

2016

Online Sovereignty: The Law and Economics of Tribal Electronic Commerce

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Gavin Clarkson, Katherine A. Spilde, and Carma M. Claw, Online Sovereignty: The Law and Economics of Tribal Electronic Commerce, 19 *Vanderbilt Journal of Entertainment and Technology Law* 1 (2020)
Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol19/iss1/1>

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VANDERBILT JOURNAL OF ENTERTAINMENT & TECHNOLOGY LAW

VOLUME 19

FALL 2016

NUMBER 1

Online Sovereignty: The Law and Economics of Tribal Electronic Commerce

Gavin Clarkson, Katherine A. Spilde,** and Carma M. Claw****

ABSTRACT

In 1886, the US Supreme Court wrote that, for Indian tribes, “the people of the states where they are found are often their deadliest enemies.” Recently, state agencies and regulators have continued that tradition of hostility by improperly attempting to regulate electronic commerce businesses operated by tribal governments that are more properly subject to regulations established by tribal law and subject to federal oversight. Despite the fact that these online businesses operate exclusively under tribal law and make their tribal affiliation clear to customers, certain state regulators have demanded absolute compliance with state law, even when such laws are from states thousands of miles away. Not only does this overreaching by uninformed state regulators limit the products available to consumers, it also severely undercuts on-reservation economic development, imperils tribal electronic commerce, and challenges basic notions of tribal sovereignty.

Businesses and consumers entering into commercial contracts rely heavily on consistency and predictability in contracting, including when the parties mutually agree to apply tribal law or utilize tribal courts to resolve disputes. Uniform interpretation and enforcement of

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such agreements are critical to ensuring continued investment in tribal businesses. With over one quarter of American Indians living in poverty—nearly twice the national average—it has never been more important to promote confidence in the Indian economy. When courts do not give full force and effect to contracting parties’ desires to resolve their private disputes using tribal courts and tribal law, this confidence is threatened. While it is unclear how this controversy will ultimately play out, one thing is certain: states are not only undermining tribal innovation and harming tribal economies but also attacking tribal sovereignty itself.

Perhaps lost in the legal rancor, however, are the very real human and economic consequences of the loss of tribal revenues from e-commerce business, as well as the potential damage to tribal e-commerce as a whole. This Article presents results of empirical research into the economic impact of tribal online lending in Indian Country. The Article first frames the issue with a brief summary of the legal foundations for tribal e-commerce and tribal lending in particular. Next, the Article presents several case studies of tribes that have engaged in online lending, focusing on the direct economic impact to those tribal communities. Finally, the Article concludes with policy arguments as to why state and federal regulators should support rather than suppress tribal e-commerce, including tribal small-dollar online lending.

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I. INTRODUCTION

In an 1886 case, the US Supreme Court wrote that, for Indian tribes, “the people of the states where they are found are often their deadliest enemies.”¹ Although that observation is nearly 150 years old, this tradition of hostility continues, particularly between state regulators and tribal governments in the arena of electronic commerce or “e-commerce.”

Numerous states have recently asserted jurisdiction over tribally owned businesses that are subject only to a combination of tribal and federal regulation. For example, the State of New York has asserted jurisdiction over online lending activities of a tribal government in Oklahoma in spite of the fact that consumers are signing contracts solely with the tribe.² Despite the fact that these businesses operate exclusively under tribal law and make their tribal affiliations clear to customers, certain state regulators have demanded absolute compliance with state law, even when such laws are from states thousands of miles away.³ Not only does this overreaching by uninformed state regulators limit the products available to consumers, it also severely undercuts on-reservation economic development and challenges basic notions of tribal sovereignty.

Perhaps lost in the legal rancor, however, are the very real human and economic consequences of the loss of tribal lending as an e-commerce business, as well as the potential damage to tribal e-commerce as a whole. In presenting the results of empirical research into the economic impact of tribal online lending in Indian Country, this Article first frames the issue in Part II with an overview of tribal economies and the need for e-commerce. It then continues in Part III with a brief summary of the legal foundations for tribal e-commerce and tribal lending in particular. In Part IV, this Article presents several case studies of tribes that have engaged in online lending, focusing on the direct economic impact to those tribal communities. Part V presents several policy arguments as to why state and federal regulators should support rather than suppress tribal e-commerce,

1. United States v. Kagama, 118 U.S. 375, 384 (1886).

2. Otoe-Missouria Tribe of Indians v. N.Y. State Dep’t of Fin. Servs., 769 F.3d 105, 107 (2d Cir. 2014).

3. Such as New York’s attempted enforcement in Oklahoma. *Id.*

including tribal small-dollar online lending. In anticipation of potential objections, Part VI of this Article summarizes a set of best practices adopted by the vast majority of tribal online lenders. This Article examines the broader policy implications of a continued assault on tribal online lending in Part VII by examining potential collateral damage to other forms of e-commerce in Indian Country before concluding with Part VIII.

II. TRIBAL ECONOMICS AND ELECTRONIC COMMERCE

On-reservation tribal businesses are vital to the sovereignty and welfare of tribal governments, American Indians, and Alaska Natives nationwide. In 2014, the US Supreme Court reiterated that “[a] key goal of the Federal Government is to render Tribes more self-sufficient and better positioned to fund their own sovereign functions, rather than relying on Federal funding.”⁴ With dwindling federal funds, tribal communities face significant challenges in establishing steady revenue streams and attracting external investors.⁵ While not exclusively linked to location, these challenges to tribal economic development are often entrenched because a majority of reservation lands are geographically isolated, historically disadvantaged, and poor.⁶

Most tribal communities struggle with long-standing cycles of poverty and, as with other developing nations, the need for economic development on tribal lands remains acute and affects nearly every aspect of reservation life.⁷ Large portions of Indian Country lack basic infrastructure, posing a daunting barrier to tribal leaders’ attempts to develop their economies. Such realities highlight the importance of stimulating economic development for the social and economic recovery of tribal communities. Research from the 2006–2010

4. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring).

5. STEPHEN CORNELL & JOSEPH P. KALT, SOVEREIGNTY AND NATION-BUILDING: THE DEVELOPMENT CHALLENGE IN INDIAN COUNTRY TODAY 5–7 (1998), <http://hpaied.org/sites/default/files/publications/PRS98-25.pdf> [<https://perma.cc/KC4L-AU6G>].

6. *See, e.g.*, Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 LEWIS & CLARK L. REV. 943, 945 (2008); *see also* Randall K.Q. Akee, Katherine A. Spilde & Jonathan B. Taylor, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSP. 185, 189 (2015); Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 COLO. L. REV. 285, 285–86 (2009); Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009, 1014 (2007).

7. Randall K.Q. Akee, Katherine A. Spilde & Jonathan B. Taylor, *Social and Economic Changes on American Indian Reservations in California: An Examination of Twenty Years of Tribal Government Gaming*, 18 U.N.L.V. GAMING RES. & REV. J. 39, 50 (2014).

American Indian Community Surveys indicate that the pace of reservation economic growth slowed between 2000 and 2010.⁸ While economic growth on reservations outpaced the rate of economic growth in the United States during the recession, the income gap between people living on reservations and the rest of the United States remains large, with the real per capita income for American Indians on reservations at \$12,142 compared to a \$26,893 average for all races in the United States.⁹ Economists now speculate that current growth rates on reservations have slowed to the point that this gap will not close before the year 2054.¹⁰

Although tribal leaders have acknowledged and attempted to reduce these problems for decades, they have not had the resources to create a more hospitable business environment. A vicious cycle has consequently developed: businesses avoid establishing a presence on reservations because of the lack of infrastructure, while tribal governments are left unable to improve their infrastructure because on-reservation commerce is woefully insufficient.

To break this cycle and increase revenue, tribal leaders have relied on their most tangible, sustainable competitive advantage: tribal sovereignty. As nations that predate the Constitution and the United States, tribal nations can generally operate in licensed environments independent of state regulation. This notion of excluding state law and regulatory authority is one of the founding principles of the Supreme Court's Indian Law jurisprudence and stems from an 1832 case, *Worcester v. Georgia*.¹¹ In that case, the state of Georgia passed a law requiring any non-Native person living within the borders of the Cherokee Nation to get a license to do so from the State.¹² Several missionaries, including Reverend Worcester, defied the law, were arrested, and were sentenced to four years of hard labor.¹³ On appeal to the Supreme Court, the Justices found that the Cherokee Nation was "a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."¹⁴

8. RANDALL K.Q. AKEE & JONATHAN B. TAYLOR, SOCIAL AND ECONOMIC CHANGE ON AMERICAN INDIAN RESERVATIONS: A DATABOOK OF THE US CENSUSES AND THE AMERICAN COMMUNITY SURVEY 1990–2010, at v (2014), <http://static1.squarespace.com/static/52557b58e4b0d4767401ce95/t/5379756ce4b095f55e75c77b/1400468844624/AkeeTaylorUSDataBook2014-05-15.pdf> [https://perma.cc/P9YK-ZEUE].

9. *Id.*

10. *Id.*

11. *Worcester v. Georgia*, 31 U.S. 515, 594–96 (1832).

12. *Id.* at 523.

13. *Id.* at 521.

14. *Id.* at 520.

As the Chairwoman of the Habematolel Pomo Indians of Upper Lake recently testified before the House Committee on Financial Services:

The inherent sovereign power of Indian Tribes predates the United States Constitution. Indian Nations appears twice in the Constitution, each time in Article I, treated as separate and existing sovereign nations. Nearly every piece of modern legislation dealing with Indian tribes explicitly affirms the protective trust relationship between tribes and the federal government. . . . The sole power to diminish tribal sovereignty rests with Congress. Whatever Congress has not expressly diminished by legislation remains for the exercise of tribal governments.¹⁵

By leveraging this sovereignty to their advantage,¹⁶ some tribal governments have relied on gaming and a lack of sales tax to entice consumers to visit and invest in their communities.¹⁷ Contrary to popular belief, however, gaming does not provide sufficient recovery for most tribal economies. A majority of the more than 567 federally recognized Indian tribes do not have significant gaming operations,¹⁸ and of those that do, only a small handful generate substantial revenues.¹⁹ While a few tribes near major metropolitan centers operate successful gaming enterprises, hundreds of tribes have reservation lands that do not support a gaming industry of any kind, while others operate small casinos located far from population centers.²⁰ Thus, the economic benefits of gaming are not universally distributed throughout Indian Country. For example, the

15. *Short-Term, Small Dollar Lending: The CFPB's Assault on Access to Credit and Trampling of State and Tribal Sovereignty: Hearing Before the H. Comm. on Fin. Servs.*, 114th Cong. 1 (2016), <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba15-wstate-streppa-20160211.pdf> [<https://perma.cc/XPS5-TQ2B>] (testimony of Sherry Treppa, Chairperson, Habematolel Pomo of Upper Lake) [hereinafter *Short-Term, Small Dollar Lending*].

