures be in place and consonant with and legitimate in the context of each tribe's own cultural norms regarding the proper use of power and authority (Cornell and Kalt 1997; Kalt 2007).

F. The Wabanaki Nations of Maine: An Unfortunate Federal Experiment[25]

The federal Maine Indian Claims Settlement Act of 1980 (MICSA; P.L. 96-420) resolved massive land claims in the state of Maine by the Wabanaki Nations – the Mi'kmaq Nation, Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and Penobscot Nation.[26] In reaching this settlement, the federal government unwittingly launched an experiment that has tested the effects of its Self-Government policies for tribes. This experiment has turned out to be much to the detriment of the Wabanakis.

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[25] See Kalt, Medford, Taylor 2022.

[26] The Mi'kmaq Nation was federally recognized in 1991 and brought under MICSA at that time by the Aroostook Band of Micmacs Settlement Act of 1991 (P.L. 102-171).

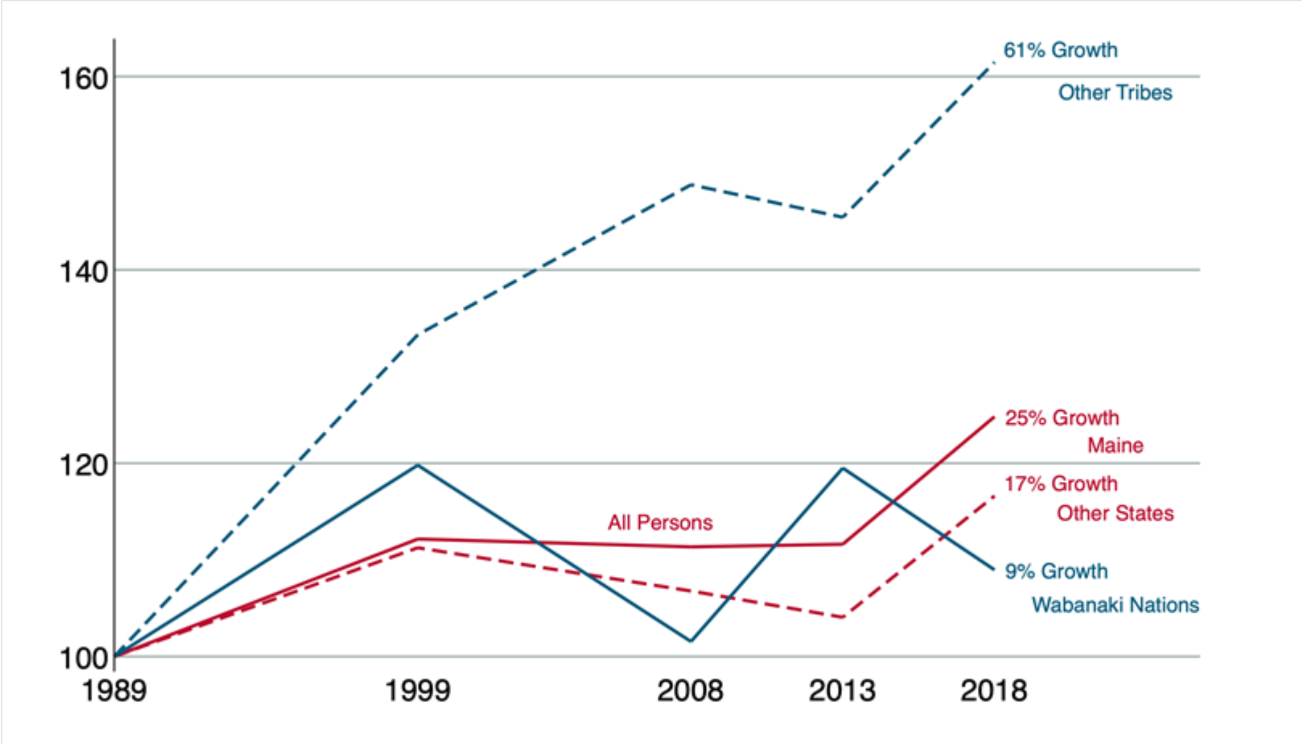
The Maine Indian Claims Settlement Act effectively blocks the application of broad swaths of federal Indian policy in Maine. Specifically, MICSA blocks the application of any federal law implicating Indian tribes that is passed after MICSA's adoption if that law "affects or preempts" the jurisdiction of the state of Maine and the pertinent federal legislation does not specifically override MICSA by explicitly providing for applicability to Maine.[27] This provides the state with effective veto power over the Wabanaki Nations' efforts to build their local tribal governments. A recent study commissioned by a state of Maine task force found that 151 federal acts implicating tribes had been passed since 1980, and the author found that not one of these contains explicit mention of applicability to Maine. Only the 2022 reauthorization of the Violence Against Women Act (VAWA), which was passed after she completed her study, did so (Friederichs 2019, 2022).

