



Emerging Stronger than Before: Guidelines for the Federal Role in American Indian and Alaska Native Tribes' Recovery from the COVID#19 Pandemic

Citation

Henson, Eric, Miriam R. Jorgensen, Joseph Kalt, and Megan Hill. "Emerging Stronger than Before: Guidelines for the Federal Role in American Indian and Alaska Native Tribes' Recovery from the COVID#19 Pandemic". COVID-19 Response and Recovery Policy Briefs, no 4. Harvard University, Cambridge, MA, 2020.

Published Version

<https://ash.harvard.edu/publications/emerging-stronger-guidelines-federal-role-american-indian-and-alaska-native-tribes%E2%80%99>

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Emerging Stronger than Before: Guidelines for the Federal Role in American Indian and Alaska Native Tribes' Recovery from the COVID-19 Pandemic

by

Eric C. Henson, Megan M. Hill, Miriam R. Jorgensen & Joseph P. Kalt¹

I. Introduction and Summary: Can Opportunity Grow Out of Adversity?

The COVID-19 pandemic has wrought havoc in Indian Country. While the American people as a whole have borne extreme pain and suffering, and the transition back to “normal” will be drawn out and difficult, the First Peoples of America arguably have suffered the most severe and most negative consequences of all. The highest rates of positive COVID-19 cases have been found among American Indian tribes, but that is only part of the story.²

Even before the pandemic, the average household income for Native Americans living on Indian reservations was barely half the U.S. average. Then the pandemic effectively shut down the economies of many tribal nations.³ In the process, tribal governments' primary sources of the funding – which are needed to fight the pandemic and to meet citizens' needs – have been decimated.⁴

As with the rest of the U.S., emergency and interim support from the CARES Act and other federal measures have helped to dampen the social and economic harm of the COVID-19 crisis

¹ Eric Henson is Adjunct Lecturer in Public Policy at Harvard University's John F. Kennedy School of Government and a Research Affiliate of the Harvard Project on American Indian Economic Development; Megan Hill is Director of the Harvard Project's *Honoring Nations* program; Miriam Jorgensen is Research Director of both the Harvard Project and the University of Arizona's Native Nations Institute; Joseph Kalt is Ford Foundation Professor (Emeritus) of International Political Economy at the Harvard Kennedy School and Co-Director of the Harvard Project.

² Akee, Randall K.Q., Nicolás E. Barceló, Stephanie Russo Carroll, and Desi Rodriguez-Lonebear, “American Indian Reservations and COVID-19: Correlates of Early Infection Rates in the Pandemic,” *Journal of Public Health Management and Practice*, July/August 2020, at 374.

³ Akee, Randall K.Q., Eric C. Henson, Miriam R. Jorgensen and Joseph P. Kalt, *Policy Brief No. 1: The Need for a Significant Allocation of COVID-19 Response Funds to American Indian Nations*, Harvard Project on American Indian Economic Development and Native Nations Institute, May 18, 2020, available at <https://drive.google.com/file/d/1yQ4PdhxBb7VFfa-SrWEWllmJfQptOi61i/view>.

⁴ Ibid.

in Indian Country. Yet this assistance has come to the country's 574 federally recognized Indian tribes with litigation-driven delay and counterproductive strings attached, and against a pre-pandemic background characterized by federal government underfunding and neglect – especially as compared to the funding provided and attention paid to state and local governments.⁵

The precedent in the CARES Act, acknowledgment that the federally recognized tribes carry responsibilities which mirror those of state and local governments is a breakthrough; tribes must continue to receive significant additional support along with their state and local counterparts as further pandemic relief funding is crafted by Congress. In the process, it is imperative to consider whether and how the current crisis in Native America can be turned into an opportunity for tribes to emerge from this crisis with greater cultural strength and community wellbeing, and with more robust and resilient economies and governments. Although laid through adversity, the grounds for such opportunity have been clarified by the COVID-19 crisis. If such a hope is to be realized, both tribal governments and the federal government will have critical roles to play.

As we discuss in our forthcoming series of companion policy briefs, turning crisis into opportunity will require tribes' concerted and clear-headed commitment to “nation building” – i.e., building and rebuilding the legal, political, and social institutions that undergird the realization of community core values and the successful pursuit of community-determined goals. Such institutions are not alien to American Indian tribes. They governed themselves for millennia prior to colonialization. The difference today, however, is that U.S. federal governmental policies are a key determining factor in Native nations' progress toward rebuilding their capacities to govern and govern well.

