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COMMENTS

JUST SAY NO (TO AMERICAN CAPITALISM): WHY AMERICAN INDIANS SHOULD REJECT THE MODEL TRIBAL SECURED TRANSACTIONS ACT AND OTHER ATTEMPTS TO PROMOTE ECONOMIC ASSIMILATION

*Aaron Drue Johnson**

I. Introduction

The economic plight of most American Indians is well documented and widely known. Efforts undertaken by private citizens and the United States government have done little to combat the cycle of poverty. Recently, the National Conference of Commissioners for Uniform Commercial Laws (NCCUSL) has proposed its own solution to the poverty conundrum: the Model Tribal Secured Transactions Act (MTSTA).¹ The purpose of the Act is to provide uniformity and lender security to afford financial capital to privately owned businesses in Indian Country.² Legislative measures similar to the MTSTA have proven effective at promoting comparable loans in all fifty states.³ Nevertheless, American Indian tribes must be aware that the negative consequences of adopting the MTSTA will likely outweigh its practical economic benefits.

The MTSTA is more than a simple legislative action. It is reflective of a school of thought that emphasizes free markets and capitalism as the only antidote to the ongoing economic crisis that plagues this country's first inhabitants.⁴ By adopting the MTSTA, a tribe would signal to its inhabitants and to off-reservation businesspeople that it intends to amalgamate into the

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1. MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-103 (2006).

2. See Susan Woodrow & Fred Miller, *Lending in Indian Country: The Story Behind the Model Secured Transaction Law*, 15 BUS. L. TODAY 39, 39 (Nov/Dec. 2005).

3. Todd J. Janzen, Comment, *Nationalize the Revised Article 9 Filing System: A Comparison of the Old Article 9 and Canadian Personal Property Filing Systems*, 11 IND. INT'L & COMP. L. REV. 389, 389 & n.1 (2001) (noting that Article 9 of the Uniform Commercial Code has been a "success" since it was completed in 1972 and adopted by all fifty states by 1988).

4. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, IMPLEMENTATION GUIDE AND COMMENTARY TO THE MODEL TRIBAL SECURED TRANSACTIONS ACT 13 (2005) [hereinafter MODEL TRIBAL SECURED TRANSACTIONS ACT IMPLEMENTATION GUIDE] (noting the need for legislation of this type in private market economies).

larger American economic system.⁵ While most of the American intelligentsia would deem such integration beneficial, or even necessary,⁶ other avenues are more promising and pose much less risk to the American Indian populace. Solving the economic crisis the right way will require great amounts of unity and fortitude, as Native Americans must develop and utilize political capital to attain the benefits of an economically successful populace. There is no doubt that the plight of the American Indians was caused and has been perpetuated by European invaders.⁷ They must shield themselves from exploitation by the same group. In addition to being wholly inadequate to combat the problem of poverty in Indian Country, the MTSTA effectively fosters further exploitation.

Part II of this comment provides the necessary background information, including examinations of the current economic status of most American Indians, the historical factors that led to the current economic crisis, and the development of the MTSTA itself. Part III explores the manner in which the MTSTA fails to address the relevant social factors that make American Indians more vulnerable to predatory lending at the hands of off-reservation creditors. Part IV explains why the current economic model adopted by most tribes, with its emphasis on centralized tribal ownership, is more conducive to widespread growth than the system of private business ownership promoted by the Act. Part V examines the advantages that tribally owned enterprises enjoy over economies centered on private enterprise. Part VI briefly examines a few political objectives that tribes should pursue to further development efforts. This comment concludes in Part VII.

II. Background

A. Origins of the Economic Crisis

After they have shaken off their fear of us, they display a liberality in their behavior which no one would believe without witnessing it.

5. *Id.* at 14 (noting that the MTSTA is intended to accommodate commercial activity between tribal members and off-reservation businesses).

6. See Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 858 (2001) (“Tribes must do everything they can to develop the entrepreneurial, capitalist spirit in reservation residents and ensure that more [tribal] businesses are started . . . in Indian country.”).

7. See JON MANCHIP WHITE, *EVERYDAY LIFE OF THE NORTH AMERICAN INDIAN* 210-48 (2003); see also PAUL RADIN, *THE STORY OF THE AMERICAN INDIAN* 364 (1937) (“The Winning of the West meant the annihilation of the Indian.”).

*No request of anything from them is ever refused, but they rather invite acceptance of what they possess, and manifest such generosity that they would give away their own hearts. Let the article be of great or small value, they offer it readily, and receive anything which is tendered in return with perfect content. . . . Such conduct cannot be ascribed to their want of understanding, for they are people of much ingenuity.*⁸

-- Christopher Columbus

The America that Christopher Columbus “discovered” was not one filled with savages. To the contrary, its inhabitants had learned to organize into complex societies, cultivate crops, and live in peace and harmony.⁹ American Indians had their own religious beliefs, which allowed them to align themselves with nature and coexist with minimal conflict.¹⁰ Attempts by European missionaries to convert American Indians to Christianity were usually unsuccessful, as “almost all Indians felt that Christianity offered them very little compared to their own beliefs.”¹¹ Contrary to the well-documented brutality and forced imperialism that had occurred throughout Europe for millennia, “there appear to have been very few instances of extensive warfare” among Indians before the arrival of Europeans.¹² Conflicts among American Indians were usually settled by compromise, and there was enough land and food for everyone.¹³

The peaceful existence of the Native American tribes changed with the arrival of Europeans. Despite that “most Indian tribes openly welcomed, assisted, and traded” with the Europeans, the “Europeans maintained their friendship with the Indians only when it served their interests.”¹⁴ As early European invaders failed to uncover the riches that they had imagined, they began to threaten and kill Indians.¹⁵ Many Indians were kidnapped and sold as slaves in Europe.¹⁶ These early acts were merely the beginning of centuries of exploitation and broken promises. In 1828, Andrew Jackson made removal

8. Letter from Christopher Columbus to Luis de Santangel (Feb. 1493), available at <http://cdlee.files.wordpress.com/2008/08/letter-of-columbus-to-luis-de-santangel.pdf>.

9. See generally KEITH L. PEARSON, THE INDIAN IN AMERICAN HISTORY 1-39 (1973).

10. *Id.* at 26.

11. *Id.*

12. *Id.* at 20.

13. *Id.* at 5, 20.

14. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 2 (3d ed. 2004).

15. PEARSON, *supra* note 9, at 21.

16. *Id.*

policy – the removal of the eastern Indian tribes to the West – the “dominant federal Indian policy of the nineteenth century.”¹⁷ In their treaties with the federal government, “many eastern tribes were promised . . . new homes in Arkansas, Kansas, Iowa, Illinois, Missouri, or Wisconsin.”¹⁸ Nearly all of those treaties were broken.¹⁹

Federal Indian policy took another turn in 1887 with the passage of the General Allotment Act.²⁰ The Act was designed “to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.”²¹ The Act effectively freed land for non-Indian settlement, as tribal members were granted separate parcels of land and remaining tribal lands were sold to non-Indian farmers and ranchers.²² Attempts to assimilate Indians were “fiercely resisted,” and efforts to do so “failed miserably.”²³

After a brief period of benevolence toward Indian tribes under Franklin Roosevelt,²⁴ the United States brought American Indians to the “brink of disaster” during the termination era.²⁵ Nineteen fifty-three marked the beginning of a new policy of terminating the tribes’ trust relationship with the federal government, “and, as a consequence, [the tribes’] loss of federal benefits and support services and the destruction of [the tribes’] government[s] and reservation[s].”²⁶ A relocation program was created in 1956 to offer “job training and housing assistance to Indians who would leave the reservation for urban areas.”²⁷ Nearly one-third of those who joined the program returned to the reservations after the government’s promises went unfulfilled.²⁸

This historical background must not be disregarded. Before we preach the capitalist gospel, we should remain mindful of two points. First, American

17. PEVAR, *supra* note 14, at 7.

18. *Id.*

19. *Id.*

20. *Id.* at 8.

21. *Id.*

22. *Id.* at 8-9.

23. *Id.* at 9.

24. *Id.* at 10 (“Between 1934 and 1953, Indian landholdings increased by over two million acres; federal funds were spent to improve reservation roads, homes, health facilities, community schools, and irrigation systems; and tribal governments experienced a revitalization after a century of oppression.”).

25. *Id.* at 11.

26. *Id.* (“In the decade that followed, Congress terminated its trust relationship with 109 tribes.”).

27. *Id.* at 12.

28. *Id.*

Indians have a rich tradition that allowed them to prosper and coexist peacefully for centuries prior to the European colonization.²⁹ Second, American Indians have repeatedly suffered abuse and exploitation at the hands of Americans who claim to have their best interests in mind.³⁰ Tribes should be mindful of the possibility that the move toward capitalism promoted by the Model Tribal Secured Transactions Act may be reminiscent of these past abuses.

