American University Business Law Review

Volume 10 | Issue 3 Article 1

2022

Legal Issues in Tribal E-Commerce

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LEGAL ISSUES IN TRIBAL E-COMMERCE

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I. INTRODUCTION

The internet has transformed the world in a myriad of ways.[1] One of the

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1. Anmar Frangoul, *10 Ways the Web and Internet Have Transformed Our Lives*, CNBC (Feb. 9, 2018, 3:30 AM), https://www.cnbc.com/2018/02/09/10-ways-the-web-and-internet-have-transformed-our-lives.html; Drew Hendricks, *3 Ways the Internet Has Changed the World — And Created New Opportunities?*, SMALL BUS. TRENDS,

greatest shifts produced by the internet is the way people shop.[2] Although people have been able to purchase items without physically entering a market for decades,[3] a larger share of products were sold online than inside stores for the first time in February 2019.[4] Even those who ultimately buy from an in-person retail outlet usually "window shop" online prior to acquiring an item.[5] Hence, well-established physical retailers like Walmart are building their online retail presence.[6] In fact, Walmart's 2020 Black Friday sales were only ten percent higher than its Cyber Monday sales.[7]

As is often the case, tribes have been largely left out of e-commerce discussions, but the exclusion cannot last forever. Tribes have long sought to diversify their economies,[8] and to that end several have engaged in e-

https://smallbiztrends.com/2017/07/impact-the-internet-has-on-society.html (last updated Sept. 15, 2021) (explaining how the development of internet has "created unmistakable, significant changes").

2. Erik Arvidson, *The Internet's Influence on Retail*, CHRON, https://smallbusiness.chron.com/internets-influence-retail-26824.html (last updated Aug. 4, 2021) ("The Internet has dramatically changed the face of retail . . . ."); Michael Ellis, *The Evolution of the Internet and its Impact on Retail Spaces*, WIRED, https://www.wired.com/insights/2014/07/evolution-internet-impact-retail-spaces/ (last visited Nov. 5, 2021) (stating that the internet allowed sellers to specialize more than they would in a physical space and connect with customers in a variety of new ways).

3. *History of the Sears Catalog*, SEARS ARCHIVES, http://www.searsarchives.com/catalogs/history.htm (last visited Nov. 5, 2021) (noting that Richard Sears used a print mailer to advertise products as early as 1888); *QVC Inc. History*, FUNDINGUNIVERSE, http://www.fundinguniverse.com/company-histories/qvc-inc-history/ (last visited Nov. 5, 2021) (explaining that in the late 1980s and 1990s QVC was able to become an "information superhighway" and by 2002, it "handled over 150 million phone calls and shipped over 107 million items").

4. Kate Rooney, *Online Shopping Overtakes a Major Part of Retail for the First Time Ever*, CNBC, https://www.cnbc.com/2019/04/02/online-shopping-officially-over takes-brick-and-mortar-retail-for-the-first-time-ever.html (last updated Apr. 3, 2019, 2:34 PM).

5. *Think With Google*, GOOGLE, https://www.thinkwithgoogle.com/feature/path-to-purchase-search-behavior/ (last visited Jan. 18, 2021) ("63% of shopping occasions begin online.").

6. Jeff Clementz, *Walmart Expands Its eCommerce Marketplace to More Small Businesses*, WALMART (June 15, 2020, 5:57 PM), https://corporate.walmart.com/newsroom/2020/06/15/walmart-expands-its-ecommerce-marketplace-to-more-small-businesses; Sindhu Sundar, *The Walmart Formula and Its E-commerce Push,* WWD (Dec. 22, 2020), https://wwd.com/business-news/retail/the-walmart-formula-and-its-e-commerce-push-1234684419/ (explaining how Walmart has invested in its online infrastructure and technology to create a successful online presence).

7. Greg Mercer, *Walmart Ecommerce Data: Black Friday & Cyber Monday 2020*, JUNGLESCOUT (Dec. 1, 2020), https://www.junglescout.com/blog/walmart-black-friday-cyber-monday-sales-data/.