16. See generally Gavin Clarkson & James K. Sebenius, *Leveraging Tribal Sovereignty for Economic Opportunity: A Strategic Negotiations Perspective*, 76 MO. L. REV. 1045, 1047 (2011).

17. Akee, Spilde & Taylor, *supra* note 6, at 201.

18. NAT'L INDIAN GAMING ASS'N, AN ANALYSIS OF THE ECONOMIC IMPACT OF INDIAN GAMING IN 2005, at 27 (2005), http://s3.amazonaws.com/zanran_storage/www.indiangaming.org/ContentPages/52719314.pdf [<https://perma.cc/TY2C-FC7L>]. According to the National Indian Gaming Association, only 224 tribes have gaming operations of any kind as of 2005. *Id.* at 2.

19. See NAT'L GAMBLING IMPACT STUDY COMM'N, NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT, at 2–10 (1999), <http://govinfo.library.unt.edu/ngisc/reports/2.pdf> [<https://perma.cc/27BS-JNWP>] (“The 20 largest Indian gambling facilities account for 50.5% of total revenues, with the next 85 accounting for [only] 41.2%. Additionally, not all gambling facilities are successful. Some tribes operate their casinos at a loss and a few have even been forced to close money-losing facilities.”). Note also that many tribes that do generate significant revenues often must share those revenues with the state as part of the compacting process of the Indian Gaming Regulatory Act. See 25 U.S.C. § 2710(d)(3)(C)(iii) (2012). In some cases, such as with the Mohegan and Mashantucket Pequot tribes in Connecticut, the revenue share is as high as 25%. See, e.g., Clarkson & Sebenius, *supra* note 16, at 1047.

20. See Donald L. Barlett & James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002, at 44.

unemployment rate still hovers around 50 percent for Indians who live on reservations, nearly ten times that for the United States as a whole,²¹ and more than one-third of American Indian children live in poverty.²²

The dawn of the Internet Age, however, ushered in a variety of new opportunities for tribes located in rural areas to become hotbeds for business innovation. Most significantly, tribal governments realized that they could export services via the Internet to transact business with consumers anywhere in the country while still being subject to tribal law alone.²³ The key to this arrangement was conducting business so that all transactions occurred on the reservation and ensuring that consumers consented to the application of tribal law instead of state law.²⁴ Seizing upon this model, tribal governments began offering small-dollar loans to consumers who needed money quickly or who were unable to obtain funding from traditional sources.²⁵ Customer need for and response to these financial services were overwhelming, and much-needed tribal government revenues began to flow into some of the poorest tribal communities.²⁶

The tribe-owned businesses that offer and service these loans were organized to take advantage of the sovereign authority that their tribes exercised over the reservation.²⁷ Under this arrangement, consumers gravitated to tribal lenders and exemplified a classic quid

21. See BUREAU OF INDIAN AFFAIRS, 2005 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT, at iv (2006), <http://www.bia.gov/cs/groups/public/documents/text/idc-001719.pdf> [<https://perma.cc/4B5F-M327>].

22. See, e.g., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., AMERICAN INDIAN AND ALASKA NATIVE CHILDREN: FINDINGS FROM THE BASE YEAR OF THE EARLY CHILDHOOD LONGITUDINAL STUDY, BIRTH COHORT (ECLS-B) 3 (2005), <http://nces.ed.gov/pubs2005/2005116.pdf> [<https://perma.cc/3AZE-L66S>].

23. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1001–1100H, 124 Stat. 1376, 1955–2113 (2012); see also *Is Sovereign Immunity for Tribal Lending Coming to an End?*, PYMNTS.COM (June 30, 2015), <http://www.pymnts.com/in-depth/2015/is-sovereign-immunity-for-tribal-payday-lending-coming-to-an-end/> [<https://perma.cc/9XWT-4UB5>] [hereinafter PYMNTS]; *The Dodd-Frank Wall Street Reform and Consumer Protection Act Benefits Native Americans*, U.S. DEP'T TREASURY, <https://www.treasury.gov/initiatives/wsr/Pages/Native-Americans.aspx> [<https://perma.cc/LX3B-AVAY>] (last updated Jan. 26, 2011, 10:03 AM).

24. Peter Lattman, *Tribes Challenge New York's Authority over Their Lending*, N.Y. TIMES (Sept. 11, 2013), <http://dealbook.nytimes.com/2013/09/11/indian-tribes-press-their-online-loan-case-against-new-york/> [<https://perma.cc/ZR4X-E3VY>].

25. PYMNTS, *supra* note 23.

26. See Julia Harte & Joanna Zuckerman, *Payday Nation*, AL JAZEERA AM. (June 17, 2014), <http://projects.aljazeera.com/2014/payday-nation/index.html> [<https://perma.cc/F2ZZ-LVNG>].

27. Bree Black Horse, Note, *The Risks and Benefits of Tribal Payday Lending to Tribal Sovereign Immunity*, 1 AM. INDIAN L.J. 388, 394–96 (2013).

pro quo.²⁸ Tribal businesses provided consumers with small-dollar loans that other lenders were unwilling or unable to offer, and in return, consumers agreed to enter into loan agreements consummated on tribal land that were subject only to tribal law.²⁹ Believing this arrangement to be a reasonable transaction, thousands of customers obtained

much-needed funds on short notice from tribal lenders through the Internet.³⁰ Many of them became repeat customers who, despite the availability of multiple off-reservation alternatives (both online and from land-based operations), intentionally chose to return virtually to the reservation to obtain additional financing.³¹

State efforts to regulate or even prohibit tribe-regulated lending began just as the model was being streamlined and perfected. Even though consumers explicitly agreed that their loans were subject only to tribal laws, states began suing tribal lenders for failing to obey local lending laws and failing to obtain state certifications.³² Initial tribal objections to these regulations relied upon the fact that the prevailing federal legislation, the Dodd-Frank Act,³³ acknowledged that tribes are to be treated as states for the purposes of financial services.³⁴ In spite of a clear federal mandate, attempted state regulation became more fervent and widespread.³⁵ Faced with costly litigation in multiple states, many tribal government lenders were forced to cease or significantly reduce their operations, thereby cutting off vital economic lifelines in their communities.³⁶ While it is unclear how this controversy will ultimately play out, one thing is certain:

28. See Lattman, *supra* note 24.

29. *Id.*

30. Harte & Zuckerman, *supra* note 26.

31. *Id.*

32. Lattman, *supra* note 24.

33. *Id.*

34. There is one mention of tribes in the Dodd-Frank Act, and that occurs in the definition of “State”: The term “State” means any State, territory, or possession of the United States . . . or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 479a-1(a) of title 25. Dodd–Frank Wall Street Reform and Consumer Protection Act § 1002(27), 12 U.S.C. § 5481(27) (2012).

35. Jane Daugherty, *Feds Claim Tribal Lenders Not a Target; Tribes Sue NY Over Crackdown*, INDIAN COUNTRY TODAY (Aug. 23, 2013), <http://indiancountrytodaymedianetwork.com/2013/08/23/feds-claim-tribal-lenders-not-target-tribes-sue-ny-over-crackdown-151001> [<https://perma.cc/M5QG-4RYH>].

36. See, e.g., Jim Gallagher, *Reservation Payday Lender to Pay Restitution to Missourians*, ST. LOUIS POST DISPATCH (Mar. 5, 2015), http://www.stltoday.com/business/local/reservation-payday-lender-to-pay-restitution-to-missourians/article_1625086f-85b6-555f-9d01-a3506b13e09b.html [<https://perma.cc/5Y8K-RF52>]; see also Harte & Zuckerman, *supra* note 26.

states are not only undermining tribal innovation and harming tribal economies but are also attacking tribal sovereignty itself.³⁷

Businesses and consumers entering into commercial contracts rely heavily on consistency and predictability in contracting, including when the parties agree to apply tribal law or utilize tribal courts to resolve disputes. Uniform interpretation and enforcement of such agreements are critical to ensuring continued investment in tribal businesses. With over one-quarter of American Indians living in poverty—nearly twice the national average³⁸—it has never been more important to promote confidence in the Indian economy. When courts do not give full force and effect to contracting parties' desires to resolve their private disputes using tribal courts and tribal law, this confidence is threatened.

III. THE LAW AND REGULATION OF ONLINE TRIBAL LENDING

The market for small-dollar lending is broad and deep, and the conditions that support its growth pre-date tribal government involvement in the industry. Tribal small-dollar online lending would not exist without a market of “underbanked” consumers not adequately serviced by traditional lenders. The 2013 FDIC National Survey of Unbanked and Underbanked Households defines the underbanked as individuals with a checking or savings account who still must rely on alternative financial services such as check-cashing services, payday loans, rent-to-own agreements, or pawn shops.³⁹ One in five (or twenty-four million) households were underbanked in 2013, consisting of an estimated sixty-eight million people.⁴⁰ According to the same report, 9.6 million households representing twenty-five million people were unbanked in 2013, defined as those who “do not have an account at an insured institution.”⁴¹ More than a third (35.6 percent) of unbanked households reported the main reasons for not having an account were insufficient money to keep in an account or not meeting minimum balance requirements.⁴² In addition, 34.1 percent of households that recently became unbanked experienced

37. Jane Daugherty, *New York's Attack on Tribal Lenders Is a Threat to All Natives*, INDIAN COUNTRY TODAY (Aug. 25, 2013), <http://indiancountrytodaymedianetwork.com/2013/08/25/new-yorks-attack-tribal-lenders-threat-all-natives> [<https://perma.cc/U43P-96RR>].

38. See U.S. CENSUS BUREAU, POVERTY RATES: 2007–2011, at 2 (2013), <http://www.census.gov/prod/2013pubs/acsbr11-17.pdf> [<https://perma.cc/4UB5-CPDR>].