B. Current Economic Conditions in Indian Country

Today, reservation Indians are among the poorest people in the United States.³¹ High rates of “poverty, unemployment, and substandard housing” among Native Americans have caused observers to compare Indian reservations to “third-world countries.”³² The statistics support that comparison. The unemployment rate among Indians is nearly forty-five percent.³³ Close to one-third of Indian households live below the poverty line, and many Indians live without basic necessities “such as running water and electricity.”³⁴ These dire conditions survive despite a surge in development efforts on these lands in recent decades.³⁵

Contrary to popular belief, Indians cannot rely upon gaming to support their economies and lift members of their ranks from poverty. As of 2005, only 224 of the more than 560 existing Indian tribes had gaming operations.³⁶ In addition, “the economic benefits of gaming are not [evenly] distributed throughout Indian Country.”³⁷ This is unlikely to change, as “[m]ost reservations, frequently the most impoverished, are too remote to attract many customers, so incurring sizeable fixed costs for gaming operations would actually reduce tribal welfare.”³⁸ There is also debate as to whether gaming is

29. Cf. WHITE, *supra* note 7, at 114 (“Indian warfare was severely restricted in scope.”).

30. *Id.* at 212 (“The Indian today refers to his ‘Trail of Broken Treaties.’”).

31. Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving Changes for Economic Development*, in MICHAEL W. CAMERON ET AL., WHAT CAN TRIBES DO? 1, 3 (Stephen Cornell & Joseph P. Kalt eds., 1992).

32. Miller, *supra* note 6, at 758-59.

33. PEVAR, *supra* note 14, at 3.

34. *Id.*

35. Miller, *supra* note 6, at 758.

36. Cezar M Froelich et al., *Investing in Tribal Gaming*, 9 GAMING L. REV. 19, 19 (2005).

37. Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285, 286-87 (2009) [hereinafter Clarkson, *Accredited Indians*].

38. David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 187-

“truly advantageous” to those tribes who engage in it, as tribes must “subject[] themselves to increased federal and state regulation” to conduct gaming activity.³⁹ Tribes must therefore pursue alternative and innovative industry if sustainable economic growth is to be achieved.

C. Scope of the Issue

American Indian tribal entities present unique challenges in development economics for several reasons. First, Native Americans have a distinctive history. Centuries of exploitation and coerced displacement have uprooted and eliminated some cultural idiosyncrasies.⁴⁰ Tribes have thus been forced to adapt to changing and unpredictable circumstances while attempting to maintain self-identity. That balancing act continues in full force among most American Indians to this day, and any attempt to significantly alter the economic and political structure of Indian tribes must take such factors into consideration. Furthermore, the tumultuous history of American Indians has fostered a deep skepticism toward the federal government.⁴¹ Where the typical third-world country would clamor for an opportunity to be integrated within the Western global economy, American Indians display an understandable resistance toward assimilation and integration.⁴² Second, the cyclical erosion and restoration of tribal sovereignty has led to an uncertainty among tribal governments that is atypical in the average developing nation.⁴³ Finally, tribes have been incentivized to employ economic structures favoring centralized business ownership and implementation.⁴⁴ This also flies in the face of traditional development economics. International entities such as the World Bank and the International Monetary Fund are notoriously insistent upon open markets, free trade, and private ownership.⁴⁵

88 (2004).

39. Alan E. Brown, *Ace in the Hole: Land's Key Role in Indian Gaming*, 39 SUFFOLK U. L. REV. 159, 160 (2005).

40. THE INDIAN IN AMERICA'S PAST 78 (Jack D. Forbes ed., 1964) (noting “the visible cultural[] and moral degeneration” accompanying the European conquest of Native Americans).

41. PEVAR, *supra* note 14, at 13 (noting that tribes have caused “backlash” in recent decades as they have “increasingly asserted their treaty and statutory rights”).

42. *See id.*

43. *See* Hope M. Babcock, *A Civic Republican Vision of Domestic Dependent Nations in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 511-12.

44. Miller, *supra* note 6, at 762.

45. *See* HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 140 (2003) (objecting to current policy-based conditions attached to financial assistance for developing countries from the International Monetary Fund and World

Among the most daunting of issues facing tribal economic development is the reality that tribes and individuals “lack access to financial capital.”⁴⁶ Tribes “cite lack of capital as one of the five main obstacles they face to economic development.”⁴⁷ It is simply impossible to implement profitable business endeavors without adequate financing.

American Indians generally lack access to the primary methods that businesspeople use to finance new enterprise – “family money, home equity, and the usual credit channels.”⁴⁸ Access to family money, of course, cannot be increased without overall economic improvement. Obtaining home equity is typically even more difficult because the federal government owns fee title to Indian trust land with the tribes retaining a right of occupancy,⁴⁹ and because Indian trust land is consequently subject to transfer restrictions imposed by Acts of Congress, Indian treaties, and proclamations from the Secretary of the Interior.⁵⁰ American Indians who cannot obtain financial capital from public sources such as the federal government therefore must usually rely upon the third method – normal credit channels. Doing so has proved difficult, as perceived instability in tribal governments and policies prevent outside lenders from making investments in Indian Country.⁵¹ Access to capital “is first and foremost a problem of political development”⁵² and is “hampered in Indian Country by the lack of standard laws governing business and lending transactions.”⁵³

D. The Model Tribal Secured Transactions Act—A Primer

The aim of the MTSTA is to govern the law of secured transactions among Indian tribes that have adopted the Act.⁵⁴ A secured transaction is a transaction that is founded on a security agreement and gives rise to a security

Bank) [hereinafter CHANG, KICKING].

46. Cornell & Kalt, *supra* note 31, at 6.

47. Joanna M. Wagner, Comment, *Improving Native American Access to Federal Funding for Economic Development Through Partnerships with Rural Communities*, 32 AM. INDIAN L. REV. 525, 527 (2007-2008).

48. *Id.* at 542.

49. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 562 (1823).

50. John McGee Ingram, *Home Ownership Opportunities in Indian Country*, 7 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 164, 165 (1998).

51. Cornell & Kalt, *supra* note 31, at 11.

52. *Id.*

53. Tim Berg, *Growing Indian Economies*, ARIZ. ATT’Y, Mar. 2006, at 30, 32.

54. MODEL TRIBAL SECURED TRANSACTIONS ACT IMPLEMENTATION GUIDE, *supra* note 4, at 11.

interest.⁵⁵ A security interest is a property interest created to secure performance of an obligation.⁵⁶ A mortgage agreement, for example, is a secured transaction.⁵⁷ In a mortgage situation, a creditor forwards money to a debtor in return for the debtor's promise to repay the loan.⁵⁸ As a condition for the loan, the creditor takes an interest in the debtor's real property that may become possessory if the debtor fails to repay the loan.⁵⁹ The creditor is "secured" by the debtor's property.⁶⁰

The MTSTA governs transactions that are similar to the mortgage situation in most respects, except the nature of the collateral. The MTSTA is similar to Article 9 of the Uniform Commercial Code in that it governs secured transactions concerning security interests in personal property rather than realty.⁶¹ Creditors prefer to be secured creditors for two main reasons. First, secured transactions provide strong incentives to debtors to pay their debts.⁶² When a restaurant owner stands to lose vital equipment upon failure to repay a loan, her entire livelihood may be at stake. She will certainly have strong incentives to make that loan a priority as she pays her debts. Second, in the event that the debtor defaults, the creditor will be in a better position to recover all or part of the debt owed to it.⁶³ If our hypothetical restaurant owner failed to pay the debt owed to a bank, the bank would thus be able to foreclose on her equipment and use the proceeds from sale to recover what is owed.⁶⁴

Outside banks have proven reluctant to lend money to individuals and entities in Indian Country largely because of fears that their interests will not be enforced by tribal governments and courts.⁶⁵ Furthermore, the variances in law and policy among the more than 560 American tribes are seen as a burden

55. *Id.* at 13.

56. BLACK'S LAW DICTIONARY 1478 (9th ed. 2009).

57. LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 21 (6th ed. 2009).

58. GRANT S. NELSON & DALE A. WHITMAN, CASES AND MATERIALS ON REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 99-100 (7th ed. 2006).

59. *Id.*

60. *Id.* at 100.

61. See Edwin E. Smith & Bingham McCutchen, *What Lawyers Need to Know About UCC Article 9: Secured Transactions 2008*, 903 PLI/COMM 101 (2008).

62. LOPUCKI & WARREN, *supra* note 57, at 22.

63. See *id.*

64. See *id.*

65. U.S. DEP'T OF THE TREASURY, COMMERCIAL LENDING IN INDIAN COUNTRY: POTENTIAL OPPORTUNITIES IN AN EMERGING MARKET 11 (Mar. 2006), available at <http://www.occ.treas.gov/cdd/commlending.pdf>.

to lenders who otherwise can adhere largely to a single body of law in all fifty states.⁶⁶

The NCCUSL promulgated the MTSTA in 2005 to address the issue of uniformity and lender security.⁶⁷ NCCUSL is also the organization responsible for drafting the Uniform Commercial Code, Article 9 of which governs secured transactions, in whole or significant part, in all fifty states.⁶⁸ The NCCUSL took steps to ensure that the MTSTA was sensitive to the cultural and economic customs of the Indian tribes.⁶⁹ The Act was drafted in liaison with Native American tribes to ensure that such factors were taken into account.⁷⁰ Despite attempts to ensure that the MTSTA is sensitive to the cultural and ethnic considerations of American Indians, it simply does not offer adequate protection to those who are unfamiliar with the Darwinian nature of the American capitalist system.