8. Jamie Fullmer, *Tribal Strength Through Economic Diversification*, INDIAN COUNTRY TODAY MEDIA NETWORK (Apr. 18, 2013), https://nnigovernance.arizona.edu/tribal-strength-through-economic-diversification; Ernest Stevens, Jr., *The Next Wave:*

commerce.[9] Tribal e-commerce ventures will likely expand in the immediate future because the COVID-19 pandemic has exposed the dangers of building economies around the gaming industry.[10] However, tribal e-commerce is certain to encounter sundry legal challenges due to the *sui generis* sovereign status of tribes.[11] The relatively low volume of tribal e-commerce has already generated an impressive string of inconsistent legal results.[12] Nevertheless, little legal scholarship has been devoted to tribal e-commerce,[13] perhaps because many people cannot comprehend indigenous peoples using modern technology.[14]

This Article is intended to serve as a starting point for legal discourse on tribal e-commerce. It will first discuss tribal sovereignty and how it relates

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Tribal Economic Diversification, INDIAN GAMING, Mar. 2007, at 20, 20–21 [hereinafter Stevens, *The Next Wave*]; Stephen J. Szapor, Jr., *Tribal Economic Diversification*, TRIBAL GOV'T GAMING, https://tribalgovernmentgaming.com/article/tribal-economic-diversification/ (last visited Nov. 5, 2021) (acknowledging that casino gaming has been a "catalyst" for tribal economic development).

9. *See infra* Part III.

10. *See* Steve Horn, *Tribal Casinos Weigh Dueling Risks of COVID-19, Economic Ruin*, VISALIA TIMES DELTA (Aug. 31, 2020, 1:06 PM), https://www.visaliatimesdelta.com/story/news/2020/08/31/tribal-casinos-weigh-dueling-risks-covid-19-economic-ruin/5662206002/ (noting the high risks of operating casinos during COVID-19 and how this affects tribal economies); Chris Hubbuch, *Tribal Governments 'Crippled' By Lost Gambling Revenue During COVID-19 Pandemic*, WIS. ST. J. (June 22, 2020), https://madison.com/wsj/business/tribal-governments-crippled-by-lost-gambling-revenue-during-covid-19-pandemic/article_67265db9-1dfa-53c4-b78c-5e462737819e.html (stating that over 200 tribes are projected to lose approximately $22.4 billion in revenue as a result of U.S. casinos being closed amidst the COVID-19 pandemic).

11. *See* United States v. Mazurie, 419 U.S. 544, 557 (1975); Morton v. Mancari, 417 U.S. 535, 550 (1974) ("Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians.").

12. *See infra* Part III.

13. However, Professor Robert Miller has hosted a conference on the topic for the past few years. *See Wiring the Rez: Innovative Strategies for Business Development Via E-Commerce CLE Conference 2021*, Ariz. St. Univ., Indian L. Program, https://events.asucollegeoflaw.com/ilp-wiringtherez/ (last visited Nov. 5, 2021).

14. *See* Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 757–58 (1998) ("The rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities."); *Night Vision and Native American Deer Hunt*, NIGHT VISION GOGGLES (Dec. 3, 2012), http://www.nvstaroptics.com/2012/12/night-vision-and-native-american-deer.html ("My only issue is when you place Night Vision Optics on a rifle you have severely changed the nature of the hunt. I don't think most Native Americans would like to see this happen either as it takes out the sport."); Danny Westneat, *Whale-hunt Scolds Are Off Target*, SEATTLE TIMES (Mar. 16, 2015, 11:54 AM), https://www.seattletimes.com/seattle-news/whale-hunt-scolds-are-off-target/ ("'Wake up in your teepee, put on your buffalo skin, paddle out in your canoe and stick it with a wooden harpoon,' said one. 'Until then, spare us the "spiritual existence" nonsense.'").

to economic development. Next, the Article will examine the legal issues that have arisen in tribal e-commerce ventures. Following this, the Article will set forth recommendations for resolving and pre-empting issues in tribal e-commerce.

II. TRIBAL SOVEREIGNTY AND ECONOMIC DEVELOPMENT

Sovereignty is the greatest economic asset that every tribe possesses.[15] Tribal sovereignty predates the formation of the United States[16] and is ingrained in the U.S. Constitution.[17] In fact, tribes' existence as distinct sovereigns meant U.S. citizens needed a passport to enter tribal territory during the country's earliest days.[18] Manifest Destiny, however, prohibited tribes from continuing as foreign, independent sovereigns and transformed tribes into "domestic dependent nations" by 1831.[19] This reduced tribal land rights from ownership and outright sovereignty to a "right of occupancy."[20] Nevertheless, state law could not penetrate tribal borders.[21] The United States' solution to the "problem" of tribal sovereignty during the 1830s was to move tribes in the eastern United States west of the

15. Gavin Clarkson et. al., *Online Sovereignty: The Law and Economics of Tribal Electronic Commerce*, 19 VAND. J. ENT. & TECH. L. 1, 5 (2016) ("To break this cycle and increase revenue, tribal leaders have relied on their most tangible, sustainable competitive advantage: tribal sovereignty.").

16. McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 172 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."); Williams v. Lee, 358 U.S. 217, 218 (1959) ("Originally the Indian tribes were separate nations within what is now the United States."); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542–43 (1832) ("America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.").

