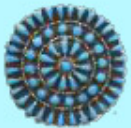
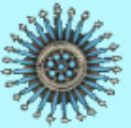
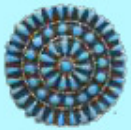




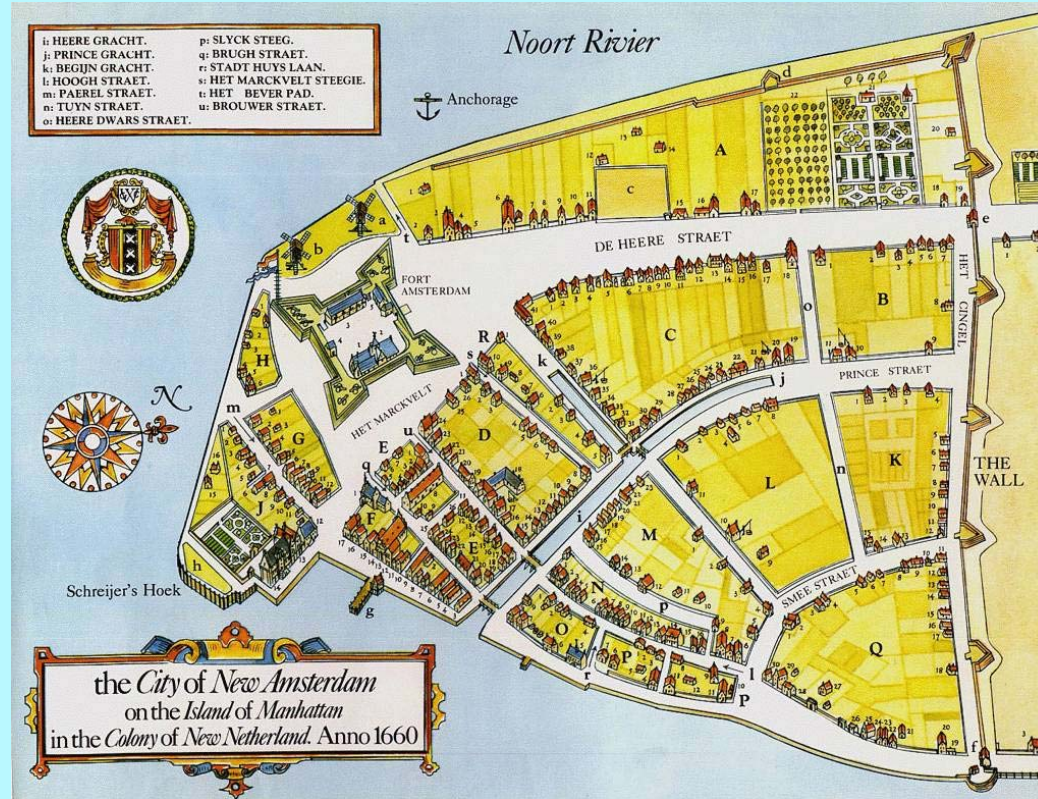
Capital and Finance Issues

Dr. Gavin Clarkson
Assistant Professor
University of Michigan
School of Information
School of Law
Native American Studies

May 15, 2007





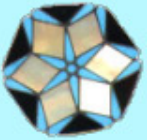


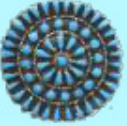
The Original Wall on Wall Street ...



was designed to keep the Indians out


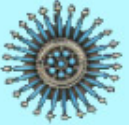
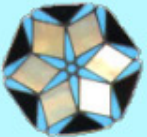


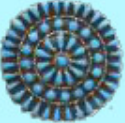


Barriers to Capital Market Access

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- Tax-Exempt Bonds
 - Securities Registration
 - Tribes as Accredited Investors
 - Information Asymmetry






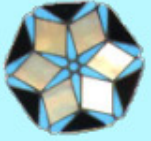


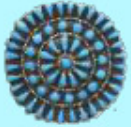
Statutory Restrictions Imposed on Tribes but not on State or Local Governments

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- 1982 Tribal Tax Status Act
 - Intended to treat tribes like states for tax purposes
 - Rep. Gibbons (D-FL) and his fight with the Seminoles
 - Limited tribal tax-exempt bond authority
 - No PABs
 - “Essential Governmental Function” test, 26 USC § 7871(c)(1)
 - 1987 Amendments
 - Rep. Gibbons (D-FL) again
 - 26 USC § 7871(e) added a “customary” requirement for EGF test



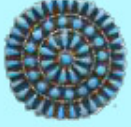


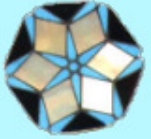


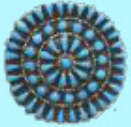
What Can Tribes Finance?

