TRIBAL LENDING AND TRIBAL SOVEREIGNTY

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ABSTRACT

The short-term lending industry involves millions of consumers and billions of dollars. Several Indian tribes have entered the lending industry as a means of economic development. These tribes have created their own lending enterprises that are headquartered in Indian country but attract customers from around the United States via the internet. This practice has been highly controversial.

Tribal lending has generated issues in a myriad of court cases. The issues are largely repetitive: Is the tribal lender entitled to sovereign immunity? And does the tribal court have jurisdiction over the loan involving a non-Indian? Courts have struggled to answer these questions. This Article answers both questions in the affirmative.

This Article begins by introducing tribal online lending. Part II provides an overview of the short-term lending industry. Part III discusses how and why tribes entered the online lending industry. Part IV examines the primary legal issues in tribal lending—sovereign immunity and tribal court jurisdiction. Part V recommends Congress pass legislation to resolve the tribal lending controversy. Specifically, the Article suggests that Congress declare that tribal courts have jurisdiction over loans involving non-Indian borrowers. The Article also suggests that Congress codify a test to determine which tribal lenders qualify for sovereign immunity.

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I. INTRODUCTION

U.S. consumers are turning to short-term lenders at a rapid rate.[1] In fact, there are more payday lending stores in the United States than McDonald's.[2] The payday lending industry involves well over 10 million households annually and nearly $40 billion per year.[3] Those who borrow from short-term lenders view the loans as a solution to their immediate cash shortage; however, borrowers are often unable to repay the loans,

1. DEMOCRATIC STAFF OF H. COMM. ON FIN. SERVS., 114TH CONG., REP. ON SKIRTING THE LAW: FIVE TACTICS PAYDAY LENDERS USE TO EVADE STATE CONSUMER PROTECTION LAWS 4 (2016), http://democrats.financialservices.house.gov/uploadedfiles/06.15.2016_committee_report_skirtingthelaw_final.pdf [hereinafter SKIRTING THE LAW] (claiming that "payday lending has become one of the fastest growing segments of the consumer credit industry").

2. Bethany McLean, *Payday Lending: Will Anything Better Replace It?*, ATLANTIC (May 2016), http://www.theatlantic.com/magazine/archive/2016/05/payday-lending/476403/ (claiming there are more short-term storefront lenders than McDonald's and Starbucks in the United States combined); *Payday Loans: Time for Review*, FED. RES. BANK ST. LOUIS, https://www.stlouisfed.org/publications/inside-the-vault/fall-2014/payday-loans (last visited Oct. 24, 2017) (stating there are 14,157 McDonald's in the United States but roughly 20,000 storefront payday lenders in 2012).

3. Yuka Hayashi, *U.S. to Curb Payday Lenders*, WALL ST. J. (June 2, 2016), https://www.wsj.com/articles/u-s-to-curb-payday-lenders-1464840063 (asserting 12 million households use payday loans and the industry has a $38.5 billion market); Astra Taylor, *Why It's So Hard to Regulate Payday Lenders*, NEW YORKER (Aug. 3, 2016), https://www.newyorker.com/business/currency/why-its-so-hard-to-regulate-payday-lenders (stating the industry is worth nearly $40 billion and affects 19 million households).

exacerbating their monetary woes.[4] States and federal agencies have taken various measures to regulate short-term loans, but lenders have been successful at evading state regulation.[5]

Perhaps the most controversial means used to avoid state regulation is tribal sovereignty. Businesses operating as an "arm of the tribe" enjoy sovereign immunity, rendering businesses exempt from suits in state and federal court.[6] Accordingly, states cannot compel tribally owned lenders to comply with state regulations.[7] Some have claimed that non-Indian companies are merely "renting tribes" to benefit from sovereign immunity.[8]

Several lending companies are actually owned and operated by tribes as a means of economic development.[9] Tribes, as sovereigns, create their own laws to regulate their lenders.[10] Disputes arising over the loan are resolved in tribal court. Tribal governments have received a financial boost

4. SKIRTING THE LAW, *supra* note 1, at 4 (noting borrowers take out payday loans to solve an urgent financial problem but usually end up in debt for over half of the year).

5. *Id.* at 5 ("Despite legislative efforts to govern short-term, small-dollar lending by states, some payday lenders have proven to be adept at avoiding state regulations.").

6. *Id.* at 15–16; Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006) ("When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe.").

7. SKIRTING THE LAW, *supra* note 1, at 16 (noting states cannot force entities entitled to sovereign immunity to comply with state regulations).

8. *See, e.g.*, *id.* at 15–16; Jenadee Nanini, *Tribal Sovereignty and FinTech Regulations: The Future of Co-Regulating in Indian Country*, 1 GEO. L. TECH. REV. 503, 503 (2017) (noting that non-Indians are exploiting tribal immunity in the lending industry); Ben Walsh, *Outlawed by the States, Payday Lenders Take Refuge on Reservations,* HUFFPOST (Jun. 29, 2015), http://www.huffingtonpost.com/2015/06/29/online-payday-lenders-reservations_n_7625006.html (observing that state regulatory efforts have caused payday lenders to move to reservations).

9. *Short-Term, Small Dollar Lending: The CFPB's Assault on Access to Credit and Trampling of State and Tribal Sovereignty: Hearing on H.R. 114–73 Before the H. Comm. on Fin. Servs*., 114th Cong. 1 (2016) (statement of Sherry Treppa, Chairperson, Habematolel Pomo of Upper Lake) [hereinafter Statement of Sherry Treppa] (stating that the Habematolel Pomo of Upper Lake "owns and operates several online small-dollar lending businesses that operate on our Trust lands"). Due to the number of tribes involved in the online lending industry, the Native American Financial Services Association was formed in 2012. *NAFSA Fact Sheet*, NATIVE AM. FIN. SERVS. ASS'N, https://nativefinance.org/nafsa-fact-sheet/ (last visited May 18, 2017).

10. Nanini, *supra* note 8, at 506–07 (stating the Otoe-Missouria Tribe and Tunica-Biloxi Tribe of Louisiana have created lending regulatory bodies); Statement of Sherry Treppa, *supra* note 9, at 3 (noting the tribe created its own lending regulations).

from lending.[11] Borrowers seem to like tribal lenders, too; otherwise, it is difficult to explain why borrowers repeatedly choose tribal lenders despite the wide availability of nontribal lenders.[12]

Although borrowers often wish to do business with tribal lenders, numerous lawsuits and regulatory efforts have attempted to disrupt the tribal lending industry.[13] Lawsuits have been filed contending tribal lenders are not entitled to sovereign immunity.[14] Arguments have also been made that tribes cannot exercise jurisdiction over the loans.[15] These regulatory efforts are often nothing more than assaults on tribal sovereignty.

Congress needs to affirm tribal sovereignty in the lending industry. It should acknowledge tribes' inherent sovereignty and allow them to use it to further their economic development.[16] Lending allows tribes to craft their own lending infrastructure and regulate the loans, and Congress should respect tribal law.[17] Outside regulations are nothing more than infringements upon tribal sovereignty.[18] Furthermore, Congress needs to make it clear that tribal courts can exercise jurisdiction over loan agreements with non-

11. Gavin Clarkson et al., *Online Sovereignty: The Law and Economics of Tribal Electronic Commerce*, 19 VAN. J. ENT. & TECH. L. 1, 7 (2016) (noting that poor tribal governments have generated revenue through online lending).

12. *Id.* at 8 (stating that many borrowers choose to return to online lenders although they have numerous choices).

13. *Id.* (noting that state regulatory efforts have impeded tribal online lending); Walsh, *supra* note 8 (noting that regulators are pursuing tribally affiliated online lenders).

14. Harold Monteau, *CFPB Is Barking up the Wrong Tree*, INDIAN COUNTRY TODAY (Aug. 26, 2016), https://indiancountrymedianetwork.com/news/opinions/cfpb-is-barking-up-the-wrong-tree/ (noting lawsuits have been filed challenging the sovereign immunity of tribal lending entities).

15. Chris Morran, *Payday Lenders Can't Use Tribal Affiliation to Garnish Wages Without Court Order*, CONSUMERIST (Apr. 11, 2014), https://consumerist.com/2014/04/11/payday-lenders-cant-use-tribal-affiliation-to-garnish-wages-without-court-order/ (claiming tribal courts have no jurisdiction over non-Indians who consented to tribal court jurisdiction); Sharon Schmickle, *Borrowers, Beware: Tribal-Affiliated Loans Sound Good, but Can Be Costly*, MINNPOST (June 6, 2013), https://www.minnpost.com/politics-policy/2013/06/borrowers-beware-tribal-affiliated-loans-sound-good-can-be-costly (noting that challenges have been made to tribal court jurisdiction over online loans).

16. *See infra* Part III.

17. *See infra* Part III.

18. *See infra* Part IV.

Indians.[19] Congress also needs to articulate how sovereign immunity applies to tribal lenders.[20]

Part II of this Article discusses the short-term lending industry. Part III discusses tribal sovereignty and how it relates to tribal online lending. Part IV provides an overview of tribal sovereign immunity and court jurisdiction as well as an examination of how nontribal courts have addressed tribal immunity and tribal court jurisdiction in lending cases. Part V recommends that Congress affirm tribal sovereignty in the lending industry and act to clarify the scope of tribal court jurisdiction and sovereign immunity in online lending. The Article ends on a conclusion.

II. SHORT-TERM LENDING

The short-term lending industry is little understood and highly controversial. This Part provides an overview of two common types of short-term, high-interest loans—payday loans and installment loans—as well as how the short-term loans are regulated. It next provides a brief summary of arguments for and against payday loans.

A. *An Overview of Short-Term Lending*

The online short-term lending industry is dominated by two types of loans: payday loans and installment loans.[21] The chief distinction between the two is that payday loans are generally due in a single payment, normally within one to four weeks, whereas installment loans are usually repaid over a few months.[22] Installment loans often require collateral, but payday loans are usually unsecured.[23] Rather, the payday loan's security is the borrower's next paycheck.[24]

19. *See infra* Part V.

20. *See infra* Part V.

21. *Payday Loans vs Installment Loans, Which to Choose?*, ELITE PERS. FIN., http://www.elitepersonalfinance.com/payday-loans-vs-installment-loans/ (last visited May 19, 2017).

22. *Id.* (discussing differences between installment and payday loans); Mitchell Hartman, *What's the Difference Between Payday and Installment Loans?*, MKT. PLACE (May 13, 2013), https://www.marketplace.org/2013/05/13/wealth-poverty/beyond-payday-loans/whats-difference-between-payday-and-installment-loans (discussing differences between payday and installment loans).

23. Hartman, *supra* note 22; *Payday Loans vs Installment Loans, Which to Choose?*, *supra* note 21.

24. *See* SKIRTING THE LAW, *supra* note 1, at 4 (noting payday loans must be repaid

Both types of loans are for relatively small amounts; however, the interest rates are very high.[25] The average amount of money borrowed in an installment loan is between $150 and a few thousand dollars.[26] Installment loan interest rates are usually between 25 percent and 100 percent,[27] but rates up to 950 percent have been reported.[28] Payday loans typically range between $100 and $1,500.[29] The average payday loan is for approximately $400,[30] and payday lenders typically charge $15 per $100 borrowed.[31] This translates into an annual percentage rate (APR) of 391 percent;[32] nonetheless, the rate can top 1,000 percent.[33] To put this in perspective, the

in one to four weeks, when the borrower's next paycheck arrives); Hartman, *supra* note 22 (noting payment is due typically within 30 days); *Payday Loans vs Installment Loans, Which to Choose?*, *supra* note 21 (noting payday loans are usually due in full within 30 days).

25. Hartman, *supra* note 22.

26. *Id.*

27. *Id.*

28. Charlene Crowell, *CFPB Lawsuit Seeks Consumer Restitution from High-Cost Online Installment Lenders*, SEATTLE MEDIUM (May 17, 2017), http://seattlemedium.com/cfpb-lawsuit-seeks-consumer-restitution-high-cost-online-installment-lenders/ (noting a federal lawsuit by the CFPB alleges four installment lenders charged interest rates between 440 and 950 percent).

29. Hartman, *supra* note 22.

30. CONSUMER FIN. PROT. BUREAU, PAYDAY LOANS AND DEPOSIT ADVANCE PRODUCTS 15 (2013), http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf ("The mean loan size was $392 . . . ."); THE PEW CHARITABLE TRS., PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 4 (2012), http://www.pewtrusts.org/~/media/legacy/%20uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf (calculating the average amount borrowed on a payday loan to be $375); *see* William Isaac, *BankThink Why Payday Loans are Good for Millions of People*, AM. BANKER (Aug. 13, 2013), https://www.americanbanker.com/opinion/why-payday-loans-are-good-for-millions-of-people (stating the average payday loan is between $100 to $500).

31. THE PEW CHARITABLE TRS., *supra* note 30, at 6; Isaac, *supra* note 30 (stating the fee accompanying a payday loan is typically 15 percent); *Payday Loans: Time for Review*, *supra* note 2 (noting the average payday loan charges "$10 to $20 per $100 borrowed").

32. THE PEW CHARITABLE TRS., *supra* note 30, at 6; Isaac, *supra* note 30; *Payday Loans: Time for Review*, *supra* note 2.

33. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2052 (2014) (Thomas, J., dissenting); Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs., 974 F. Supp. 2d 353, 355 (S.D.N.Y. 2013) (noting interest rates on payday loans can top 1,000 percent); Alain Sherter, *1,000% Loans? Millions of Borrowers Face Crushing Costs*, MONEY WATCH (Apr. 25, 2016), http://www.cbsnews.com/news/1000-loans-millions-of-borrowers-face-crushing-costs/ (noting loans with interests as high as 1,500 percent);

average interest rate on credit cards is about 16 percent,[34] and banks usually charge around 10 percent for personal loans.[35]

The high interest rates accompanying short-term loans have prompted many to call them "[m]odern day usury."[36] Usury, the lending of money at extremely high interest rates,[37] has been universally despised for centuries.[38] Indeed, interest rate caps predate the invention of money.[39] Several religions, including Christianity, Judaism, Islam, and Hinduism forbid their practitioners from engaging in usury.[40] Accordingly, it is unsurprising that

Michelle Singletary, *The Trap of Payday Loans Can Lead to Triple-Digit Interest Rates*, WASH. POST (Mar. 25, 2014), https://www.washingtonpost.com/business/the-trap-of-payday-loans-can-lead-to-triple-digit-interest-rates/2014/03/25/ca1853dc-b471-11e3-8cb6-284052554d74_story.html (noting APRs of more than 1,000 percent).