In practice, MICSA has put the burden of proof regarding "affects or preempts" Maine's jurisdiction on the Wabanaki Nations of the state. As a result, the tribes have had to confront each prospect of taking advantage of federal legislation, programs, and funding that might be beneficial to the development of their governments and economies as possible and expensive conflict with Maine – i.e., *possible* if the tribes see enough prospect of positive payoff after incurring the cost, effort, time, litigation, and hostility attendant to challenging the state. The on-the-ground consequence of this process has turned out to marked underdevelopment of the Wabanaki Nations' tribal government capacities (Kalt, Medford, Taylor 2022). In effect, the Wabanakis have been trapped in, at best, the pre-late 1980s period of initial federal policies of self-determination as self-administration of pre-1980 federal policy, rather than the subsequent self-determination through self-government (see discussion above).

Compared to the experiences of the federally recognized tribes in the other Lower 48 states, the Wabanaki paths toward economic development have been sharply limited. This can be seen in Figure 9, which assesses the growth of real (inflation-adjusted) per capita income of AIAN residents of reservations in the Lower 48 states other than Maine over 1989-2018 relative to the income growth experienced by the Wabanaki Nations over the same period. The former is greater than sixty percent, while per capita income among the Wabanakis increased only 9%.

[27] MICSA (P.L. 96-420 §6(h), 94 Stat. 1794) at §6(h).

Figure 9: Growth in Real (inflation-adjusted) Per Capita Income: Wabanaki Nations v. the Other Tribes, Maine, & the U.S. as a Whole (1989=100)



Real (i.e., inflation-adjusted) population-weighted Indians on reservations per capita income (1989 = 100) for Wabanaki reservations and other reservations in the lower forty-eight states. ACS 5-year averages are plotted at their middle years (2008, 2013, 2018). (FRED 2022; Taylor and Kalt 2005; Census 2010, 2015, 2020a)

The explanation for the poor economic performance of the Wabanaki Nations of Maine seen in Figure 9 is not explained by, for example, relatively poor economic performance overall in the state of Maine: As seen in Figure 9, the non-Maine tribes' income growth far outpaced the U.S. as a whole, and Maine outpaced the United States. Maine's economy has not been preventing the Wabanaki Nations from keeping up with their non-Maine peers.

The striking aspect of the Wabanaki experience under MICSA's constraints on their ability and capacity to self-govern is that all four of the Wabanaki Nations dramatically underperform their peers. Even when we adjust and account for the locations and sizes of the four Nations and focus only on similarly situated peer tribes outside of Maine, the four Wabanaki Nations are near or are the bottom of the economic barrel in terms of, for example, the numbers of jobs supported by their economies (Kalt, Medford, Taylor 2022).

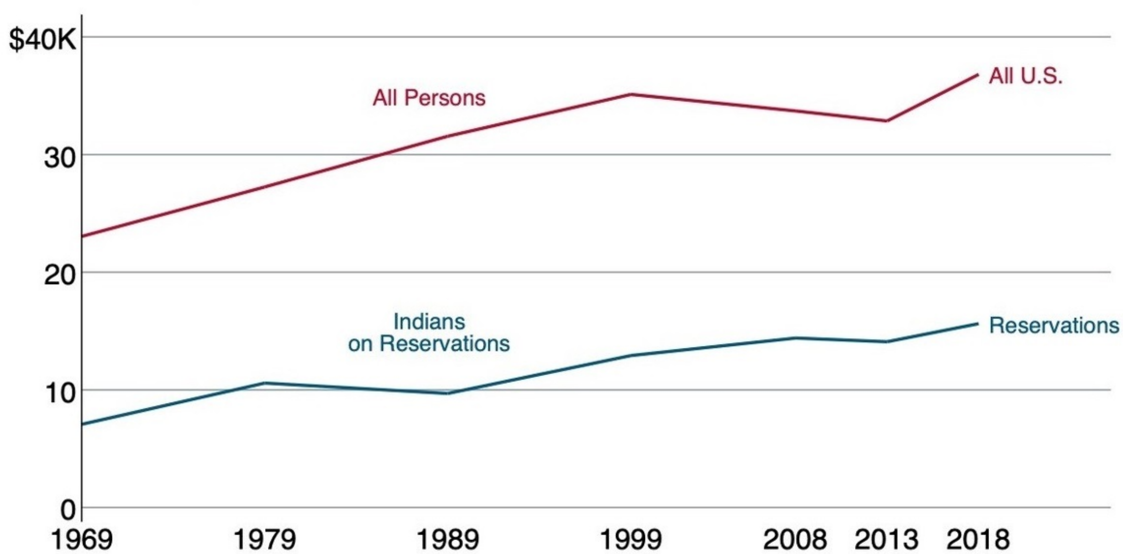
We can find nothing fundamental about the Wabanaki Nations, themselves, that would lead us to expect that they would be so economically underdeveloped relative to other tribes. In fact, while it is statistically possible that one or more of the Wabanaki Nations would have ended up far below or far above the levels and rates of economic development of their similarly situated peers, there is no inherent reason to believe that they *all* would have inherently underperformed all but a handful of the hundreds of tribes in the Lower 48 states. Of course, there is one factor that all four of the tribes in Maine do share in common: For the last four decades, they have all been restricted by MICSA from partaking in the full range of federal policies and programs of self-determination through self-governance that other tribes have enjoyed.