In this policy brief, we offer guidelines for federal policy reform that can fulfill the United States' trust responsibility to tribes, adhere to the deepest principles of self-governance upon which the country is founded, respect and build the governing capacities of tribes, and in the process, enable tribal nations to emerge from this pandemic stronger than they were before. We believe that the most-needed federal actions are an expansion of tribal control over tribal affairs and territories and increased funding for key investments in tribal communities. Specifically:

- 1. Expansion of tribal authority and jurisdiction.** The federal policy of tribal self-determination through self-government is the only policy that has ever worked to make progress against long-standing poverty and the social and cultural strains of economic underdevelopment on America's Native communities. It is time that federal policy complete the devolution of local governing powers to tribal governments, with priority

⁵ U.S. Civil Rights Commission, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, December 2018.



placed on recognition of tribes, not states, as the locally sovereign taxing and jurisdictional authorities within the boundaries of tribes' respective territories. If tribes are going to be looked to – as they should be – to provide the same services and perform the same functions as state and local governments, they should be accorded the same lawmaking, law enforcement, and revenue-generation powers as their state and local counterparts.

2. **Increased federal funding for tribal governments, infrastructure, and education.** The federal government's own analyses have repeatedly found that, on the basis of comparable need and affected populations, federal support of tribal communities and tribal governments is embarrassingly deficient. The federal response to the COVID-19 pandemic creates an opportunity to address the systemic poverty that has made Indian Country disproportionately susceptible not only to the coronavirus but to prospective future crises of all sorts. In this regard, priority should be given to funding for: (1) the administrative infrastructures of the tribal governments; (2) the physical infrastructure of tribal reservations and communities; and (3) the educational opportunities of young and adult tribal citizens.

II. The Key: Reinvigorating the Only Policy that Has Ever Worked

Leading up to the present worldwide health crisis, several decades of official U.S. federal policies of self-determination through self-government by the federally recognized Indian tribes had proven to be the only policy approach to ever make substantial headway against long-standing problems of reservation poverty and the social and cultural stresses generated by that poverty.⁶ Under the banner of *Native nation building*, tribe after tribe had built, and was operating and substantially funding, its own capacity to fulfill the responsibilities that we expect any state or local government to take on. Indeed, although progress has been uneven across Indian Country, Native nation governments were generating more and more examples – in policy areas ranging from law enforcement and elder care to environmental protection and public health provision – of the ways they could outperform their non-Indian state and local counterparts.⁷ And in the process, many tribes made themselves the economic and governmental anchors of the local regions in which they are embedded.⁸

⁶ Cornell, Stephen and Joseph P. Kalt, "Two Approaches to the Development of Native Nations: One Works, the Other Doesn't" in M. Jorgensen, ed., *Rebuilding Native Nations: Strategies for Governance and Development*, (Tucson: University of Arizona Press, 2007), Chapter 1.

⁷ See Harvard Project on American Indian Economic Development, *Honoring Nations* at <https://hpaied.org/honoring-nations>.

⁸ Akee, et al., *Policy Brief No. 1*, op. cit.



The COVID-19 crisis has dealt a severe blow to tribes' progress toward community strengthening through self-determination and self-government. In the process, it has thrown the systemic weaknesses of tribal governments and economies into sharp focus. If history has taught us anything, it is that while any nation – Native or otherwise – might claim rights of self-government, there is no guarantee of actually being able to exercise those rights effectively. Debilitating constraints can come from both internal and external forces.

Thus, for example, while many tribes have been able to meet the coronavirus pandemic with their own fully developed health departments, robust financial planning and budgeting, and up-to-date public infrastructure, some tribes were poorly prepared. They were forced to depend on non-Native governments' programs, policies, and resources as they struggled to develop policies of social distancing, provide basic medical care to citizens, and protect health workers and first responders. They lacked the pre-planning or preparation needed to enable them to sustain employment and incomes. Their economies were highly concentrated in one or only a few sectors – often the very sectors that had to be shut down in the face of an epidemic of infectious disease. They were saddled with antiquated and unhealthy water, housing, and health care infrastructure. They paid the price for not having been able to equip their respective nations with the institutional and administrative capacities necessary for true *self*-government.

In some cases, tribes' shortcomings in this regard have been at least partially of their own making. Their leadership did not “get” what Native nation building involved, or those leaders had not succeeded in generating the political support – through citizen education – for aggressive assertions of tribal sovereignty and for the substantial financial allocations needed to build their tribes' legal, administrative, and physical infrastructures.

In all cases, major blockades to successful tribal nation building have continued to be erected by *non-tribal* governments. The federal government itself has repeatedly documented, both in absolute dollars and in comparison to the massive support routinely provided to state and local governments, that the funding it provides to tribal governments for the basic necessities of civil society (education, public infrastructure, law enforcement, social services, public health, etc.) is worse than inadequate.⁹ At the same time, federal policies that perpetuate confusing and counterproductive limitations on tribal governments' taxing, regulatory, and judicial jurisdictions over the lands, people, and activities that take place within reservation boundaries have few parallels in the state and local government context. These limitations hold back economic development in Indian Country and handcuff tribes as they attempt to fund and operate their own governments. The result is that both tribes *and their neighbors* suffer. Intelligent federal funding and policy reforms that support and complete the agenda of tribal self-determination through self-government are needed at this critical time.

⁹ U.S. Civil Rights Commission, *Broken Promises*, op. cit.