34. *Current Credit Card Interest Rates*, BANKRATE, http://www.bankrate.com/finance/credit-cards/current-interest-rates.aspx (last visited Sept. 6, 2017) (showing the current credit interest rate to be approximately 16.7 percent).

35. *Payday Loans: Time for Review*, *supra* note 2 (stating the interest rate on a traditional personal loan is 10 percent).

36. *See, e.g.*, CTR. FOR RESPONSIBLE LENDING, MODERN DAY USURY: THE PAYDAY LOAN TRAP 2 (2010), http://www.responsiblelending.org/allies/faith-and-credit/Modern-Day-Usury-The-Payday-Loan-Trap.pdf; Alex Mikulich, *Payday Loans and Catholic Social Teaching—A Modern Form of Usury!*, LOY. U. NEW ORLEANS (Feb. 2010), http://www.loyno.edu/jsri/payday-loans-and-catholic-social-teaching-modern-form-usury.

37. Dictionary.com defines usury as "the lending or practice of lending money at an exorbitant interest." *Usury*, DICTIONARY.COM, http://www.dictionary.com/browse/usury (last visited Oct. 21, 2017); State laws usually define usury as charging higher interest rates than permitted by statute. *See, e.g.*, WASH. REV. CODE ANN. § 19.52.030(1) (West 2017).

38. Yaron Brook, *The Morality of Moneylending: A Short History*, 2 OBJECTIVE STANDARD, no. 3, 2007, at 1 (noting that moneylenders have been blamed for financial woes "[f]or millennia"); Wayne A.M. Visser & Alastair McIntosh, *A Short Review of the Historical Critique of Usury*, 8 ACCT., BUS. & FIN. HIST., no. 2, 1998, at 175, 178, http://www.alastairmcintosh.com/articles/1998-Usury-Visser-McIntosh.pdf (noting that usury has been condemned for thousands of years); *The History of Usury,* AM. FAIRNESS LENDING, https://americansforfairnessinlending.wordpress.com/the-history-of-usury/ (last visited Sept. 18, 2017) (listing prohibitions on usury from the Old Testament to the modern era).

39. McLean, *supra* note 2 (noting the Babylonians limited the amount of grain that could be paid as interest).

40. *Bible Verses About Usury*, KING JAMES BIBLE, https://www.kingjamesbibleonline.org/Bible-Verses-About-Usury/ (last visited Oct. 21, 2017) (listing Bible verses discussing usury); Lewis N. Dembitz & Joseph Jacobs, *Usury*, JEWISH ENCYCLOPEDIA, http://www.jewishencyclopedia.com/articles/14615-usury (last visited Oct. 21, 2017); *Riba (Usury) in Islam*, ISLAMWEB.NET (Sept. 19, 2013),

short-term lending is a controversial topic[41] and that legislators have been urged to regulate the industry more closely.[42]

There are virtually no federal laws governing short-term loans.[43] However, the Consumer Financial Protection Bureau (CFPB) has proposed a rule that would regulate payday lenders.[44] The Federal Trade Commission (FTC) can regulate payday lenders in matters related to deceptive, unfair, and abusive lending tactics.[45] The FTC has successfully sued and reached

http://www.islamweb.net/en/article/157155/riba-usury-in-islam ("In Islam, dealing with Riba is one of the major sins, which entail severe punishment by Allah Almighty."); *The Vashishta Dharmashastra, Part 1*, HINDUWEBSITE.COM, http://www.hinduwebsite.com/sacredscripts/hinduism/dharma/vash1.asp (last visited Oct. 21, 2017) (for example, verse 42: "(Brahman) weighed in the scales the crime of killing a learned Brâhma[n]a against (the crime of) usury; the slayer of the Brâhma[n]a remained at the top, the usurer sank downwards."); *Usury*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/usury (last visited Oct. 21, 2017) (noting that the Talmud considers everyone who participates in usurious loans, even accessories to the loan, to have violated Jewish law); SÜLEYMANIYE FOUND., *Usury in Quran and Sunnah*, ISLAM & QUR'AN, http://www.islamandquran.org/fatwas/economics/usury-in-koran-and-sunnah.html (last visited Oct. 21, 2017).

41. *See, e.g.*, Matthew Hisrich, *The Payday-Loan Controversy*, FOUND. ECON. EDUC. (Oct. 1, 2004), https://fee.org/articles/the-payday-loan-controversy/; Hilary Osborne, *What Is a Payday Loan—and Why Are They So Controversial?*, GUARDIAN (July 26, 2013), https://www.theguardian.com/money/2013/jun/27/what-is-a-payday-loan.

42. Brittany Jones-Cooper, *Americans Want Payday Loans to Be More Regulated: Pew Survey*, YAHOO! FIN. (Apr. 19, 2017), http://finance.yahoo.com/news/americans-want-payday-loans-regulated-pew-survey-185517541.html; *Editorial: It's Time to Rein in Payday Lenders*, COLUMBUS DISPATCH (Mar. 27, 2017), http://www.dispatch.com/opinion/20170327/editorial-its-time-to-rein-in-payday-lenders.

43. *A Short History of Payday Lending Law*, PEW CHARITABLE TRS. (July 18, 2012), http://www.pewtrusts.org/en/research-and-analysis/analysis/2012/07/a-short-history-of-payday-lending-law (stating that aside from laws protecting military families from interest rates above 36 percent, federal law is silent on payday lending); Liz Farmer, *The Myth vs. the Truth About Regulating Payday Lenders*, GOVERNING ST. & LOCALITIES (Mar. 2017), http://www.governing.com/topics/finance/gov-payday-lending-online.html (noting federal law regulates payday loans to military members and the absence of federal payday loan regulations for nonmilitary members); Taylor, *supra* note 3 (stating the Dodd-Frank Act prohibits the CFPB from regulating interest rates).

44. CONSUMER FIN. PROT. BUREAU, CONSUMER FINANCIAL PROTECTION BUREAU PROPOSES RULE TO END PAYDAY DEBT TRAPS *passim* (2016), http://files.consumerfinance.gov/f/documents/CFPB_Proposes_Rule_End_Payday_Debt_Traps.pdf.

45. *Payday Lending*, FTC (Feb. 28, 2008), https://www.ftc.gov/news-events/media-resources/consumer-finance/payday-lending (noting the Federal Trade Commission

settlements with several payday lenders.[46] The Office of the Comptroller of the Currency (OCC) has also taken legal action against payday lenders;[47] nevertheless, the OCC has proposed a rule that some think would protect payday lenders.[48] The Federal Deposit Insurance Corporation is developing a program to help banks offer small-dollar loans,[49] and this could put short-term lenders out of business.[50]

States do the bulk of short-term-loan regulation.[51] Fourteen states and the District of Columbia prohibit short-term lending.[52] Of the 36 states that allow short-term lending, 9 regulate the practice.[53] Examples of regulations include limits on the loan's amount, duration, and maximum interest rate.[54] Twenty-seven states allow lenders to charge APRs in excess of 391 percent.[55] Under the Dodd-Frank Act, federally recognized tribes are considered

enforces a variety of laws against payday lenders but referencing no law regulating loan interest rates).

46. *See, e.g.*, *FTC Secures $4.4 Million from Online Payday Lenders to Settle Deception Charges*, FTC (Jan. 15, 2016), https://www.ftc.gov/news-events/press-releases/2016/01/ftc-secures-44-million-online-payday-lenders-settle-deception.

47. *Payday Lending*, OFF. COMPTROLLER CURRENCY: U.S. DEP'T TREASURY, https://www.occ.treas.gov/topics/consumer-protection/payday-lending/index-payday-lending.html (last visited Oct. 21, 2017).

48. *See, e.g.*, *FinTech Could Be Hurt by Fight Between OCC and States,* PYMPTS.COM (Apr. 25, 2017), http://www.pymnts.com/news/banking/2017/fintech-could-be-hurt-by-fight-between-occ-and-states-regulation-charter-finance-industry/.

49. Rae-Ann Miller et al., *A Template for Success: The FDIC's Small-Dollar Loan Pilot Program*, 4 FDIC Q., no. 2, 2010, at 28, 28 (noting the FDIC is developing a program to help banks provide an alternative to payday loans).

50. *See* Isaac, *supra* note 30 (noting banks do not perform payday loans because "the transaction costs are simply too high").

51. THE PEW CHARITABLE TRS., *supra* note 30, at 29 ("To date, payday loans have been regulated primarily at the state level.").

52. *State Payday Loan Regulation and Usage Rates*, PEW CHARITABLE TRS. (Jan. 14, 2014), http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/state-payday-loan-regulation-and-usage-rates (meaning these states have no storefront payday lenders).

53. *Id.* (noting that 27 states have permissive payday lending loans and 9 states have payday regulations between permissive and restrictive, for a total of 36 states).

54. Heather Morton, *Payday Lending State Statutes*, NAT'L CONF. ST. LEGISLATURES (Sept. 6, 2016), http://www.ncsl.org/research/financial-services-and-commerce/payday-lending-state-statutes.aspx (listing and summarizing state payday lending statutes).

55. *State Payday Loan Regulation and Usage Rates*, *supra* note 52.

states.[56]

About three-quarters of borrowers obtain short-term loans exclusively through storefronts.[57] This makes determining which state's laws to apply simple. For loans conducted online, determining which laws apply is much more complicated—especially when the lender is an Indian tribe.

B. *The Debate over Regulating Short-Term Lenders*

Short-term lending is a contentious topic. This Part summarizes the arguments for and against the short-term-lending industry, in general and irrespective of tribal lenders.

Short-term-loan detractors point to the high price of the loans.[58] These critics contend the high price of loans traps borrowers in a never-ending cycle of debt.[59] Indeed, critics assert that short-term lenders depend on customers being unable to make their payments.[60] To facilitate this, detractors claim short-term lenders target the poor and that lenders engage

56. 12 U.S.C. § 5481(27) (2012).

57. THE PEW CHARITABLE TRS., *supra* note 30, at 27.

58. Mark Flannery & Katherine Samolyk, *Payday Lending: Do the Costs Justify the Price?* 3 (FDIC Ctr. for Fin. Research, Working Paper 3 No. 2005-09, 2005), https://www.fdic.gov/bank/analytical/cfr/2005/wp2005/2005-09.pdf ("Consumer groups criticize payday lenders for selling overpriced loans to people who are already experiencing financial difficulties.").

59. *Id.* at 3–4 (noting critics claim payday lenders engage in practices that increase the likelihood of loans rolling over); Scott Horsley, *Payday Loans—And Endless Cycles of Debt—Targeted by Federal Watchdog*, NPR (Mar. 26, 2015), http://www.npr.org/2015/03/26/395421117/payday-loans-and-endless-cycles-of-debt-targeted-by-federal-watchdog ("[C]ritics say that borrowers often end up trapped in a cycle of high-cost debt as a result.").

60. Stacy Cowley, *Payday Loans' Debt Spiral to Be Curtailed*, N.Y. TIMES (June 2, 2016), https://www.nytimes.com/2016/06/02/business/dealbook/payday-borrowings-debt-spiral-to-be-curtailed.html ("The very economics of the payday lending business model depend on a substantial percentage of borrowers being unable to repay the loan and borrowing again and again at high interest rates." (quoting Richard Cordray, director of the Consumer Financial Protection Bureau)); Horsley, *supra* note 59 ("[R]epeat borrowers are the heart of the payday business."); Paul Kiel, *The 182 Percent Loan: How Installment Lenders Put Borrowers in a World of Hurt*, PROPUBLICA (May 13, 2013), https://www.propublica.org/article/installment-loans-world-finance (noting installment lenders' goals are to have borrowers renew or refinance their loans); McLean, *supra* note 2 ("Study after study has found that repeat borrowing accounts for a large share of the industry's revenues.").

in shady tactics such as hidden charges to deceive borrowers.[61] Payday lenders have been accused of racism because they are much more likely to open stores in predominantly minority neighborhoods.[62]

On the other hand, short-term loans have their supporters. As one report notes, "Except for the ten to twelve million people who use them every year, just about everybody hates payday loans."[63] Supporters of short-term loans assert the high loan prices are justified by the lenders' operating costs and the borrowers' risk of default.[64] These supporters acknowledge that lenders tend to locate in minority neighborhoods; however, they argue neighborhood financial—not racial—characteristics explain lender location selection.[65] Significantly, short-term-loan proponents claim the industry serves a public need because the people who seek short-term loans have nowhere else to turn when they need money.[66]

61. Flannery & Samolyk, *supra* note 58, at 3–4 (noting payday lenders "engage in deceptive and unfair practices" and have been accused of targeting low-income neighborhoods); Jill Insley, *Payday Loan Borrowers 'Trapped in Debt Spiral'*, GUARDIAN (May 18, 2012), https://www.theguardian.com/money/2012/may/18/payday-loan-borrowers-trapped-debt-spiral; Kiel, *supra* note 60 (noting installment loan providers surreptitiously sell borrowers insurance for their loans and provide borrowers with extra money to incentivize their return).

62. Zoe Elizabeth Lees, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending-B. Payday Loans Perpetuate the Badges and Incidents of Slavery*, RACE, RACISM, & L., http://racism.org/index.php?option=com_content&view=article&id=1599:paydaylending01&catid=50&Itemid=173&showall=&limitstart=8 (last visited Oct. 21, 2017).

63. Robert DeYoung et al., *Reframing the Debate About Payday Lending*, LIBERTY STREET ECON. (Oct. 19, 2015), http://libertystreeteconomics.newyorkfed.org/2015/10/reframing-the-debate-about-payday-lending.html#.ViUb2Z1Vikp.

64. *See, e.g.*, *id.* (noting the short-term loan market is competitive, and this suggests payday interest rates are justified); Flannery & Samolyk, *supra* note 58, at 2 ("We find that fixed operating costs and high loan loss rates justify a large part of the high APR charged on payday advance loans.").

65. *See, e.g.*, ADAM B. SUMMERS, PAYDAY LENDING: PROTECTING OR HARMING CONSUMERS? 26 (2013), http://reason.org/files/payday_lending_regulation.pdf (asserting that perceptions of short-term lenders targeting minorities is a myth); DeYoung et al., *supra* note 63 (stating research indicates that financial characteristics of a neighborhood are determinative of whether a short-term lender establishes a store).