39. FED. DEPOSIT INS. CORP., FDIC, 2013 NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 4 (2014), <https://www.fdic.gov/householdsurvey/2013report.pdf> [<https://perma.cc/FGD2-QD63>].

40. *Id.*

41. *Id.*

42. *Id.* at 24.

either a significant income loss or job loss that they said contributed to becoming underbanked.⁴³ Traditional banks and lending institutions are not serving these consumers.

In spite of the federal government's attempt under the Community Reinvestment Act (CRA)⁴⁴ to incentivize banks to serve the communities in which they operate, research reveals that the CRA operates inefficiently in many regions. The CRA was intended to push banks to reinvest and help rein in the "redlining" of poor communities, the long-time practice of not offering mortgages in "bad" neighborhoods.⁴⁵ While the Federal Reserve is "currently considering what can be done to make CRA a more effective regulatory incentive going forward to address an unprecedented set of community needs," the CRA apparatus has never even rated the availability of basic banking services" for the underbanked.⁴⁶

Given the megabanks' lack of attention to underbanked Americans, tribal governments have stepped in to serve them remotely through online lending businesses located on tribal lands. While not specifically subject to the CRA, tribal governments are in an ideal position to fulfill the mandates of the CRA. Through online lending, tribes can provide a critical service for financially fragile Americans while actively investing the governmental revenues from their lending businesses into struggling tribal communities and surrounding regions. In many respects, tribal online lenders are responding not only to the vast unmet need but also to Congressional intent as embodied in the CRA.

A. Tribal Governments and the CRA

Academic research in law and geography has revealed numerous ways that laws are intended to influence or control behaviors across physical space.⁴⁷ A so-called "law and geography" analysis uses geographic tools to understand the consequences of legal

43. *Id.* at 6.

44. Community Reinvestment Act (CRA) of 1977, Pub. L. No. 95-128, §§ 801-806, 91 Stat. 1147 (codified as amended at 12 U.S.C. §§ 2901-2908 (2012)).

45. *E.g.*, Aleatra P. Williams, *Lending Discrimination, the Foreclosure Crisis and the Perpetuation of Racial and Ethnic Disparities in Homeownership in the U.S.*, 6 WM. & MARY BUS. L. REV. 601, 625 (2015) (citing Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1318 (1995)).

46. Jeff Foreman, *Op-Ed: Poor People Can't Bank on Banking Services*, GOTHAM GAZETTE (June 6, 2013), <http://www.gothamgazette.com/index.php/opinion/4250-poor-people-cant-bank-on-banking-services> [https://perma.cc/KB77-657L].

47. *See, e.g.*, Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

policies and institutions.⁴⁸ For example, several authors have used geographic analyses of mortgage lending patterns to demonstrate racial bias in the approval of credit applications.⁴⁹

Previous geographic evidence was also used to demonstrate that storefront payday lenders disproportionately located their branches around military bases, persuading Congress to adopt a federal usury law and arbitration ban on some loans to military personnel.⁵⁰

Geographic analysis also helped convince Congress that, in some communities, banks accepted deposits but did not give out an equivalent amount in loans—a process called “disinvestment.”⁵¹ Accordingly, Congress adopted the CRA requiring that depository institutions make efforts to lend in low- and moderate-income neighborhoods within the contiguous geographic area surrounding their office or group of offices.⁵² In spite of the CRA requirements, however, research by the New York City’s Association for Neighborhood and Housing Development (ANHD) reveals how the federal government’s attempt under the CRA to make banks serve the communities in which they operate actually affects low-income neighborhoods in the city.⁵³

Banks are bringing in record earnings, but ANHD finds their investments insufficient to truly help “meet the credit needs of low- and moderate-income New Yorkers.”⁵⁴ It reports that the city’s twenty-three largest banks have deposits in the city exceeding \$590 billion, but lend or invest only 1.35 percent of those deposits in a way that benefits low- and moderate-income residents.⁵⁵ Even with an

48. E.g., Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of “Payday” Loans in Military Towns*, 66 OHIO ST. L.J. 653, 694 (2005).

49. See, e.g., Helen F. Ladd, *Evidence on Discrimination in Mortgage Lending*, 12 J. ECON. PERSP., 41, 41 (1998); Douglas S. Massey, Jacob S. Rugh, Justin P. Steil & Len Albright, *Riding the Stagecoach to Hell: A Qualitative Analysis of Racial Discrimination in Mortgage Lending*, 15 CITY & COMMUNITY 118 (2016).

50. Steven M. Graves & Christopher L. Peterson, *Usury Law and The Christian Right: Faith-Based Political Power and the Geography of American Payday Loan Regulation*, 57 CATH. U. L. REV. 637, 656 (2008).

51. See Jean Pogge, *Reinvestment in Chicago Neighborhoods: A Twenty-Year Struggle*, in FROM REDLINING TO REINVESTMENT: COMMUNITY RESPONSES TO URBAN DISINVESTMENT 133 (Gregory D. Squires ed., 1992).

52. Community Reinvestment Act (CRA) of 1977, Pub. L. No. 95-128, §§ 801–806, 91 Stat. 1147 (codified as amended at 12 U.S.C. §§ 2901–2908 (2012)).

53. Jaime Weisberg, ASS’N FOR NEIGHBORHOOD AND HOUS. DEV., THE STATE OF BANK REINVESTMENT IN NEW YORK CITY: 2014, at 5–6 (2015), http://www.anhd.org/wp-content/uploads/2011/07/2014-REPORT-Single_Page-NoBleed_FINAL.pdf [<https://perma.cc/VW8Q-2D9J>].

54. *Id.* at 10.

55. *Id.* at 25–32.

average reinvestment of 1.35 percent, the study found several banks—Bank of America, JPMorgan Chase, Sovereign, Apple Bank, Astoria, Emigrant, Ridgewood, Morgan Stanley, Deutsche Bank, and Bank of NY Mellon—each reinvested less than 1 percent of their New York City deposits in New York City.⁵⁶ JPMorgan reinvested just 0.33 percent of its more than \$385 billion in city deposits and Deutsche Bank just 0.57 percent.⁵⁷

The four biggest American megabanks—JPMorgan Chase, Citibank, Bank of America, and Wells Fargo—have over 61 percent of all New York City deposits according to ANHD.⁵⁸ They also have about half of all city government deposits in their banks, amounting to over \$230 million.⁵⁹ But those institutions are not looking for low-income city resident depositors. That kind of financial investment in underserved communities is vital to low-income neighborhoods and residents, yet banks are failing to adequately provide these services in areas where they are most needed. In the era of “too big to fail” megabanks merging and buying out smaller institutions, immense competition exists for wealth management services and private banking for multi-millionaires, but interest for vital banking services for low-income customers diminishes.

Tribal government innovation in short-term, online lending serves the financially fragile and subprime borrowers that traditional banks and institutions typically shun. Efforts by federal or state regulators to “choke off” access to credit for underbanked people in this country reveals the protectionism afforded to mainstream financial institutions, as well as the ways that nonprime consumers are overlooked or actively ignored.

B. Tribal Government Inclusion in the Dodd-Frank Act

When tribal governments began to pursue gaming as a form of economic development in the 1970s and 1980s, they had to pursue a series of court cases culminating in the 1987 US Supreme Court decision *California v. Cabazon*, which clarified that tribal governments retain civil regulatory authority on tribal lands.⁶⁰ With tribal online lending, there is no need for such a fight since tribes’

56. *Id.* at 8–14.

57. *Id.* at 29.

58. *Id.* at 39–41.

59. *Id.* at 10.

60. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221–22 (1987).

authority to offer and regulate financial services is already enshrined in federal law.⁶¹

Title X of the Dodd-Frank Act,⁶² the Consumer Financial Protection Act of 2010 (CFP Act), created the Consumer Financial Protection Bureau (CFPB)⁶³ to ensure “that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”⁶⁴ The CFPB has the power to promulgate rules to administer and carry out the purposes and objectives of the CFP Act and eighteen existing federal consumer financial protection statutes, each an “Enumerated Consumer Law.”⁶⁵ It also has the power to regulate activities relating to consumer real estate lending activities, payday loans, private student loans, and any larger participant of consumer financial products or services.⁶⁶

Congress’s drafting of the Dodd-Frank Act reveals its intention to include tribes among the financial regulators and not the regulated. The only mention of tribes occurs in the Dodd-Frank Act’s definition of State: “The term ‘State’ means any state, territory, or possession of the United States . . . or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 479a-1(a) of title 25.”⁶⁷ Accordingly, each time “State” appears in the Dodd-Frank Act, Congress intended these provisions to cover tribes and to treat tribes the same way states are treated. Treating tribes as states is consistent with the general federal policy of encouraging tribes to strengthen self-government and to assume control over their business and economic affairs.

All of the references to states throughout the CFP Act highlight the cooperation Congress envisioned between the federal government and states (and thus, by definition, tribes). For example, the Dodd-Frank Act: (i) requires the CFPB to coordinate “fair lending efforts of the [CFPB] with other Federal agencies and State regulators, as appropriate, to promote consistent, efficient, and effective enforcement of Federal fair lending laws,”⁶⁸ (ii) gives states a significant role in

61. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2012).

62. Consumer Financial Protection (CFP) Act of 2010, Pub. L. No. 111-203, §§ 1001–1100H, 124 Stat. 1376, 1955–2113 (codified as amended in scattered sections of 12 U.S.C.) (2012).

63. § 1011, 124 Stat. at 1964.

64. § 1021(a), 124 Stat. at 1979.

65. § 1022, 124 Stat. at 1980.

66. § 1011, 124 Stat. at 1964.

67. § 1002(27), 124 Stat. at 1955.