G. Summary

Federal policies of tribal self-determination through self-government took hold with force in the late 1980s. The overall result has been an unprecedented surge in economic development and tribal government capacity building. Much publicized exercises of self-determination in the form of tribal expansions into the gaming industry are important parts of this story, but far from the only parts. Economic development in non-gaming sectors has also surged. Along with economic development, in a virtuous cycle of support, tribal governments have made huge leaps forward in the size, scope, and quality of their services.

Lastly, it should be pointed out that, despite the extraordinary pace of economic development in Indian Country in the Self-Government Era, the need for economic development remains acute. Decades and centuries of deprivation and dispossession put Indian Country at a very low starting point as self-determination took hold. Notwithstanding the impressive 60+% growth we see in Figure 1 above, Figure 10 shows the income per person in Indian Country today to still be only one-half that of the United States. Indian Country started from such a low base that it will take decades for the income gap to close, even if Indian Country maintains its strong pace. It would be poor public policy for the federal government to waver or retreat in its support for tribal self-determination through self-government and American Indian economic self-sufficiency.

Figure 10: Real Per Capita Income, 1979–2018



Real (i.e., inflation-adjusted, 2021 dollars) population-weighted per capita income for Wabanaki reservations and other reservations in the lower forty-eight states. ACS 5-year averages are plotted at their middle years (2008, 2013, 2018). (FRED 2022; Taylor and Kalt 2005; Census 2010, 2015, 2020a)

III. Recommendations for Moving Federal Policy Forward[28]

A. Guidelines for federal policy

Tribal self-government is working. Nevertheless, there are additional steps that federal policy can take that promise to strengthen tribal self-rule and propel tribal economic and institutional development forward. Here, I set out guidelines for federal policy reform that can fulfill the United States' trust responsibility to tribes, adhere to the deepest principles of self-governance upon which the country is founded, respect and build the governing capacities of tribes, and in the process, enable tribal nations to strengthen tribes' abilities to dig themselves out of the historical deficits created by prior eras policies of extermination, determination, and paternalistic domination.

The first step that federal policy should take should not be a backward step. It is time that federal policy complete the devolution of local governing powers to tribal governments, with priority placed on recognition of tribes, not states, as the locally sovereign taxing and jurisdictional authorities within the boundaries of tribes' respective territories. If tribes are going to be looked to – as they should be – to provide the same services and perform the same functions as state and local governments, they should be accorded the same lawmaking, law enforcement, and revenue-generation powers as their state and local counterparts.

Regarding funding, as pointed out above, the federal government's own analyses have repeatedly found that, on the basis of comparable need and affected populations, federal support of tribal communities and tribal governments is embarrassingly deficient. Priority now should be given to funding for: (1) the administrative infrastructures of the tribal governments; (2) the physical infrastructure of tribal reservations and communities; and (3) the educational opportunities of young and adult tribal citizens. In keeping with the self-determination through self-government framework, maximum decision making over the use of funds should reside with local tribal governments.

B. Strengthening tribal self-government

Notwithstanding its political appeal and the successes it has generated, the federal regime of tribal self-determination through self-government retains material limitations on tribes' sovereignty. These limitations prevent tribes and the general U.S. public from realizing the full range of economic and social benefits that would otherwise arise from eliminating the poverty and standard of living gaps that exist between tribal communities and typical mainstream communities. The unwarranted limitations on the scope of tribal self-government that stand out the most in this regard are in the areas of governmental finance (taxation) and jurisdiction.