III. The Problem of Predatory Lending⁷¹

Adam Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations*,⁷² released in 1776, earned its Scottish author the title "the father of modern economic theory."⁷³ Perhaps the most influential theme of the book is that of the "invisible hand" – the concept that the aggregate of all individuals, guided by self-interest in a society, will have the cumulative effect of creating wealth in the overall society.⁷⁴

66. See generally Bruce A. King, *The Model Tribal Secured Transactions Act and Tribal Economic Development*, 61 CONSUMER FIN. L. Q. REP. 804 (2007).

67. See Woodrow & Miller, *supra* note 2, at 39.

68. See King, *supra* note 66, at 808.

69. MODEL TRIBAL SECURED TRANSACTIONS ACT IMPLEMENTATION GUIDE, *supra* note 4, at 19.

70. King, *supra* note 66, at 804.

71. Much controversy exists as to the precise definition of the term "predatory lending." For our purposes, predatory lending has two essential characteristics: "(1) a wide range of lender behavior that is either substantively or procedurally unreasonably abusive, exploitive, harmful, or unfair; (2) a pool of borrowers that are particularly vulnerable targeted and exploited precisely because of their vulnerability." Cecil J. Hunt II, *In the Racial Crosshairs: Reconsidering Racially Targeted Predatory Lending Under a New Theory of Economic Hate Crime*, 35 U. TOL. L. REV. 211, 222 (2003).

72. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Edwin Cannan ed., 1904) (1776).

73. John Mixon, *Neoclassical Economics and the Erosion of Middle-Class Values: An Explanation for Economic Collapse*, 24 NOTRE DAME J.L. ETHICS & PUB POL'Y 327, 333 (2010).

74. Jeanne M. Dennis, *The Lessons of Comparable Worth: A Feminist Vision of Law and*

The United States has implemented much of Smith's theory with obvious success. An illustrative application of Smith's invisible-hand theory to the current discussion would appear as follows: Off-reservation lenders seeking to attain wealth will make loans in Indian Country that they deem worth the risk so that they may profit by collecting interest. Similarly, Indians, also seeking wealth, will accept those loans if they consider the terms of the loans offered by off-reservation lenders to be satisfactory. In an ideal scenario, each party will correctly make the decisions that are most individually favorable, and each party, in turn, will benefit. Rarely is reality so seamless. In the real world, the party with the greatest bargaining power will tend to receive more favorable treatment under the agreement.⁷⁵ While the typical off-reservation bank will have no trouble surviving without issuing high-risk loans in Indian Country, the struggling American Indian will likely find any loan – even those that make him extremely vulnerable – to be attractive.

Lenders are known to target America's poorest people.⁷⁶ It is therefore unsurprising that Native Americans are disproportionately affected by predatory lending, according to a recent study carried out by the Center for Responsible Lending.⁷⁷ Actualizing the MTSTA's stated objective of facilitating private investment could open a Pandora's box of unfair business dealing and manipulation, doing more harm than good to consumers and aspiring business owners. For several reasons, including a lack of experience with the American financial system, language issues, and the increased risk caused by legal uncertainty in Indian Country, American Indians may be even more vulnerable than other minority groups in similar economic circumstances to the harmful lending practices of financial institutions. The MTSTA does not do enough to combat this threat, and unfortunately, strong efforts to amend the Act would ultimately eliminate its effectiveness.

A. Factors Rendering Native Americans Vulnerable to Predatory Lending

1. Lack of Financial Literacy

Financial illiteracy in the face of today's exotic lending market has proven

Economic Theory, 4 UCLA WOMEN'S L.J. 1, 16 (1993).

75. See JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 215-16 (1975).

76. Megan S. Knize, *Payday in Louisiana, Mississippi, and Arkansas: Toward Effective Protections for Borrowers*, 69 LA. L. REV. 317, 323 (2009).

77. Michael E. Roberts, *Limit Financial Setbacks with Consumer Protection*, INDIAN COUNTRY TODAY (Dec. 18, 2009), <http://www.indiancountrytoday.com/opinion/79611412.html>.

to be a pervasive issue that affects more than the country's poor.⁷⁸ Even among highly educated people, a good proportion are not financially literate.⁷⁹ Lack of financial literacy could be a critical issue in Indian Country for at least three reasons. The first issue concerns the performance of the educational systems in Indian Country. Tribal school student performance remains significantly lower than that of public school students, and drop-outs are disproportionately high.⁸⁰ In addition, "half [of] the adult Indian population lacks a high school diploma."⁸¹

The second problem is linguistic in nature. "As recently as 1994, approximately one-third of all students in BIA and tribal schools spoke a language other than English in their home, and . . . about twenty-eight percent had limited English proficiency."⁸² Without a strong grounding in the English language, it is unlikely that a borrower could understand the complex legalese often present in security agreements.

Finally, American Indians' lack of experience in dealing with off-reservation banks could prove problematic. While many Americans acquire extensive experience with the financial system as they secure mortgage loans to buy a home, Native Americans rarely gain such experience.⁸³ In fact, "even middle and upper income Indians on reservations are confronted by inadequate housing, a situation aggravated by a lack of access to home mortgages."⁸⁴ Another factor that leads to limited experience with commercial lenders is the nature of most tribal economies, which tend to feature relatively little private enterprise.⁸⁵ While tribal governments are experienced in matters regarding

78. *Clues for the Clueless*, NEWSWEEK (Apr. 05, 2008), <http://www.newsweek.com/id/130590>.

79. *Id.*

80. Jonathan M. Lindeen, Comment, *BIA Tribal Schools and the No Child Left Behind Act: An Argument for a More Culturally Sensitive Implementation*, 9 J. GENDER RACE & JUST. 361, 364-69 (2005).

81. PEVAR, *supra* note 14, at 3.

82. Lindeen, *supra* note 80, at 368.

83. See Ingram, *supra* note 50, at 164-67 (noting that numerous factors, including the inalienability of trust land, the absence of market data available to lenders, and the limited enforceability of contracts requiring the tribe to be a party severely hamper the possibility of widespread home ownership in Indian Country).

84. Yair Listokin, *Confronting the Barriers to Native American Home Ownership on Tribal Lands: The Case of the Navajo Partnership Housing*, 33 URB. LAW. 433, 433 (2001).

85. See Miller, *supra* note 6, at 758-59.

business and development,⁸⁶ the typical reservation inhabitant simply does not have that experience.⁸⁷

2. Risk

A very thin line separates unfair predatory lending and equitable, mutually beneficial subprime lending.⁸⁸ Virtually all lenders scrutinize the ability of potential borrowers to repay a loan by examining, *inter alia*, their income, assets, and credit history.⁸⁹ Borrowers who are deemed to pose higher risks are charged higher rates than those who seem to pose little risk of non-repayment.⁹⁰ Trouble arises when lenders charge excessive rates to desperate borrowers under the guise of fair subprime lending. Even if tribes implement the MTSTA, lenders will still claim that loans granted in Indian Country are excessively risky.

Article 9 of the Uniform Commercial Code has been in place in all fifty states for decades.⁹¹ Lenders can simply look to a state's case law to determine how issues arising under the statute will be handled. Conversely, lenders in the immediate future will be unable to look to tribal courts, which are not bound by the precedent of any state.⁹² Furthermore, attempts by lenders to insert contractual provisions designed to minimize jurisdictional quarrels may be ineffective. For example, a contractual provision granting an off-reservation lender a right to self-help repossession of property located on reservation land could be deemed unenforceable if the provision conflicts with tribal law. Such was the case in *Babbitt Ford v. Navajo Indian Tribe*.⁹³ This legal uncertainty, coupled with the high poverty rates of American Indians and the potential difficulty of repossessing collateral on reservation lands, would do much to support a lender's assertion that loans to tribal debtors warrant

86. Miller, *supra* note 6, at 760 ("Today, Indian tribes organize, fund, and, in many instances, operate or direct day to day affairs of many of the businesses and the majority of economic activity in Indian country.").

87. Cornell & Kalt, *supra* note 31, at 6-7 (noting that "[e]ntrepreneurial skills and experience are scarce" in Indian Country).

88. U.S. DEP'T OF TREASURY & U.S. DEP'T OF HOUSING AND URBAN DEV., CURBING PREDATORY HOME AND MORTGAGE LENDING 2, 27 (2000) [hereinafter HUD REPORT].

89. *Id.*

90. Deborah Goldstein, Comment, *Protecting Consumers from Predatory Lenders: Defining the Problem and Moving Toward Workable Solutions*, 35 HARV. C.R.-C.L. L. REV. 225, 229 (2000).

91. See King, *supra* note 66, at 808.

92. Gabriel S. Galanda, *Reservations of Right: A Practitioner's Guide to Indian Law*, BRIEF, Fall 2002, at 64, 65, available at Westlaw, 32-FALL BRIEF 64.

93. 710 F.2d 587 (9th Cir. 1983).

high rates of interest. It is almost inevitable that many loans, examined either *ex ante* or *ex post*, would be deemed unfair or even predatory.