68. § 1013(c)(2)(B), 124 Stat. at 1966.

collecting and tracking consumer complaints, and (iii) requires that, “[i]n developing and implementing registration requirements [for covered persons],”⁶⁹ the CFPB must “consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration), where appropriate.”⁷⁰

Further reinforcing the idea that Congress intended states (and, by definition, tribes) to be co-regulators, the Dodd-Frank Act promotes enforcement of state consumer protection laws and state power to directly enforce state and federal law. For example, the CFP Act provides that, but for a few exceptions, it “may not be construed as annulling, altering, or affecting, or exempting any person subject to the provisions of this subchapter from complying with, the statutes, regulations, orders, or interpretations in any State, except to the extent that any such provision of law is inconsistent with the provisions of this title”⁷¹ The CFP Act also provides that “[n]o provision of this title, except as is provided in section 1083, shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the application of a law in effect in any State with respect to such Federal law.”⁷²

The CFP Act uses the term “State” 164 times and generally does so within the following four contexts: (i) in requiring the CFPB and states to coordinate with respect to regulating consumer financial products or services; (ii) in requiring the CFPB and states to share reports relating to persons providing consumer financial products or services; (iii) in discussions of state law in the context of preemption; and (iv) in definitions and exclusions not relevant to lending.⁷³ The CFP Act never uses the term “State” in the context of waiving immunity from suit or granting a court jurisdiction to hear a claim.⁷⁴ Tribes, therefore, have pursued lending businesses from the position that they may engage in lending without waiving their sovereign immunity with respect to state enforcement actions or private plaintiff suits as a result of definitional aspects of the CFP Act.

69. § 1022, 124 Stat. at 1980.

70. § 1024, 124 Stat. at 1987.

71. § 1041(a)(1), 124 Stat. at 2011.

72. § 1041(b), 124 Stat. at 2011.

73. *See generally* §§ 1001–1100H, 124 Stat. at 1955–2113.

74. *See* § 1053, 124 Stat. at 2025.

C. Tribal Lending Entities Improve Access to Mainstream Financial Institutions

The stated purpose of Title XII of the Dodd-Frank Act is “to encourage initiatives for financial products and services that are appropriate and accessible for . . . Americans who are not fully incorporated into the financial mainstream.”⁷⁵ To encourage these initiatives, the Treasury Secretary has the authority, but not the obligation, to establish programs intended to enable low- and moderate-income individuals to establish accounts at insured deposit institutions and enter into low-cost, small loans as alternatives to payday loans.⁷⁶ Only certain eligible entities are permitted to participate in these programs and thereby offer such loans and provide related services.⁷⁷ The Dodd-Frank Act expressly defines such eligible entities to include “tribal government entities,”⁷⁸ thereby recognizing that tribal entities may play an important role in consumer finance. The Treasury Secretary, to date, has neither promulgated any rules implementing the programs nor indicated whether the Treasury Department intends to do so. Regardless, by including tribal entities in the definition of eligible entities, Congress has expressly recognized that tribes have the ability, if not the right, to play an important role in consumer finance.⁷⁹ If the Treasury Department decides to move forward with certain initiatives, it may provide a strong opportunity for tribes to expand their footprint in the financial system.

First, Title XII authorizes the Treasury Secretary to establish a multiyear program of grants, cooperative agreements, and other undertakings for the purposes of: (i) enabling low- and moderate-income individuals to establish accounts in a federally insured depository institution, and (ii) improving access to such accounts on reasonable terms.⁸⁰ Eligible entities, potentially including tribal entities, participating in these programs may provide products and services to low- and moderate-income persons, including small-dollar value loans and financial education and counseling relating to conducting transactions and managing accounts.

Second, Title XII authorizes the Treasury Secretary to establish a multiyear demonstration program to provide low-cost,

75. § 1202, 124 Stat. at 2129.

76. § 1205, 124 Stat. at 2130.

77. § 1203(3), 124 Stat. at 2129.

78. § 1203(3)(D), 124 Stat. at 2129.

79. See § 1203(3), 124 Stat. at 2129.

80. § 1204(a), 124 Stat. at 2130.

small loans to consumers as an alternative to costlier payday loans.⁸¹ Lenders must make these loans on terms and conditions and pursuant to lending practices that are reasonable for borrowers.⁸² Eligible entities must provide financial literacy education to each borrower provided with a loan pursuant to this program.⁸³

D. The Indian Gaming Regulatory Act as an Analogue

Tribal governments that participate in e-commerce, including legal online lending, are putting these governmental revenues to use in ways that fulfill the mandate of the CRA and which should, therefore, enjoy full federal government support. The federal legislation that provides a regulatory structure for tribal government gaming, the 1988 Indian Gaming Regulatory Act (IGRA),⁸⁴ requires tribes to invest all net gaming revenues in tribal government social and economic recovery, thereby fulfilling the federal goals of strengthening tribal self-determination and supporting tribal self-government. IGRA clearly states that

net revenues from any tribal gaming are not to be used for purposes other than—(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.”⁸⁵

Tribal governments participating in the online financial services industry have used this opportunity to create jobs and invest in tribal nation building activities, including health care, education, and infrastructure improvements.⁸⁶ Many tribes participating in tribal lending have few other options in the wake of federal funding shortfalls and shrinking tribal budgets, and most of them invest their lending revenues according to the general categories outlined by the Indian Gaming Regulatory Act.⁸⁷

Tribal governments engaged in e-commerce through online lending, whether or not they engage in gaming, have similarly supported nation building in the following ways:

81. § 1205(a), 124 Stat. at 2130.

82. § 1205(b)(1), 124 Stat. at 2130.

83. § 1205(b)(2)(A), 124 Stat. at 2130.

84. Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701–2721, *invalidated by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

85. 25 U.S.C. § 2710(b)(2)(B) (2012).

86. *See, e.g., Arrow*, TREASURER UPDATE (Habematolel Pomo, Upper Lake, CA), Jan.–June 2014, at 8, <http://www.upperlakepomo.com/forms/HPUL-Arrow-Newsletter-14-01-06.pdf> [<https://perma.cc/T2PA-8Z29>] [hereinafter TREASURER UPDATE].

87. *See, e.g., id.*

- Employment: creating jobs on tribal land, including financial support staff, Head Start educators, and tribal housing personnel;⁸⁸
- Infrastructure: critical funding for new tribal housing and renovation;⁸⁹
- Education: additional classrooms, books, and teachers for Head Start, new after-school programs, new summer youth programs;⁹⁰
- Tribal Services: child care services, employment training, natural resources, development, financial assistance, utility assistance, healthcare and wellness coverage, emergency assistance;⁹¹ and
- Social Services: child protection, low-income Home Energy Assistance Program, family violence protection.⁹²

Tribal government e-commerce initiatives do not just support basic, fundamental needs for tribal government operations and services. They also extend the opportunity for tribes to move beyond sheer subsistence and basic economic survival. Internet commerce gives tribal governments hope in their ability to depart from past struggles for survival to legitimate possibilities for continued economic growth, prosperity, and success.

While some tribal governments have the necessary human capital to operate online lending ventures without outside managerial assistance, other tribes have had to look outside the tribe for management or technical expertise. Such partnering is common for tribal entities entering a new industry and it has succeeded in the past for land-based businesses ranging from tribal gaming management to US Small Business Administration 8(a) Program contracting.⁹³ “When tribal governments began to participate in the land-based casino industry, many opponents and critics claimed that they did not possess the business or technical skills to operate their

88. See, e.g., *id.*

89. *Otoe & Missouri: Five Hundred Years of History*, OTOE MISSOURIA TRIBE, <http://www.omtribe.org/index.php?culture-history> [<https://perma.cc/4FLJ-HRQ3>] (last visited Sept. 22, 2016); see also Daugherty, *supra* note 35.

90. TREASURER UPDATE, *supra* note 86.

91. NAFSA, *Frozen Homeland*, VIMEO, <https://vimeo.com/91351636> [<https://perma.cc/69PK-MTM7>] (last visited Oct. 9, 2016).

92. *Id.*

93. *About the 8(a) Business Development Program*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/content/about-8a-business-development-program> [<https://perma.cc/XZ7E-HPJM>] (last visited Sept. 22, 2016).

properties successfully.⁹⁴ Some tribal governments, with approval from the federal government—both the Department of the Interior (DOI) and the National Indian Gaming Commission (NIGC)—and within a framework described in IGRA, signed agreements with outside management companies to facilitate operations and train tribal members for casino operations management.⁹⁵ In addition to formalizing these management relationships, generally for a limited term, tribal governments also contracted with product vendors who supplied technology solutions for slot machine gaming, electronic forms of bingo and other sophisticated games management, products, and services.⁹⁶ Like gaming, tribal lending strengthens tribal sovereignty through empowering tribal governments to perform due diligence and select the proper business partners to build and learn a complex and heavily regulated business.

E. An Indigenous Rights Perspective

Although the analysis in this Article is generally limited to domestic law, it should be noted that the United States has endorsed the United Nations Declaration on the Rights of Indigenous Peoples. Article 9 of the Declaration states that “indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.”⁹⁷ Thus, it would seem entirely inappropriate to deny tribal governments the same abilities to engage in lending that other non-tribal institutions enjoy.⁹⁸

IV. ECONOMIC IMPACT OF TRIBAL ONLINE LENDING

This Article presents the following case studies to exemplify the impact that tribal lending operations have on the respective tribal communities. For most tribes engaged in lending, these operations are a critical source of tribal government funds. While most tribal governments participating in lending are also engaged in gaming, it is

94. Katherine Spilde, *E-Commerce Opportunities for Tribal Governments*, INDIAN GAMING (ArrowPoint Media Inc., Bellevue, WA), Oct. 2012, at 53.

95. *Id.*; see 25 U.S.C. § 2711 (2012); 25 C.F.R. § 533 (2016).

96. G. William Rice, *Some Thoughts on the Future of Indian Gaming*, 42 ARIZ. ST. L.J. 219, 248 (2010).

97. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/61/295&Lang=E [<https://perma.cc/NRP6-BY3U>].

98. See *infra* note 187 and accompanying text.

clear that gaming is not meeting their economic development, employment, or community needs.⁹⁹ In some instances, tribes, including the following examples, have either agreed to be identified or to have had their operations discussed publicly. In other cases, tribes have asked that their identities not be disclosed.

