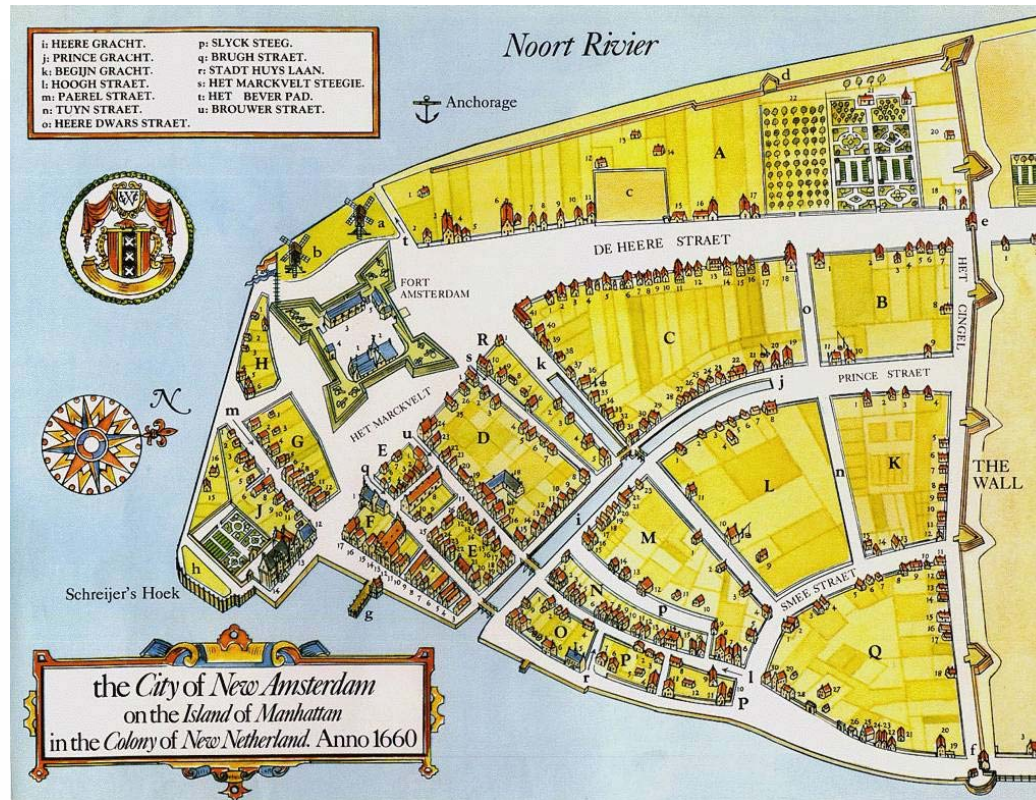


# **Tribal Bondage: Statutory Shackles and Regulatory Restraints on Tribal Economic Development**

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



# The Original Wall on Wall Street ...



was designed to keep the Indians out

# Tribal Finance Research

- **Discrimination in the Securities Laws**
  - Measure the magnitude of the liquidity premium caused by a lack of a securities regulation exemption for tribal municipal debt
- **Market Information Asymmetries**
  - Develop the Tribal Finance Information Clearinghouse to support tribal economic decision makers, entrepreneurs, and both large and small investors in the tribal finance marketplace
- **Racism in the Tax Code**
  - Assess the economic harm caused by differential treatment of tribal tax-exempt debt under the “essential government function” test



# History of Tax Treatment of Tribal Debt

- Prior to 1982
  - IRS Rulings only
- 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)
    - “Tribal governments were given bonding authority they were unable to use and denied bonding authority they would have welcomed” (Aprill, p. 348)



# History of Tax Treatment of Tribal Debt

- Treasury's Interpretation of 1982 Act
- Tribal bond issues between 1982 and 1987
- 1987 Amendments
  - Rep. Gibbons (D-FL) again
  - 26 USC § 7871(e) added a “customary” requirement for EGF test



# 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](http://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
- Conduit financing and other audits



# Suppression of Tribal Finance:

## The Impact of the Essential Government Function Test

	<b>2002 Issues</b>	<b>2002 Par Amount (US\$ mil)</b>	<b>2003 Issues</b>	<b>2003 Par Amount (US\$ mil)</b>	<b>2004 Issues</b>	<b>2004 Par Amount (US\$ mil)</b>
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	-	-	-	-
<b>Total</b>	<b>14,056</b>	<b>355,544.4</b>	<b>14,752</b>	<b>378,727.9</b>	<b>13,306</b>	<b>356,504.8</b>
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.
- Indian Country must comment by November
  - Instructions on [www.tribalfinance.org](http://www.tribalfinance.org)



# 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

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



# Legislative Fix Needed

- Senate Finance Committee Testimony
  - May 23, 2006
  - Presented empirical results
- Legislative Response: S. 3567
  - Baucus (D-Montana) and Smith (R-Oregon)
  - Amends § 7871
    - Eliminate EGF requirement
    - Allow Private Activity Bonds (PABs)



# 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	
<b>Federal Revenue Impact</b>	<b>\$</b>	<b>27,500</b>	<b>\$ (27,500)</b>



# Supportive Research Activities

- Research Website
  - [www.tribalfinance.org](http://www.tribalfinance.org)
- Collecting IRS Form 8038
  - Joint activity with NCAI, NITA, and others
  - Limited disclosure
  - Result will be a collective database of tribal tax-exempt financing
- Forthcoming article



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