Eliminate Constraints on Tribal Governments' Powers to Tax. To meet the needs of their citizens beyond the level that can be addressed with transfers of limited federal funds, state and

[28] Here, I draw heavily on and adopt from Henson, Hill, Jorgensen, and Kalt (2020). I am deeply indebted to my colleagues for their contributions.

local governments have recourse to traditional income, sales, property, fuel, use, and other taxes. In addition, they rely to a small extent on their gaming enterprise revenues (i.e., state government-owned lottery businesses, which provide about 1% of states' revenues). Tribes, on the other hand, typically do not have access to traditional tax bases. Income taxes are generally infeasible for low-income tribes, and property taxes are often blocked by the fact that reservation lands are commonly owned by a tribe itself or held in trust by the federal government. Some tribes have begun experimenting with sales, use and fuel taxes, but they often are pre-empted by unilateral state and local government impositions of such levies.

The effective absence of traditional tax bases means that tribes must overwhelmingly rely upon their enterprise profits, earned through their ownership of gaming and non-gaming businesses, as their primary form of governmental finance. The result, as tribes work to fulfill their responsibilities to provide infrastructure, basic public services, judicial and other jurisdictional functions, and income security for their citizens, are essentially de facto corporate income tax rates (on their tribal government-owned businesses) that are commonly several times the rates borne by non-tribal businesses in mainstream America. Tribal governments' funding needs take away from the re-investible retained earnings upon which company expansion and innovation would otherwise be based. In this way, tribes' need to rely heavily on their own enterprises' revenues directly impedes those enterprises from realizing their full potential to produce jobs and income in the community.

With few exceptions, states and their county and/or city arms are recognized as the legitimate taxing authorities within the territories under their jurisdiction. Tribes generally do not have such protection from states imposing their taxes on a wide range of activities inside reservation boundaries, and particularly on non-Indian business activities. The result has been endless tribal government versus state government litigation in the federal courts. These tax battles have yielded a policy mess that only federal legislation can – and should – remedy. With tribes already performing the full array of functions and service provision that we expect of any state and local government, tribes should be accorded the concomitant powers of taxation enjoyed by state and local governments by making tribes the pre-emptive local taxing authorities within the boundaries of their territories.

Clarify and Strengthen Tribal Jurisdiction. Conflicting and confusing regulatory jurisdiction over local land use and commercial activity, along with federally-created race-based distinctions limiting tribal criminal and civil jurisdiction over non-Indians on reservations, severely hampers both economic development and the provision by tribes of the local governmental foundations of a civil society.

In commercial and regulatory affairs, as in the tax arena, federal courts have generally resisted, or at least restricted, tribal jurisdiction in favor of state jurisdiction on fundamentally racial grounds – i.e., when the activities in question concern the oft-repeated notion of "non-Indians engaging in commerce (buying, selling, zoning, manufacturing, farming, contracting, etc.) primarily with non-Indians." The unequal treatment of tribes is obvious: When a non-Arizona hotel chain sets up a resort in, say, Arizona, and sells its resort services primarily to non-Arizonans, we do not conclude that Arizona lacks jurisdiction over building codes, insurance regulation, land use decisions, and the like.

The problems created for tribes and their communities by this unequal treatment vis-à-vis their state and local counterparts are often lethal to reservation economic development and even social conditions. With disparate jurisdictions – tribal, state, and federal – often hopscotching acre-by-acre across reservations depending on the race and tribal versus non-tribal legal status of land ownership, red tape proliferates, costs are raised, hurdles are erected, and legal risks are multiplied. These impediments to improving tribal communities are compounded when development and construction activities on federal trust lands lead to federal insistence on heavy-handed, delay-magnifying federal – rather than tribal – regulation and approval processes.

Beyond taxation, commercial, and regulatory contexts, the federal government also has long fostered race-based distinctions between tribal governments' criminal and civil jurisdiction over Indians versus non-Indians, with jurisdiction over the latter largely blocked. Undoubtedly, this finds support in systemic racism, which cannot help but see tribal governments and, especially, tribal judicial systems, as fundamentally incapable of administering justice up to the standards of perfection reached (albeit, only in the imagination) by non-Native governments in the U.S. Yet, race-based criteria that create jurisdictional boundaries, confusion, and barriers to efficiency, are in no small part to blame for breakdowns of law enforcement in Indian Country.

Improvement in all of these arenas will only be found in Congressional action which recognizes tribal governments as the pre-empting local governing authority within the boundaries of their territories.