66. *See, e.g.*, SUMMERS, *supra* note 65, at 30 (noting that short-term loans are the best option borrowers have in some instances); Isaac, *supra* note 30 ("But many may face the Hobson's choice of deciding between having their electricity turned off, their car repossessed, their job lost, their rent or mortgage unpaid or their check bounced. Payday lenders offer a better way out."); Thaya Brook Knight, *Pay Day Lending Is Not Harmful to Low Income Borrowers*, HILL (May 6, 2017), http://thehill.com/blogs/

Unsurprisingly, short-term-loan detractors want greater lending regulation, while industry supporters assert regulation will hurt those who need the loans.[67] Payday supporters contend regulation could eliminate this source of credit for borrowers and argue that more loan providers can lead to lower interest rates.[68] Opponents argue states with strict lending regulations have lower loan interest rates and fewer payday storefronts.[69] Either way, it is undeniable that short-term lenders have had tremendous success at evading regulation.[70] One of the more controversial tactics used to skirt regulation is partnering with a federally recognized Indian tribe.[71]

III. TRIBES AND LENDING

The 567 federally recognized Indian tribes in the United States[72] are "domestic dependent nations."[73] Federally recognized tribes have a direct

congress-blog/economy-budget/278731-pay-day-lending-is-not-harmful-to-low-income-borrowers (calling short-term loans "a lifeline" for those in dire financial situations).

67. *See, e.g.*, DeYoung et al., *supra* note 63.

68. *See, e.g.*, *id.* (citing research showing that more payday lenders in an area leads to lower payday loan fees).

69. James R. Barth et al., *Do State Regulations Affect Payday Lender Concentration?*, 84 J. ECON. & BUS. 14, 24 (2016) (concluding strict state regulation reduces the number of lenders in a state); THE PEW CHARITABLE TRS., *supra* note 30, at 22 (concluding that strict short-term lending laws reduce the number of lenders and lead to fewer state citizens using short-term loans).

70. SKIRTING THE LAW, *supra* note 1, at 5 ("[S]ome payday lenders have proven to be adept at avoiding state regulations."); Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 754 (2012) ("Payday lenders are adept at avoiding any regulations states pass . . . ."); McLean, *supra* note 2 ("Lenders have excelled at finding loopholes in these regulations.").

71. SKIRTING THE LAW, *supra* note 1, at 15–16; Martin & Schwartz, *supra* note 70, at 753 (stating partnerships between tribes and online lenders "call into question" the legitimacy of tribal sovereign immunity in the commercial sphere); Benscha, *The Relationship Between Indian Tribes and the Payday Lending Industry*, PAYMENT 21 (Apr. 19, 2016), https://payment21.com/blog/relationship-between-indian-tribes-and-payday-lending-industry ("Controversy has developed with regards to online payday lending operations that evade state regulations by affiliating with Native American tribes.").

72. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019, 5019 (Jan. 29, 2016).

73. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014) (citations omitted) ("Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'").

government-to-government relationship with the United States[74] and have been recognized as sovereigns since long before the United States' founding.[75] Consequently, Indian tribes are not bound by the U.S. Constitution.[76] Tribes are presumed to maintain their original powers until Congress explicitly divests them of the power.[77]

74. Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951 (Apr. 29, 1994) ("The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes."); Memorandum from President George W. Bush to the Heads of Exec. Dep'ts & Agencies, https://www.fws.gov/nativeamerican/pdf/government-to-government-relationship.pdf ("I take pride in acknowledging and reaffirming the existence and durability of our unique government-to-government relationship and these abiding principles.").

75. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); United States v. Wheeler, 435 U.S. 313, 322–23 (1978) *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. §§ 1301–03 (2012), *as recognized in* United States v. Lara, 541 U.S. 193 (2004) (noting that tribes were sovereigns prior to the arrival of Europeans); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."); Martin & Schwartz, *supra* note 70, at 768 ("Indian governments have inherent sovereignty which is not derived from any other government but rather from the people themselves."); Hilary B. Miller, *The Future of Tribal Lending Under the Consumer Financial Protection Bureau*, ABA: BUS. L. TODAY (Mar. 2013), http://www.americanbar.org/publications/blt/2013/03/04_miller.html ("Indian tribes were sovereign nations prior to the founding of the United States.").

76. Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991) (noting that tribes surrendered no powers at the Constitutional Convention); Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding the Bill of Rights does not apply to Indian tribes). Nevertheless, tribes are bound by the Indian Civil Rights Act. 25 U.S.C. §§ 1301–04.

77. *Wheeler*, 435 U.S. at 323 ("[U]ntil Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."); Las Vegas Tribe of Paiute Indians v. Phebus, 5 F. Supp. 3d. 1221, 1228 (D. Nev. 2014) ("Congressionally recognized tribes retain all aspects of sovereignty they enjoyed as independent nations before they were conquered, with three exceptions: (1) they may not engage in foreign commerce or foreign relations; (2) they may not alienate fee simple title to tribal land without the permission of Congress; and (3) Congress may strip a tribe of any other aspect of sovereignty at its pleasure." (citations omitted)); Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 762 (2004) [hereinafter Fletcher, *In Pursuit*] ("In fact, the basis for much federal Indian law is the maxim that Indian Tribes have the inherent

Indian country[78] suffers from a dearth of economic opportunities.[79] Geographic isolation makes casinos impractical for many tribes,[80] and federal red tape makes opening a business in Indian country extremely challenging.[81] If a business is opened on tribal land, state taxes of on-reservation commerce make tribal taxes economically impractical to impose.[82] Consequently, Indian reservations often have extremely poor

authority of all sovereigns until Congress takes it away.").

78. Defined by 18 U.S.C. § 1151 (2016) as all land within an Indian reservation that is under federal jurisdiction, Indian allotments that have not been extinguished, and dependent Indian communities.

79. Nanini, *supra* note 8, at 504 (footnote omitted) ("Economic development in Indian Country is scarce."); Robert J. Miller, *Creating Economic Development on Indian Reservations*, PROP. & ENV'T RES. CTR., Oct. 1, 2012, https://www.perc.org/articles/creating-economic-development-indian-reservations (discussing how quickly money leaves tribal economies); *Online Primers: Economic Development at a Glance*, U.S. DEP'T INTERIOR INDIAN AFF., https://www.bia.gov/as-ia/ieed/online-primers-economic-development-glance (last visited Oct. 30, 2017) (noting that Indians have suffered from "decades of high unemployment, lack of access to credit, and sparse economic opportunities"); Katherine Peralta, *Native Americans Left Behind in the Economic Recovery*, U.S. NEWS & WORLD REP. (Nov. 27, 2014), https://www.usnews.com/news/articles/2014/11/27/native-americans-left-behind-in-the-economic-recovery (discussing the economic challenges American Indian communities face).

80. Clarkson et al., *supra* note 11, at 6 (footnote omitted) (noting many tribes are located too far from population centers to reap rewards from casinos); Nanini, *supra* note 8, at 504 (footnote omitted) (stating that casinos are not economically viable for remotely located tribes); *Tribal Online Lending Provides a Critical Lifeline for Non-Gaming Tribes*, NATIVE AM. FIN. SERVS. ASS'N., https://nativefinance.org/lending-vs-gaming/ (follow "Download The PDF" link) (last visited Oct. 21, 2017) (noting that location determines whether a tribal casino will be profitable).

81. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE AUTHORITATIVE ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS 4 (3d. ed. 2002) ("No other ethnic or cultural group is so heavily regulated."); Adam Crepelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE. J. CIVIL RTS. & SOC. JUST. 315, 326 (2017) (discussing the bureaucratic impediments that stand in the way of tribal economic development).

82. Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163, 189 (1989) (acknowledging that allowing states to tax on-reservation economic activity puts a higher tax burden on entities doing business on the reservation as opposed to those doing business off reservation); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 151 (1980) (explaining that states can impose taxes on reservation purchases "even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians"); Fletcher, *In Pursuit*, *supra* note 77, at 771 (footnotes omitted) ("[S]tates and localities may tax non-Indians residing in Indian Country and, in some limited circumstances, the Indians living in Indian Country. This has created on some reservations the specter of double taxation, meaning that where an Indian tribe might

infrastructure,[83] pervasive unemployment,[84] and exceedingly high poverty rates.[85]

Online lending has provided isolated tribes with an opportunity to improve their economies.[86] State law typically does not apply on tribal land,[87]

tax a non-Indian owned business, the state may also do so. This, in turn, creates a strong disincentive for non-Indian businesses to operate businesses in Indian Country.").

83. *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing on Indian Affairs Before the S. Comm. on Indian Affairs*, 111th Cong. 59 (2010) (statement of John Barrasso, U.S. Senator from Wyoming) [hereinafter Statement of John Barrasso] (stating that everyone agrees Indian country has a "lack of adequate physical infrastructure—good roads and bridges, public water supply and sanitation facilities, and adequate housing"); U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 51 (2003), http://www.usccr.gov/pubs/commission.php (follow link to document) (noting that less than 50 percent of houses on reservations are connected to sewer systems and 20 percent lack indoor plumbing); *Investing in Tribal Governments: An Analysis of Impact and Remaining Need Under the American Recovery and Reinvestment Act*, ISSUELAB (Mar. 1, 2010), https://www.issuelab.org/resource/investing-in-tribal-governments-an-analysis-of-impact-and-remaining-need-under-the-american-recovery-and-reinvestment-act.html (follow download link) (noting that most jurisdictions receive $5,000 for maintenance per road mile while Indian country receives $500 per road mile).

84. Statement of John Barrasso, *supra* note 83, at 6; Vincent Schilling, *Getting Jobbed: 15 Tribes with Unemployment Rates over 80 Percent*, INDIAN COUNTRY TODAY (Aug. 29, 2013), http://indiancountrymedianetwork.com/news/business/getting-jobbed-15-tribes-with-unemployment-rates-over-80-percent.

85. *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing on Indian Affairs Before the S. Comm. on Indian Affairs*, 111th Cong. 1 (2010) (statement of Hon. Byron L. Dorgan, Chairman, S. Comm. on Indian Affairs) [hereinafter Statement of Byron L. Dorgan] (noting 8 of the 10 poorest counties in the United States are a majority American Indian); SUZANNE MACARTNEY ET AL., POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011, at 2 (2013), https://www.census.gov/prod/2013pubs/acsbr11-17.pdf (American Indians have the nation's highest poverty rate); Clarkson et al., *supra* note 11, at 7 ("[M]ore than one-third of American Indian children live in poverty.").

86. Clarkson et al., *supra* note 11, at 7 (noting online lending has provided desperately needed revenues to impoverished tribes); Nanini, *supra* note 8, at 504 (stating that isolated tribes have had success in raising revenue through online lending); *The Truth About Tribal Lending*, NATIVE AM. FIN. SERVS. ASS'N, https://nativefinance.org/truth-tribal-lending/ (last visited Oct. 21, 2017) (discussing how online lending benefits geographically isolated tribes).

87. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147 (1982) ("Only the Federal Government may limit a tribe's exercise of its sovereign authority."); *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 154 ("[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government,

and states are the primary payday-loan regulators.[88] Since the Dodd-Frank Act considers tribes "States,"[89] poor and isolated tribes have seen online payday lending as an opportunity to use their sovereignty to promote economic development.[90] Indeed, payday lending provides some tribes with the majority of their budgets.[91]

The controversy over tribal lending largely stems from the belief that non-Indian lenders are pairing with tribes to skirt regulatory authorities. Private lending companies have sought partnerships with tribes to evade state law.[92] These lenders are only partially owned by tribes, and they are not

not the States."); Clarkson et al., *supra* note 11, at 5 ("As nations that predate the Constitution and the United States, tribal nations can generally operate in licensed environments independent of state regulation.");
Blake Sims & Justin Hosie, *Tribal Loans to State Residents—The Next Test of Sovereign Immunity*, ABA, http://apps.americanbar.org/buslaw/committees/CL230000pub/newsletter/201112/sims_hosie.pdf (last visited May 20, 2017) ("States are generally prevented from enforcing state laws against tribes, except in limited circumstances where Congress explicitly delegated such ability.").

88. THE PEW CHARITABLE TRS., *supra* note 30, at 29 ("To date, payday loans have been regulated primarily at the state level."); Michael D. Shear & Jessica Silver-Greenberg, *Payday Loan Rules Proposed by Consumer Protection Agency*, N.Y. TIMES (Mar. 26, 2015), https://www.nytimes.com/2015/03/27/business/dealbook/consumer-protection-agency-proposes-rules-on-payday-loans.html?_r=0 (noting that states are the primary payday lending regulators).

89. Consumer Financial Protection Act of 2010 § 1002(27), 12 U.S.C. § 5481(27) (2012).

90. Clarkson et al., *supra* note 11, at 7 (noting that lending has provided revenue to tribal governments); Miller, *supra* note 75 (stating some isolated tribes have generated sorely needed revenue through online lending); Dan Frosch & Alan Zibel, *Tribes' Online Lending Faces Federal Squeeze*, WALL ST. J. (July 23, 2014), http://www.wsj.com/articles/tribes-online-lending-squeezed-by-regulators-1406158967 ("But tribal business groups maintain that many Native American lending ventures are owned, operated and regulated by tribes and that lending had provided a critical economic lift to places beset by poverty."); *Tribal Online Lending Provides a Critical Lifeline for Non-Gaming Tribes*, *supra* note 80 ("Tribal online lending provides a critical lifeline for sovereign tribes in remote areas, whether or not they engage in tribal government gaming.").

91. Frosch & Zibel, *supra* note 90 ("In some cases, lending provides more than half of the operating budgets for tribes . . . .").