17. U.S. CONST. art. I., § 2, cl. 3; U.S. CONST. art. I, § 8, cl. 3.

18. Treaty with the Creeks, art. VII, Aug. 7, 1790, 7 Stat. 35, 37; Treaty with the Cherokee, art. IX, July 2, 1791, 7 Stat. 39, 40.

19. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

20. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 585 (1823) ("It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.").

21. *Worcester*, 31 U.S. (6 Pet.) at 561 ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress.").

Mississippi River.[22] Once relocated, the United States pledged to honor tribes' inherent right to govern themselves.[23]

Tribes throughout the United States agreed to relinquish their traditional territories for smaller parcels in treaties, the constitutional mechanism for conducting relations with sovereigns.[24] Treaties were more than real estate deals as tribes successfully negotiated for housing, education, medical care, and annuities.[25] Significantly, tribes retained all sovereign powers not explicitly surrendered in treaties.[26] Tribal sovereignty was considered so potent that Indians were not made U.S. citizens by the Fourteenth Amendment but remained citizens of their tribe absent a treaty provision or special legislation.[27] Not until 1924 would every original American become an American citizen.[28]

However, the United States failed to honor tribal treaties.[29] The Supreme Court ruled the United States had plenary power to abrogate treaties with

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22. Indian Removal Act of 1830, ch. 148, 4 Stat. 411.

23. McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020) ("And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves."); Andrew Jackson, President of the United States, First Annual Message to Congress (Dec. 8, 1829),

https://millercenter.org/the-presidency/presidential-speeches/december-8-1829-first-annual-message-congress ("As a means of effecting this end[,] I suggest for your consideration the propriety of setting apart an ample district west of the Mississippi, and without the limits of any state or territory now formed, to be guaranteed to the Indian tribes as long as they shall occupy it, each tribe having a distinct control over the portion designated for its use. There they may be secured in the enjoyment of governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes.").

24. U.S. CONST., art. II, § 2, cl. 2; THE FEDERALIST NO. 75 (Alexander Hamilton) ("They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."); Ted Cruz, *Limits on the Treaty Power*, 127 Harv. L. Rev. F. 93, 98 (2014) ("The treaty power is a carefully devised mechanism for the federal government to enter into agreements with foreign nations.").

25. *See* Adam Crepelle, *Decolonizing Reservation Economies: Returning To Private Enterprise and Trade*, 12 J. BUS., ENTREPRENEURSHIP & L. 129, 146–47 (2019) [hereinafter Crepelle, *Decolonizing Reservation Economies*].

26. United States v. Wheeler, 435 U.S. 313, 323 (1978) ("[U]ntil Congress acts, the tribes retain their existing sovereign powers."); United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted."); *see also* Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 104 (2017).

27. *See* Elk v. Wilkins, 112 U.S. 94, 104 (1884) ("Since the ratification of the Fourteenth Amendment, Congress has passed several acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become, without any action of the government, citizens of the United States.").

28. 8 U.S.C. § 1401(b).

29. Nick Martin, *Congress Is Still Breaking Treaties and Cheating Indian Country*,

Indian tribes.[30] The United States' plenary power over tribes was born because the Indians were considered a weak, helpless, and dependent people.[31] Over a century later, the unconstitutional, imperial plenary power remains intact,[32] curiously now made decent by the Commerce Clause.[33] The United States has wielded its plenary power to rob tribes of their land,[34] natural resources,[35] culture,[36] and even their children.[37] Despite it all, tribal sovereignty remains unless expressly terminated by Congress.[38]

NEW REPUBLIC (Sept. 26, 2019), https://newrepublic.com/article/155180/congress-still-breaking-treaties-cheating-indian-country (noting that in the century since the signing of the tribal treaties, the U.S. Government failed to comply with the treaty terms); *see also* Rory Taylor, *6 Native Leaders On What It Would Look Like If The US Kept Its Promises*, VOX (Sept. 23, 2019, 8:30 AM), https://www.vox.com/first-person/2019/9/23/20872713/native-american-indian-treaties; Hansi Lo Wang, *Broken Promises On Display At Native American Treaties Exhibit*, NPR CODESW!TCH (Jan. 18, 2015, 4:57 PM), https://www.npr.org/sections/codeswitch/2015/01/18/368559990/broken-promises-on-display-at-native-american-treaties-exhibit (noting there are more than 370 treaties between the United States and various Native American nations).

30. McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) ("This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties."); Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (stating "it was never doubted that the *power* to abrogate existed in Congress").