C. Establish and Honor Federal Funding Priorities

In addition to the policy changes that are needed to strengthen the capacity of the federally recognized tribes to govern themselves and govern themselves well, the same kind of supportive federal funding going to state and local governments is warranted for tribes since they are taking on the same range of responsibilities as state and local governments. In fact, scores of treaties – i.e., contracts between sovereigns – as well as the federal trust responsibility encoded in innumerable federal laws and judicial decisions obligate the federal government to provide resources to tribes. At least three priorities stand out in this regard: tribal governmental infrastructure, physical infrastructure on tribal lands, and education.

Governmental Infrastructure. To maximize the benefits that accrue to tribes through self-governance, tribal governments require more resources. Even if tribes were not limited in their taxing capacities, many are in the nascent stages of their economic development. Whether it is building a tribal court system from the ground up, creating new tribal health, housing, education, business regulation, and environmental protection departments, or rewriting a one-size-fits-all tribal constitution that was federally imposed in the 1930s, pushing back long histories of having one's affairs run by the federal government, and replacing oppressive and paternalistic approaches with policies and institutions of tribes' own designs, is expensive.

Accordingly, increased federal support should be directed to tribes' core governmental operations so that they have the wherewithal to govern most effectively. This applies especially to tribal judicial systems and central administrations – i.e., the nuts and bolts of any effective local government. Research consistently finds that these functions add materially to a tribe's ability to create jobs and provide public services adequately and efficiently. In providing funding for tribal governments, approaches that sustain dependence of tribal operations on the priorities and procedures of the U.S. government should be replaced by policies which maximize tribes' flexibility in identifying priorities and allocating funds. This is the direct implication of the need to strengthen tribal sovereignty and jurisdiction discussed above.

Physical Infrastructure. Modern economies require modern infrastructure, and arguably nothing highlights the paucity of wealth creation in Indian Country more than dilapidated and outdated physical infrastructure. If we worry – as we should – about the infrastructure needs of the rest of the U.S. economy, we need to worry doubly about the needs of tribal communities.

Grossly inadequate and even totally absent water and sewer systems inhibit the adoption of infection-fighting habits of good health. Old and over-crowded housing invites the spread of disease. School buildings that are falling down, some built as long ago as the 19th Century, not only block effective teaching, but also stand in the way of hiring effective teachers. And of course, attracting effective teachers is critical because they are needed to educate future tribal leaders with the tools to guide their communities in achieving improved standards of living, healthier lifestyles, and stronger cultural supports for well-being. Outdated and decaying health facilities have directly adverse health impacts. Inadequate roads and commercial buildings weaken food supply systems, impede the provision of emergency services, and attenuate tribes' opportunities for development and social strengthening. Poor internet service and an absence of broadband connectivity, especially in rural areas, are severe detriments to education programs. All of these needs have been extensively documented and quantified.

A commitment of federal funds toward expanding and modernizing the physical infrastructure of Indian Country is necessary and is demanded by precepts of basic justice and fairness. Such a commitment also will yield long-term dividends for tribes and for the United States as a whole.

Education: Education builds the human infrastructure of communities. The era of tribal self-determination through self-governance has seen tribes take over management of formerly federal schools and programs, as well as create new institutions that can meet the needs of their youth and communities. With a growing set of tribally controlled public, private, and charter schools, and a system of 35 fully accredited tribally established and controlled tribal colleges and universities (TCUs), educational outcomes for Native citizens are improving. High school graduation rates among Native students on reservations, for example, are now approaching parity with the mainstream population, and while Native post-secondary educational attainment still lags, alumni of the TCUs report favorable post-college outcomes. In addition, tribes are further improving educational outcomes by devoting growing resources and attention to lifelong and mid-career education of Native professionals. These efforts are important because the efforts in self-rule which tribes are engaged in is rapidly increasing the need for citizens who are educated in such fields as business, public administration, law, finance, and accounting. Capacity in such fields is critical infrastructure for tribal communities.

Local provision of education against backdrops of long-standing underfunding is especially daunting. Federal funding must provide increased support for tribal education departments and schools (including physical facilities and broadband access), and federal policy should support tribal control and innovation in tribal schooling. Moreover, it is not practical for the many smaller tribes to build and/or operate their own schools; they accordingly turn to off-reservation (i.e., state and local) public and charter school systems. Those systems, too, need support for their efforts to meet the needs of their Native students. At the very least, it is time to eliminate the gaps noted above between tribal education funds and the federal funding of education nationally.

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