92. Martin & Schwartz, *supra* note 70, at 753 (noting that non-Indian lenders partner with tribes in order to avoid state regulation); Nanini, *supra* note 8, at 503 (stating non-Indians have used tribal partnerships to evade state regulation); Adam Mayle, Note, *Usury on the Reservation: Regulation of Tribal-Affiliated Payday Lenders*, 31 REV. BANKING & FIN. L. 1053, 1057 (2012) (stating state regulation has caused payday lenders to seek refuge in tribes thanks to their sovereign status).

operated by tribes either.[93] Tribally owned lenders actually have their own regulatory bodies that oversee lending.[94] In fact, the Native American Financial Services Association was formed in 2012 "[t]o develop and provide financial products and services which responsibly meet consumer need with transparency, value, and convenience."[95] It encourages tribes involved in the lending industry to enact lending laws and to establish a loan regulatory agency.[96]

Concerns about tribal businesses capitalizing on their sovereignty at state expense are old. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, the U.S. Supreme Court ruled that tribes could not use their exemption from state taxes to lure non-Indian consumers into business deals.[97] It stated that value must be produced on the reservation; otherwise, state taxes apply to the transactions that occur on tribal land.[98] The Court

93. Nanini, *supra* note 8, at 504–05 (noting that non-Indians often finance tribal lenders giving them an interest in the lender's revenue); *Support for Tribes Providing Online Short Term Consumer Financial Services and Products Pursuant to Tribal Law and Ensuring Appropriate Regulation of These Services for the Protection and Fairness of Consumers*, NAT'L CONGRESS AM. INDIANS (Oct. 2013), http://www.ncai.org/resources/resolutions/support-for-tribes-providing-online-short-term-consumer-financial-services-pursuant-to-tribal-law-and-ensuring-appropriate-regulation-of-these-services-for-the-protection-and-fairness-of-consumers [hereinafter *Support for Tribes*] (noting some lenders have affiliated with tribes, and the National Congess of American Indians (NCAI) does not consider these truly tribal lenders); *see also* Martin & Schwartz, *supra* note 70, at 784 (noting that the authors "suspect that many of the current connections between tribes and internet payday lenders are tenuous, and further, that tribes generally receive minimal compensation relative to their non-tribal partners").

94. Nanini, *supra* note 8, at 506–07 (commenting that some tribes, including the Otoe-Missouria Tribe and the Tunica-Biloxi Tribe of Louisiana, have established financial regulatory commissions); *see also* Statement of Sherry Treppa, *supra* note 9, at 3 (noting the tribe's "robust . . . regulatory framework"); *Support for Tribes*, *supra* note 93 (stating the NCAI supports tribes' efforts to establish lending laws).

95. *NAFSA Mission and Vision*, NATIVE AM. FIN. SERVS. ASS'N, https://nativefinance.org/our-mission-and-vision (last visited Oct. 21, 2017).

96. *See, e.g.*, *Best Practices*, NATIVE AM. FIN. SERVS. ASS'N, https://nativefinance.org/best-practices (click the tab "Operational Best Practices") (last visited Oct. 21, 2017).

97. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 155 (1980) ("We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.").

98. *Id.* ("It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which

reached this conclusion while admitting that state taxes on reservation transactions put tribes at an economic disadvantage.[99] However, this is not the case with tribal lending.

Tribal lenders are more akin to tribal casinos than the smoke shops in *Confederated Tribes*. In that case, tribes were "merely importing a product onto the reservations for immediate resale to non-Indians."[100] Contrarily, tribes enact gaming ordinances, and build and operate casinos.[101] Tribes can have gaming operations if the surrounding state civilly regulates gaming rather than criminally prohibits it.[102] States that permit gaming cannot block tribal gaming even if tribes offer much larger prizes than are allowed under state law.[103] Patrons at tribal casinos are predominantly non-Indians who do not live on tribal land.[104] Revenue generated by tribal casinos is used to fund tribal programs.[105] Congress passed legislation superseding the Court's holding in *California v. Cabazon Bank of Mission Indians*.[106] The legislation, however, was specific to Indian gaming; that is, the general regulatory principles from the case still stand.[107]

the Tribes have a significant interest.").

99. *Id.* at 151 (footnote omitted) (noting that a state tax can be valid "even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians").

100. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219 (1987), *superseded by statute*, Indian Gaming Regulation Act, 25 U.S.C. § 2710 (2012), *invalidated by* Seminole Tribe of Fla. v. Florida 517 U.S. 44 (1996).

101. *Id.*

102. *Id.* at 210 ("We are persuaded that the prohibitory/regulatory distinction is consistent with *Bryan*'s construction of Pub. L. 280."); *see, e.g.*, Dennis Romboy, *Utahns Find Ways to Gamble Despite It Being Illegal in the State—But the Cost Is High*, DESERET NEWS (Jul. 5, 2013), https://www.deseretnews.com/article/865582732/No-casino-no-lottery-yet-gambling-pervasive-in-Utah.html ("Utah has no tribal casinos because the state outlaws all forms of gambling.").

103. *Cabazon Band of Mission Indians*, 480 U.S. at 211 ("But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280.").

104. Matthew L.M. Fletcher, *Contract and (Tribal) Jurisdiction*, 126 YALE L.J. F. 1, 2 (2016) ("Indian gaming is a nearly $30 billion revenue source for Indian nations, and nearly all of that revenue is generated from non-Indians.").

105. 25 U.S.C. § 2710(b)(2)(B) (limiting tribal casino revenues to governmental, welfare, and charitable purposes).

106. Indian Gaming Regulation Act, 25 U.S.C. § 2710, *invalidated by* Seminole Tribe of Fla. v. Florida 517 U.S. 44 (1996).

107. Kevin Washburn, *Federal Law, State Policy, and Indian Gaming,* 4 NEV. L. J. 285, 292–93 (2004) (noting states can prohibit tribal gaming only if a state prohibits all forms of gaming within its borders); Matthew L.M. Fletcher, *California v. Cabazon*

Lending is analogous to gaming because the lending structures developed by tribal governments are what generate the value to non-Indian borrowers.[108] Tribes adopt lending ordinances, create regulatory bodies, develop the infrastructure to make loans, and engage in lending—activities that are lawful in every state.[109] Likewise,the reasoning in *Cabazon* suggests that states are not able to bar tribes from offering interest rates above state caps.[110] Since the bulk of tribal casino money comes from non-Indians, it is not a problem that the majority of tribal lending customers are non-Indian.

Unfortunately, courts have not always applied this straightforward analogy. The next Part explains why tribes have sovereign immunity and provides an overview of tribal legal systems.

IV. SOVEREIGN IMMUNITY AND TRIBAL COURTS: THE TRIBAL LENDING BATTLEFIELD

Tribal lenders have been involved in a myriad of lawsuits.[111] The issues in the cases are largely repetitive: Are tribal lenders entitled to sovereign immunity?[112] And can tribal courts adjudicate disputes involving non-Indian borrowers?[113] This Part discusses the history of tribal sovereign immunity and tribal court systems. It then examines how courts have addressed both issues in the tribal lending context. As a disclaimer, many of the lending cases cited involve Western Sky—perhaps the most infamous "tribal" lender.[114]

Band: A Quarter-Century of Complex, Litigious Self-Determination, FED. LAW., Apr. 2012, at 53 ("The second foundation of the *Cabazon Band* decision, the interpretation of Public Law 280 through the civil-regulatory/criminal-prohibitory distinction, remains intact.").

108. Clarkson et al., *supra* note 11, at 15–18.

109. *Id.*

110. *See Cabazon Band of Mission Indians*, 480 U.S. at 211.

111. *See*, *e.g.*, Cash Advance & Preferred Cash Loans v. Colorado, 242 P.3d 1099, 1102 (Colo. 2010).

112. *See*, *e.g.*, *id.*

113. *See*, *e.g.*, Heldt v. Payday Fin., LLC, 12 F. Supp. 3d 1170, 1173 (D.S.D. 2014).

114. Danielle Douglas, *Payday Lender Western Sky Financial to Stop Funding Loans on Sept. 3.*, WASH. POST (Aug. 26, 2013), https://www.washingtonpost.com/business/economy/payday-lender-western-sky-financial-to-stop-funding-loans-on-sept-3/2013/08/26/d683c298-0e7f-11e3-85b6-d27422650fd5_story.html?utm_term=.7a4e08846509 (noting Western Sky's prominence in the lending industry and that it stopped lending due to its legal troubles); Sheryl Harris, *CFPB Sues CashCall for Attempts to Collect on Tribal Loans*, CLEVELAND.COM (Dec. 16, 2013), http://www.cleveland.com/consumeraffairs/index.ssf/2013/12/cfpb_sues_cashcall_for_attempt.html (noting Western Sky is "notorious" for its lending tactics).

A. *Tribal Sovereign Immunity*

1. *Why Tribes Have Sovereign Immunity*

Sovereign immunity is the idea that the sovereign or government is immune from lawsuits or other legal actions except when it consents to them[115] and is an inherent feature of sovereignty.[116] Tribal sovereignty enters U.S. jurisprudence with the "Marshall trilogy."[117] The Court acknowledged tribes as "independent nations" in 1823 but used the doctrine of discovery to undermine Indian property rights.[118] The Court denoted Indian tribes "domestic dependent nations" in 1831.[119] A year later, the Court acknowledged that tribes have been treated as nations since the United States' founding and also that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their natural original rights."[120] The Court went on to declare that state law "can have no force" within an Indian nation's borders.[121]

As the Court recognized tribes as nations, it explicitly granted immunity to tribal officials in 1851.[122] It held:

> The Cherokees are in many respects a foreign and independent nation. They are governed by their own laws and officers, chosen by themselves. And though in a state of pupilage, and under the guardianship of the United States, this government has delegated no power to the courts of this District to arrest the public representatives or agents of Indian nations, who may be casually within their local jurisdiction, and compel them to pay the debts of their nation, either to

115. *Sovereign Immunity*, CORNELL L. SCH., https://www.law.cornell.edu/wex/sovereign_immunity (last visited Sept. 13, 2017).

116. THE FEDERALIST NO. 81 (Alexander Hamilton) (emphasis added) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.").

117. Philip J. Prygoski, *From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty*, COMPLEAT LAW., Fall 1995, at 14, 15 ("In what is known as the 'Marshall trilogy,' the Supreme Court established the doctrinal basis for interpreting federal Indian law and defining tribal sovereignty.").

118. Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).

119. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

120. Worcester v. Georgia, 31 U.S. 515, 556–57, 559 (1832), *abrogated by* Nevada v. Hicks, 533 U.S. 353 (2001).

121. *Id.* at 561.

122. Parks v. Ross, 52 U.S. 362, 374 (1850).

an individual of their own nation, or a citizen of the United States.[123]

It followed the same line of reasoning when it refused to hold the Creek Nation liable for damages caused by its citizens.[124] The Court acknowledged the Creek as "a distinct political community"; thus, it concluded, "No such liability existed by the general law."[125]

United States v. United States Fidelity Guaranty Company (*USF&G*) is the landmark case on tribal sovereign immunity.[126] On behalf of the Chickasaw and Choctaw Nations, the United States leased lands to a coal company.[127] The lessee went into receivership, and the United States filed a claim for royalties on behalf of the tribes.[128] The company denied the United States' claim and filed a counterclaim against the tribes.[129] In 1940, the Court held: "Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."[130] The Court concluded that immunity from direct lawsuits translated into immunity against crossclaims.[131]

Since *USF&G*, the Court has continuously affirmed tribal sovereign immunity.[132] The Court has ruled tribal sovereign immunity applies to governmental, as well as the commercial, activities of tribes conducted inside and outside of Indian country.[133] It has acknowledged that corporations can be entitled to a tribe's sovereign immunity.[134] It has also held tribal sovereign

123. *Id.*

124. Turner v. United States, 248 U.S. 354, 357–58 (1919), *abrogated by* Kiowa Tribe of Okla. v. Mfg. Techs., Inc, 523 U.S. 751 (1998).

125. *Id.* at 357.

126. United States v. U.S. Fid. Guar. Co., 309 U.S. 506, 512–13 (1940).

127. *Id.* at 510.

128. *Id.*

129. *Id.*

130. *Id.* at 512 (footnotes omitted).

131. *Id.* at 513.

132. *See, e.g.*, Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 705 n.1 (2003); Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 760 (1998); Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 173 (1977).

133. *Kiowa Tribe of Okla.*, 523 U.S. at 760.

134. *Inyo Cty.*, 538 U.S. at 705 n.1 ("The United States maintains, and the County does not dispute, that the Corporation is an 'arm' of the Tribe for sovereign immunity purposes.").

immunity prevents suits to enforce state fishing laws[135] and even prohibits enforcement of the Indian Civil Rights Act.[136] Although the Court has ruled that states can tax on-reservation transactions, it has held that sovereign immunity bars lawsuits to enforce the tax.[137] In 2014, the Court held the Indian Gaming Regulatory Act's (IGRA) authorization of suits against tribes for gaming on Indian land did not authorize suits against tribes for gaming conducted off Indian land.[138] The Court recently explained, however, that a tribal indemnity provision does not grant tribal employees immunity from suits against them in their individual capacities.[139] Nevertheless, the general rule remains that tribes lack immunity from suit only when Congress "unequivocally" permits suits against them or a tribe clearly waives its immunity.[140]

The primary purpose of tribal sovereign immunity is to prevent states from infringing upon tribal sovereignty.[141] This allows tribes to use their sovereign immunity as a tool to promote economic development and self-

135. *Puyallup Tribe, Inc.*, 433 U.S. at 172–73 (holding that the State of Washington could not bring a suit against the Puyallup Tribe to enforce its fishing laws).

136. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) ("In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.").

137. Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514 (1991) (discussing ways to enforce taxes on a reservation, such as seizing unstamped cigarettes when they leave the reservation).

138. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2033 (2014) (the Court noted this created an "anomaly," but said fixing the legislation's text is Congress's responsibility).

139. Lewis v. Clarke, 137 S. Ct. 1285, 1288 (2017).

140. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001) (citing *Oklahoma Tax Comm'n*, 498 U.S. at 509; *Santa Clara Pueblo*, 436 U.S. at 58).

141. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998) (noting sovereign immunity has been necessary to protect tribes from state invasions of their jurisdiction); Martin & Schwartz, *supra* note 70, at 753 ("Sovereign immunity is a corollary of tribal sovereignty, and protects tribes from enforcement of state law."); Sims & Hosie, *supra* note 87 (stating sovereign immunity is intended to protect tribes from states encroaching upon their sovereignty).

government,[142] but some assert immunity can hinder tribal economies.[143] Moreover, the Court has noted that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."[144] Tribal sovereign immunity has become an increasingly controversial topic,[145] and Congress has proposed bills limiting tribal immunity.[146] To date, Congress has passed no legislation generally stripping tribes of their sovereign immunity,[147] though it has expressly waived tribes' sovereign immunity in certain contexts.[148]

142. *Kiowa Tribe of Okla.*, 523 U.S. at 757 (citation omitted) ("Congress had failed to abrogate [tribal sovereign immunity] in order to promote economic development and tribal self-sufficiency."); *Okla. Tax Comm'n*, 498 U.S. at 510 (noting sovereign immunity has been used by Congress to further "tribal self-sufficiency and economic development"); Gregory J. Wong, *Intent Matters: Assessing Sovereign Immunity for Tribal Entities*, 82 WASH. L. REV. 205, 211–12 (2007) (stating Congress has recognized tribal sovereign immunity as a means of promoting self-government and economic development).