A. *Lac Vieux Desert Band of Lake Superior Chippewa*

The Lac Vieux Desert Band of Lake Superior Chippewa located in Watersmeet, Michigan, gained federal recognition in 1988.¹⁰⁰ Its reservation land is geographically isolated on its original homelands ten miles north of the Wisconsin border in Michigan.¹⁰¹ The tribe is one of twelve bands identified as the Lake Superior Bands of Chippewa Indians.¹⁰² The tribe operates a variety of businesses, including construction, day care services, restaurant, fish hatchery, golf course, casino, and consumer financial services, including an online lending operation.¹⁰³ Employment opportunities outside these ventures are located thirty to fifty miles away from Watersmeet.¹⁰⁴

Red Rock Tribal Lending, LLC, and Duck Creek Tribal Financial, LLC, support the online lending ventures of the tribally owned and operated financial service businesses.¹⁰⁵ These tribally owned lending enterprises started in 2012 in an industry that has “grown nearly 20 percent since 2009.”¹⁰⁶ The tribe’s general counsel states, “[T]he revenues generated from the tribal lending entities accounts for about 42 percent of the general fund budget.”¹⁰⁷ These funds directly support programs such as housing, education, community health clinics, scholarships, and propane assistance.¹⁰⁸ With winter temperatures as cold as forty-five to forty-seven degrees

99. Akee, Spilde & Taylor, *supra* note 6, at 199.

100. NAFSA, *supra* note 91.

101. *Id.*

102. *Lac Vieux Desert Band of Chippewa Indian Community*, INTERTRIBAL COUNCIL OF MICHIGAN, INC. (2012), <http://www.itcmi.org/blog/2012/10/11/lac-vieux-desert-band-of-chippewa-indian-community> [<https://perma.cc/5GBD-3FG4>].

103. NAFSA, *supra* note 91.

104. *Id.*

105. *Privacy Disclosure*, BIG PICTURE LOANS (2016), <https://www.bigpictureloans.com/privacy-disclosure> [<https://perma.cc/2VGG-5Z95>].

106. Chico Harlan, *Indian Tribes Gambling on High-Interest Loans to Raise Revenue*, WASH. POST (Mar. 1, 2015), http://www.washingtonpost.com/business/economy/indian-tribes-gambling-on-high-interest-loans-to-raiserevenue/2015/03/01/8551642d-e51b-4d3a-89c6-4de0d3bdf385_story.html [<https://perma.cc/4PFL-8643>].

107. NAFSA, *supra* note 91.

108. *Id.*

below zero, propane assistance in 2013 was a necessity for many tribal members.¹⁰⁹

B. Otoe-Missouria Tribe

Originally from the Great Lakes Region of the United States, the Otoe-Missouria Tribe was relocated in 1881 to the town of Red Rock in the northern part of Oklahoma.¹¹⁰ The tribe reports nearly 3,000 tribal members living in and around Oklahoma.¹¹¹

The tribe's gaming enterprises fostered investments in ventures, including a rural propane company,¹¹² agriculture operations in cattle and farming,¹¹³ convenience stores,¹¹⁴ and two financial services companies.¹¹⁵ Tribal Chair John Shotton states, "[T]he most exciting area we've been involved in recently that's been the most productive in our community has been online, short-term lending and e-commerce opportunities."¹¹⁶ American Web Loan and Great Plains Lending are two consumer financial service businesses owned and operated by the tribe.¹¹⁷ In 2013, Great Plains Lending employed thirty tribal and non-tribal employees to staff its call center at full capacity,¹¹⁸ with another thirty jobs at a separate call center.¹¹⁹

At the 2015 Reservation Economic Summit, Chairman Shotton pointed out that the tribe derives 40 percent of the total tribal government budget from the TLEs and that the tribe's investment priorities are aligned to meet community needs.¹²⁰ Unlike federal funds or gaming revenues that have investment restrictions, tribes

109. *Id.*

110. *Otoe & Missouri: Five Hundred Years of History*, *supra* note 89.

111. *Id.*

112. *Other Enterprises: Businesses of the Otoe Missouri Tribe*, OTOE MISSOURIA TRIBE, <http://www.omtribe.org/index.php?other-enterprises> [<https://perma.cc/GCH2-8YHC>] (last visited Sept. 22, 2016).

113. *Id.*

114. *Tribal Enterprises: Convenience Stores*, OTOE MISSOURIA TRIBE, <http://www.omtribe.org/index.php?convenience-stores> [<https://perma.cc/22N4-BB2W>] (last visited Sept. 22, 2016).

115. *Tribal Enterprises: Financial Services Companies*, OTOE MISSOURIA TRIBE, <http://www.omtribe.org/index.php?financial-services> [<https://perma.cc/7WJG-833Y>] (last visited Sept. 22, 2016).

116. NAFSA, *Otoe Missouri Tribe*, VIMEO, <https://vimeo.com/62361652> [<https://perma.cc/JS2D-AJ2V>] (last visited Oct. 9, 2016).

117. *Id.*

118. *Id.*

119. John Shotton, Tribal Chair, Otoe Missouri Tribe, Comments at 2015 Reservation Economic Summit (Mar. 12, 2015).

120. *Id.*

have flexibility when investing lending revenues. This flexibility allows tribal leadership to invest in ways that provide direct benefits to tribal people.

Chairman Shotton also discussed how the tribe's use of tribal government revenues from lending has evolved over time.¹²¹ During the first year of lending, the tribe invested 100 percent of revenues into housing renovation.¹²² After years of waiting on funds from the Native American Housing Assistance and Self Determination Act¹²³ and other federal funds, the tribe took the lead and renovated housing across the reservation.¹²⁴ In the second year, it focused on new housing and created a twenty-home addition on the reservation.¹²⁵ Next, it invested in tribal programs, including a Head Start program with a new classroom.¹²⁶ This program is completely funded by lending revenues.¹²⁷ The tribe further used these funds for building and infrastructure maintenance.¹²⁸ While the tribe can use grants or other funding for building and infrastructure improvement, these buildings cost money to maintain. Therefore, tribal lending revenues are invested in ways that maximize the use and longevity of these tribal assets.¹²⁹ The tribe also implemented investments in elders' services, education, and economic development.¹³⁰ The Chairman concluded his remarks by noting that, in addition to the sixty people employed in the call centers, eight full-time employees work in the afterschool program.¹³¹ The revenues from the online loan companies have made it possible to further invest in the Otoe-Missouria Tribe's efforts of cultural preservation, language revitalization, and support for its warrior society. The Tribal Assistance Program (TAP) relies exclusively on tribal lending revenues. The purpose of the TAP is to:

provide financial assistance to tribal members who are unemployed, economically disadvantaged, disabled or who are experiencing extraordinary circumstances.¹³² Assistance is available for housing (mortgage and rental), housing repairs, utilities, dental and medical services, eyeglasses, prescriptions, hearing aids, child care, school expenses, elder assistance and extraordinary assistance. In addition to TAP funds, the

121. *Id.*

122. *Id.*

123. *See generally* Native American Housing Assistance and Self Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (1996).

124. Shotton, *supra* note 119.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

tribe created a Housing Department that is funded from the online lending venture that distributes funds directly to members through home improvement options for existing homes and building new homes with green technology and sustainability features. A separate complex of 19 new homes aimed toward home ownership instead of renting [are now] available to tribal members for purchase at half the cost of construction.¹³³

C. Habematolel Pomo of Upper Lake Tribe

The Habematolel Pomo of Upper Lake tribe is located in Upper Lake, California, north of Sacramento.¹³⁴ The ancestors of the tribe have been in that region of California since at least 6,000 BC.¹³⁵ European migration and settlement brought conflict and disease that decimated the tribe's population by 95 percent in one generation.¹³⁶ The flawed federal policies that followed "subjected Pomo Indian tribes to enslavement, internment, horrific abuse, and slaughter."¹³⁷ Notably, in 1950, the US Cavalry nearly eradicated the tribe by targeting the elderly, women, and children in an aggressive military operation known as the "Bloody Island Massacre."¹³⁸ According to the tribal chairwoman, the "only survivor of that attack was a six-year-old girl who survived by hiding underwater and breathing through a tule reed."¹³⁹ Despite the systematic governmental efforts to destroy the tribe and its identity, the tribal leadership persevered and challenged the federal government's genocidal policies in 1975.¹⁴⁰ Although the litigation took nearly ten years, the tribe prevailed by regaining federal recognition while confronting the Bureau of Indian Affairs (BIA) continued efforts to thwart the tribe's attempts at self-determination.¹⁴¹ Although the ancestral homeland of the tribe once spanned parts of central and northern California, it took until 2008 for the Department of the Interior to finally agree to accept into trust a small, 11.24-acre tract of land for the benefit of the tribe.¹⁴² As a result, "[t]oday, federal law permits tribes such as Upper Lake to find a suitable site for restoration of its tribal activities and business operations near its aboriginal tribal lands."¹⁴³

133. *Id.*

134. *Short-Term, Small Dollar Lending, supra* note 15, at 1.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 2.

141. *Id.*

142. *Id.*

143. HABEMATOLEL POMO OF UPPER LAKE, <http://www.upperlakepomo.com> [<https://perma.cc/23VW-J6S2>] (last visited Sept. 21, 2016).

The tribe's initial economic development entity, a casino operation, entered its second year in the early part of 2014,¹⁴⁴ though the gaming facility is not yet profitable. While the tribe hopes that a permanent building to house the gaming operation and potentially a hotel will enhance gaming revenues and begin to generate profits, the tribe currently generates 100 percent of its governmental budget from a variety of consumer financial services companies it categorizes as Tribal Lending Entities (TLEs).¹⁴⁵ These services include online lending operations: Silver Cloud Financial, Golden Valley Lending, and Mountain Summit Financial.¹⁴⁶ Further, to support these lending entities, the tribe has embarked on streamlining its lending service operations by acquiring Upper Lake Processing Services, a propriety underwriting system, and Arrowshade, a marketing and lead-generation company.¹⁴⁷

The tribe's chairperson, Sherry Treppa, has said that revenues from TLE-related businesses fund all of the governmental programs, including the Honor Elder Assistance Program, the Supplemental Assistance Self Sufficiency Program, the Summer Youth Education Program, the Educational Clothing Allowance Program, Committee Stipend Program, Burial Assistance Program, and Tribal Charity Program.¹⁴⁸ Revenues also supplement the Seven Generations Scholarship Program, culturally based education programs, and acquisition of historically significant tribal lands.¹⁴⁹ Chairperson Treppa also asserts that TLE operations are a key factor in the economic stability of the tribe.¹⁵⁰ In early 2014, the tribal newsletter reported each TLE exceeded its guaranteed income baseline.¹⁵¹ At the annual Reservation Summit in 2015, Treppa reiterated that 100 percent of the tribal government budget comes from the TLEs,¹⁵² noting that the tribe uses TLE profits to pay for all of its tribal programs, with an emphasis on education, mainly college and adult education, and programs to help tribal members transition from

144. *Arrow*, CHAIRPERSON'S REP. (Habematolel Pomo, Upper Lake, CA), Jan.–June 2014, at 1, <http://www.upperlakepomo.com/forms/HPUL-Arrow-Newsletter-14-01-06.pdf> [<https://perma.cc/T2PA-8Z29>].