31. *See* United States v. Kagama, 118 U.S. 375, 385 (1886).

32. *Id.* at 378 ("This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause . . . ."); *see* Adam Crepelle, *Lies Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 554–56 (2021) [hereinafter Crepelle, *Lies, Damn Lies*].

33. United States v. Lara, 541 U.S. 193, 200 (2004); Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 172 n.7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.").

34. General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388, *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, 114 Stat. 1991.

35. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 273 (1955) (denying compensation for the taking of Native American timber in Alaska).

36. Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 774–75 (1997) (stating that the United States Government, along with the Christian churches sought to "assimilate the Indians" to "American culture" while suppressing traditional indigenous religions).

37. VOX, *How the US Stole Thousands of Native American Children,* YOUTUBE (Oct. 14, 2019), https://www.youtube.com/watch?v=UGqWRyBCHhw ("What started there at the Carlisle Indian Industrial School was nothing short of genocide disguised as American education. Children were forcibly taken from reservations and placed into

The United States executive and legislative branches embraced tribal sovereignty during the 1970s.[39] Tribes responded by using their sovereignty to promote economic development.[40] As state law was (and still is) presumed to be inapplicable on tribal lands,[41] tribes attempted to sell cigarettes free from state taxes on tribal lands.[42] Following the same rationale, tribes turned to gaming;[43] a move which states vigorously opposed.[44] Nevertheless, the Supreme Court affirmed tribes' inherent right

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the school hundreds, even thousands, of miles away from their families."); JASON R. WILLIAMS ET AL., A RESEARCH AND PRACTICE BRIEF: MEASURING COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT 4 (2015), https://www.casey.org/media/measuring-compliance-icwa.pdf ("The BIA hired social workers to place Indian children in non-Indian homes, and in 1957, it contracted with the Child Welfare League of America to establish the Indian Adoption Project, which advanced the mission of interstate placement of Indian children into non-Indian homes."); *About ICWA*, NAT'L INDIAN CHILD WELFARE ASS'N (2020), https://www.nicwa.org/about-icwa/ (finding that of the 25%–35% of Native American children separated from their families, 85% of those children were placed in a home outside of their community, even if there was a relative willing and able to take in the child).

38. Menominee Tribe v. United States, 391 U.S. 404, 412–13 (1968) ("We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians.").

39. Richard Nixon, President of the United States, Special Message to Congress on Indian Affairs (July 8, 1970) (proclaiming the need for the federal government to recognize tribal sovereignty "as a matter of justice . . . and enlightened social policy"); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 5301–5423) (enacting protections and participatory rights for Native Americans).

40. Adam Crepelle, *The Tribal Per Capita Payment Conundrum: Governance, Culture, and Incentives*, 56 GONZ. L. REV. 483, 491-493 (2021) [hereinafter Crepelle, *Per Capita Payment*] (discussing how President Nixon's self-determination inspired tribes to engage in commercial activity).

41. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (holding the laws of Georgia "have no force" inside the Cherokee Nation); 42 C.J.S. *Indians* § 92 (2020) ("A state is preempted by operation of federal law from applying its own laws to land held by the United States in trust for the tribe.").

42. Cal. Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 12 (1985) (holding that California's cigarette tax is applicable to non-Native American customers of cigarettes purchased on tribal lands and California has the right to require this tax be collected and paid to the state); Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 155 (1980) ("What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation."); Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv., 425 U.S. 463, 483 (1976) ("The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.").

43. *See* Crepelle, *Per Capita Payment*, *supra* note 40.

44. *See, e.g.*, United States v. Dakota, 796 F.2d 186, 186 (6th Cir. 1986); Barona Grp. of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1185–86

to engage in gaming on their land.[45] States responded to the tribes' Supreme Court victory by immediately lobbying Congress to grant states power over tribal gaming.[46] Congress obliged with the 1988 Indian Gaming Regulatory Act ("IGRA").[47] The IGRA is a massive invasion of tribal sovereignty.[48] Notwithstanding, Indian gaming became a $30 billion a year industry.[49]

Gaming has been incredibly lucrative for some tribes; indeed, a handful of tribes are able to provide their citizens with per capita payments in excess of $100,000 a year.[50] However, success in gaming is almost entirely dependent on geography.[51] For tribes located in remote areas, in-person gaming will never become a major industry. Location aside, many believe Indian gaming has peaked.[52] The number of non-Indian casinos is

(9th Cir. 1982); Seminole Tribe of Fla. v. Butterworth, 658 F.2d 310, 310 (5th Cir. 1981); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712, 712 (W.D. Wis. 1981).