III. The Context: Federal Indian Policy Choices and Debates

Before turning to our recommendations, it is important to develop a baseline of shared understanding. In particular, certain common myths and misconceptions deserve to be addressed. They exist and persist because policymakers, the media, and so-called “influencers” often lack requisite basic knowledge of Indian affairs in the U.S. While deeply regrettable, this is somewhat understandable. The Native voice in nationwide politics and in many non-Natives’ day-to-day lives is tiny: American Indians and Alaskan Natives make up only 1.7% of the U.S. population.¹⁰ This makes it especially hard for Native peoples’ ideas and concerns to be heard on the national stage. Indeed, what may seem like well-founded knowledge of Indian affairs to many mainstream non-Natives often is derived from icons and stereotypes.

A. Economic Conditions

Consider the iconic, bookend images of wealth and poverty in Indian Country. One image is that of a tribe flush with money from a casino resort – often the only locale where rank-and-file non-Natives and mainstream media are made aware of even the existence of tribes. The other image is that of the extremely poor tribe, plagued by rampant unemployment, desperately low incomes, and all of the stressors and health problems that come with such underdevelopment.

But these images are exactly that – bookends. They represent the extremes of a reality that is much more concentrated away from the extremes. Yes, there is poverty: as noted above, household incomes among Native reservation residents are relatively low, and even prior to the pandemic, unemployment rates in Indian Country were inordinately high.¹¹ At the same time, under the last several decades of tribal self-governance, average economic conditions on reservations have been improving, and improving much more rapidly than in the U.S. as a whole. Based on decennial U.S. Census data, the rate of increase in per capita income among Native reservation residents over the last 25-30 years has been five times that of the average American.¹² The glass may only be half full, but at least it is filling.

Importantly, the progress being made in the era of tribal self-determination has not been all about casinos: Only about 5% of tribal citizens are from tribes that operate the mega-casinos (located through historical accident in or next to major metropolitan areas) that frequently are represented in the media; the vast majority of tribes are in rural locales with small potential

¹⁰ NCAI, *Demographics*, at [http://www.ncai.org/about-tribes/demographics#:~:text=According%20to%20the%202010%20Decennial,in%20combination%20with%20another%20race.](http://www.ncai.org/about-tribes/demographics#:~:text=According%20to%20the%202010%20Decennial,in%20combination%20with%20another%20race.,), accessed July 24, 2020.

¹¹ Akee, Randall and Jonathan Taylor, *Social and Economic Change on American Indian Reservations: A Databook of the US Censuses and the American Community Survey, 1990-2010*, The Taylor Policy Group, taylorpolicy.com/us-databook, accessed January 2, 2020; U.S. Census, 2014-2018 American Community Survey 5-Year Estimates (*My Tribal Area*), accessed January 2, 2020.

¹² Akee and Taylor, op. cit.; U.S. Census, 2014-2018 American Community Survey 5-Year Estimates (*My Tribal Area*), accessed July 16, 2020.



customer bases.¹³ In fact, beyond gaming, many tribes have exercised their self-governing powers to establish enterprises and build successful economies in the manufacturing, tourism, and service sectors.

B. The Rights of Tribes

It is common to encounter the view among the general public that American Indians have “special rights” to activities such as gaming that other Americans do not have. Yet such purported special rights are not materially different for tribal citizens than for the citizens of any state in the Union: If you want your community to experience, for instance, the economic benefits that may flow from casino gambling, go to your government and convince lawmakers to allow casino gambling in the geographic region over which that government has jurisdiction. If you are a tribal citizen, that government is your tribal government; if you are a citizen of any state, the appropriate government to approach is your state government. If you are not Native but want to receive a monthly cash payment from your *state’s* gambling business (i.e., one of the ubiquitous state lotteries), convince the voters in your state of the merits of that policy – just as many tribal citizens have tried to convince their fellow citizens to tilt the allocations of tribal business earnings toward (or away from, as the case may be) family income support and away from (or toward) other worthy public ends (such as increased spending on education, health care, etc.).

By the same token, if you are a citizen of a tribe and work on that tribe’s reservation and under its jurisdiction, you are required to pay whatever taxes the tribe levies on you and to pay federal income taxes, but you do not pay income taxes to a neighboring jurisdiction (e.g., the state of Washington). This precisely mirrors the rights of non-Indians: If you are a citizen of Arizona and earn your income within the state of Arizona, you are required to pay whatever taxes the state of Arizona levies on you and to pay federal income taxes, but you do not pay taxes to the neighboring Tohono O’odham (tribal) Nation, the state of California, or the country of Mexico.

