THE SUPREME COURT AND THE ECONOMICS OF TRIBAL RESISTANCE

Matthew L.M. Fletcher (Michigan State Univ. College of Law)
March 26, 2010 – University of Idaho College of Law
Tribal Economies

- Wealthy Gaming and Resource Tribes and the Dilemma of Schumpeterian Economics
- Middle of the Road Tribes and the Dilemma of Institutional Economics
- Poor Tribes and the Dilemma of Market Share
Tribal Economies and Resistance

- Resistance to federal and state law has created only **sustainable** tribal economic development
  1. Gaming
  2. Smokeshops
  3. Natural Resources (e.g., minerals, fishing)
Fallacy of Regulatory Immunity

- Typical business development projects in Indian Country promise regulatory and taxation immunities or advantages
- E.g., manufacturing, defense contracts, microbusinesses
- Exception (?): SBA set asides (tribal corporations)
Part 1 – Grand River Enterprises (Six Nations)

- Six Nations Grand River Enterprises v. United States (NAFTA Arbitration 2010)
Schumpeterian Growth

- Major shocks and investment creating wealth
- E.g., invention of the cotton gin or discovery of massive natural resources
Schumpeterian Zero-Sum Game

- Wealth redistribution/windfalls do not improve economic pie, merely redistribute wealth at expense of others
- E.g., regulatory changes or legal loopholes
Schumpeter and Indian Economies

- Does Indian gaming create Schumpeterian growth?
- Does other Indian business create Schumpeterian growth?
- Wealth and market redistribution or genuine investment-based growth?
Schumpeterian Growth!

- Tribal treaty fishing rights: tribal investment includes fish hatcheries, conservation, and environmental protection initiatives
- Tribal gaming: tribal investment results include job creation (welfare roll reduction), local business development, and so on
Modern Congressional Regime

- Indian Self-Determination Acts:
  1. 638 contracts and self-governance contracts
  2. IHS
  3. Housing
  4. Natural Resources

- Gaming

- Recovery Act?
Supreme Court Utilitarianism (Schumpeterism?)

- SCT impliedly asks whether the tribal activity benefits community
- “Community” means United States
- SCT has been asking this question since *Johnson v. M’Intosh*
Recent Supreme Court Decisions

- *Wagnon v. Prairie Band* (2005): affirms state taxes on tribal, on-reservation business with nonmembers (on-reservation value added irrelevant)
Grand River Enterprises

- Six Nations Grand River-based enterprise, selling tobacco products wholesale to on- and off-reservation American retailers and wholesalers
- GRE employs hundreds on reserve
- American Indian tobacco sales revenues are significant, perhaps employing hundreds more
- GRE manufactures in Indian Country (on-reservation value) – Schumpeterian growth!
GRE Resistance

- GRE (and Native Wholesale Supply) establish reservation-to-reservation tobacco trade
- 46 States adopt MSA (tobacco settlement)
- GRE becomes NPM (non participating manufacturer); limits business to 5 states in accordance with MSA “loophole”
- State AGs and PMs agree to close “loophole” without input of NPMs
- Gives rise to NAFTA claim; GRE & NWS under state pressure, even indictment
Part 2 – Little River Band

Institutional Economics

- Douglass North: organizations will trend in an institutional direction most familiar to the organization, even if it is to their detriment
Rise of Labor Unions in Indian Country

- NLRA generally inapplicable to Indian nations
- Calif. gaming compacts forced Calif. tribes to negotiate with one union, favoring NLRB jurisdiction in *San Manuel Indian Bingo and Casino*
- Labor charges filed at Foxwoods, Soaring Eagle, and elsewhere (2007—present)
Progressive Institutional Response

- Tribal Labor Relations Ordinance and grievance structure
- Foxwoods and Little River Band, examples
- Cf. Soaring Eagle (ban on unions); San Juan Pueblo (right to work ordinance)
Little River Band

- Signatory to 1836 and 1855 treaties
- Owns Indian gaming enterprise in Manistee, Michigan
LRB Resistance

- LRB adopts labor relations ordinance (quicker response time, non-politicized dispute resolution board)
- Sues NLRB to foreclose federal jurisdiction: both union and NLRB wants to use NLRA (despite institutional infirmities disadvantageous to both LRB and union)
Conclusions?

- Tribal Resistance often a source of sustainable economic growth
- Tribal Resistance inspires investment and creativity
- Regulatory and/or tax immunities are short term boosts, but require long-term investment to generate sustained growth
Resources

- **Fletcher, American Indian Tribal Law** (forthcoming 2010)
- **Getches, Wilkinson, & Williams, Cases and Materials on Federal Indian Law** (5th ed.)
- **Schumpeter, The Theory of Economic Development** (1934)