143. *See, e.g.*, Am. Vantage Cos., Inc. v. Table Mountain Rancheria, 292 F.3d 1091, 1098 (9th Cir. 2002) (noting that Congress allowed Section 17 corporations to waive sovereign immunity for the purpose of "facilitating business transactions and fostering tribal economic development and independence"); ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 96 (2013) ("Due to fears of sovereign immunity, many businesses shy away from reservation opportunities due to the impression that tribal immunity is a major problem.").

144. *Kiowa Tribe of Okla.*, 523 U.S. at 758; *see also* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2045 (2014) (Thomas, J., dissenting) (discussing the "inequities engendered" by tribal sovereign immunity).

145. *See, e.g.*, Joanna Zuckerman Bernstein, *How Tribes Make Payday Loans and Avoid State Laws*, MEDIUM (Apr. 30, 2014), https://medium.com/@triballending/how-tribes-make-payday-loans-and-avoid-state-laws-5fbcd46cd64b (discussing how tribal sovereign immunity is enmeshed in the tribal lending controversy).

146. Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 3 (Native Issues Research Symposium, Working Paper No. RWP04-016, 2004), http://scholar.harvard.edu/files/jsinger/files/myths_realities.pdf (noting the "increasing numbers of bills" that Congress has introduced to curtail sovereign immunity and other facets of tribal sovereignty).

147. Bree R. Black Horse, *The Risks and Benefits of Tribal Payday Lending to Tribal Sovereign Immunity*, 1 AM. INDIAN L.J. 388, 398 (2013) (noting that Congress has passed no legislation depriving tribes of immunity in the commercial sphere).

148. Krystal Energy Co. v. Navajo Nation, 357 F.3d. 1055, 1059, *amended on denial of reh'g en banc* (9th Cir. 2004) (holding that Congress clearly intended to abrogate tribal sovereign immunity in 11 U.S.C. 106(a) by using the phrase "other foreign or domestic governments"); Osage Tribal Council v. U.S. Dep't of Labor, 187 F.3d 1174, 1181 (10th Cir. 1999) (concluding "that the language of the Safe Drinking Water Act contains a

Tribal enterprises, including short-term lenders, commonly operate outside of Indian country and are entitled to sovereign immunity.[149] The next Part examines how courts have tried to address this issue.

2. *Determining Whether Sovereign Immunity Applies: Arm-of-the-Tribe Tests*

Tribes operate a variety of businesses,[150] and determining which tribal entities are entitled to sovereign immunity has befuddled courts across the country.[151] Courts have set forth various tests to determine which entities are entitled to sovereign immunity by virtue of being "arms of the tribe."[152] Two state supreme courts have drawn on various arm-of-the-tribe tests to craft their own tests in payday lending cases.[153] This Part summarizes these two tests.

Incidentally, the Miami Tribe of Oklahoma and the Santee Sioux Nation lending entities were involved in both state supreme court

clear and explicit waiver of tribal immunity").

149. *Kiowa Tribe of Okla.*, 523 U.S. at 760 ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.").

150. *Id.* at 758 (stating that tribes operate casinos, ski resorts, and other enterprises that cater to non-Indians); Fletcher, *In Pursuit*, *supra* note 77, at 782–83 (noting many tribes are trying to diversify their economies); Steve Friess, *Indian Tribes Look Beyond Casinos for Income*, N.Y. TIMES (Oct. 23, 2015), https://www.nytimes.com/2015/10/24/business/indian-tribes-look-beyond-casinos-for-income.html (noting that tribes have been diversifying their economies since the onset of gaming); *Tribal Businesses*, INDIANS MIDWEST, http://publications.newberry.org/indiansofthemidwest/indians-the-marketplace/commercial-activity/tribal-businesses/ (last visited Oct. 21, 2017) (providing examples of tribal businesses).

151. Martin & Schwartz, *supra* note 70, at 776 ("Courts have articulated numerous variations on the test for whether a tribal business enterprise is entitled to the tribe's immunity."); Wong, *supra* note 142, at 220 ("Both state and federal courts have created various tests to determine whether a tribal entity is an arm of the tribe."); Mayle, *supra* note 92, at 1076 (lamenting that federal courts have not provided a definitive test to determine which entities are arms of the tribe).

152. Cash Advance & Preferred Cash Loans v. Colorado, 242 P.3d 1099, 1109 (Colo. 2010) (quoting Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006) ("According to the federal courts of appeals, the proper inquiry is 'whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe.' In making this determination, those courts have considered a variety of facts that help define whether an entity acts as an arm of the tribe." (citations omitted)).

153. People *ex rel.* Owen v. Miami Nation Enters., 386 P.3d 357, 365–66 (Cal. 2016); *Cash Advance & Preferred Cash Loans*, 242 P.3d at 1102.

decisions.[154] In 2010, the Colorado Supreme Court provided three questions to determine if the lenders were an arm of the tribe: "(1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty."[155] In 2016, the Supreme Court of California set forth a five-factor test to ascertain whether tribal lenders are entitled to immunity.[156] The factors are: "(1) the entity's method of creation, (2) whether the tribe intended the entity to share in its immunity, (3) the entity's purpose, (4) the tribe's control over the entity, and (5) the financial relationship between the tribe and the entity."[157]

The tests are similar, but there are significant differences. Both explicitly take into account the entity's method of creation and the extent of the tribe's control of the entity.[158] Financial considerations are not explicitly named in the Colorado test, but the California test directly factors in the financial link between the tribe and the lender.[159] The California test inquires about the entity's purposes; however, the Colorado test does not use this factor.[160]

The discrepancies in the tests make it possible for a tribal lender to be considered an arm of the tribe entitled to sovereign immunity in one state but not the other.[161] Indeed, the Colorado Supreme Court remanded the case to the trial court to determine whether the lenders were entitled to immunity.[162] The trial court answered in the affirmative, and the appellate court dismissed the state's appeal.[163] Contrarily, the Supreme Court of California held the lenders were not entitled to sovereign immunity.[164]

154. *People ex rel. Owen*, 386 P.3d at 361; *Cash Advance & Preferred Cash Loans*, 242 P.3d at 1102.

155. *Cash Advance & Preferred Cash Loans*, 242 P.3d at 1110.

156. *People ex. rel. Owen*, 386 P.3d at 365–66.

157. *Id.*

158. *Id.*; *Cash Advance & Preferred Cash Loans*, 242 P.3d at 1110.

159. *Compare Cash Advance & Preferred Cash Loans*, 242 P.3d at 1110, *with People ex. rel. Owen*, 386 P.3d at 365.

160. *Compare People ex. rel. Owen*, 386 P.3d at 365, *with Cash Advance & Preferred Cash Loans*, 242 P.3d at 1110.

161. *See People ex. rel. Owen*, 386 P.3d at 365–66; *Cash Advance & Preferred Cash Loans*, 242 P.3d at 1110.

162. *Cash Advance & Preferred Cash Loans*, 242 P.3d at 1115.

163. Colorado v. Cash Advance & Preferred Loans, No. 12CA1406, 2013 WL 6683373, at *1 (Colo. App. Dec. 19, 2013).

164. *People ex rel. Owen*, 386 P.3d at 379 ("Applying the five factors discussed above,

B. *Tribal Courts and Lending*

1. *Tribal Courts*

America's indigenous inhabitants had their own methods of resolving conflicts long before Europeans set foot on the continent.[165] Although the indigenous nations did not have written legal codes, customs and stories informed citizens of the society's rules.[166] Each nation had its own unique methods of administering justice;[167] nevertheless, most traditional indigenous dispute-resolution systems focused on restoring peace to the community rather than punishing the offender.[168]

Indian tribes continued their traditional forms of justice during the early years of the United States, and anyone within a tribe's territory was

we hold that on the record before us, neither [lender] has shown by a preponderance of the evidence that it is entitled to tribal immunity as an arm of its affiliated tribe.").

165. B.J. JONES, ROLE OF INDIAN TRIBAL COURTS IN THE JUSTICE SYSTEM 4 (2000), http://www.icctc.org/Tribal%20Courts.pdf [hereinafter JONES, ROLE OF INDIAN TRIBAL COURTS] (acknowledging that America's indigenous people had dispute resolution systems before Europeans arrived on the continent); ROBERT V. WOLF, WIDENING THE CIRCLE: CAN PEACEMAKING WORK OUTSIDE OF TRIBAL COMMUNITIES? 1 (2012), http://www.courtinnovation.org/sites/default/files/documents/PeacemakingPlanning_2012.pdf (noting tribal justice systems existed before European arrival in America); Eugene K. Bertman, *Tribal Appellate Courts: A Practical Guide to History and Practice*, OKLA. B.J., (Oct. 12, 2013), http://www.okbar.org/members/BarJournal/archive2013/OctArchive13/OBJ8427Bertman.aspx (noting that Indian tribes had fora for dispute resolution prior to the arrival of Europeans).

166. Matthew L.M. Fletcher, *A Perfect Copy: Indian Culture and Tribal Law*, 2 YELLOW MED. REV. 95, 100 (2007) ("Many indigenous laws and norms were incorporated into the languages and stories of Indian communities.").

167. Bertman, *supra* note 165 ("Almost all Indian tribes had some form of dispute resolution process, although those processes were not always similar to the European courts introduced by the colonists.").

168. MAHA JWEIED, EXPERT WORKING GROUP REPORT: NATIVE AMERICAN TRADITIONAL JUSTICE PRACTICES, at i (2014), https://www.justice.gov/sites/default/files/atj/legacy/2014/10/09/expert-working-group-report--native-american-traditional-justice-practices.pdf (stating that traditional American Indian justice systems "are often based on restoring harmony and peace to the victim and community—while still including elements of offender accountability"); Justice Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 354 (2011) (noting that pre-contact indigenous justice systems were non-adversarial, and "peacemaking" was a catchall term for indigenous justice); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 133 (1995) (comparing indigenous justice systems to the U.S. justice system).

subject to its exclusive jurisdiction.[169] The United States began to intrude upon the tribal justice system when it passed the General Crimes Act of 1817, which authorized the federal government to prosecute crimes involving non-Indians that occurred in Indian Territory.[170] In 1881, the Supreme Court stripped tribes of jurisdiction over crimes involving only non-Indians in Indian country.[171]

However, justice in Indian country began to shift drastically in 1883.[172] That year, "Crow Dog murdered Spotted Tail . . . on the Great Sioux Reservation."[173] The matter was resolved according to tribal custom—Crow Dog's family compensated Spotted Tail's family.[174] Americans of the era were dissatisfied with the punishment.[175] Crow Dog was prosecuted and sentenced to death by a federal court, but the Supreme Court reversed the conviction because the "red man" cannot be judged "by the maxims of the white man's morality."[176] In response to this decision, Congress passed the Major Crimes Act of 1885, which granted the federal government jurisdiction over certain felonies involving only Indians in Indian country.[177]

The *Crow Dog* case has been credited as the impetus for Courts of Indian Offenses, also known as CFR courts.[178] CFR courts were created to

169. Adam Crepelle, *Concealed Carry to Reduce Sexual Violence Against American Indian Women*, 26 KAN. J.L. & PUB. POL'Y 236, 240 (2017) [hereinafter Crepelle, *Concealed Carry*] ("During the early years of the United States, tribes exercised criminal jurisdiction over all people within their borders.").

170. *See* 18 U.S.C. § 1152 (2012); INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 2 (2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf (noting the enactment of the General Crimes Act in 1817).

171. United States v. McBratney, 104 U.S. 621, 624 (1881).

172. Crepelle, *Concealed Carry*, *supra* note 169, at 240.

173. *Id.* (noting the Crow Dog case precipitated significant changes in Indian country criminal law).

174. *Id.*

175. *Id.*

176. *Ex Parte* Crow Dog, 109 U.S. 556, 571 (1883).

177. Major Crimes Act of 1885, 18 U.S.C. § 1153 (Supp. III 2016); Keeble v. United States, 412 U.S. 205, 209 (1973) ("The Major Crimes Act was passed by Congress in direct response to the decision of this Court in *Ex Parte* Crow Dog, 109 U.S. 553 (1883)"); Crepelle, *Concealed Carry*, *supra* note 169, at 241 (stating the Major Crimes Act was a result of the Supreme Court's decision in *Crow Dog*).

178. B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457,

stamp out Indian culture and accelerate assimilation.[179] Consequently, CFR courts employed U.S.-style law instead of law based upon traditional tribal values.[180] Congress has never explicitly authorized CFR courts;[181] nevertheless, over a dozen CFR courts are still functioning.[182] Federal administrative regulations play an extensive role in their operation.[183]

468–69 (1998) [hereinafter Jones, *Welcoming Tribal Courts*] (claiming that the *Ex Parte Crow Dog* case led to CFR courts); *The History of Tribal Courts*, MASHANTUCKET (WESTERN) PEQUOT TRIBAL NATION, https://www.mptn-nsn.gov/tchistory.aspx (last visited Oct. 21 2017) ("The development of modern tribal courts can be traced to the 1883 case Ex Parte Crow Dog . . . .").

179. Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 805 (2014) [hereinafter Fletcher, *A Unifying Theory*] (stating that CFR courts were designed to stamp out tribal culture and governing systems); *1883: Courts of Indian Offenses Established*, NATIVE VOICES, https://www.nlm.nih.gov/nativevoices/timeline/364.html (last visited Oct. 31, 2017) (noting CFR courts were designed to prosecute practitioners of traditional Indian ways and convert Indians to Christianity); JONES, ROLE OF INDIAN TRIBAL COURTS, *supra* note 165, at 4–5 ("A majority of these courts and the Codes under which they operated did not reflect Native values and customs, but instead were efforts to change those values into the values the dominant society found important.").