In short, although not identical, the rights and powers of tribal governments and state governments in the United States are very similar. This is because, at the founding of the United States, both tribes and the colonies that became the United *States* operated as self-governing sovereigns. In the case of the colonies, the Constitution in large part was (and is) a document devoted to recognizing and specifying the self-governing rights of the states. In the case of the Indian tribes, the Constitution recognized them as self-governing sovereigns when it spelled out key dimensions of the relationship between the tribes, the states, and the central government,

¹³ “List of Casinos State-by-State,” *500Nations.com*, https://www.500nations.com/Indian_Casinos_List.asp, accessed April 19, 2020, reports 245 tribes as having gaming operations as of mid-2018. Many of the tribes without casinos are located in Alaska.



providing that only the U.S. Congress “shall have the Power... To regulate Commerce with foreign Nations, and among the several States, *and with the Indian Tribes.*”¹⁴

This broad limitation on the powers that *states* have over tribes has been key to why tribes, rather than states, now regulate activities ranging from casino gaming to hunting and fishing within tribal territories. Moreover, it was within this framework historically that the United States found it proper to enter into more than 500 treaties with Indian tribes. Treaties are ultimately contracts *between governments*. Though violated and ignored more times than can be counted, those treaties live on – as they should in a world in which parties abide by their contracts. The U.S. Supreme Court recently affirmed this principle, stating that: “Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.”¹⁵ In fact, over most of the last 50 years, numerous federal court cases presided over by judges appointed by both Republicans and Democrats, acts of Congress supported by powerful members of both political parties, and Executive Orders promulgated by both liberal and conservative U.S. Presidents have affirmed that the rights of tribes are not “special” or race-based rights.

In particular, tribes do not have the rights they have because they consist, ethnically, of Native American people. If that were the case, Native people might be all considered as one tribe. What distinguishes one tribe from another is the same thing that distinguishes one state from another: each is a distinct and sovereign polity or political collective. In other words, just as Californians are distinct *in their statehood and political systems* from New Yorkers, so the San Carlos Apache are distinct from the Cheyenne River Lakota, the Oklahoma Cherokee are distinct from the Mississippi Choctaw, and the Prairie Band Potawatomi are distinct from the Aquinnah Wampanoag. In the United States of today, tribes are simply one of the several types of sovereigns that make up the multi-layered U.S. federalist system of government. Tribes’ sovereignty and rights of self-government emanate from their status as original sovereigns on the continent.

Failure to recognize that the very essence of the United States’ system of government is a multi-layered combination of multiple types of overlapping governments is an impediment to sound policymaking in Indian affairs. To the oft-voiced concern, “How can we possibly have a multiplicity of tribal governments operating alongside each other and the states?,” the proper response is that the United States already has a multiplicity of 50 state governments, 3,141

¹⁴ United States Constitution, Article I, Section 8 (emphasis added).

¹⁵ This has recently been reaffirmed with force by the United States Supreme Court in its *McGirt* decision. See *McGirt v. Oklahoma*, 591 U.S. __ (No. 18–9526) 2020 (slip op. July 9, 2020).



county governments,¹⁶ 19,495 incorporated cities, towns and villages,¹⁷ and untold numbers of special fire, school, port, water, and other special-purpose governments. With these come tens of thousands of court systems, regulatory policies, election procedures, revenue collection methods, and myriad other dimensions of the exercise of governmental authority.

The result of this multiplicity of governments across multiple layers of authority has certainly not created the strawman of “an unstable jurisdictional crazy quilt” of laws, taxation, and adjudication that has been proffered as the practical blockade to the exercise of tribal governments’ jurisdiction over their territories and activities within those territories.¹⁸ While conflicts and inconsistencies certainly arise, what we have learned is that responsible state, county, municipal, special purpose, *and* tribal governments work out tensions and inconsistencies at their jurisdictional boundaries with innumerable comity agreements, tax agreements, power-sharing arrangements, cross-deputization procedures, and other mechanisms of inter-governmental cooperation and conflict resolution. It is systemic racism, borne of ignorance of the actual functioning of tribal governments,¹⁹ that sees tribes as incapable of fully participating, or of operating effectively, within the U.S. federalist system of multiple, multi-layered, and overlapping governments.

Daily, tribes are killing these strawmen of systemic racism. They do this as they implement their own laws governing everything from divorce to restaurant cleanliness; as they incorporate

¹⁶ U.S. Geological Survey, “How many counties are in the United States?,” https://www.usgs.gov/faqs/how-many-counties-are-united-states?qt-news_science_products=0#qt-news_science_products, accessed June 18, 2020.

¹⁷ “How Many Cities Are There in the United States?,” *World Population Review*, <https://worldpopulationreview.com/us-city-rankings/how-many-cities-are-in-the-us>, accessed June 18, 2020.

¹⁸ Scalia, Antonin (Justice), *Opinion of the Court in Nevada et al. v. Hicks et al.*, United States Supreme Court, 533 U.S. 353 (2001), quoted at 383, <https://tile.loc.gov/storage-services/service/ll/usrep/usrep533/usrep533353/usrep533353.pdf?content-disposition=attachment>, accessed June 18, 2020.