- Infrastructure
 - Particularly if unrelated to commercial activity
 - Uncertainty if related to gaming facilities
- Museums
 - Recent private letter ruling from IRS
- Ancestral Land Repurchase
 - If no commercial activity takes place on land
 - Unless activity can be characterized as essential governmental function



Using Tax Exempt Bonds to Repurchase Ancestral Homeland

- Oklahoma tribe
 - What to do with the corn?
- Bad River Band of Lake Superior Chippewa
 - Checkerboard Reservation
 - Non-Indian fee land
 - Abused timber land

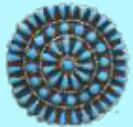
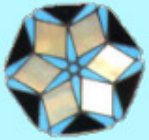
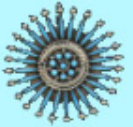
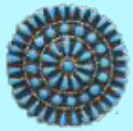


Using Tax Exempt Bonds to Repurchase Ancestral Homeland

- Tribe repurchased 23,000+ acres
- \$5.5 Million municipal bond
 - Variable Rate
 - Remarketed
 - Backed by bank letter of credit (LOC)
 - Moody's Rating
 - Prospectus available at www.tribalfinance.org
- Once again, however, tribe restricted on land use because of tax code

Disparities with States

- Publicly financed, non-gaming activity
 - Hotels
 - Convention Centers
 - Liquor Stores
 - Golf Courses
- Publicly financed, gaming activity
 - Race tracks
 - Casinos
 - Lotteries





Hostile IRS Activity

- IRS FSA 200247012 -- Paiute golf course case
 - FSA available on www.tribalfinance.org
- Examining hostile IRS audit practices
 - Less than 0.5% of the more than 13,000 tax exempt municipal issuances each year are audited
 - 16.7% of tribal tax-exempt bonds issued between 2002 and 2005 have been audited
 - Tribes are 30 times more likely to be audited
 - Joint research with IRS
 - IRS has finally agreed that audit rate is “quite high”
- Conduit financing and other audits

Suppression of Tribal Finance: The Impact of the Essential Government Function Test

	2002 Issues	2002 Par Amount (US\$ mil)	2003 Issues	2003 Par Amount (US\$ mil)	2004 Issues	2004 Par Amount (US\$ mil)
State authority	1,943	125,595.7	1,978	119,013.3	1,884	102,837.4
Local authority	2,109	59,156.1	2,141	62,572.7	1,837	57,197.4
District	4,351	54,509.7	4,613	56,560.5	4,298	58,235.3
City, Town or Village	4,062	46,948.4	4,330	54,526.9	3,782	53,368.7
State	272	34,042.4	262	48,401.7	241	47,042.6
County /Parish	1,047	23,325.1	1,146	24,479.3	961	23,182.0
College or University	199	7,045.9	226	8,929.4	235	8,860.1
Direct Issuer	69	3,991.1	56	4,244.1	68	5,781.3
Co-op Utility	4	930.0	-	-	-	-
Total	14,056	355,544.4	14,752	378,727.9	13,306	356,504.8
Indian tribe	4	194.4	6	233.2	5	178.4

Source: Thompson Financial



Latest Developments

- Proposed IRS Regulations
 - Published in the Federal Register (8/9/06)
 - Tribal bonds will only be tax-exempt if
 - 1) There are numerous State and local governments with general taxing powers that have been conducting the activity and financing it with tax-exempt governmental bonds
 - 2) State and local governments with general taxing powers have been conducting the activity and financing it with tax-exempt governmental bonds for many years, and
 - 3) the activity is not a commercial or industrial activity.
- Significant Negative Commentary