180. PATHWAYS TO JUSTICE: BUILDING AND SUSTAINING TRIBAL JUSTICE SYSTEMS IN CONTEMPORARY AMERICA 3 (2017), https://www.judges.org/wp-content/uploads/executive_summary.pdf (noting that CFR courts were designed to assimilate American Indians into mainstream U.S. society); Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. Rev. 1752, 1765 (2016) (noting CFR courts "were blunt tools of assimilation" that criminalized many traditional tribal practices); Jones, *Welcoming Tribal Courts*, *supra* note 178, at 470 ("The Courts of Indian Offenses, also known as Code of Federal Regulation Courts (C.F.R. Courts), were not 'tribal' courts in the sense that the values and mores reflected in the laws promulgated by the Bureau of Indian Affairs were 'tribal' values. Instead, these courts were the agents of assimilation, and followed laws and regulations designed to assimilate the Indian people into both the religious and jurisprudential mainstream of American society.").

181. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 236 (1994) (footnote omitted) ("In fact, Congress has never expressly authorized these courts; their legitimacy derives from congressional acquiescence with the Secretary's use of his power.").

182. JONES, ROLE OF INDIAN TRIBAL COURTS, *supra* note 165, at 7 (noting CFR courts are still operation); *The History of Tribal Courts*, *supra* note 178 (noting there are dozens of CFR courts still in operation).

183. Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 56–57 (1988) [hereinafter Pommersheim, *The Contextual Legitimacy of Adjudication*] ("CFR courts are largely governed by federal administrative regulations and are therefore widely regarded as entities subject to extensive and excessive Bureau of Indian Affairs control and influence.").

CFR courts were largely eliminated by the Indian Reorganization Act (IRA) of 1934.[184] The IRA encouraged tribes to establish their own court systems and laws,[185] though federal approval is required before tribes can establish their own court systems.[186] Tribal justice systems are an amalgamation of U.S. law and traditional indigenous dispute-resolution methods.[187] Congress imposed the Indian Civil Rights Act on tribes in 1968 to push tribal courts further into the legal mainstream.[188] Today, there are roughly 300 tribal courts in operation.[189]

Tribal courts are presumed to have civil jurisdiction over nonmembers;[190] nevertheless, tribal courts have limited jurisdiction.[191] The

184. Indian Reorganization Act, 25 U.S.C. §§ 461–79 (2012); Cutler, *supra* note 180, at 1765–66 (noting the IRA led to the replacement of CFR courts and establishment of tribal courts); Rose Carmen Goldberg, *No Tribal Court Is an Island? Citation Practices of the Tribal Judiciary*, 3 AM. INDIAN L.J. 247, 251 (2014) ("These courts replaced almost all of the federal government-run 'Courts of Indian Offenses' that had previously been the principal legal forums for reservations."); Bertman, *supra* note 165 ("It was not until 1934, with the passage of the Indian Reorganization Act, that Indian tribes were encouraged by Congress to create or re-establish their own courts and judicial systems.").

185. 25 U.S.C. § 476; Jones, *Welcoming Tribal Courts*, *supra* note 178, at 470–71 (noting the IRA approved of tribes creating their own court systems); Bertman, *supra* note 165 (noting the IRA encouraged tribes to establish their own legal systems); *The History of Tribal Courts*, *supra* note 178 (stating the IRA encouraged tribes to set up their own legal systems).

186. Cutler, *supra* note 180, at 1766 (stating federal approval is needed before tribes can set up their own courts); Jones, *Welcoming Tribal Courts*, *supra* note 178, at 471 (noting that many tribal legal systems resemble the U.S. legal system because federal approval is needed to establish a tribal legal system).

187. Cutler, *supra* note 180, at 1763 (footnote omitted) ("Today's tribal courts represent a negotiation between tribal values and custom and Congress's execution of plenary power to limit and shape the scope of tribal court jurisdiction."); Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 2 (1997) (noting that tribal courts incorporate elements of traditional justice into what are often largely standard U.S. justice systems).

188. Cutler, *supra* note 180, at 1766 (stating the ICRA's purpose was to incorporate tribes into the legal mainstream).

189. *Id.* at 1763; Fletcher, *A Unifying Theory*, *supra* note 179, at 790.

190. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.").

191. Nevada v. Hicks, 533 U.S. 353, 367 (2001) ("Tribal courts, it should be clear, cannot be courts of general jurisdiction" in the same way that state courts are courts of general jurisdiction).

Supreme Court divested tribes of the ability to prosecute non-Indians in 1978.[192] A few years later, the Court limited tribes' civil jurisdiction over non-Indians on non-Indian fee lands within a reservation to situations where the non-Indians enter into a consensual commercial relationship with the tribe or one of its members, and also when the non-Indians' conduct threatens the tribe's ability to govern itself.[193] The Court further trimmed tribes' jurisdictional limits when it held a tribal court could not adjudicate a car accident that occurred within the boundaries of its reservation if only non-Indians were parties.[194] The Court reasoned a tribe's adjudicatory jurisdiction does not exceed its legislative jurisdiction.[195] Nonetheless, the Court requires those challenging tribal court jurisdiction to exhaust tribal remedies prior to removing the case to federal court unless there is no possible legitimate basis for tribal court jurisdiction.[196]

2. *Tribal Courts and Payday Lending Cases*

The ability of tribal legal systems to resolve disputes involving non-Indians is a common issue in payday lending cases. Whether tribal courts can exercise jurisdiction over loan agreements between tribal lenders and non-Indians is the most pivotal issue because it relates to every other aspect of the loan.[197] Nevertheless, the issue in some tribal lending cases is the validity

192. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. § 1301 (2012), *as recognized in* United States v. Lara, 541 U.S. 193 (2004).

193. Montana v. United States, 450 U.S. 544, 565–66 (1981).

194. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997).

195. *Id.* at 453.

196. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855–56 & n.21 (1985) (explaining that tribal court remedies need not be exhausted if the exercise of tribal jurisdiction is conducted in bad faith, clearly outside of tribal jurisdiction, "or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction").

197. MacDonald v. CashCALL, Inc., No. 16-2781, 2017 WL 1536427, at *7 (D.N.J. Apr. 28, 2017) ("The forum selection clause is unenforceable because the CRST Court does not have subject matter jurisdiction over Plaintiff's claims."); Smith v. W. Sky Fin., LLC., 168 F. Supp. 3d 778, 782 (E.D. Pa. 2016) ("A forum selection does not suffice to create jurisdiction, which depends upon a grant of judicial authority from Congress."); Heldt v. Payday Fin., LLC., 12 F. Supp. 3d 1170, 1180 (D.S.D. 2014) (citations omitted) ("In short, both the effect of the forum-selection provision and the question of application of the tribal court exhaustion doctrine turn on whether assertion of jurisdiction by the Cheyenne River Sioux Tribe would be 'patently violative of express jurisdictional prohibitions[.]'" (alteration in original)).

of forum selection clauses and arbitration agreements.[198] These questions have major implications for tribal sovereignty.

In lending cases, federal courts have generally taken a narrow view of tribal jurisdiction. Federal courts have focused their jurisdictional analysis on *Montana v. United States*.[199] Federal courts have held that exercising jurisdiction over loan agreements does not implicate tribal sovereignty; thus, federal courts have disregarded the second prong of *Montana*—tribes' inherent sovereign power to regulate activities that infringe upon tribal welfare—in lending cases.[200]

Montana's first prong, consensual commercial relations, has given federal courts more trouble.[201] Federal courts have noted that *Montana* recognizes tribal court jurisdiction over consensual relationships between a tribe or its members and non-Indians.[202] Not all entities purporting to be tribal lenders are incorporated under tribal law; for example, Western Sky was incorporated under state law.[203] Likewise, not all lenders purporting to be tribally owned are owned by a tribe—again, Western Sky.[204] In situations like this, federal courts have been highly skeptical of tribal jurisdiction but have not considered this point fatal.[205] Other federal courts have ruled that

198. *See, e.g.*, *Smith*, 168 F. Supp. 3d at 782.

199. *See, e.g.*, Jackson v. Payday Fin., LLC, 764 F.3d 765, 781–82 (7th Cir. 2014); MacDonald, 2017 WL 1536427, at *7 (citing *Montana* as the bellwether for tribal civil jurisdiction over non-Indians).

200. *See, e.g.*, *Jackson*, 764 F.3d at 781–82 (noting *Montana* only permits tribal jurisdiction over non-Indian conduct that affects tribal sovereignty); *Heldt*, 12 F. Supp. 3d at 1182 ("Applying the analysis under *Montana* to the circumstances here, this Court deems the second *Montana* exception—based on the inherent power of a tribe to exercise civil authority over the conduct of non-Indians on fee lands within the reservation 'when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe'—not to support tribal jurisdiction here.").

201. *See* Montana v. United States, 450 U.S. 544, 565 (1981).

202. *See, e.g.*, *Heldt*, 12 F. Supp. 3d at 1183 (quoting *Montana*, 450 U.S. at 565) ("First, the *Montana* exception at issue concerns consensual relationships 'with the tribe or its members.'").

203. *Id.* ("The entity with which Plaintiffs entered into contracts for high-interest loans was Western Sky Financial LLC, which is a South Dakota limited liability corporation with a license from the Cheyenne River Sioux Tribe to do business and with its principal place of business on the Cheyenne River Indian Reservation.").

204. Hayes v. Delbert Servs. Corp., 811 F.3d 666, 668 (4th Cir. 2016) (stating that Martin Webb owns Western Sky—not an Indian tribe).

205. *See, e.g.*, *Heldt*, 12 F. Supp. 3d at 1187 ("Here, the Court's skepticism about

consent is not a sufficient grounds for tribal court jurisdiction over loans with non-Indians, claiming that tribes lack subject matter jurisdiction over non-Indians in issues unrelated to tribal self-governance.[206]

A pivotal factor in jurisdictional analysis in tribal lending cases is that the loans are conducted online.[207] The U.S. Court of Appeals for the Seventh Circuit ruled against tribal jurisdiction over loans with non-Indians, asserting that borrowers "did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents. They applied for loans in Illinois by accessing a website. They made payments on the loans and paid the financing charges from Illinois."[208] Other federal courts have followed this rationale.[209] Courts subscribing to this rationale have concluded that lending does not implicate tribal sovereignty; consequently, these courts have ruled against tribal jurisdiction over online loans.[210] Contrarily, some

tribal court jurisdiction is not sufficient to establish that invocation of tribal court jurisdiction is 'patently violative of express jurisdictional prohibitions.'"); FTC v. Payday Fin. LLC, 989 F. Supp. 2d 799, 819 (D.S.D. 2013) (revealing the court was "skeptical" about a South Dakota company being eligible for tribal jurisdiction but left the question open for further testimony).

206. *See, e.g.*, Jackson v. Payday Fin., LLC, 764 F.3d 765, 783 (7th Cir. 2014) (footnote omitted) ("The Loan Entities, however, have made no showing that the present dispute implicates *any* aspect of 'the tribe's inherent sovereign authority.'"); MacDonald v. CashCALL, Inc., No. 16-2781, 2017 WL 1536427, at *7 (D.N.J. 2017) (noting the tribal court lacked "subject matter jurisdiction over" the non-Indian's claims); Smith v. W. Sky Fin., LLC, 168 F. Supp. 3d 778, 782 (E.D. Pa. 2016) (citation omitted) ("While consent may be sufficient to establish personal jurisdiction over a party to a contract, 'a tribal court's authority to adjudicate claims involving nonmembers concerns its subject matter jurisdiction, not personal jurisdiction.'").

207. *See, e.g.*, *Jackson*, 764 F.3d at 782.

208. *Id.*

209. *See, e.g.*, Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs., 769 F.3d 105, 115 (2nd Cir. 2014) (noting that the online transaction was insufficient to establish a basis for tribal jurisdiction); *MacDonald*, 2017 WL 1536427, at *7 (stating "few if any of the relevant activities occurred on tribal land" and thus rejecting tribal court jurisdiction); *Smith*, 168 F. Supp. 3d at 783 (rejecting a tribal forum selection clause because the borrower never physically entered the reservation and the loan was serviced "off of the reservation"); Pearson v. United Debt Holdings, LLC, 123 F. Supp. 3d 1070, 1075 (N.D. Ill. 2015) (stating that "[n]o party argues that Pearson ever entered on Indian land or that the dispute presents any serious issues of self-governance of tribal land," and holding tribal exhaustion is not necessary in this case because the borrowers never set foot on tribal land nor do loans impact self-government).

210. *See, e.g.*, *Jackson*, 764 F.3d at 782 ("Because the Plaintiffs' activities do not implicate the sovereignty of the tribe over its land and its concomitant authority to regulate the activity of nonmembers on that land, the tribal courts do not have

courts have found it is irrelevant that borrowers never set foot in Indian country because business in the twenty-first century is often conducted electronically and at a distance.[211] These courts have concluded the non-Indians' consent to tribal jurisdiction combined with business relations with a tribal lender can provide grounds for tribal court jurisdiction over online loan agreements.[212] Federal courts that have found internet transactions insufficient to trigger tribal jurisdiction have disregarded the tribal exhaustion doctrine.[213]

Although federal policy favors the enforcement of arbitration agreements[214] and forum selection clauses,[215] federal courts have stated these

jurisdiction over the Plaintiffs' claims.").

211. *See, e.g.*, Brown v. W. Sky Fin., LLC, 84 F. Supp. 3d 467, 479 (M.D.N.C. 2015) (noting the plaintiff's contact with the tribal lender, solely through an online medium, was sufficient to give rise to "a colorable claim of tribal jurisdiction"); Heldt v. Payday Fin., LLC, 12 F. Supp. 3d 1170, 1186 (D.S.D. 2014) ("The borrower certainly does not enter onto a reservation, but in today's modern world of business transactions through internet or telephone, requiring physical entry on the reservation particularly in a case of a business transaction with a consent to jurisdiction clause, seems to be requiring too much."); FTC v. Payday Fin., LLC, 935 F. Supp. 2d 926, 940 (D.S.D. 2013) ("Reducing the *Montana* jurisdictional analysis from a thorough investigation of the nonmember's course of conduct and contact with the reservation, to a mere determination of the nonmember's physical location is improper and would render *Montana*'s jurisdictional inquiry inapplicable to many modern-day contracts involving a reservation-based business.").