¹⁹ Consider, for example, Justice Antonin Scalia’s self-confident, albeit founded on no expressed facts, conclusion that: “Tribal courts...differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges” (*Ibid.*, at 384) – as if the recent spate of Pennsylvania state court (including state Supreme Court) justices’ convictions on charges of corruption (see, e.g., <https://www.post-gazette.com/news/crime-courts/2020/01/14/joan-orie-melvin-public-corruption-allegheeny-county-federal-habeas-appeal-denied/stories/202001140109> and [https://www.theatlantic.com/politics/archive/2018/10/impeachment-west-virginias-supreme-court/574495/](https://www.prisonlegalnews.org/news/2010/jun/15/pennsylvania-judges-involved-in-corruption-case-face-liability-5000-convictions-thrown-out/#:~:text=Pennsylvania%20Judges%20Involved%20in%20Corruption%20Case%20Face%20Liability%3B%205%20000%20Convictions%20Thrown%20Out,-Loaded%20on%20June&text=of%20abusing%20their%20positions%20as,approximately%20%242.8%20million%20in%20payoffs), the impeachment of the justices of the West Virginia Supreme Court of Appeals (see, e.g., <a href=)), and similar long and sordid histories in other states (Pahis, Stratos, “Corruption in Our Courts: What It Looks like and Where It Is Hidden,” *The Yale Law Journal*, Vol.118, No. 8, June 2009, at 1900-1943) should not give us pause about the quality of non-tribal courts in the U.S.; or as if the differences between the origins of Louisiana’s judicial system in the Napoleonic Civil Code of 1804, as compared to the British common law-based systems in other states is inconsequential; or as if California’s business and environmental regulatory regimes are harmonized with those of Texas.



tribal and tribal citizen-owned businesses under their tribe’s own laws of incorporation and commercial codes; as they impeach, prosecute, and remove corrupt officials from office; and as they pave the roads, run the schools, collect the trash, build the houses, test employees for coronavirus, and regulate emissions of pollutants into tribal waters. They do all this while simultaneously participating in literally hundreds of inter-governmental agreements to enforce traffic laws, share tax revenues, and jointly plan and enforce land use policies.²⁰ Tribal governments may not do all of these things – and more – perfectly, but we are not aware of any governments, tribal or non-tribal, that meet such a standard.²¹

C. Federal Support

Finally, there is a common misconception in the mainstream public that the federally recognized American Indian nations, and even individual Native Americans in the U.S., are essentially dependents of the federal government, receiving outsized federal support upon which it would hardly seem possible to act with sovereignty. Yet, again, this misses essentials of U.S. federalism. It is *state and local governments* that receive outsized support from the federal government. As of 2019, the federal government’s Congressional Research Service (CRS) reported that:

The federal government is expected to provide state and local governments about \$750 billion in federal grants in FY2019, funding a wide range of public policies, such as health care, transportation, income security, education, job training, social services, community development, and environmental protection. Federal grants account for about one-third of total state government funding, and more than half of state government funding for health care and public assistance.²²

Moreover, CRS calculates that, since 1970 (i.e., covering the period of devolution of basic governmental functions to tribes), federal grants to state and local governments have increased 373% in real (inflation-adjusted, spending power) dollars. Since 2000 alone, real-dollar federal outlays to state and local governments have increased 77%.²³

Meanwhile, the federal government’s Commission on Civil Rights’ 2003 report on *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* “documented the federal government’s historic failure to carry out its promises and trust obligations. These failures included longstanding and continuing disregard for tribes’ infrastructure, self-governance,

²⁰ See, for example, The Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions under U.S. Policies of Self-Determination* (New York: Oxford University Press, 2008).

²¹ See note 19 above.

²² Congressional Research Service, *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues*, May 22, 2019, <https://fas.org/sgp/crs/misc/R40638.pdf>, accessed July 15, 2020.

²³ *Ibid.*, at Table 2; Table 2 nominal dollars adjusted for inflation according to <http://https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator>, accessed July 15, 2020.



housing, education, health, and economic development.”²⁴ Overall federal spending per person on Native American U.S. citizens was only two-thirds of the spending on the average U.S. citizen. In health, the comparable figure was 50%; and in education, tribal funding was only 50%-60% of the federal total spent on mainstream education. In the criminal justice arena, federal expenditures on law enforcement in Indian Country was only 80% of the level devoted to demographically comparable non-Indian communities.

There has not been substantial improvement. Updating its 2003 report in December 2018, the Commission concluded:

Federal funding for Native American programs across the government remains grossly inadequate to meet the most basic needs the federal government is obligated to provide. Native American program budgets generally remain a barely perceptible and decreasing percentage of agency budgets. Since 2003, funding for Native American programs has mostly remained flat, and in the few cases where there have been increases, they have barely kept up with inflation or have actually resulted in decreased spending power.²⁵

IV. Guidelines for the Federal Role in Enabling Tribal Nations to Emerge Stronger than Before

The federal policy of tribal self-determination through self-governance was launched in earnest by the Nixon administration and has survived because it has enjoyed fairly consistent bipartisan support for almost 50 years. This support is not surprising. The demonstrable economic payoffs to the policy not only have improved living conditions on most reservations, but they also have put tribes in the position to begin (albeit modestly and inadequately relative to demonstrable needs) to self-fund their governmental operations. The devolutionary nature, “bootstrap” character, and budgetary implications of such self-financing have held appeal to fiscal and small (federal) government conservatives. From the liberal side, tribal self-determination through self-government can be seen as a restoration of basic and inherent rights and a lightening of the hand of oppression by the dominant society.