Regulatory Fix

- Treasury should issue regulations that take an expansive view of essential governmental function.
 - The regulations should state that “if a state or local government can finance a given activity with tax-exempt bonds, then a tribe should be able to finance the same type of activity.”
- Supreme Court in *Kelo v. New London*, (2005)
 - “Promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized.” 545 U.S. 469, 470.
- Revenue Enhancing



Legislative Fix



- Senate Finance Committee Testimony
 - May 23, 2006
 - Presented empirical results
- Legislative Response: S. 3567 (109th)
 - Baucus (D-Montana) and Smith (R-Oregon)
 - Amends § 7871
 - Eliminate EGF requirement
 - Allow Private Activity Bonds (PABs)
- Two policy rationales
 - Enhance federal revenues
 - Eliminate racial discrimination against tribes

Positive Revenue Impact if §7871 is Amended

Taxable Rate	10.0%
Tax exempt rate	6.5%
Effective Federal Tax Rate on Wages	15%

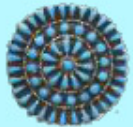
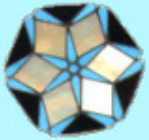
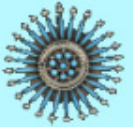
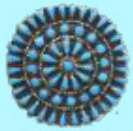
Bond	\$ 5,000,000	\$ 5,000,000
Annual Tax-Exempt "Subsidy"	\$ 175,000	
Annual Revenues	\$ 2,000,000	\$ 2,000,000
Interest Expense	\$ 325,000	\$ 500,000
Wages	\$ 1,350,000	\$ 1,350,000
Other expenses	\$ 300,000	\$ 300,000
Distribution to Tribe	\$ 25,000	\$ (150,000)
Federal Taxes Paid by Employees	\$ 202,500	
Federal Revenue Impact	\$ 27,500	\$ (27,500)

Details in forthcoming North Carolina Law Review article

Defining Racism


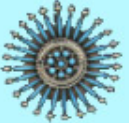
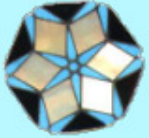


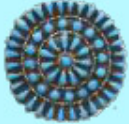
- Albert Memmi

- the generalizing definition and valuation of differences, whether real or imaginary, to the advantage of the one defining and deploying them, and to the detriment of the one subjected to the act of definition, whose purpose is to justify (social or physical) hostility and assault





Memmi's Moments of Racism

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1. Insisting on a difference, whether real or imaginary
 2. Imposing a negative valuation upon those seen as differing
 3. Generalizing that difference to an entire group, which is then deprecated in turn
 4. Justifying hostility, aggression, or privilege based on that difference



Securities Registration and the Tribal Liquidity Premium



- Non-tribal governments are exempt from securities registration
 - Tribes are not
- Non-tribal governments can sell their bonds to anyone
 - Tribes cannot without bearing significant registration costs
- Current law imposes a liquidity premium on tribal debt because of these market restrictions.
 - Those tribes that cannot absorb upfront registration costs are confined to the private placement market. These tribes generally receive inferior terms due to the illiquidity of their privately-placed bonds.
- Liquidity premium ranges between 75 and 250 basis points (.75% to 2.5% more in interest paid by tribes)

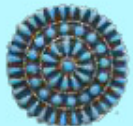
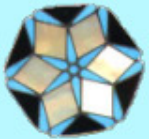
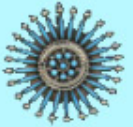
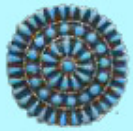



Give Tribes the Same Securities Registration Exemption

- Regulatory Change
 - The SEC should change its rules to treat tribal bonds as municipal bonds
- Statutory Change
 - The first sentence of section 3(a)(2) of the Securities Act of 1933 (15 U.S.C. 77c(a)(2)) should be amended by inserting “or by any Indian tribal government or subdivision thereof (within the meaning of section 7871 of the Internal Revenue Code of 1986),” after “or Territories,”.
- Revenue enhancing

Tribes Not Treated as Accredited Investors

- Tribes are not included in the list of “accredited investors” under Regulation D of the Securities Act of 1933
 - Inhibits flow of equity capital from wealthy tribes to poorer tribes and entrepreneurs
 - Limiting sale of securities to accredited investors ensures compliance with state and federal securities laws