212. *See, e.g.*, *Brown*, 84 F. Supp. 3d at 481 (holding that plaintiff's contractual consent to tribal jurisdiction gave rise to a viable claim for tribal jurisdiction); *Heldt*, 12 F. Supp. 3d at 1186 (determining the plaintiff's online connection to the tribal lender was sufficient to warrant tribal court consideration of tribal jurisdiction over the loan agreement); FTC v. Payday Fin. LLC, 989 F. Supp. 2d 799, 819 (D.S.D. 2013) (stating the court was going to consider further evidence regarding the tribal court's jurisdiction in the case); *FTC*, 935 F. Supp. 2d at 942 (noting the contractual consent to tribal jurisdiction was sufficient to confer tribal court jurisdiction over non-Indians; however, the court refused to enforce tribal jurisdiction due to confusing language in the contract's forum selection clause).

213. *See, e.g.*, *MacDonald*, 2017 WL 1536427, at *8 (citations omitted) ("[T]ribal exhaustion is not required because Defendants have 'not presented a "colorable" claim that CRST courts have jurisdiction over Plaintiff.'").

214. CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012) (citation omitted) (noting the Federal Arbitration Act denotes "a liberal federal policy favoring arbitration agreements"); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985).

215. Atl. Marine Constr. Co., v. U.S. Dist. Court, 134 S. Ct. 568, 583 (2013) (holding that "the interest of justice," in the vast majority of cases, will require the enforcement of forum selection clauses); *see also* David K. Duffee et al., *U.S. Supreme Court Reaffirms that Forum-Selection Clauses Are Presumptively Enforceable*, ABA: BUS. L.

agreements present a "conundrum" in tribal lending cases.[216] Some tribal loan agreements—notably those involving Western Sky—are missing integral elements. For example, federal courts have refused to enforce arbitration agreements because the tribal law selected in the loan agreement "does not authorize Arbitration."[217] Federal courts have also taken issue with arbitration agreements because the tribal rules selected to govern the agreement are not readily available to the borrower; in fact, federal courts have refused to enforce choice of law provisions in tribal loan agreements because the tribes have not established lending laws.[218] Similarly, federal courts have found the selected forum unavailable.[219] Loans that contain these flaws have been saved by language that allows the borrower to select the entity that performs the arbitration.[220]

TODAY (Jan. 2014), http://www.americanbar.org/publications/blt/2014/01/keeping_current_duffee.html ("The Court in Atlantic Marine reinforced the strong federal policy favoring the enforcement of such clauses, and clarified the mechanism for their enforcement.").

216. Hayes v. Delbert Servs. Corp., 811 F.3d 666, 673 (4th Cir. 2016).

217. *See, e.g.*, *id.* at 672; *MacDonald*, 2017 WL 1536427, at *5 ("Several courts interpreting this provision held that it was unenforceable because it was illusory, in that the CRST did not actually conduct arbitrations and had no rules for the conduct of the arbitration.").

218. *See, e.g.*, Parnell v. CashCall, Inc., 181 F. Supp. 3d 1025, 1039, 1044 (N.D. Ga. 2016) (stating, "as there is no access to the alleged Cheyenne River Sioux Tribal law, there is no way that one could determine whether AAA rules or JAMS rules in any way contradict Cheyenne River Sioux Tribal law," and quoting *Hayes*, 811 F.3d at 676 that Western Sky cannot "convert a choice of law provision into a choice of no law clause").

219. *See, e.g.*, Parm v. Nat'l Bank of Cal., N.A., 835 F.3d 1331, 1337 (11th Cir. 2016) ("[T]he arbitration agreement's forum selection clause mandates the use of an illusory and unavailable arbitral forum."); Jackson v. Payday Fin., LLC., 764 F.3d. 765, 781 (7th Cir. 2014) ("It is procedurally unconscionable because the Plaintiffs could not have ascertained or understood the arbitration procedure to which they were agreeing because it did not exist. It is substantively unconscionable because it allowed the Loan Entities to manipulate what purported to be a fair arbitration process by selecting an arbitrator and proceeding according to nonexistent rules."); Inetianbor v. CashCall, Inc., 962 F. Supp. 2d 1303, 1309 (S.D. Fla. 2013) (concluding that the plaintiff provided sufficient evidence to prove that procedural rules do not exist).

220. Yaroma v. CashCall, Inc., 130 F. Supp. 3d 1055, 1063 (E.D. Ky. 2015) (noting that different language from the *Inetianbor* and *Jackson* cases make the forum selection clause valid by allowing the borrower "to choose an organization such as AAA or JAMS to administer the arbitration, which thereby defeats the argument that the specified forum is illusory or non-existent"); Williams v. CashCall, Inc., 92 F. Supp. 3d. 847, 853–54 (E.D. Wis. 2015) ("By providing the option of using the consumer dispute rules of the AAA or JAMS, Mr. Williams's contract solves that problem.").

V. RESOLVING THE CONFLICT

Congress should take action to solve the tribal lending controversy because courts are not well-suited for policymaking.[221] Indeed, Congress passed the Indian Gaming Regulatory Act to ameliorate tensions between tribes and states after a Supreme Court decision.[222] Although Congress's authority over Indian tribes is constitutionally dubious,[223] tribal lending with non-Indians is an activity that clearly falls within the bounds of Congress's authority.[224] Congress can tack the tribal lending legislation onto one of the financial bills it is currently considering.[225]

221. Eric Hamilton, Note, *Politicizing the Supreme Court*, 65 STAN. L. Rev. ONLINE 35, 37 (2012) ("The Framers correctly connected loss of public confidence in the Court with judicial policymaking."); Eric Black, *How the Supreme Court Has Come to Play a Policymaking Role*, MINNPOST (Nov. 20, 2012), https://www.minnpost.com/eric-black-ink/2012/11/how-supreme-court-has-come-play-policymaking-role (noting that judicial policymaking undermines the United States' governing structure); Joshua Dunn, *The Perils of Judicial Policymaking: The Practical Case for Separation of Powers*, HERITAGE FOUND. (Sept. 23, 2008), http://www.heritage.org/political-process/report/the-perils-judicial-policymaking-the-practical-case-separation-powers (arguing that the judiciary is ill-suited for policymaking and undermines the separation of powers).

222. Joshua L. Sohn, *The Double-Edged Sword of Indian Gaming*, 42 TULSA L. REV. 139, 142 (2006) (noting that IGRA was a response to the *Cabazon* decision); Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 428–29 (2001) (explaining that Congress passed the IGRA in response the Supreme Court's holding in *Cabazon*); *General History*, ARIZ. DEP'T GAMING, https://gaming.az.gov/about/history (last visited Oct. 21, 2017) ("In enacting IGRA, Congress was reacting to a regulatory vacuum left by a 1987 U.S. Supreme Court ruling (California v. Cabazon Band of Mission Indians) that States have no regulatory authority over gaming on Indian reservations.").

223. FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 46 (2009) [hereinafter POMMERSHEIM, BROKEN LANDSCAPE] ("Plenary authority in Indian affairs is not rooted in the text or history of the Constitution but in the text and history of colonialism—a colonialism in which a 'conquered people' only has authority at the 'sufferance' of the 'conqueror.'"); Crepelle & Block, *supra* note 81, at 331 (discussing Congress's lack of constitutional authority to legislate in Indian affairs).

224. U.S. CONST. art. I, § 8, cl. 3. Lending money is commerce; in fact, tribal lenders consider their businesses e-commerce. *See*, NAFSA Staff Writers, *Tying It All Together: E-Commerce, TLEs, and Consumer-Oriented Services*, NATIVE AM. FIN. SERS. ASS'N (Mar. 2, 2017), https://nativefinance.org/tying-it-all-together-e-commerce-tles-and-consumer-oriented-services/ (describing lending as a form of e-commerce).

225. *See Bill to Allow Banks to Service Legal Pot Businesses Introduced in Senate*, FIN. REG. NEWS (May 19, 2017), https://financialregnews.com/bill-allow-banks-service-legal-pot-businesses-introduced-senate/; Ashley Fahey, *Congressman Pittenger Introduces Legislation to Clarify Commercial Real Estate Lending Regulations*, CHARLOTTE BUS. J. (Apr. 27, 2017), http://www.bizjournals.com/charlotte/news/2017/

The legislation addressing lending must recognize tribes' ability to regulate commercial relationships between Indians and non-Indians. Tribes are already establishing their own lending regulatory structures,[226] and Congress has the power to recognize the tribal regulatory structures.[227] At present, Congress empowers tribes to set up their own environmental regulations.[228] Congress can use similar approval procedures to recognize tribal lending laws; however, the oversight need not be as stringent in lending as it is in environmental matters because lending is based on consensual relationships. Environmental regulations affect third parties.[229] Plus, allowing tribes wide latitude to create their own regulations furthers federalism, leading to the best policy through experimentation.[230]

04/27/congressmanpittenger-introduces-legislation-to.html (noting legislation has been introduced to clarify commercial lending regulation); Andrew Soergel, *Financial Choice Act Looms Over Dodd-Frank's Future*, U.S. NEWS & WORLD REP. (May 4, 2017), https://www.usnews.com/news/articles/2017-05-04/jeb-hensarlings-financial-choice-act-looms-over-dodd-franks-future.

226. *E.g.*, TRIBAL LENDING REGULATORY AUTHORITY, TRIBAL LENDING REGULATIONS § 100.2 (2017), http://www.bestchoice123.com/docs/Guidiville-TLRA_Lending_Regulations-compressed.pdf (establishing the scope and application of lending regulations for the "Guidiville Band of Pomo Indians of the Guidiville Indian Rancheria"); THE LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS TRIBAL CONSUMER FINANCIAL SERVICES REGULATORY CODE § 1.2 (2015), http://www.lvdtribal.com/pdf/2015%2011%2003%20Tribal%20Consumer%20Financial%20Services%20Regulatory%20Code.pdf; Nanini, *supra* note 8, at 506–07 (noting the Tunica-Biloxi Tribe of Louisiana and the Otoe-Missouria Tribe have created financial regulatory bodies); Statement of Sherry Treppa, *supra* note 9, at 2–3 (noting the tribe has crafted its own lending ordinances and developed a regulatory commission).

227. United States v. Mazurie, 419 U.S. 544, 557 (1975) ("It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes.'").

228. 33 U.S.C. § 1377(e) (Supp. III 2016); 42 U.S.C. §§ 300h-1(e),7601(d) (2012).

229. Environmental regulations are designed to minimize the negative externality of industry—pollution. R. C. d'Arge & E. K. Hunt, *Environmental Pollution, Externalities, and Conventional Economic Wisdom: A Critique*, 1 B.C. ENVTL. AFF. 266, 267 (1971) (discussing externalities and the environment); Richard A. Epstein, *Property Rights, State of Nature Theory, and Environmental Protection*, 4 N.Y.U. J.L. & LIBERTY 1, 7 (2009) (discussing how property rights relate to environmental externalities); Donald J. Kochan, *Economics-Based Environmentalism in the Fourth Generation of Environmental Law*, 21 J. ENVTL. & SUSTAINABILITY L. 47, 68 (2015) ("Many issues in environmental law can be boiled down to the control of negative externalities."); Peter Lewin, *Pollution Externalities: Social Cost and Strict Liability*, 2 CATO J. 205, 206 (1982) (noting that market failures lead to externalities like pollution).

230. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J.,

In addition to affirming tribes' ability to craft their own lending laws, the legislation should do two things. First, the legislation should affirm tribal court jurisdiction over online loans between tribes and non-Indians. Second, the legislation should set forth a test to determine which tribal entities qualify for sovereign immunity. Furthermore, the legislation should annotate how the immunity applies in tribal online lending. How the legislation should address each is discussed below. The legislation addressing tribal lending would help clarify Indian law in general, as tribal court jurisdiction and sovereign immunity are issues that courts have struggled with for years—often to the detriment of tribes.[231]

A. *Tribal Court Jurisdiction*

Congress should authorize tribal court jurisdiction over payday lending suits with non-Indians. Recognizing tribal court authority over loan agreements between tribes and non-Indians furthers Congress's goal of promoting tribal sovereignty.[232] Granting tribal courts jurisdiction over the

dissenting) ("Denial of the right to experiment may be fraught with serious consequences to the Nation."); JENNA BEDNAR, NUDGING FEDERALISM TOWARD PRODUCTIVE EXPERIMENTATION 8 (2010), http://www-personal.umich.edu/~jbednar/WIP/rfs(3).pdf ("Policy experimentation, the kind that involves some pressing against the boundaries of federalism (and sometimes stepping across them), allows us to learn about the efficacy of the federal adjustment even as we learn about the usefulness of the new policy."); Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1336–37 (2009) (footnote omitted) ("[A] key argument in favor of decentralized provision of government services, such as in the U.S. system of federalism, is that an array of local governments is more innovative than a single monolithic central authority.").

231. *See* N. Bruce Duthu, *The New Indian Wars: Tribal Sovereignty, The Courts and Judicial Violence*, *in* 144 REVUE FRANÇAISE D'ETUDES AMERICAINES 78–94 (2015) (discussing the Supreme Court's role in divesting tribes of sovereignty while the executive and legislative branches have adopted policies favoring tribal sovereignty); POMMERSHEIM, BROKEN LANDSCAPE, *supra* note 223, at 297 (discussing the Supreme Court's massive erosion of tribal sovereignty in *Oliphant v. Suquamish Indian Tribe* and *Montana v. United States*, and noting that the Court's decisions in those cases are entirely unmoored from the Constitution or any other statute); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 627 (2011) ("[T]he Court has essentially stripped tribal sovereignty beyond intra-tribal relations and 'has transformed itself from the court of the conqueror into the court as the conqueror.'"); Matthew L.M. Fletcher, *Statutory Divestiture of Tribal Sovereignty*, FED. LAW., April 2017, at 38 *passim* [hereinafter Fletcher, *Statutory Divestiture*] (discussing the Supreme Court's role in the erosion of tribal sovereignty).