3. Race

We must not deny reality. Native Americans will likely be targeted with unfair lending practices because of their race. The subprime predatory lending problem is disproportionately concentrated in minority communities.⁹⁴ Statistics indicate that the gap in subprime lending practices cannot be explained by disparities in income alone.⁹⁵ A HUD/Treasury study determined that the disproportionate concentration of predatory lending in minority groups existed not only in low- and moderate-income neighborhoods, but in high-income neighborhoods as well.⁹⁶ The study's findings are startling. For example, the study found that "borrowers . . . in upper-income black neighborhoods [are] twice as likely as homeowners in low-income white neighborhoods to refinance with a subprime loan."⁹⁷

HUD gives several reasons for the discrepancy. The HUD report asserts that "the disproportionate amount of subprime lending in certain neighborhoods likely results from the following factors: differences in credit characteristics of borrowers; differences in the types of loans (e.g. small balance loans); and less competition from mainstream lenders."⁹⁸ Moreover, it asserts that "[l]ow-income and minority neighborhoods may be especially vulnerable to abusive lending practices because subprime lending tends to be concentrated in these neighborhoods."⁹⁹

Notwithstanding HUD's conclusions, American Indians are free to make their own inferences in response to these statistics. My feeling, however, is that Native American tribes that adopt the MTSTA are inviting the same type of harmful lending practices documented in the HUD study. The MTSTA simply does not provide adequate protection against racially disproportionate predatory-lending practices.

94. Hunt II, *supra* note 71, at 235.

95. *Id.*

96. *Id.*

97. *Id.* at 235-36.

98. HUD REPORT, *supra* note 88, at 47.

99. *Id.*

B. Shortcomings of the MTSTA

There is no doubt that entering into business is inherently risky. Attempts to eliminate that risk are generally futile and often harmful.¹⁰⁰ The MTSTA, however, barely accounts for the excessive risks posed to potential tribal debtors entering into agreements with off-reservation lenders. The Act fails most significantly in three areas: (1) it maintains the same consumer/commercial distinctions as Article 9 of the Uniform Commercial Code without offering enhanced protection for tribal commercial debtors, (2) it places no additional limits on what can serve as collateral to secure a loan, and (3) it places no limitations on a debtor's ability to declare default under an "insecurity clause," leaving the flimsy "fair dealing" duty as a debtor's only protection.¹⁰¹ Each of these issues will be examined in turn.

1. Consumer/Commercial Debtor Distinction

The Uniform Commercial Code includes several specific protections for consumer debtors, as opposed to commercial ones.¹⁰² The rationale behind these provisions is that consumers are generally less knowledgeable of commercial business practices and are therefore more susceptible to exploitation.¹⁰³ The same rationale may be applied to commercial debtors on many Indian reservations. Many tribes have not opened their markets to facilitate widespread private enterprise among members.¹⁰⁴ New business owners thus may be as vulnerable to exploitation by experienced investors as consumer borrowers. It is therefore critical to include provisions that ensure borrowers will be informed of their rights and duties with respect to secured credit. Fortunately, much can be done in this regard without substantially burdening the rights of creditors.

If such protections are not implemented to protect tribal commercial debtors, then it is imperative that tribal governments find some way to ensure that budding business owners have access to adequate legal counsel and/or business education. Off-reservation creditors are likely to target inexperienced

100. See Dennis, *supra* note 74, at 16 (noting the assertion of neoclassical economists that "government involvement in market transactions" are "unnecessary and disruptive").

101. MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-113 (2006).

102. See Smith & McCutchen, *supra* note 61, at 153.

103. See Jean Braucher, *Deadlock: Consumer Transactions Under Revised Article 9*, 73 AM. BANKR. L.J. 83, 93-94 (1999).

104. See Miller, *supra* note 6, at 759-60.

tribal businesspeople.¹⁰⁵ The frequent distinctions between consumer and commercial debtors make those business owners substantially more vulnerable to abuse.¹⁰⁶

2. *No Limitations on What Can Serve as Collateral*

The lack of home ownership in Indian Country has a substantial impact on overall tribal economies. Nearly a third of all home-equity lines of credit in the United States are taken out for business purposes.¹⁰⁷ Far too few Indians own homes to support sustainable business growth and necessary access to affordable capital sources.¹⁰⁸ Complex legal issues, including the inalienability of Indian trust land by tribes and their members absent government consent, have rendered individual home ownership in Indian Country almost nonexistent.¹⁰⁹ Because of such barriers, “home ownership rates for [] moderate- and higher-income Native Americans are still well below home ownership rates for non-Indians at the same income level.”¹¹⁰

The nature of ownership in Indian Country demands that most American Indians find sources other than their homes to serve as collateral for off-reservation loans.¹¹¹ Limits on what may serve as collateral are non-existent in the Act. States typically deal with this issue by passing “exemption statutes,” which protect debtors by sheltering specified property from forced

105. See Patricia A. McCoy, *A Behavioral Analysis of Predatory Lending*, 38 AKRON L. REV. 725, 735 (2005).

106. There are several instances in the MTSTA in which consumer debtors receive added protection. First, creditors must provide a more specific description of collateral in a consumer transaction than in a commercial one. MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-116(c) (2006). Second, there are limitations set on the effectiveness of an after-acquired property clause in consumer transaction. *Id.* § 9-203(b). Third, twenty days notice is required for disposition of collateral in consumer transactions, with only ten required in case of commercial debtors. *Id.* § 9-612(b). Fourth, creditors are required to offer a detailed explanation of the calculation of surplus or deficiency after disposition in consumer transactions. *Id.* § 9-616. Fifth, creditors may not retain collateral in partial satisfaction of an obligation in consumer transactions. *Id.* § 9-620(a). Sixth, disposition of collateral is mandatory if sixty percent of the principal amount has been paid by a consumer debtor. *Id.* § 9-620(e).

107. Craig Nolte, *Sovereign Lending: Bringing Housing to Indian Country*, COMMUNITY INVESTMENTS, May 2000, at 15, available at <http://www.frbsf.org/publications/community/investments/cra00-1/MayCINewsMay00.pdf>.

108. *Id.*

109. See Ingram, *supra* note 50, at 164-66.

110. *Id.* at 168.

111. See Clarkson, *Accredited Indians*, *supra* note 37, at 298 (“[A]s of 1999, there were only 471 home mortgages throughout Indian Country.”).

sale.¹¹² Any tribe that elects to pass the MTSTA as proposed must be sure that it contains an exemption provision providing adequate protection to tribal debtors.

One Navajo Nation tribal court judge noted that granting security interests in collateral essential to one's survival renders debtors exceptionally vulnerable to the whims of creditors.¹¹³ Commenting on the negative nature of the self-help-repossession remedy, the Navajo Tribal Court has labeled the doctrine of self-help "an archaic legal provision" that has permitted businesspeople to "ride rough shod over consumers" by "holding [] essential property needed for daily life as a means of extorting money from the consumer."¹¹⁴

Given the lack of home ownership in Indian Country, it is difficult to imagine the items of value that desperately poor Indians would pledge as collateral. Without protection, American Indians would certainly be vulnerable to the type of extortionate practices railed against by the Navajo Nation court.

3. Exploitation Through Default Provisions

A secured party may carry out the remedies made available in the MTSTA only after default on the part of the debtor.¹¹⁵ The prospect of debtor abuse arises when "default" is not clearly defined.¹¹⁶ Generally, "default" is defined as "the debtor's failure to pay a debt when due or otherwise perform the agreement between the debtor and creditor."¹¹⁷ The precise terms of default are stipulated in the security agreement between the parties, and agreements generally contain broad definitions of default that favor the creditor.¹¹⁸ Most agreements include an insecurity clause, which generally states that a debtor is in default "[w]henever [the] Secured Party in good faith believes the prospect of payment or performance is impaired or in good faith believes the collateral is insecure."¹¹⁹ Such an expansive provision gives a creditor almost unlimited authority to call a loan at his option. Debtors, however, are protected under the MTSTA by a provision requiring parties to "be honest and

112. 31 AM. JUR. 2D *Exemptions* § 3 (2010).

113. *Russell v. Donaldson*, 3 Navajo Rptr. 209, 213 (Navajo 1982).

114. *Id.*

115. MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-601(a) (2006).

116. *Cf. LOPUCKI & WARREN, supra* note 57, at 217.

117. *Id.*

118. *Id.*

119. *Id.* at 218.

act in a manner that is consistent with reasonable commercial standards of fair dealing.”¹²⁰ The question of what constitutes “good faith” in calling a loan is therefore not left entirely to the discretion of the creditor. A tribal court would have the authority under the MTSTA to impose its own definition of good faith and fair dealing if the issue were to arise. The lack of concrete limitations on when creditors may call a loan could, however, be problematic. Reliance upon the good-faith provision gives tribal courts a great deal of discretion, but distrust of tribal courts among off-reservation creditors could increase the risk profile of loans in Indian Country. Such an increase in risk would undoubtedly be accompanied by increases in interest rates.¹²¹

Tribes that adopt the MTSTA could provide additional protection to debtors by adding statutory provisions requiring creditors to notify debtors of their intent to accelerate, which would grant the debtor a chance to cure and reinstate.¹²² Some courts have imposed the requirement judicially. The Ninth Circuit, for example, has stated that “[b]oth state and federal courts have made clear the unquestionable principle that, even when the terms of a note do not require notice or demand as a prerequisite to accelerating a note, the holder must take affirmative action to notify the debtor that it intends to accelerate.”¹²³

Regardless of which solution adopting tribes choose, off-reservation creditors cannot be granted excessive leeway in declaring default and accelerating loans against tribal debtors. The balance of power in these transactions already favors off-reservation creditors.¹²⁴ The ability to evoke an agreement’s insecurity clause to call a loan would grant creditors extraordinary leverage and harmful influence.

120. MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-113.

121. MODEL TRIBAL SECURED TRANSACTIONS ACT IMPLEMENTATION GUIDE, *supra* note 4, at 13.

122. “Accelerate” refers to a creditor’s ability to declare all payments owed by a debtor immediately due and payable. LOPUCKI & WARREN, *supra* note 57, at 221-22. “[A] debtor has the right to ‘cure’ a default by paying the amount then due” if the debtor does so before the creditor elects to accelerate. *Id.* at 226. Once the debtor has cured the default, the original payment schedule is “reinstated.” *Id.* at 227.

123. *In re Crystal Props., Ltd.*, 268 F.3d 743, 749 (9th Cir. 2001) (emphasis removed).

124. LOPUCKI & WARREN, *supra* note 57, at 226 (“The typical agreement permits the creditor to accelerate for any default, however small.”).

C. Why Correcting the Act Is Impractical: The Necessity of the Self-Help Remedy

Identifying the flaws in the MTSTA is easy. Yet, because of the nature of the Act and the business of lending, correcting these flaws is virtually impossible. Creditors will be unwilling to invest in Indian Country if their rights are not protected, and the MTSTA already includes an enormous concession that could deter creditors: the absence of a self-help-repossession remedy.¹²⁵ An in-depth discussion of this omission is warranted for two reasons. First, the decision is easily the MTSTA's most noteworthy departure from Article 9. Virtually no discussion of the Act would be complete without addressing its absence. Second, the absence of a self-help-repossession remedy illustrates how difficult it is to shift the balance of power legislatively by offering enhanced debtor protection. Each action taken to protect debtors reduces the efficacy of the Act.

Section 9-609 of the MTSTA limits the manner in which secured creditors can take possession of property after default by a debtor.¹²⁶ The creditor may take possession unless otherwise agreed by the parties, but the secured party may do so only after obtaining consent of the debtor or acquiring the right through the judicial process.¹²⁷ This provision differs from Article 9 of the Uniform Commercial Code, which allows a secured party to repossess collateral without appealing to the judicial process.¹²⁸ In a legislative note, the NCCUSL observes the economic efficiencies of allowing self-help repossession and implicitly suggests that adopting tribes consider a provision modeled after the Uniform Commercial Code.¹²⁹

The Committee's stated reason for requiring debtor consent or judicial authorization as a prerequisite for repossession of collateral is "that issues involving repossession are typically reserved to Tribal courts."¹³⁰ It is more likely, however, that the Committee simply did not want to deter tribes from adopting the MTSTA by including one of the most controversial elements of Article 9. Even in general American society, where the cultural divisions are not nearly as pronounced as those involving transactions between reservation

125. See generally MODEL TRIBAL SECURED TRANSACTIONS ACT.

126. *Id.* § 9-609.

127. *Id.*

128. UNIF. COMMERCIAL CODE § 9-609 (2000).

129. MODEL TRIBAL SECURED TRANSACTIONS ACT IMPLEMENTATION GUIDE, *supra* note 4, at 83.

130. *Id.*

borrowers and off-reservation lenders, the self-help remedy of Article 9 has caused a great deal of friction and litigation.¹³¹ The Code stipulates that secured parties may use the remedy only if they can do so without breaching the peace.¹³² The contention surrounds the repossession service's legal boundaries in seizing collateral without breaching the statutory duty.¹³³

It is obvious why this provision would generate great scrutiny among Indian tribes. One can only imagine the potential for commotion as outside lenders encroach upon reservation property to seize goods in the possession of its inhabitants. In addition to provoking resistance from tribal citizens, issues such as this can easily be mired in legal complexities involving tribal sovereignty.¹³⁴ Long before the MTSTA was promulgated, tribal courts expressed disdain for the self-help provision.¹³⁵ There is a logical fear that outside lenders, often unsympathetic to the cultural sensitivities of tribal people, will use the leverage acquired through a security interest to abuse debtors.¹³⁶ Any community looking to adopt the MTSTA must address the issue, as a failure to do so could result in a rejection of the Act by tribal members.

Despite the complications introduced by inclusion of the self-help remedy, the availability of self-help repossession is crucial to creditors, and a piece of legislation that does not afford the remedy may not satisfactorily achieve its end. The remedy is not novel, as “[e]ven before the [Uniform Commercial Code], [] creditor[s] w[ere] allowed to repossess [] chattel[s] using self-help methods.”¹³⁷ For several reasons, the remedy is popular and pervasive despite its obvious faults. Litigation and law enforcement can be expensive and

131. See Eugene J. Kelly, Jr. et al., *Secured Party Liability for the Acts of Repossessors: Exposure, Protective Steps, and Ethical Responsibility*, 55 CONSUMER FIN. L.Q. REP. 158, 159-61 (2001).

132. UNIF. COMMERCIAL CODE § 9-609.

133. Kelly, Jr. et al., *supra* note 131, at 160-61.

134. See Steven W. Bugg, *The Business Ramifications of Tribal Sovereign Immunity: Life After Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 53 CONSUMER FIN. L.Q. REP. 59, 61 (1999) (noting that states will not aid lenders in obtaining pledged property in Indian Country, and that tribal legal systems comprise the sole remedy).

135. See *Russell v. Donaldson*, 3 Navajo Rptr. 209, 213 (Navajo 1982).

136. See *id.* (“[Self-help repossession] permits sellers to ride rough shod over consumers and use the holding of essential property needed for daily life as a means of extorting money from the consumer.”).

137. Stephen M. Cozart, Note, *Through the Eyes of the Debtor: Mississippi Reexamines the Breach of the Peace Exception to Uniform Commercial Code Section 9-503*, 15 MISS. C.L. REV. 145, 147 (1992).

inconvenient.¹³⁸ In American courts, creditors “must obtain a court order for possession” before enlisting the sheriff to levy on the property at issue, and “[t]he easiest way to obtain such an order is by filing an action for replevin.”¹³⁹ The creditor can usually get a hearing within ten to twenty days, but the party must usually post a bond to protect the debtor in the event that the debtor ultimately prevails in the action.¹⁴⁰ Alternatively, exercising the right to self-help repossession typically saves time and money.¹⁴¹ Furthermore, debtors who will soon be dispossessed of a piece of property “may have little incentive to preserve and maintain the property.”¹⁴² Once alerted of an impending repossession, debtors may even actively seek to diminish the value of the collateral.¹⁴³ Self-help repossession therefore aids in protecting the property at issue.

That the omission of a single provision could potentially jeopardize the effectiveness of the entire Act is illustrative of a greater dilemma. Exploitation of tribal debtors by off-reservation lenders should be expected if legislation is passed to facilitate off-reservation lending. Attempts to minimize such predatory practices, however, could render the MTSTA useless. Unless the benefits of the legislation outweigh the risks, it should be rejected.

IV. Exploring the Act's Potential for Actual Effectiveness

There is truth to the adage, “Beggars cannot be choosers.” But that adage is not applicable here. Admittedly, the potential evils regarding predatory lending seem minor in comparison to the dire economic circumstances facing the vast majority of reservation Indians. If the MTSTA – along with the accompanied shift toward private business ownership – could serve as a viable tool in facilitating real economic development, no one would allow the potential for exploitation to stand in its way. Regrettably, the Act is unlikely to abet development efforts. While the current economic models of most tribes have clearly been ineffective,¹⁴⁴ those models should not be abandoned.

138. LOPUCKI & WARREN, *supra* note at 57, at 43.

139. *Id.* at 39.

140. *Id.* at 39-40.

141. *Id.* at 43.

142. *Id.* at 38.

143. *Id.* at 38-39. The MTSTA does not empower the creditor to employ judicial means to retain collateral, which means that the debtor would be aware of the pending repossession. MODEL TRIBAL SECURED TRANSACTIONS ACT § 9-601 (2006).

144. Miller, *supra* note 6, at 798 (noting that the majority of Native American “‘governmental’ businesses and economic activities” have been unsuccessful).

Instead, tribes should seek to improve the efficiency of the current models while making only gradual, controlled movement toward economic assimilation.