145. *Id.* at 6.

146. *Id.*

147. *Id.* at 6–7.

148. *Arrow*, CHAIRPERSON'S REP. (Habematolel Pomo, Upper Lake, CA), Oct. 2014–Mar. 2015, at 1, <http://www.upperlakepomo.com/forms/HPUL-Arrow-Newsletter-14-Oct-15-Mar.pdf> [<https://perma.cc/3TJ9-YEDR>].

149. *Id.* at 24, 26.

150. *Id.* at 6.

151. TREASURER UPDATE, *supra* note 86.

152. Shotton, *supra* note 119.

unemployment to employment. Those TLE profits are also used to pay down existing tribal debt, including the casino.

D. Other Tribal Lenders

Because of the threat of unwarranted assault from state regulators, some tribes with lending operations declined to be individually identified in this Article. One such tribe, however, did highlight the direct impact of tribal lending on the health and welfare of not only its community but also the wellbeing of nearly a dozen other tribes in the surrounding community.¹⁵³ Among the tribes, in one county in California, prediabetes rates are at nearly 50 percent within the adult population.¹⁵⁴ One tribal chairman, who has a lifelong devotion to health and fitness, decided that, even though his tribe was one of the smallest in the county, it would pull together the resources necessary for a diabetes and wellness center.¹⁵⁵ That tribe generates no gaming revenues whatsoever, but it does generate revenue from TLEs.¹⁵⁶ In addition to funding government programs, the revenue from the TLEs is also servicing the debt on the loan for the newly constructed diabetes and wellness center, which is now providing services to all of the tribes in the county.¹⁵⁷

Another tribe in the Midwest operates TLEs not only as a form of economic development but also as a source of funds for extending its investment efforts beyond both gaming and lending.¹⁵⁸ One of the goals of tribal government economic development in the gaming era is economic diversification.¹⁵⁹ Because gaming relies upon public opinion and support, many tribes across the United States are hesitant to rely solely on gaming for long-term tribal revenues.¹⁶⁰ In terms of

153. Interview notes on file with Professor Clarkson.

154. See Susan H. Babey, Joelle Wolstein, Allison L. Diamant & Harold Goldstein, *Prediabetes in California: Nearly Half of California Adults on Path to Diabetes*, UCLA CTR. FOR HEALTH POLY RES. 3 (Mar. 2016), <http://healthpolicy.ucla.edu/publications/Documents/PDF/2016/prediabetes-brief-mar2016.pdf> [<https://perma.cc/9BA8-EVWP>].

155. Interview notes on file with Professor Clarkson. This tribe prefers to remain anonymous.

156. *Id.*

157. *Id.*

158. Interview notes on file with Professor Spilde. This tribe similarly prefers to remain anonymous.

159. Jamie Fullmer, *Tribal Strength Through Economic Diversification*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Apr. 18, 2013), <http://indiancountrytodaymedianetwork.com/2013/04/18/tribal-strength-through-economic-diversification> [<https://perma.cc/4TUF-YUJU>].

160. See NAT'L GAMBLING IMPACT STUDY COMM'N, NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT, at 6-2 (1999), <http://govinfo.library.unt.edu/ngisc/reports/6.pdf> [<https://perma.cc/DUG7-D7BG>].

government structure, this tribe houses its lending operation within its larger tribal Economic Development Corporation (EDC).¹⁶¹ The EDC then directs 100 percent of the tribe's lending revenues into economic diversification efforts.¹⁶² As a result, all new (non-gaming) jobs are directly or indirectly created by the tribal online lending operation.¹⁶³ Investments of lending revenue by the EDC also extend to the renovation of old or formerly shuttered tribal businesses,¹⁶⁴ as well as a strategic restructuring of the tribe's business operations. In addition, the tribe is breaking ground on an addiction treatment center that will rely on EDC and lending funds for building and maintaining the tribe's long-term commitment to health and wellness in the community.¹⁶⁵

V. THE PROBLEM WITH OUTSIDE REGULATION

Because small business drives much of the US economy, an increase in small-business activity is a rational step toward decreasing unemployment levels and other aspects of reservation economies. However, whether they intend to or not, hostile federal and state officials are attempting to crush the fledgling tribal e-commerce industry, striking a blow to both consumers and tribes.¹⁶⁶

We have seen this scenario at least once before, at the nascent stage of tribal gaming industry. As Professors Gavin Clarkson and James Sebenius discussed in an earlier article,¹⁶⁷ when Indian gaming began, state officials were vehemently opposed and fought vigorously to shut down tribal gaming operations.¹⁶⁸ They succeeded in some cases,¹⁶⁹ but ultimately Indian gaming has emerged as the single greatest economic development strategy in Indian Country. Critical to that tribal victory was the Supreme Court decision in *California v. Cabazon Band of Mission Indians*,¹⁷⁰ wherein the Court told the states

161. Interview notes on file with Professor Spilde.

162. *Id.*

163. *Id.*

164. These include smoke shops, convenience stores, and grocery stores. *Id.*

165. *Id.*

166. Dan Frosch & Alan Zibel, *Tribes' Online Lending Faces Federal Squeeze*, WALL ST. J., <http://www.wsj.com/articles/tribes-online-lending-squeezed-by-regulators-1406158967> [<https://perma.cc/V7TW-7BJY>] (last updated July 23, 2014, 7:56 PM).

167. See Gavin Clarkson & James K. Sebenius, *A Brief History of Indian Gaming*, N.M. BUS. OUTLOOK, Mar. 2013, at 2; see also Clarkson & Sebenius, *supra* note 16, at 1069–79.

168. Clarkson & Sebenius, *supra* note 16, at 1069–79.

169. See *Alabama-Coushatta Tribes of Texas v. Texas*, 208 F. Supp. 2d 670, 681 (E.D. Tex. 2002); *Texas v. Ysleta del Sur Pueblo*, 220 F. Supp. 2d 668, 713–14 (W.D. Tex. 2001); Clarkson, *supra* note 16, at 1071 (discussing successful litigation against tribes in New York).

170. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

in no uncertain terms that they had no business regulating on-reservation economic activity when regulation is not expressly prohibited in the state.¹⁷¹

In much the same way, state efforts to regulate or eliminate tribal government lending entities severely damage tribal economies while providing little benefit to states. In many cases, lending operations have become the center of a reservation's economy and are one of the most significant employers of tribal members.¹⁷² When lending operations in these communities are forced to shut down, their absence means that critical cash resources no longer flow directly into the tribal economy.¹⁷³ This money is often earmarked for developing other sustainable businesses and infrastructure, and without it, tribes are left in the same dire situation they have been in for decades.¹⁷⁴ Additionally, by eliminating jobs associated with tribal lending, state overreach leaves the best and brightest tribal members with the excruciating choice of unemployment or community abandonment.¹⁷⁵

States, in contrast, benefit very little from imposing their laws on tribal lenders. While some state residents may have the opportunity to escape loans they agreed to but could not repay, it should not be a state's prerogative to nullify contracts consummated on reservations. Expending state resources to regulate behavior on reservations that are in some instances thousands of miles away and share no borders with the state is similarly questionable. With this perspective in mind, tribal loan controversies pit innovative tribal entrepreneurs who greatly benefit their communities against states that arrogantly presume that they know what is best for tribes and consumers.

Looking beyond direct economic effects, state regulation violates the most fundamental tenet of tribal sovereignty: the right of a tribe to govern its land and people. The vast majority of tribes have comprehensive bodies of tribal law and adjudicate disputes arising on their territories through tribal courts.¹⁷⁶ If an agreement is entered into on tribal land and involves a tribal member, it is logical that

171. *Id.* at 207.

172. Frosch & Zibel, *supra* note 166.

173. Karrie Wichtman, *Karrie Wichtman Discusses the Critical Role that Tribal Lending Revenues Play for Her Tribe*, YOUTUBE (Oct. 1, 2015), <https://www.youtube.com/watch?v=oivD7A1Iy2Y> [<https://perma.cc/HHS7-6QT2>].

174. *Id.*

175. Gavin Clarkson, *Nanny-State Regulators: The New "Deadliest Enemies" for Economic Development in Indian Country*, N.M. BUS. OUTLOOK, Nov. 2013.

176. *Concurrent Tribal Authority Under Public Law 83-280*, TRIBAL CT. CLEARINGHOUSE (Nov. 9, 2000), http://www.tribal-institute.org/lists/concurrent_tribal.htm [<https://perma.cc/C98W-EZZQ>].

tribal law should apply.¹⁷⁷ To allow application of another sovereign's law to such agreements—which directly implicate the economic well-being of the tribe—is not only counterproductive but is contrary to nearly two centuries of Supreme Court jurisprudence.¹⁷⁸ Yet this overreaching is exactly what states seek to do by regulating tribal lenders. Implicit in this attempted regulation is a fundamental disrespect for tribes. Not only do states assume that tribes cannot sufficiently govern basic loan transactions but also are willing to reach across state boundaries in an effort to keep tribes “on the reservation” even when a tribe has no connection to that state other than having a citizen of that state as an on-reservation virtual visitor. In doing so, the states violate basic notions of mutual respect that underlie the peaceful co-existence of tribal and state governments, once more with little benefit to show for their efforts.