The broad support for tribal self-determination through self-governance is also seen “down on the ground.” When not obscured by grandstanding politicians and nay-saying activists pursuing their own agendas, what we find are many, many more cases of tribal, city, county, and state governments cooperating than the media-highlighted cases of conflict, racism, and litigation. From the funding and building of highways,²⁶ to combatting drug traffickers and gang

²⁴ U.S. Civil Rights Commission, *Broken Promises*, op. cit., at 6 (citing U.S. Civil Rights Commission, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country*, July 2003).

²⁵ U.S. Civil Rights Commission, *Broken Promises*, op. cit., at 4.

²⁶ Harvard Project on American Indian Economic Development, *Quil Ceda Village* (Honoring Nations), <http://hpaied.org/publications/quil-ceda-village>. accessed July 15, 2020.



violence,²⁷ to restoring fisheries,²⁸ to land use planning and development,²⁹ to improving high school graduation rates,³⁰ tribal governments and their non-Native partner governments are working together on everyday problems because they all are trying to serve the interests of their voting citizens – and those interests are often overlapping and intertwined.

Unlike in past eras, tribal officials, administrators, and managers are “at the table” with their counterparts because the strengthening of tribal governments and tribal economies has made tribes players in terms of both their needs and their abilities to contribute to solutions. While problems of racism and social conflict have hardly disappeared, such problems tend to recede when the tribal chief of police and the county sheriff sit down together to figure out how to share each other’s detention facilities,³¹ when the tribe offers tribal and non-tribal individuals more and faster coronavirus testing than the county health department,³² when more than half of the tribal government employees are non-Indian,³³ and when the tribe’s wellness center and health clinics offer the best, and maybe the only, local health care options in the region for Indians and non-Indians alike.³⁴

Then, too, tribes are often large – even the dominant – employers in their regions. Our research has found that across the U.S. economy immediately before the COVID-19 crisis hit, tribes’ governments and enterprises were directly employing almost 350,000 non-Indians, supporting an additional 600,000 non-Indian jobs and \$40 billion per year in non-Indian wages and benefits through the spillover effects that flow from their governmental and enterprise

²⁷ Harvard Project on American Indian Economic Development, *Native American Drug and Gang Initiative Task Force* (Honoring Nations), <https://hpaied.org/publications/native-american-drug-and-gang-initiative-task-force>, accessed July 15, 2020.

²⁸ Ash Center for Democratic Governance and Innovation (Harvard Kennedy School), *Red Lake Walleye Recovery Program* (Innovators Network), <https://www.innovations.harvard.edu/red-lake-walleye-recovery-program>, accessed July 15, 2020.

²⁹ Harvard Project on American Indian Economic Development, *Swinomish Cooperative Land Use Planning* (Honoring Nations), <https://hpaied.org/publications/swinomish-cooperative-land-use-program>, accessed July 15, 2020.

³⁰ Harvard Project on American Indian Economic Development, *Academic Readiness Effort – Santa Ynez Band of Chumash Indians* (Honoring Nations), <https://hpaied.org/sites/default/files/publications/2015%20Report.pdf>, accessed July 15, 2020.

³¹ See, e.g., *Jail Services Agreement – Snohomish County [Washington] and Upper Skagit Tribe* (2012), at <http://mrsc.org/getmedia/f2b9a4f1-b3b1-4a7a-b0fc-a8e0d159ee66/s611LAJailSvcsUpperSkagit.pdf.aspx>, accessed July 22, 2020.

³² Statement of Hon. Stephen Lewis, Governor, Gila River Indian Community, *On the Front Lines: Tribal Nations Take on COVID-19* (Ash Center for Democratic Governance and Innovation, May 26, 2020), <https://ash.harvard.edu/event/front-lines-tribal-nations-take-covid-19>, accessed July 15, 2020.

³³ Akee, et al., *Policy Brief No. 1*, op. cit.

³⁴ See, for example, Harvard Project on American Indian Economic Development, *Coeur d’Alene Tribal Wellness Center* (Honoring Nations), <https://hpaied.org/publications/coeur-d%E2%80%99alene-tribal-wellness-center>, accessed July 15, 2020.



operations, and contributing more than \$9 billion per year to state and local government revenues.³⁵ Tribal self-determination through self-government has been a “win-win” for both the tribal and non-tribal citizens of the U.S.