The MTSTA is designed to promote loans to private individuals who seek to start and operate private businesses.¹⁴⁵ Governments who seek to obtain financial capital do not do so through the type of private loans governed by the MTSTA.¹⁴⁶ The adoption and success of the Act thus is contingent on the ability of private individuals to start businesses in the first place. American Indians rank “last in the United States in the number of privately owned businesses and business income per capita.”¹⁴⁷ A large percentage of commercial enterprise in tribal areas is owned, run, and operated by tribal governments.¹⁴⁸ The current economic systems of Indian tribes resulted largely from past federal Indian policy in which the federal government operated and funded much commercial activity in Indian Country.¹⁴⁹ As a consequence of these policies, the economic systems of most tribal governments resemble socialist economies.¹⁵⁰

Tax incentives provided by the federal government also encourage tribes to adopt socialist structures. Specifically, “[t]ribes are exempt from state and federal income taxes, empowered to levy their own taxes and devise their own business codes, and often exempt from federal and/or state economic regulation.”¹⁵¹ There is no doubt that the socialist structure of most tribal economies presents problems. Most scholars argue that such schemes are unsatisfactory and will not lead to sustained development. One such scholar asserts that “the number one problem for tribal enterprises is separating politics from day-to-day business affairs.”¹⁵² Another shortcoming of this type of system is that managers may not be adequately motivated to work toward the firm’s profit maximization.¹⁵³ In private firms, shareholders ensure that

145. MODEL TRIBAL SECURED TRANSACTIONS ACT IMPLEMENTATION GUIDE, *supra* note 4, at 13.

146. See Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009, 1030-31 (2009) [hereinafter Clarkson, *Tribal Bonds*] (explaining the nature of municipal debt).

147. Miller, *supra* note 6, at 827.

148. *Id.* at 760.

149. *Id.*

150. *Id.* at 760-61.

151. Cornell & Kalt, *supra* note 31, at 36.

152. *Id.* at 37.

153. *Id.* at 31.

performance by managers is adequately compensated and rewarded.¹⁵⁴ Conversely, “[i]t generally has not been politically acceptable for government officials to gain significantly off the operations of businesses that are . . . publicly owned.”¹⁵⁵

Attempts to ensure that management in state-owned operations will have adequate incentives by linking pay to performance are generally ineffective. As economist Ha-Joon Chang explains, the difficulty results from phenomenon known as the “principal-agent problem,” which is caused by the “fundamental gap in information” that exists between the citizenry (principals) and hired managers (agents).¹⁵⁶ Essentially, “the principal will find it very difficult to prove that” the business’s “poor performance” was caused by the agent’s deficient management.¹⁵⁷

Another factor contributing to the inefficiency of state-run enterprises is the “free-rider” problem. This term refers to “[t]he problem [] that any increase in profit resulting from the extra monitoring of the [state-owned enterprise] managers by some citizens will be shared by every citizen, while only those citizens who do the monitoring pay the costs.”¹⁵⁸ The effect is that the effort expended by the monitoring citizens will not reap adequate returns for those individuals. Everyone will elect to “free-ride,” and no one will take the necessary action to detect and eliminate poor managerial performance.

These problems are mitigated among Indian tribes because the effective stockholders in Indian tribes (the voting-age members of the tribe) are relatively few in number and have personal access to agents.¹⁵⁹ These tribal members can pressure agents to serve their interests.

While the state-owned enterprise has its downsides, the private-sector firm is vulnerable to the very same issues.¹⁶⁰ In the future, it will likely be wise for tribes to make some movement toward private ownership; however, wholesale abandonment of current tribal economic principles is unnecessary. Such a

154. *Id.* at 37.

155. *Id.*

156. HA-JOON CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* 105 (2008) [hereinafter CHANG, *SAMARITANS*].

157. *Id.*

158. *Id.* at 105-06.

159. Cornell & Kalt, *supra* note 31, at 37.

160. CHANG, *SAMARITANS*, *supra* note 156, at 107 (noting that in situations in which “a private enterprise is run by hired managers and there are numerous shareholders owning only small factions of the company, . . . [t]he hired managers . . . will [] have no incentive to put in more than sub-optimal levels of effort . . . , while individual shareholders will not have enough incentive to monitor the hired managers”).

shift would be impractical because tribal governments would be unable to raise adequate revenue by taxing tribal members.¹⁶¹ Most importantly, a drastic shift toward the American capitalist structure will likely be wholly ineffective in sparking tribal economies because many tribes will have trouble obtaining adequate revenue to perform standard government functions, and private entrepreneurship is unlikely to spark the type of economic growth needed to promote wholesale employment.

A. The Need for Tribal Revenue

The dire economic condition of most American Indian tribes also plays a role in the development and maintenance of pseudo-socialist economic systems. Because such a large percentage of Indian Country inhabitants live in extreme poverty, it is impractical for tribal governments to raise revenues by taxing those members.¹⁶² To provide basic goods and services for its members, tribes must therefore raise revenue through alternative methods. Operating businesses and reaping profits is a practical way to achieve this end.

High rates of poverty and the attendant failure of social institutions in Indian Country necessitate social welfare institutions.¹⁶³ Such institutions, including those designed to promote health and education, are necessary for economic development.¹⁶⁴ To this point, Chang asserts,

Cost-effective public provision of health and education can bring about improvements in labour [sic] force quality that can, in turn, raise efficiency and accelerate productivity growth. Social welfare institutions reduce social tensions and enhance the legitimacy of the political system, thus providing a more stable environment for long-term investments. Inter-temporal smoothing of consumption through devices like unemployment benefit can even contribute to dampening the business cycle. And so on.¹⁶⁵

Social welfare institutions are costly.¹⁶⁶ “State and local governments obtain revenues to finance their operations primarily through three channels:

161. Miller, *supra* note 6, at 833 (“Few tribes have access to substantial sources of taxation because of a lack of economic activity.”).

162. *Id.*

163. Cornell & Kalt, *supra* note 31, at 3 (“Indian reservations continue to experience . . . high dependency on welfare.”).

164. CHANG, KICKING, *supra* note 45, at 102.

165. *Id.*

166. *Id.*

tax revenues, borrowing, and federal grants.”¹⁶⁷ Absent substantial increases in federal monies, tribes that move away from the tribally-run-enterprise system must rely on taxation and borrowing. Borrowing, however, is probably not a viable option for most tribal governments. While some tribal governments have the ability to issue tax-exempt bonds – debt securities “in which the interest portion of the debt service paid is not included in gross income”¹⁶⁸ – the borrowed proceeds must be used in the exercise of essential governmental functions,¹⁶⁹ and those tribes must nonetheless compete with other government entities for those funds.¹⁷⁰ While “[b]orrowing has increasingly become a favored method of raising revenue for state and local governments,”¹⁷¹ the tax-exempt status of municipal bonds means that municipalities can borrow at lower rates than Indian tribes.¹⁷² The inability to offer tax-exempt debt severely limits the ability of smaller tribes to borrow competitively.¹⁷³

Taxation is also not a viable method of raising revenue for Indian tribes.¹⁷⁴ Though there is great debate surrounding the efficacy and fairness of the American progressive-tax system, “theorists on both sides of the debate . . . agree that legislators and policymakers must avoid imposing tax costs on individuals living at or below subsistence levels of income.”¹⁷⁵ Similarly, tribal governments must avoid overtaxing their poorest citizens. Obviously, this would include a large percentage of the citizenry of most tribes. Effective taxation in Indian Country thus would require tribal governments to impose heavy taxes upon their wealthiest members. Rightward-thinking economists should immediately be put on alert. Higher tax rates have proven to be “a major disincentive to production.”¹⁷⁶ If tribal governments are forced to tax

167. Clarkson, *Tribal Bonds*, *supra* note 146, at 1014.

168. *Id.*

169. 26 U.S.C. § 7871(c)(1) (2006). “Essential government function” has been interpreted narrowly, limiting the circumstances under which tribes can issue tax-exempt bonds. See Clarkson, *Tribal Bonds*, *supra* note 146, at 1045-52.

170. See Clarkson, *Tribal Bonds*, *supra* note 146, at 1014.

171. *Id.*

172. See JEFF MADURA, *FINANCIAL MARKETS AND INSTITUTIONS* 45 (8th ed. 2008) (“If all other characteristics are similar, taxable securities will have to offer a higher before-tax yield to investors than tax-exempt securities to be preferred.”).

173. Clarkson, *Tribal Bonds*, *supra* note 146, at 1015 (“Most tribes [] are still unable to access the capital markets competitively, if at all.”).

174. Miller, *supra* note 6, at 833.

175. Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919, 921 (1997).

176. Robert W. McGee, *Principles of Taxation for Emerging Economies: Lessons from the*

budding business owners too heavily, the stated purpose of the MTSTA is unlikely to be achieved. Shifting toward private enterprise prematurely could make it impossible for tribes to raise sufficient revenue.

B. Shifting to Private Enterprise Will Likely Be Ineffective

Efforts to develop urban ghettos have been made for decades.¹⁷⁷ To this point, none of those efforts have achieved real success, and in many aspects, the economic situation in those areas has worsened.¹⁷⁸ Shifting toward an economic model that promotes private enterprise could relegate Indian tribes to the same fate. The ability to operate state-owned enterprises is an advantage that residents of urban ghettos cannot exploit.¹⁷⁹ Wise implementation of the tribally run model is Native America's most viable solution for sustained economic growth.

C. The Recipe for Development: Imperfect Competition and Increasing Returns

Economic theorist Erik Reinert explains that the crucial difference between rich nations and poor nations lies in the very nature of their economies.¹⁸⁰ While the economies of poor nations are dominated by the production of raw material commodities, the economies of the wealthy countries are dominated by manufacturing.¹⁸¹ Reinert asserts that the manufactured exports of the richer countries "contain the 'good' [economic] effects – increasing returns and imperfect competition – whereas traditional exports of poor countries contain the opposite, the 'bad' effects" – diminishing returns and perfect competition.¹⁸² It is necessary to explain these key concepts.