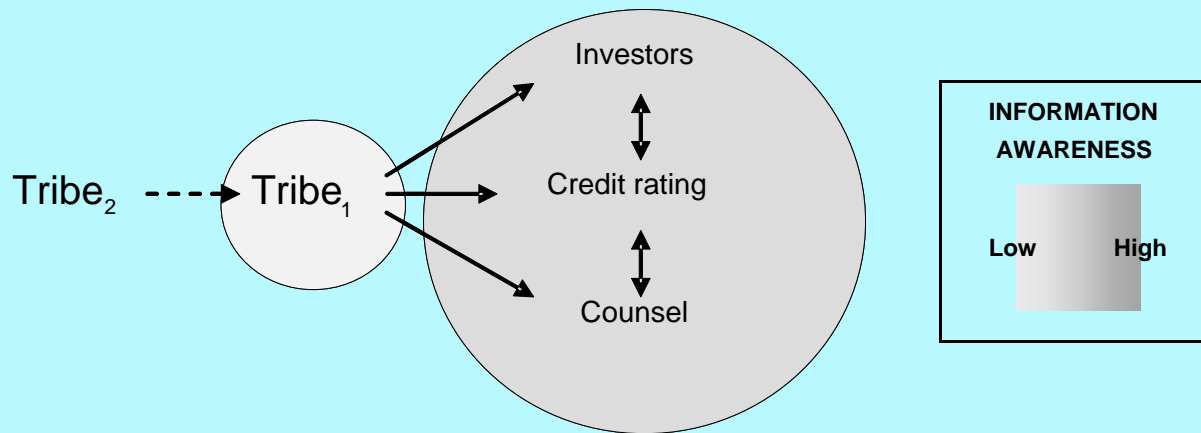


Tribes Should be Treated as Accredited Investors

- Amend Rule 501(a) of Regulation D of the Securities Act of 1933 to include in the list of accredited investors:
 - “Any American Indian Tribe, or any entity in which all of the equity interests are owned by an American Indian Tribe, with non-trust assets in excess of \$5 million”
- Revenue enhancing

Information Asymmetry

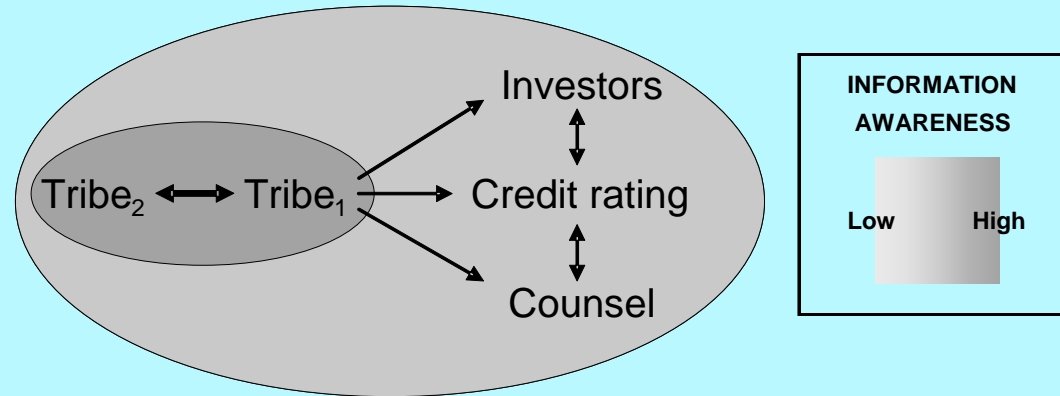
- Less is known about tribal finance marketplace than any other in the US
- Tribes at an informational disadvantage relative to other capital market players



Information Asymmetry

TFIC - Tribal Finance Information Clearinghouse

- Central Repository for Tribal Finance Information
- Collecting IRS Form 8038
 - Joint activity with NCAI, NITA, and others
 - Limited disclosure
 - Collective database of tribal tax-exempt financing



Information Sharing



<http://www.tribalfinance.org>

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