State regulation also has dire implications for the rights of consumers and businesses.¹⁷⁹ Tribal members structured their lending businesses so they could offer products on the reservation that consumers could not obtain in their respective states. These lenders were open about the fact that only tribal law applied, and consumers willingly consented.¹⁸⁰ Nevertheless, states are now asserting that the clear, agreed-upon terms are invalid and are trying to ban tribal lenders from offering loans.¹⁸¹ From an economic perspective, this restriction prevents consumers from accessing products they desire and exemplifies the “nanny state” at its worst. Instead of having the option to enter into loan agreements under tribal law, states are potentially leaving many consumers with no ability to borrow whatsoever.¹⁸²

Perhaps most disturbing about state regulation efforts is their underlying rationale. States have claimed that because borrowers communicated with the tribal lenders through the Internet, state law rather than tribal law must apply.¹⁸³ This reasoning cannot be right—if it were, any state could apply its laws to online transactions involving its residents to the exclusion of other sovereigns with even greater interests at stake. It would also mean that tribal sovereignty is a nullity online, a regressive view that conflicts with ongoing

177. See, e.g., 1-21 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 21.04 (Nell Jessup Newton ed., 2012).

178. *Id.*

179. Clarkson, *supra* note 175.

180. See sample loan documents, on file with Professor Clarkson.

181. *Id.*

182. *Id.*; FDIC Releases National Survey of Unbanked and Underbanked, FDIC (Oct. 29, 2014), <https://www.fdic.gov/news/news/press/2014/pr14091.html> [<https://perma.cc/M6GB-9NMJ>].

183. Clarkson, *supra* note 175.

congressional efforts to promote tribal economic development and self-sufficiency. Our governmental system cannot abide these irrational legal interpretations.

The states will have to concede that if the borrowers drove the thousand miles to sign the paperwork on the reservation, state law would not apply. In spite of the fact that the tribe is essentially exporting its sovereignty via this paperwork signed on the reservation, the states would not be able to object. Illogically, state regulators seek to require these inefficient economic transaction costs for two poor counterparties when they limit tribes' abilities to use advanced technology to export sovereignty via the Internet to compete in modern society. The same rhetoric was used when animal rights activists attempted to deny Alaskan natives or Makah Indians their inherent rights to engage in subsistence whaling—it was not “traditional” to use modern technology such as high-powered rifles to kill the whale, only hand-thrown harpoons were acceptable.¹⁸⁴

Now, many state regulators are arguing that tribal governments should not be able to offer lending products over the Internet even though larger non-Indian enterprises can legally export interest rates on credit cards and loans with impunity.¹⁸⁵ A quick Annual Percentage Rate (APR) calculation of payroll advance lending by major banks revealed that the rates ranged between 651 percent and 1,303 percent,¹⁸⁶ yet we are unaware of state regulators attacking Wells Fargo or US Bank for offering loan products with rates far higher than those offered by institutions chartered in the home states of their customers. The ability of banks and credit card companies to charge interest to out-of-state borrowers based on rates permitted in states in which they are chartered was settled more than thirty-five years ago in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*¹⁸⁷ That decision, coupled with subsequent Congressional action,¹⁸⁸ fundamentally transformed the credit card industry by allowing banks and credit card issuers to export nationally whatever interest rate is allowed in the state in which they

184. See, e.g., William Yardley & Erik Olsen, *With Powerboat and Forklift, a Sacred Whale Hunt Endures*, N.Y. TIMES (Oct. 16, 2011), <http://www.nytimes.com/2011/10/17/us/in-sacred-whale-hunt-eskimos-use-modern-tools.html> [<https://perma.cc/8NZT-S9TE>].

185. Clarkson, *supra* note 175.

186. According to Professor Clarkson's analysis in 2013, Wells Fargo charged \$1.50 per \$20 borrowed or \$7.50 per \$100 borrowed, so borrowing \$500 for 14 days results in a payback of \$537.50 or an APR of 977 percent. US Bank charged \$2 per \$20 borrowed or \$10 per \$100 borrowed, so borrowing \$500 for 14 days results in a payback of \$550 or an APR of 1303 percent. See *id.*

187. See generally *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

188. See National Bank Act, 12 U.S.C. § 85 (2012); 12 C.F.R. § 7.4001 (2016).

are headquartered, regardless of the law where the borrower resides. Thus, South Dakota banks and credit card issuers are able to offer unlimited interest rates to New York customers.¹⁸⁹ However, according to New York's regulators, tribes in Oklahoma should not be able to offer similar financial products.¹⁹⁰

According to the FDIC, consumers “need . . . responsible small-dollar loan products.”¹⁹¹ State and federally chartered banks have a long history of offering credit consistent with US federal law, including the extension of small-dollar, short-term credit. These loans are offered by some banks and expressly *encouraged* by the FDIC.¹⁹² Equal treatment should be accorded to small-dollar credit offered by non-depository lenders, making loans consistent with applicable US federal and tribal laws, specifically when these loans are offered by tribal governments along the following terms:

- Fully Disclosed. Loans made by tribal governments are made consistent with the federal Truth in Lending Act and provide disclosure of all material loan terms, including the APR, finance charge, schedule of payments, and total payments.¹⁹³
- Authorized. Loans made by tribal governments are made consistent with the federal Electronic Funds Transfer Act. Accordingly, the offering of credit is not conditioned on repayment by recurring debits. Rather, the consumer authorizes the debit in a specific dollar amount to be debited on a certain date from a specific bank account.¹⁹⁴
- Not “Evergreen.” Loans made by tribal governments are generally structured as short-term installment loans. As such, the loans have a maturity date and do not automatically roll over, extend, or renew.¹⁹⁵

189. Robin Stein, *The Ascendancy of the Credit Card Industry*, FRONTLINE (Nov. 23, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/credit/more/rise.html> [https://perma.cc/U2K7-XSC5]. In addition to South Dakota, federal law also allows Delaware banks and credit card issuers to offer unlimited interest rates to New York customers. *Id.*

190. See Frosch & Zibel, *supra* note 166.

191. *Federal Deposit Insurance Corporation on Payday Loans: Short-Term Solution or Long-Term Problem: Hearing Before the S. Spec. Comm. on Aging*, 113th Cong. 2 (2013) (statement of Mark Pearce, Director, Division of Depositor and Consumer Protection).

192. *Id.* at 3.

193. See, e.g., *Best Practices*, NAFSA, <http://www.mynafsa.org/best-practices/> [https://perma.cc/3G4P-JPEY] (last visited Oct. 6, 2016).

194. *Id.*

195. *Id.*

VI. TRIBAL CONSUMER PROTECTION BEST PRACTICES

Although they have not directly stated that that tribal online lenders lack the capability to regulate appropriately, that premise lies at the core of the states' attempts to overreach and regulate distant on-reservation conduct. As with Indian gaming, tribal nations have repeatedly demonstrated their capability to regulate activities involving non-Indians, often in a manner superior to those put forward by federal or state regulators. When the US House of Representatives Committee on Financial Services held a hearing on February 10, 2016, the topic of the hearing was appropriately identified as "Short-Term, Small Dollar Lending: The CFPB's Assault on Access to Credit and Trampling of State and Tribal Sovereignty."¹⁹⁶ In those hearings, Chairwoman Sherry Treppa detailed a sophisticated consumer protection regime consistent with the best practices put forward by Native American Financial Services Association (NAFSA),¹⁹⁷ noting that

[f]rom our sovereign power springs the right to legislate and regulate the operations of business activities within our jurisdiction. . . . After a thorough review of the industry and related opportunities, our tribal council, consistent with our inherent power, constructed a regulatory framework using the model that has proven successful in the tribal gaming industry.¹⁹⁸

Chairwoman Treppa then detailed how the tribe passed lending laws setting forth the parameters of legal operation of consumer lending from within the reservation, specifically noting that tribal law prohibits TLEs from "engaging in unfair, deceptive, or fraudulent practices, or engaging in any consumer financial services other than those expressly permitted under that ordinance. [TLEs] that issue loans within [the reservation] must comply with that legislation."¹⁹⁹ She then described the creation of a regulatory commission charged with oversight of the TLEs and given the power to enforce tribal laws.²⁰⁰ She emphasized that the regulatory commission is a separate instrumentality of the tribe, operating independently of the political arm of the tribal government, noting that "[t]he commission has the autonomy to exercise its enforcement authority should a [TLE] violate the consumer protection laws that we established."²⁰¹

196. *Short-Term, Small Dollar Lending*, *supra* note 15, at 1.

197. *Id.*; *Best Practices*, *supra* note 193.

198. *Short-Term, Small Dollar Lending*, *supra* note 15, at 1.

199. *Id.* at 3.

200. *Id.*

201. *Id.*

Chairwoman Treppa's testimony then turned to a discussion of how the Habematolel Pomo Indians of Upper Lake exercise their sovereign power in other ways beyond just their "robust legal and regulatory framework."²⁰² She described how her tribe, as well as other tribes, "actively sought opportunities to enter into cooperative agreements or compacts with states as a means to coordinate the exercise of authority in this area and promote a collaborative government-to-government regulatory environment."²⁰³ She further explained,

By way of example, our Tribe successfully entered into a Memorandum of Understanding with the State of New Mexico in December, 2014, which explicitly memorialized our Tribe's sovereign authority to engage in online short-term lending and acknowledged that the legislation enacted by our Tribe effectively regulates transactions between consumers and licensed lenders that occur on Trust land, adheres to best practices, and does not violate federal or tribal law.²⁰⁴

She then described the California Department of Business Oversight's Information-Sharing Pilot program, a collaborative effort between state regulators, her tribe, and other tribal members of NAFSA, which is:

Explor[ing] opportunities to develop a framework that facilitates information exchanges between regulatory authorities. . . . Indeed, these efforts are consistent with the regular practice of many Tribes throughout the country to collaborate with state authorities on tribal-state relations in areas as wide-ranging as law enforcement, environmental protection, hunting and fishing, public lands management, and education.²⁰⁵

As evidence that existing law is sufficient to protect consumers, Chairwoman Treppa noted that an additional "enforcement power available to Tribes in regulating financial services businesses, as the CFPB itself admits, is the ability to bring legal actions under the Dodd-Frank Act, just as States can."²⁰⁶ She then described how, in 2015, the Navajo Nation brought an enforcement action, together with the CFPB, against a tax refund business under this authority.²⁰⁷ On behalf of Upper Lake, she stated that:

[w]hile we have not seen the need to rely upon anything more than our own laws and regulatory commission to handle consumer complaints and other regulatory issues, my Tribe (and others operating small dollar lending businesses) are aware of this significant power, and are certainly prepared to exercise it should the need to do so

202. *Id.* at 3–4.

203. *Id.* at 3.

204. *Id.*

205. *Id.* ("The experience was positive and we continue to pursue open dialogues and additional Memoranda of Understanding with other states, ever eager to work cooperatively and communicate openly with states as co-regulators to achieve shared goals of consumer fairness and protection.")