Perfect competition occurs when "the producer cannot influence the price of what he produces. This situation is typically found in markets for

U.S. Experience, 12 DICK. J. INT'L L. 29, 37 (1993).

177. See Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE 753, 759 (1996-1997).

178. *Id.* at 753.

179. Theoretically, voters could elect legislators who would promote state-run industry. The practical chances of such a move toward socialism in this country are, however, extremely small.

180. ERIK S. REINERT, *HOW RICH COUNTRIES GOT RICH AND WHY POOR COUNTRIES STAY POOR* 5 (2008).

181. See *id.* at 5-6.

182. *Id.* at 6.

agricultural or mining products.”¹⁸³ In the case of these products, product differentiation – the process of distinguishing a product from others to make it more attractive to a particular target market¹⁸⁴ – is nearly impossible.¹⁸⁵ Effective product differentiation leads to monopolistic competition and imperfect competition – “[t]he situation said to exist when, because of peculiar conditions of the market or advantages held by certain buyers or sellers, prices can be abnormally influenced by one or more traders.”¹⁸⁶ When a firm creates imperfect competition in a market, it has the ability to influence the price of what it sells.

Consider a potato farmer on one hand and a producer of televisions on the other. The farmer will likely be unable to convince consumers that his potatoes are higher in quality than those produced by other farmers. As a result, he will have little to no effect on the price of his potatoes; “he is facing a ‘perfect’ market and literally reads in the newspaper what the market is willing to pay.”¹⁸⁷ This is near-perfect competition. Conversely, the television manufacturer can employ clever marketing tactics to convince the consumer that his product is worth more than other products on the market. If he succeeds in his marketing tactics, he will be able to exert some control over the price of his product. This is imperfect competition.

Another advantage enjoyed by rich nations is that they experience falling costs as volumes of production increase. “When production is expanded in manufacturing industry, cost developments go in the opposite direction – down rather than up.”¹⁸⁸ By contrast, poor countries usually experience diminishing returns. Diminishing returns refers to the concept that, “as extra units of one factor of production are employed, with all others held constant, the output generated by each additional unit will eventually fall.”¹⁸⁹ Essentially, “as production is expanded, after a certain point, more units of the same input – capital and/or labour [sic] – will produce smaller and smaller amounts of new output.”¹⁹⁰

Again, consider our potato farmer and television manufacturer. Due to the nature of his product, the potato farmer will reach a point, due to limitations

183. *Id.* at 5.

184. GRAHAM BANNOCK ET AL., *DICTIONARY OF ECONOMICS* 97 (4th ed. 2003).

185. REINERT, *supra* note 180, at 6.

186. HAROLD SLOAN & ARNOLD J. ZURCHER, *DICTIONARY OF ECONOMICS* 215 (5th ed. 1970).

187. REINERT, *supra* note 180, at 5.

188. *Id.*

189. BANNOCK ET AL., *supra* note 184, at 98.

190. REINERT, *supra* note 180, at 5.

on the amount of land available, etc., where adding workers and tractors is not beneficial because each new person or tractor will produce less than the last unit added. Unlike the farmer, the manufacturer has no immediate inputs that are limited in quality and quantity. The manufacturer will “experience falling costs . . . as volumes of production increase.”¹⁹¹ This is because of the phenomenon known as “economies of scale.” Economies of scale are the cost advantages obtained by businesses due to expansion.¹⁹² They arise when the cost per unit falls as output increases.¹⁹³ For example, as businesses grow and require larger quantities of production inputs, order values increase and businesses obtain more bargaining power and are able to obtain materials at lower prices. Financial economies, another example, occur as larger firms find it easier than small businesses to obtain lenders and to raise money at low interest.¹⁹⁴ As the company becomes “big,” the cost per unit falls as more products are produced and sold.

These phenomena explain why urban ghettos have been unable to achieve sustained economic development. It is difficult for companies to become “big” when market forces are simply not conducive to such success. Consider a small business owner in the inner-city who is seeking to start a small convenience store. Why would individuals elect to shop in his store when they can obtain the same goods from a large chain two miles down the road and perhaps at a reduced price? They would not, and it is apparent that firms seeking to break into the American economy must find ways to succeed at product differentiation.¹⁹⁵ They must reduce directness of competition with established firms by drawing fewer comparisons to those firms.¹⁹⁶

Creating imperfect competition through product differentiation will require innovation. Tribal businesses must figure out ways to produce products that are superior – or at least products that consumers perceive to be superior – to other products on the market. Tribes cannot shy away from this reality. Tribal business must compete, and win, in the larger American markets. This is where the state-run enterprise proves its worth. Tribally owned businesses

191. *Id.*

192. BANNOCK ET AL., *supra* note 184, at 114.

193. *Id.*

194. See CHRISTINE AMMER & DEAN S. AMMER, *DICTIONARY OF BUSINESS AND ECONOMICS* 375-76 (1977).

195. NEIL SEITZ & MITCH ELLISON, *CAPITAL BUDGETING AND LONG TERM FINANCIAL DECISIONS* 37 (4th ed. 2005).

196. *Id.*

enjoy several advantages that give them a much stronger chance than private enterprises at achieving this end.

V. Advantages of Tribally Owned Enterprises

A. Targeted Development

An important aspect of tribal-development strategy is the choice of development activity.¹⁹⁷ Tribes undertaking tribally owned enterprise can and must select “specific development projects . . . that take advantage of tribes’ market opportunities [and] allow tribes to specialize in using the natural and/or human resources most available to them.”¹⁹⁸ The ability to direct resources toward the projects that are most likely to be successful is an advantage of the tribally owned enterprise. In a system that promotes individual entrepreneurship, resources are inevitably wasted on projects with very little chance of success.¹⁹⁹

Consider this example. A tribal member has an idea for a new radio that he believes will produce better sound quality than any other device on the market. If the tribe promotes private enterprise, there will likely be many other members with ideas of their own. If each potential business owner must seek financial capital from off-reservation lenders, then our deserving inventor will likely be unable to secure any more financing than the other tribal members. Our prospective entrepreneur’s growth will undoubtedly be hindered. Even if his project succeeds while the others fail, much will have been wasted. The true winners may be the lending institutions who have recouped their high interest loans.

Conversely, tribal governments seeking to establish profitable businesses can examine the tribal member’s proposal along with the others. If tribal officials deem his idea to be the most likely of the group to be successful, then the lion’s share of resources can be thrown behind his project. As authors Stephen Cornell and Joseph P. Kalt note, “Many American Indian tribes face a barrage of ideas, proposals, offers, and enticements – some from within the tribe, many from outside it – aimed at establishing specific development or investment projects on the reservation.”²⁰⁰ Determining which proposals are

197. Cornell & Kalt, *supra* note 31, at 10.

198. *Id.*

199. See Rafael Efrat, *The Tax Burden and the Propensity of Small-Business Entrepreneurs to File for Bankruptcy*, 4 HASTINGS BUS. L. J. 175, 177 (2008) (“[O]ver thirty-percent of small businesses close within two years of establishment and over half close within four years.”).

200. Cornell & Kalt, *supra* note 31, at 44.

most viable is no easy task, and “[t]he success of tribal development activities depends [] upon the strategic skills of decision-makers. . . . The heart of the strategic problem is the appropriate matching of particular development activities and projects to the governance capabilities, asset endowments, and cultural attributes of the tribe.”²⁰¹

With the proper structure – one that promotes an environment in which tribal decisions are made by wise individuals with adequate incentives – efficient allocation of resources can be achieved. This is clearly an advantage that tribally owned enterprises enjoy over the private enterprise.

B. Access to Capital

Innovation is usually expensive.²⁰² An aspiring inventor must engage in extensive research, trial models, and other steps before she can confidently reproduce her innovation and put it on the market.²⁰³ Increasing returns may be enjoyed in such circumstances. For example, “[t]he first copy of a software product costs a lot to produce, but subsequent copies have a very low cost.”²⁰⁴ The small business owner, however, may have trouble obtaining the necessary capital to produce that first copy.

Tribal governments have means of attaining financial capital that are simply unavailable to the private business owner. Tribal governments that engage in tribally owned enterprise receive revenue from those endeavors.²⁰⁵ Those same tribal governments can borrow at much lower rates than can the typical small business owner.²⁰⁶ Additionally, “over thirty-percent of small businesses close within two years of establishment and over half close within four years.”²⁰⁷ Because of the risks associated with this high rate of failure, purchasing bonds from a tribal government that owns much of the enterprise on tribal land is generally a much safer investment than making similar loans to individuals.

In addition to being subject to higher rates of interest on loans obtained from off-reservation investors, individual entrepreneurs have access to only

201. *Id.* at 44-45.

202. *See* REINERT, *supra* note 180, at 5.

203. *See id.*

204. *Id.*

205. *See* Miller, *supra* note 6, at 760.

206. This is generally true where tribal revenue gained from tribal enterprise and taxation renders the prospect of default less likely than that of a private enterprise whose ability to repay debt depends upon the success of the enterprise. *See generally* MADURA, *supra* note 172, at 43-44 (explaining the nature of credit default risk and its effect on the yields of debt securities).