A. Strengthen Tribal Sovereignty

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

Eliminate Constraints on Tribal Governments’ Powers to Tax. To meet the needs of their citizens beyond the level that can be addressed with transfers of limited federal funds, state and local governments have recourse to traditional income, sales, property, fuel, use, and other taxes. In addition, they rely to a small extent on their gaming enterprise revenues (i.e., state government-owned lottery businesses, which provide about 1% of states’ revenues).³⁶ Tribes, on the other hand, typically do not have access to traditional tax bases. Income taxes are generally infeasible for low income tribes, and property taxes are often blocked by the fact that reservation lands are commonly owned by a tribe itself or held in trust by the federal government. Some tribes have begun experimenting with sales, use and fuel taxes, but they often are pre-empted by unilateral state and local government impositions of such levies.

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

³⁵ Akee, et al., *Policy Brief No. 1*, op. cit.

³⁶ National Council of State Legislators, *Keeping State Lottery Revenue Alive*, <https://www.ncsl.org/research/fiscal-policy/keeping-state-lottery-revenue-alive.aspx#:~:text=On%20average%2C%20about%201%20percent,senior%20services%20or%20environmental%20protection>, accessed July 15, 2020.



With few exceptions, states and their county and/or city arms are recognized as the legitimate taxing authorities within the territories under their jurisdiction. Tribes generally do not have such protection from states imposing their taxes on a wide range of activities *inside* reservation boundaries, and particularly on non-Indian business activities.³⁷ The result has been endless tribal government versus state government litigation in the federal courts. These tax battles have yielded a policy mess that only federal legislation can – and should – remedy. With tribes already performing the full array of functions and service provision that we expect of any state and local government, tribes should be accorded the concomitant powers of taxation enjoyed by state and local governments by making tribes the pre-emptive local taxing authorities within the boundaries of their territories.

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

In commercial and regulatory affairs, as in the tax arena, federal courts have generally resisted, or at least restricted, tribal jurisdiction in favor of state jurisdiction on fundamentally racial grounds – i.e., when the activities in question concern the oft-repeated notion of “non-Indians engaging in commerce (buying, selling, zoning, manufacturing, farming, contracting, etc.) primarily with non-Indians.”³⁸ The unequal treatment of tribes is obvious: When a non-Arizona hotel chain sets up a resort in, say, Arizona, and sells its resort services primarily to non-Arizonans, we do not conclude that Arizona lacks jurisdiction over building codes, insurance regulation, land use decisions, and the like.

The problems created for tribes and their communities by this unequal treatment vis-à-vis their state and local counterparts are often lethal to reservation economic development and even social conditions. With disparate jurisdictions – tribal, state, and federal – often hopscotching acre-by-acre across reservations depending on the race and tribal versus non-tribal

³⁷ Similar unequal treatment of tribes arises when tribal governments seek to borrow in order to fund their activities. State and local governments have much broader powers to attract funds through the use of tax-exempt debt instruments. (See Dunne, Margaret D., *Tribal Economic Development Bonds: Lessons Learned and Implications for Nation-Building*, Massachusetts Institute of Technology, Department of Urban Studies and Planning, June 2019, at <https://dspace.mit.edu/bitstream/handle/1721.1/123953/1140388221-MIT.pdf?sequence=1&isAllowed=y>, accessed July 15, 2020.) Particularly in light of their responsibilities and the restrictions on their abilities to generate tax revenues, there is no principled reason to not put tribal governments’ borrowing capacities on the same footing as state and local government. This should be done by Congress.

³⁸ See, for example, Memorandum Opinion in *The Tulalip Tribes, et al. and the United States of America v. The State of Washington, et. al.* (U.S. District Court, Western District of Washington, No. 15-CV-940 BJR), October 4, 2018 (hereinafter “Tulalip Opinion”), at 17.



legal status of land ownership, red tape proliferates, costs are raised, hurdles are erected, and legal risks are multiplied.³⁹ These impediments to improving tribal communities are compounded when development and construction activities on federal trust lands lead to federal insistence on heavy-handed, delay-magnifying federal – rather than tribal – regulation and approval processes.

Beyond taxation, commercial, and regulatory contexts, the federal government also has long fostered race-based distinctions between tribal governments' criminal and civil jurisdiction over Indians versus non-Indians, with jurisdiction over the latter largely blocked. Undoubtedly, this finds support in the systemic racism noted above,⁴⁰ which cannot help but see tribal governments and, especially, tribal judicial systems, as fundamentally incapable of administering justice up to the standards of perfection reached (albeit, only in the imagination) by non-Native governments in the U.S. Yet, race-based criteria that create jurisdictional boundaries, confusion, and barriers to efficiency, are in no small part to blame for breakdowns of law enforcement in Indian Country.⁴¹

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

B. Establish and Honor Federal Funding Priorities

As noted, the federal response to the COVID-19 pandemic creates opportunities to address root causes found in economic underdevelopment that explain why the coronavirus has hit Indian Country so hard. In addition to the policy changes that are needed to strengthen the capacity of the federally recognized tribes to govern themselves and govern themselves well, the same kind of supportive federal funding going to state and local governments will be needed by tribes, but matched to Indian Country's needs. At least three priorities stand out in this regard: tribal governmental infrastructure, physical infrastructure on tribal lands, and education.