206. *Id.*

207. *Id.*

arise. This Committee should make no mistake—ample power already exists for Tribes to protect consumers and regulate businesses within its jurisdiction.²⁰⁸

To fully illustrate what the Upper Lake Pomo had developed to meet the needs of both consumers and tribal members, Chairwoman Treppa then proceeded to detail its lending operations and obligations under tribal law. TLEs “must be licensed by our Tribal regulatory commission before they may engage in lending.”²⁰⁹ TLEs may not charge consumers application fees or penalize them for early repayment.²¹⁰ TLEs “must maintain a compliance management system to ensure compliance with Tribal law, promulgated regulations and applicable federal law.”²¹¹ The required TLE systems “must include a full suite of written policies that covers all aspects of lending. Each lender must also have internal controls and processes that allow it to monitor its operations to ensure that its procedures follow those policies.”²¹²

Additionally, the Upper Lake regulatory commission regularly audits TLEs.²¹³ If the commission identifies deficiencies during an audit, “or if a lender fails in any way to satisfy its compliance obligations, then the commission is empowered to take corrective action.”²¹⁴ The commission’s power “includes imposing fines and penalties, as well as suspending and revoking the lender’s license, which would terminate the lender’s ability to extend credit. This regulatory framework is what our tribal lending entities operate under, and it ensures that their practices are responsible and based on principles of consumer protection.”²¹⁵

Chairwoman Treppa then highlighted an important distinction between the types of loans offered by NAFSA members, including the Upper Lake Pomo, and payday loans.²¹⁶ Unlike payday loans, loans authorized under Upper Lake tribal law “are unsecured loans that are repaid in installments, which means our lenders have no real remedies if a customer defaults. Consequently, a robust underwriting process is an operational imperative.”²¹⁷ The TLEs operating at Upper Lake

208. *Id.* at 3–4.

209. *Id.* at 4.

210. *Id.*

211. *Id.*

212. *Id.* at 4 (citing the Habematolel Pomo of Upper Lake Tribal Consumer Financial Services Regulatory Ordinance, § 7.1).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

use computer algorithmic waterfalls and data analytic tools to assess a consumer's application. The amount of a customer's credit request is compared against their income and existing credit obligations because it is a strong factor in determining their ability to repay. An applicant's repayment history is checked because it is the strongest factor in assessing their willingness to repay. If a customer's ability to repay or willingness to repay do not meet the lending company's underwriting requirements, or if the identity verification portion fails, then the application will be denied.²¹⁸

She then shared data from the TLEs to illustrate the rigor and effectiveness of their underwriting.²¹⁹ Only 3.1 percent of 2015 applicants were accepted.²²⁰ Of those applicants accepted for review, "less than 2 percent were approved and funded."²²¹ In other words, 98.3 percent of potential new customers were rejected as a result of the underwriting process.²²² Chairwoman Treppa then noted that Upper Lake's "commitment to responsible lending helps to prevent customers from taking loans they are unable to repay."²²³

Chairwoman Treppa then proceeded to dispel misplaced notions about the consumers that their TLEs serve, noting that their average customer approved for credit is typically "[forty-five] years old with a median income of \$45,000 [and] rarely reports public assistance or other benefits as an income source."²²⁴ The median loan amount is typically "\$700, and, although the installment contract is structured on a ten-month payment schedule, customers are encouraged to pay extra toward the principal or pay off the loan early without penalty."²²⁵ The Upper Lake regulatory commission has "significant data that shows customers frequently repay their loans in less than four months. Data also shows that our customers have moderate borrowing patterns: when measured over two years, our customers have an average of 1.6 loans."²²⁶

After detailing her tribe's financial dependence on revenues from TLEs and the myriad of programs funded by TLE operations, Chairwoman Treppa concluded her prepared remarks with a discussion of Upper Lake's commitment to consumer protection:

For American consumers, our credit products offer options for meeting financial obligations without fear of defaulting on an obligation, failing to pay a bill, or overdrawing their checking account. The CFPB may consider small dollar lending to be a scourge of the credit industry; our customers tell a different story. In 2015, our total complaint rate was only 1.6 percent. This number likely drops to 1 percent when

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 5.

225. *Id.*

226. *Id.*

considering that some of those complaints are likely due to loan applications we denied. That number is significant and it illustrates the quality and the legitimacy of our operations.

My tribe agrees that consumer protection should be a primary concern of this industry, because responding to consumer demand in a regulated, compliant, and helpful manner is the essence of consumer protection—and that is what we do. Much of the reason we have been successful is the strong commitment we have made to ensure that tribal lending businesses adhere to fair and responsible lending practices that protect consumers.²²⁷

After both her written and oral testimony, many of the committee members questioned the need for CFPB regulation in this arena, and a heated discussion followed about whether CFPB was overreaching in its attempts to regulate tribal government online lending.²²⁸

VII. BROADER POLICY IMPLICATIONS OF STATE AND FEDERAL ASSAULTS ON TRIBAL E-COMMERCE

The continued assault by state and federal regulators on tribal online lenders discriminates against tribal courts and tribal entrepreneurs that select tribal courts and tribal law in their electronic commerce endeavors off-reservation. The potential damage extends beyond tribal online lending and, in fact, imperils all tribal attempts at e-commerce.²²⁹ For example, one of the authors is currently working with the Native American Business Students Association at New Mexico State University to develop an online marketplace to connect Indian artisans with potential off-reservation purchasers.²³⁰ Many of these native artisans have little or no experience with e-commerce, and almost all of them are below the poverty level.²³¹ If an American Indian artisan is asked through the exchange to produce a piece of jewelry by a potential, non-Indian customer from Illinois, it is perfectly reasonable for the parties to incorporate into their contract a clause stating that disputes will be settled in tribal court and under tribal law. Under the new rule

227. *Id.*

228. *Hearing entitled "Short-term, Small Dollar Lending: The CFPB's Assault on Access to Credit and Trampling of State and Tribal Sovereignty"*, FIN. SERVS. COMMITTEE (Feb. 11, 2016, 1:00 PM), <http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=400267> [<https://perma.cc/F6QD-UPU2>].

229. *See* Brief for Professor Gavin Clarkson et al. as Amici Curiae Supporting Defendant-Appellees at 1–8, *Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014) (No. 12-2617), <https://turtletalk.files.wordpress.com/2014/09/clarkson-amicus-brief.pdf> [<https://perma.cc/NJE6-G348>].

230. *See* Arrowhead Artist Exchange business plan, on file with Professor Clarkson.

231. Brief for Professor Gavin Clarkson et al., *supra* note 229, at 5–6.

imposed by the Seventh Circuit,²³² however, such forum selection and choice of law provisions would be inapplicable if the non-Indian purchaser does not travel nearly 1,500 miles to physically enter the reservation. Instead, in order to pursue a legal remedy, the Seventh Circuit expects the artisan to travel that same distance, at her own expense, or hire an attorney in a jurisdiction that she has never visited, simply because she is an Indian living on a reservation. No other business in the United States is subject to such an arcane requirement in selecting its preferred forum and choice of law. It is improper and discriminatory for the Seventh Circuit to impose such a restriction on a tribal artisan, or any reservation-based business.

Furthermore, well-established Congressional policy²³³ and Supreme Court jurisprudence²³⁴ show strong support for tribal economic development, which the Seventh Circuit has substantially impaired. If extended to other circuits, this new rule would thwart federal e-commerce efforts already underway as part of the National Broadband Plan, such as Fast-Forward New Mexico, which helps Navajo and Pueblo Indians develop e-commerce capabilities.²³⁵

As more and more states continue to legalize online gambling, a logical concern arises given that tribes have been exploring online gaming as well.²³⁶ As discussed earlier, tribes have fought long and hard to exercise their sovereign right to conduct gaming on their reservations. Will the same overly aggressive regulators who seek to trample on tribal sovereignty in the e-commerce arena similarly attempt to stifle tribal online gaming?

232. See *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 781–82 (7th Cir. 2014) (“Here, the Plaintiffs have not engaged in *any* [in person] activities inside the reservation . . . They applied for loans in Illinois by accessing a website [rather than physically visiting the reservation]. 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 jurisdiction over the Plaintiffs’ claims.”).

233. See 1-21 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 177, at § 21.04 (listing numerous federal programs promoting tribal economic self-sufficiency).

234. See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (“A key goal of the Federal Government is to render Tribes more self-sufficient . . . rather than relying on federal funding.”).

235. See FED. COMM’NS COMM’N, *CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN*, 170 (2010), <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf> [<https://perma.cc/MN8F-2T9D>].

236. See Rob Capriccioso, *Internet Tribal Gaming Group Tests the Waters*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Apr. 2, 2014), <http://indiancountrytodaymedianetwork.com/2014/04/02/internet-tribal-gaming-group-tests-waters-154292> [<https://perma.cc/TX9T-SYY5>].

VIII. CONCLUSION

Tribal governments are beginning to engage in a range of e-commerce activities ranging from play-for-fun gaming sites to robust online lending businesses. As these activities become more successful and spread across Indian Country, state governments and the Federal Government become more involved in monitoring and in some cases attempting to exert regulatory authority over tribal e-commerce. E-commerce is the great equalizer for tribal economic development and should not be frustrated by state government interference or attacks on tribal sovereignty by those who oppose the online lending industry in general or tribal sovereignty in particular.

As a matter of law and policy, tribal lending businesses should be permitted to offer loans that are governed by tribal law without fear of state regulation. States exist to serve the people, and it is not in the people's best interest to deny them access to financial products, refuse to enforce their agreements, or destroy the industry of friendly, developing economies.

Academic research challenges policy makers and the financial services industry to focus on foundational causes for the inability of many Americans to live within their means. Consumers of short-term loans are often overlooked in the debate over increasing access to and healthy competition for these tribal online lending services. When states or business competitors attempt to frustrate tribal governments' legal participation in this industry, these under-served consumers lose. Rather than restrict tribal participation in this industry, the public (and public policy) would be better served by addressing the financial mismanagement, high unemployment, and other fiscal conditions that create a growing market for these products in the first place.

Most importantly, tribes' ability to leverage their tribal sovereignty should remain available for e-commerce since it provides an opportunity for the poorest and most isolated tribes to create business opportunities that do not rely on reservation visitors. It is well established in federal law and policy that state laws should not take precedence over tribal law, and this relationship should not change automatically just because tribal governments are utilizing technology to export their sovereignty in the online financial services industry.