207. Efrat, *supra* note 199, at 177.

limited capital. The MTSTA, even if effective at achieving its end, cannot counteract investors' reluctance to loan large sums of money to small business owners. This is largely because federal regulations prohibit banks from assuming excessive risk.²⁰⁸ It is also because making large investments to support risky endeavors is unsound investment policy.²⁰⁹

C. *The X-Factor: Tribal Loyalty*

Loyalty among Indian tribal members may be the tribes' greatest competitive advantage. American Indians elect to continue living on reservations despite the prevalence of poor economic conditions.²¹⁰ Their decision to remain has much to do with "the determination of Indians to preserve their land, government, culture, religion, and traditions."²¹¹ Furthermore, greed is frowned upon among the more communal tribes.²¹² Even government officials are strongly discouraged from achieving significant gain from publicly owned businesses.²¹³ It is likely that tribal laborers would be willing to display similar selflessness for the good of the tribe.

Inexpensive labor is precisely the type of competitive advantage that could enable tribes to flourish. Low labor costs significantly decrease the costs of production and allow tribal businesses to yield higher returns.²¹⁴ Additionally, tribal loyalty is ideal for creating a beneficial corporate culture, which is extremely valuable. In describing the importance of corporate culture, Seitz and Ellison state that "[a] critical basis for cost advantage is a commitment to efficient operations. The shared values and beliefs that make up the culture of the organization must include the understanding that efficiency is important and will be rewarded."²¹⁵

Tribal workers' willingness to sacrifice produces another momentous advantage. Economic recessions occur when there is a substantial decrease in aggregate demand – the total amount of goods and services that people want to buy within an economy.²¹⁶ In an ideal world, business would swiftly adjust to shifts in aggregate demand by lowering prices, which would entice

208. See George H. Brown, *Financial Institutions for Lawyers as Quasi-Public Enforcers*, 7 GEO. J. LEGAL ETHICS 637, 698-99 (1994).

209. See *id.* at 690-91.

210. PEVAR, *supra* note 14, at 4.

211. *Id.*

212. Cornell & Kalt, *supra* note 31, at 31.

213. *Id.* at 37.

214. See generally C.E. FERGUSON, MICROECONOMIC THEORY 169-71 (1969).

215. SEITZ & ELLISON, *supra* note 195, at 38-39.

216. See HELMUT MERKLEIN, MACROECONOMICS 120-31 (1972).

customers to again purchase full-employment levels of output²¹⁷ – the amount of output produced in an economy when there is full employment in the labor market.²¹⁸ In the real world, the static nature of labor costs prevents speedy price adjustments.²¹⁹ Business owners have found that it is better to downsize than lower wages, as wage decreases cause workers to retaliate by becoming less productive.²²⁰ In extreme cases, tribal businesses can take advantage of tribal loyalty by requesting that workers accept wage cuts. If the workers trust those officials in charge of making such decisions, they may be more likely to accept the cuts. Prices can be slashed, and tribal economies can seamlessly return to full-employment output without eliminating workers. This is an immense benefit that the tribally owned business can employ to facilitate macroeconomic development.

Economic systems centered on tribal enterprise offer the most viable opportunity for true economic growth. The MTSTA and similar tools designed to entice movement toward private enterprise promote exploitation and provide very little opportunity for real, sustainable growth and job creation. Tribes should just say no.

VI. Political Moves that Could Help Facilitate Development

Existing tribal income simply cannot maintain the standard of living to adequately maintain our culture. What should we do? If a recommendation is made to the president, it should ask for enough money for each reservation to honestly provide a standard of living that will support tribal sovereignty and self-rule. Then, we can proudly say, this is our culture and we are taking care of ourselves.

-- Benjamin Reifel, former commissioner of Indian affairs²²¹

It is imperative that Indian tribes exhaust all available political avenues to help ensure that tribal governments have sufficient monies to carry out their businesses. One source of capital that should be tapped is the federal government. Regrettably, the prospects of obtaining more federal funds

217. *See id.* at 129.

218. *See id.* at 121.

219. Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 48 (1999).

220. *See* MERKLEIN, *supra* note 216, at 69-70.

221. Joe De La Cruz et al., *What Indians Should Want: Advice to the President*, in INDIAN SELF-RULE 311 (Kenneth R. Philp ed., 1986).

appear slim.²²² Although “[c]urrently, there are 184 grant and loan programs to support economic development in Indian Country,”²²³ these programs have enjoyed limited success.²²⁴ This trend contradicts statements made by the Supreme Court. According to the Court,

These Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.²²⁵

The argument for greater federal funding for Indian tribes is also supported by the trust relationship that exists between the federal government and the tribes. The Supreme Court has noted “the undisputed existence of a general trust relationship between the United States and the Indian people.”²²⁶ Incident to this relationship, “[b]etween 1787 and 1871, the United States entered into nearly four hundred treaties with Indian tribes.”²²⁷ In those treaties, the United States obtained desired land from Indian tribes, “and in return, the United States set aside [] reservation lands for those tribes and guaranteed that the federal government would respect ‘the sovereignty of the tribes, [] would ‘protect’ the tribes, [and would] provide food, clothing, and services to the tribes.”²²⁸

Admittedly, no treaty provides for specific federal funding to be issued for the benefit of Indian tribes; however, this country’s moral obligation cannot be overlooked. If our elected officials have any interest in promoting justice and fair dealing, they must make a commitment to facilitate tribal development efforts. Considering the long history of mistreatment toward Indians, the

222. Cornell & Kalt, *supra* note 31, at 11 (“With declines in federal funding over the last decade and poor prospects for significant increases in the near future, attention to the institutions-of-governance factor can be the best way to overcome the access-to-capital obstacle.”).

223. Wagner, *supra* note 47, at 528.

224. *See id.* at 529.

225. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) (emphasis removed).

226. *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

227. PEVAR, *supra* note 14, at 32.

228. *Id.*

tribes should perhaps be wary of expecting any sudden acts of true benevolence.

A more achievable political aim that could have deeply positive effects on tribal governments' access to financial capital is the issuance of tax-exempt bonds, a highly complex and constantly evolving paradigm. Recall "that a tax-exempt bond is 'a debt security in which the interest portion of the debt service paid is not included in gross income.' The tax-exempt status of municipal debt allows state and local governments to issue bonds at lower interest rates."²²⁹ Only about fifteen percent of tribes have obtained tax-exempt financing from lenders.²³⁰ Furthermore, "Indian tribes can only issue tax-exempt [bonds] if 'substantially all' of the borrowed proceeds 'are to be used in the exercise of any essential governmental function.'"²³¹

After favorable interpretations of the 1982 Tribal Tax Status Act adopting broad readings of the essential-government-function requirement,²³² the IRS began to aggressively enforce the requirement in the years following a 1987 Amendment.²³³ It is widely believed "that the percentage of tribal bonds audited is substantially greater than the percentage of non-tribal bonds."²³⁴ As a result of this inequity, "tribal governments [] issued an average of [only] five tax-exempt bonds" per year between 2002 and 2004.²³⁵ During the same period, non-tribal "governments issued an average of 14,038 tax-exempt bonds" per year.²³⁶

The inability to issue tax-exempt debt outside the narrow confines imposed by the IRS is a substantial blow to tribal economies. A relevant and essential benefit enjoyed by tribal governments over private enterprise is the ability to obtain large amounts of financial capital at reasonable interest rates.²³⁷ Convincing the federal government to expand tribal tax-exempt bonding authority could significantly aid efforts to actualize tribal economic development. It would be wise for American Indians, and those sympathetic

229. Clarkson, *Tribal Bonds*, *supra* note 146, at 1014.

230. *Id.* at 1015.

231. 26 U.S.C. § 7871(e) (2006).

232. Clarkson, *Tribal Bonds*, *supra* note 146, at 1042.

233. *Id.* at 1045-46.

234. *Id.* at 1046.

235. *Id.* at 1047.

236. *Id.*

237. This is generally true where tribal revenue gained from tribal enterprise and taxation renders the prospect of default less likely than that of a private enterprise whose ability to repay debt depends upon the success of the enterprise. *See generally* MADURA, *supra* note 172, at 43-44 (explaining the nature of credit-default risk and its effect on the yields of debt securities).

to their interests, to pressure our legislature to amend legislation and expand tribal authority.

VII. Conclusion

There is no doubt that tribal economic development is hampered by a lack of access to financial capital that could be used to spark and sustain businesses in Indian Country. Article 9 has proven effective in promoting loan arrangements between creditors and entrepreneurs for decades. The Model Tribal Secured Transactions Act, nearly identical to Article 9 in most relevant aspects, simply does not account for the complications that arise as a result of financial arrangements between reservation debtors and off-reservation creditors. Specifically, it does not provide adequate safeguards against predatory lending, and the possibility that the profits of American banks will prove detrimental to Indian debtors is too great to ignore. The tribally run business model currently prevalent throughout Indian Country may indeed be the answer to the development conundrum facing most tribes. The ability of tribes to raise revenue by engaging in tribal enterprise and issuing bonds is precisely what is needed to amass the vast startup capital necessary for innovation and product differentiation in the American market. American Indians have never lacked ingenuity. Only through that ingenuity will the Native American reverse centuries of misfortune and rise as a major force in the world economy.