Governmental Infrastructure. To maximize the benefits that accrue to tribes through self-governance, tribal governments require more resources. Even if tribes were not limited in their taxing capacities, many are in the nascent stages of their nation rebuilding. Whether it is building a tribal court system from the ground up, creating new tribal health, housing, education, business

³⁹ Research finds, for example, that reservation incomes and job creation are significantly impeded by checkerboarded land ownership and, hence, jurisdictions on reservations. See, for example, Cornell, Stephen and Joseph P. Kalt, "Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development," *The Journal of Socio-Economics*, vol. 29, 2000.

⁴⁰ See discussion and note 19 above.

⁴¹ Indian Law & Order Commission, *A Roadmap for Making Native America Safer*, at <https://www.aisc.ucla.edu/iloc/report/>, accessed July 24, 2020.



regulation, and environmental protection departments, or rewriting a one-size-fits-all tribal constitution that was federally imposed in the 1930s, pushing back long histories of having one's affairs run by the federal government, and replacing oppressive and paternalistic approaches with policies and institutions of tribes' own designs, is expensive.

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

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

The COVID-19 pandemic has shone a bright light on the national embarrassment of unmet infrastructure needs in Native communities. Grossly inadequate and even totally absent water and sewer systems inhibit the adoption of infection-fighting habits of good health. Old and overcrowded housing invites the opposite of social distancing. School buildings that are falling down, some built as long ago as the 19th century, not only block effective teaching, but also stand in the way of hiring effective teachers. And of course, attracting effective teachers is critical because they are needed to educate future tribal leaders with the tools to guide their communities in achieving improved standards of living, healthier lifestyles, and stronger cultural supports for well-being. Outdated and decaying health facilities have directly adverse health impacts. Inadequate roads and commercial buildings weaken food supply systems, impede the provision of emergency services, and attenuate tribes' opportunities for development and social strengthening. Poor Internet service and an absence of broadband connectivity, especially in rural areas, are severe detriments to education programs. All of these needs have been extensively documented and quantified.⁴²

A massive commitment of federal funds toward expanding and modernizing the physical infrastructure of Indian Country is necessary and is demanded by precepts of basic justice and fairness. Such a commitment also will yield long-term dividends for tribes *and* for the United States as a whole. Native citizens are among the poorest and longest neglected U.S. citizens, but

⁴² U.S. Civil Rights Commission, *Broken Promises*, op. cit.



basic epidemiology recognizes that investments in updated and adequate infrastructure is an antidote to disease and pandemics.⁴³ At the same time, basic economics recognizes that investments in public infrastructure are a particularly wise form of stimulus in times of economic malaise.⁴⁴

Education: Education builds the human infrastructure of communities. The era of tribal self-determination through self-governance has seen tribes take over management of formerly federal schools and programs, as well as create new institutions that can meet the needs of their youth and communities. With a growing set of tribally-controlled public, private, and charter schools, and a system of 35 fully accredited tribally established and controlled tribal colleges and universities (TCUs),⁴⁵ educational outcomes for Native citizens are improving. High school graduation rates among Native students on reservations, for example, are now approaching parity with the mainstream population, and while Native post-secondary educational attainment still lags, alumni of the TCUs report favorable post-college outcomes.⁴⁶ In addition, tribes are further improving educational outcomes by devoting growing resources and attention to lifelong and mid-career education of Native professionals. These efforts are important because the nation building which tribes are engaged in is rapidly increasing the need for citizens who are educated in such fields as business, public administration, law, finance, and accounting. Capacity in such fields is critical *infrastructure* for tribal communities.

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

⁴³ Akee, et al., ““American Indian Reservations and COVID-19...,” op. cit.

⁴⁴ For a recent summary, see Anderson, Stacy, Ryan Nunn and Jay Shambaugh “Wise Infrastructure Spending Can Stabilize the Economy, Boost Climate,” Brookings Institution, July 2, 2019, at <https://www.brookings.edu/opinions/wise-infrastructure-investments-can-stabilize-the-economy-and-reduce-climate-risk/>, accessed July 22, 2020.

⁴⁵ American Indian Higher Education Consortium, at <http://www.aihec.org/who-we-serve/TCUroster-profiles.htm>, accessed July 22, 2020.

⁴⁶ Akee and Taylor, op. cit.; U.S. Census, 2014-2018 American Community Survey 5-Year Estimates (*My Tribal Area*), accessed January 2, 2020; American Indian College Fund, at https://collegefund.org/wp-content/uploads/2020/03/Gallup_Report_Final_8-1-192.pdf, accessed July 24, 2020.