232. 25 U.S.C. § 5302(b) (2012) ("The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and

loans strengthens tribal sovereignty, and it does not undermine the rights of non-Indians. Loans arise from consensual agreements, and non-Indian borrowers consent to tribal court jurisdiction.[233] The lending laws tribes developed are the very reason non-Indians choose to do business with tribes;[234] thus, non-Indians cannot be surprised to end up in tribal court.[235] Plus, tribal courts usually operate very much like typical U. S. legal systems[236] and are normally staffed by qualified judges.[237] Loan disputes are also fairly

responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) *superseded by statute*, Indian Gaming Regulation Act, 25 U.S.C. § 2710 (2012), *invalidated by* Seminole Tribe of Fla. v. Florida 517 U.S. 44 (1996) (citation omitted) ("The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."); Nat'l Farmers Union Ins. Cos., v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

233. Fletcher, *Statutory Divestiture*, *supra* note 231, at 39.

234. Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568, 582 (2013) ("When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain."); Clarkson et al., *supra* note 11, at 8 (noting non-Indians choose to do business with tribal lenders over non-Indian lending companies).

235. *Atl. Marine Constr. Co.*, 134 S. Ct. at 583 (noting contractual forum selection provisions provide parties with an expectation of where litigation will occur); *see also* Fletcher, *Statutory Divestiture*, *supra* note 231, at 39 (noting non-Indians consent to tribal court jurisdiction all the time during commercial dealings with tribes); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction Over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1229–30 (2010) ("When a person consents to a court's jurisdiction, either by filing suit as a plaintiff or by waiving any objections to jurisdiction as a defendant, many, if not all, of the individual fairness interests dissipate.").

236. Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (acknowledging that "some" tribal courts operate nearly identically to non-Indian courts); JONES, ROLE OF INDIAN TRIBAL COURTS, *supra* note 165, at 7 (discussing how similar tribal courts are to state and federal courts); Valencia-Weber, *supra* note 181, at 240 (observing the "growing legitimacy of tribal courts").

237. Fletcher, *Statutory Divestiture*, *supra* note 231, at 42 (noting Dollar General dropped its argument that tribal courts are unfair as a result of the Mississippi Choctaw's

straightforward because the loan's terms are contained in the loan itself, and information about whether it was paid is easily obtainable. These factors should mitigate fears that non-Indians will not receive fair trials in tribal court.[238]

Tribal courts currently exercise jurisdiction over matters that are much more significant than short-term, small-dollar loans. Congress acknowledges that tribal courts are an "essential" facet of tribal sovereignty[239] and recognizes tribal courts as the proper forum "for the adjudication of disputes affecting personal and property rights."[240] Accordingly, Congress has named tribal courts as the proper forum for adjudicating adoption proceedings involving Indian children even when one parent is a non-Indian.[241] Congress recently acknowledged tribal courts' criminal jurisdiction over non-Indians.[242] Tribes have been prosecuting non-Indians for two years and no issues have been reported.[243] Additionally, Congress extended the maximum criminal punishment that tribes can pronounce.[244] Congress did this to give

highly qualified personnel); Pommersheim, *The Contextual Legitimacy of Adjudication*, *supra* note 183, at 61 (noting that the number of tribal judges with legal training was increasing rapidly in the late 1980s); Valencia-Weber, *supra* note 181, at 240 (noting the increasing number of legally trained members of tribal judicial systems).

238. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-252, INDIAN COUNTRY CRIMINAL JUSTICE: DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS 19 (2011), http://www.gao.gov/assets/320/315698.pdf (stating that the cozy relationships between some tribal councils and tribal courts have led to questions about their integrity); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Tribal Courts*, 22 AM. INDIAN L. REV. 285, 351 (1998) ("[C]ritics of tribal courts make the basic assumption that non-Indians, in particularly white people, will not get a fair trial in tribal courts."); Valencia-Weber, *supra* note 181, at 234 ("In disputes arising from contacts and the reach of tribal government power, the non-Indian parties scrutinize the tribal court's claims of integrity, fairness, and legitimacy.").

239. 25 U.S.C. § 3601(5) (2012) ("The Congress finds and declares . . . tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments . . . .").

240. 25 U.S.C. § 3601(6).

241. 25 U.S.C. § 1911(a) (2012) (noting that tribal courts have "exclusive jurisdiction" over child custody proceedings involving Indian children).

242. 25 U.S.C. § 1304(b)(1) (Supp. III 2016).

243. Crepelle, *Concealed Carry*, *supra* note 169, at 237 (footnote omitted) ("Multiple tribes are currently exercising [Violence Against Women Act] jurisdiction, and no due process issues have been reported to date.").

244. 25 U.S.C. § 1302(b) (2012).

tribes a greater ability to develop their justice systems.[245] Criminal and child custody cases are infinitely more important and complex than disputes over small-dollar loans.

The Supreme Court has increasingly recognized the legitimacy of tribal courts as well. In 2016, the Court held that tribal court convictions may serve as constitutionally valid predicate offenses in nontribal court proceedings.[246] The same year, the Court also declined to overrule tribes' ability to exercise civil jurisdiction over non-Indians who enter consensual relationships with tribes or their members,[247] and loans are commercial transactions that the lender and borrower consensually enter into. Moreover, the United Nations has declared that indigenous justice systems should be respected,[248] and the United States has adopted the United Nations' position.[249] Thus, Congress should pass legislation affirming tribal court jurisdiction over loans between tribal lenders and non-Indian borrowers.

B. *Tribal Sovereign Immunity*

Congress should establish a test to determine which tribal entities are entitled to sovereign immunity.[250] Congress has passed legislation that produced criteria such as the Service-Disabled Veteran-Owned Small Business Concern Program,[251] small disadvantaged businesses

245. Cutler, *supra* note 180, at 1769–70 (noting that one of the Tribal Law and Order Act's purposes was to grant tribes more opportunities to build their legal systems).

246. United States v. Bryant, 136 S. Ct. 1954, 1966 (2016).

247. Dolgencorp. Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 177 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2159 (2016) (holding that tribal courts can exercise jurisdiction over a non-Indian who consents to tribal court jurisdiction).

248. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples, at 13 (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf ("Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.").

249. *United Nations Declaration on the Rights of Indigenous Peoples*, UN, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited May 22, 2017) (stating that although the United States originally opposed the United Nation's Declaration of the Rights of Indigenous Peoples, it now supports it).

250. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 759 (1998) (noting that Congress is the proper branch of government to determine the limits of tribal sovereign immunity).

251. *Service-Disabled Veteran-Owned Businesses*, SBA, https://www.sba.gov/contracting/government-contracting-programs/service-disabled-veteran-owned-businesses (last visited Sept. 19, 2017).

certification,[252] and the well-known 8(a) program.[253] An 8(a) program exists specifically for tribes,[254] and the Secretary of the Interior can charter tribal corporations,[255] known as "Section 17 corporations."[256]

The qualifications for tribal 8(a) and Section 17 are useful in gauging which entities are actually arms of the tribe entitled to sovereign immunity, but they are not definitive guideposts.[257] Section 17 corporations must be wholly owned by a tribe and require the Bureau of Indian Affair's approval.[258] Aside from this, specific instructions for forming a Section 17 corporation do not exist.[259] To achieve 8(a) certification, a tribe must own at least 51 percent of the business's voting stock, as well as the aggregate of all other classes of stock.[260] The entity must also be managed and controlled by one or more citizens of the tribe.[261] There are other requirements for tribal 8(a), but they are not relevant for determining whether the corporation is owned by a tribe.[262] Accordingly, they are not germane to an immunity analysis.

Based upon the consistencies between the various administrative, legislative, and court tests, Congress should require tribal lenders to exhibit the following characteristics in order to qualify for sovereign immunity. First, the entity must be incorporated under tribal or federal law—not state law.[263]

252. *Small Disadvantaged Businesses*, SBA, https://www.sba.gov/contracting/government-contracting-programs/small-disadvantaged-businesses (last visited Sept. 19, 2017).

253. *8(a) Requirements Overview*, SBA, https://www.sba.gov/contracting/government-contracting-programs/8a-business-development-program/eligibility-requirements/8a-requirements-overview (last visited Nov. 1, 2017).

254. 13 C.F.R. § 124.109 (b)–(c) (2017).

255. 25 U.S.C. § 5124 (2012).

256. Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc., 585 F.3d 917, 918 (6th Cir. 2009).

257. *See* 25 U.S.C. § 5124; 13 C.F.R. § 124.109 (b)–(c).

258. TRIBAL BUSINESS STRUCTURES: A GUIDEBOOK ON DIFFERENT STRUCTURES FOR TRIBAL BUSINESS ENTITIES 9 (2011), http://www.michiganbusiness.org/cm/files/tribal_business_development/tribal%20business%20structures%20guidebook.pdf ("The corporation must be wholly owned by the Tribe, but is separate and distinct from the tribal government.").

259. *See id.* at 8–9.

260. 13 C.F.R. § 124.109(b)(3)(i).

261. 13 C.F.R. § 124.109(b)(4)(i).

262. 13 C.F.R. § 124.109(b)(1–2) (noting social and economic disadvantage are not germane to whether an entity is tribally owned nor is the tribe's poverty level).

263. *See supra* Part IV.B.2.

Second, a tribe should own a majority of the lending company.[264] Third, the majority of the tribal entity's revenue should go to the tribe.[265] Fourth, tribal citizens should manage and control the corporation.[266] The first three criteria are objective and easy to measure. The fourth criterion, however, may cause some difficulty. Nevertheless, there is a large amount of objectivity to it. Courts wrestle with the corporate control issue fairly frequently in non-Indian business cases, so the criterion is measurable.[267] Codifying these criteria would help bring uniformity in determining which entities are treated as arms of tribes.

Congress also needs to elucidate that sovereign immunity protects tribal lenders from state regulation in online lending. Congressional affirmation of tribal sovereign immunity can serve as a shield against state assaults on tribal sovereignty and economic development.[268] E-commerce is a tremendous opportunity for tribes to improve their economies, but regulatory efforts can kill it.[269] Tribal online lenders in no way infringe upon state sovereignty; after all, the borrowers voluntarily choose to transact

264. *See supra* note 260 and accompanying text.

265. *See supra* Part III.

266. *See supra* notes 260–61 and accompanying text.

267. *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77, 92–93 (2010) (adopting the "nerve center" test to determine a corporation's principal place of business for diversity jurisdiction purposes).

268. Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163, 189 (1989) (holding states can assess taxes on commercial activity on tribal land although the state provides minimal services to facilitate the commerce); United States v. Kagama, 118 U.S. 375, 384 (1886) (noting states provide tribes "no protection" and state politics harm tribes); POMMERSHEIM, BROKEN LANDSCAPE, *supra* note 223, at 301 (discussing how court decisions have undercut tribal sovereignty and expanded state authority in Indian country); KELLY S. CROMAN & JONATHAN B. TAYLOR, WHY BEGGAR THEY INDIAN NEIGHBOR? THE CASE FOR TRIBAL PRIMACY IN TAXATION IN INDIAN COUNTRY 1 (2016), http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf ("To borrow from Adam Smith, states beggar their Indian neighbors, seeking fiscal gain to the tribes' detriment and, ultimately, their own."); Blaine I. Green, *Sovereignty and Economy: Tribal-State Conflict in Time of Recession*, PILLSBURY L. (2010), https://www.pillsburylaw.com/images/content/3/2/3260.pdf (discussing how states are trying take a cut of tribal revenues).

269. Clarkson et al., *supra* note 11, at 8 (noting state regulation of tribal online lenders began just as tribes started to become proficient in the industry); Jane Daugherty, *How Natives Can Make E-Commerce Work for Them*, INDIAN COUNTRY TODAY (Apr. 8, 2015), https://indiancountrymedianetwork.com/news/opinions/how-natives-can-make-e-commerce-work-for-them/ (noting that just as tribes were finding success in e-commerce, regulatory efforts took the wind from their sails).

business with the tribe. The end result is the same whether the borrower enters the loan online or by physically entering the reservation—the borrower gets access to cash. Cash is perfectly legal in every state. Moreover, tribes are defined as states for financial regulation purposes,[270] and states have sovereign immunity.[271] Sovereign immunity prevents tribes from enforcing federal and tribal laws against states;[272] accordingly, it is fair to prohibit states from bringing legal actions against tribes for engaging in online lending. Thus, Congress should act to affirm tribal sovereign immunity in online lending.

VI. CONCLUSION

Congress has declared the promotion of tribal sovereignty and economic development as policy goals regarding Indian nations.[273] Online lending is a viable means for tribes to achieve these objectives.[274] In order for the tribal online lending industry to reach its full potential, Congress needs to pass legislation approving tribal lending. The legislation must acknowledge tribal courts' ability to exercise jurisdiction over online loans with non-Indians—particularly those who have consented to tribal court jurisdiction. Congress also needs to articulate what it views as an arm of the tribe and explain how immunity applies to tribal lenders.

As long as tribes lack the ability to generate tax revenue, they will need to seek out means to fund their governments.[275] Geographic isolation and a dearth of resources have doomed tribal economies since the Indian Wars.[276] Online lending has breathed life into some tribal economies.[277] Limiting

270. 12 U.S.C. § 5481(27) (2012).

271. U.S. CONST. amend. XI.

272. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (holding that tribes cannot sue states to enforce federal law).

273. 25 U.S.C. § 2701(4) (2012).

274. Clarkson et al., *supra* note 11, at 18–25 (providing examples of tribes using online lending to further economic development and self-government); *NAFSA Fact Sheet*, *supra* note 9 ("Tribally offered financial service products create jobs and development on tribal lands, increasing financial independence of tribes and decreasing dependence on the federal government."); *Support for Tribes*, *supra* note 93 (resolving that online lending presents an opportunity for tribes to promote economic development and self-determination).

275. Fletcher, *In Pursuit*, *supra* note 77, at 774 (noting tribes lack tax bases, so they must engage in economic development).

276. Clarkson et al., *supra* note 11, at 6.

277. *Id.* at 36.

tribal sovereignty in the industry would return these tribes to destitution. The online lending industry is not going away;[278] therefore, tribes should be able to offer a financial service that benefits both their citizens and non-Indian borrowers. Tribes helped transform gaming into the industry that it is today.[279] Tribes can have the same effect in the online lending industry.

278. Brock Blake, *Is Online Lending Doomed? 5 Predictions for the Future of the Industry*, FORBES (July 18, 2016), https://www.forbes.com/sites/brockblake/2016/07/18/is-online-lending-doomed-5-predictions-for-the-future-of-the-industry/2/#2e42fd404fbe (noting that despite the online lending industry's troubles, it is not disappearing).

279. Adam Crepelle, *Tribes and Cannabis: Where Things Stand*, AM. GAMING LAW., Spring 2017, at 24, 26.