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

46. Justin Neel Baucom, *Bringing Down the House: As States Attempt to Curtail Indian Gaming, Have We Forgotten the Foundational Principles of Tribal Sovereignty*, 30 AM. INDIAN L. REV. 423, 427 (2006); Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 50 (2007) [hereinafter Fletcher, *Bringing Balance*]; Steven Andrew Light & Kathryn R. L. Rand, *The Hand That's Been Dealt: The Indian Gaming Regulatory Act at 20*, 57 DRAKE L. REV. 413, 420 (2009).

47. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721.

48. Interview by Roger Gros with Ernest L. Stevens, Jr., Chair, Nat'l Indian Gaming Ass'n, in Scottsdale, Ariz. (Dec. 3, 2008), https://ggbmagazine.com/article/ernest_l___stevens__jr___/ (calling the IGRA a "roadblock" to tribal economic development).

49. Press Release, Nat'l Indian Gaming Comm'n, 2018 Indian Gaming Revenues of $33.7 Billion Show a 4.1% Increase (Sept. 12, 2018), https://www.nigc.gov/news/detail/2018-indian-gaming-revenues-of-33.7-billion-show-a-4.1-increase. However, the onset of the COVID-19 pandemic has had a significant negative impact on the Indian gaming industry's profitability.

50. *E.g.*, *Inside the Richest Native American Tribe In The U.S. Where Casino Profits Pay $1m A Year To EVERY Member*, DAILY MAIL, https://www.dailymail.co.uk/news/article-2187456/Shakopee-Mdewakanton-Tribe-Casino-revenue-pays-member-1million-year.html (last updated Aug. 12, 2012, 6:26 PM) (stating that the Shakopee Mdewakanton Tribe paid each adult in the Nation more than $1 million per year in payouts from casino and resort revenues).

51. Adam Minter, *As Covid Shutters Casinos, Indian Country Reels*, BLOOMBERG OP. (Aug. 4, 2020, 8:30 AM) [hereinafter Minter, *Indian Country Reels*], https://www.bloomberg.com/opinion/articles/2020-08-04/as-covid-shutters-casinos-indian-country-reels (estimating that more than 80% of gaming revenue comes from less than 20% of tribes, those located near other large cities and populations).

52. *See* David Blatt, *Have Oklahoma Gaming Revenues Peaked?*, OKLA. POL'Y INST., https://okpolicy.org/oklahoma-gaming-revenues-peaked/ (last updated May 1, 2019); David McKee, *Has Tribal Gaming Peaked*?, STIFFS & GEORGES BLOG (July 24, 2014), https://www.lasvegasadvisor.com/stiffs-and-georges/has-tribal-gaming-peaked/.

increasing,[53] and online gaming will likely diminish the customer base of casino resorts.[54] Moreover, the COVID-19 pandemic has exposed the perils of building economies around a single industry.[55] Tribes, and their citizens, are looking for new commercial endeavors.[56] E-commerce has potential to be the next big thing in Indian country.[57]

III. TRIBES, E-COMMERCE, AND THE LAW

E-commerce opens Indian country to the world. Vast distances between reservations and large populations are overcome by the worldwide web. Indeed, reservation lands long deemed undesirable now have the potential to become low-cost locations for firms. The remainder of this Section examines tribal forays into e-commerce to date, and the legal issues that have arisen from the ventures.

A. Online Reservation Sales and State Taxes

Several tribes are engaged in online retail. Items available on tribal websites include wild rice,[58] coffee,[59] and cannabis.[60] No lawsuits have

53. Tatiana Schlossberg, *A Connecticut Indian Tribe Faces Its Eroding Fortunes From Foxwoods*, N.Y. TIMES (Nov. 30, 2014), https://www.nytimes.com/2014/12/01/nyregion/pequot-indian-tribe-faces-its-eroding-fortunes-from-foxwoods.html (observing New York's and Massachusetts' plans to open non-Native American owned casinos, which will increase the competition experienced by Native American owned casinos); Matt Villano, *All In: Gambling Options Proliferate Across USA*, USA TODAY (Jan. 26, 2016, 5:00 PM), https://www.usatoday.com/story/travel/destinations/2013/01/24/gambling-options-casinos-proliferate-across-usa/1861835/.

54. David Danzis, *How Big an Impact Has Internet Gaming Made on Atlantic City?*, PRESS OF ATLANTIC CITY (Nov. 11, 2018), https://www.pressofatlanticcity.com/news/casinos_tourism/how-big-an-impact-has-internet-gaming-made-on-atlantic/article_e415fbbf-b926-52f5-9fcc-065dcfeb25aa.html (noting concerns that online gaming will negatively affect the economy of Atlantic City).

55. Letter from Ernest L. Stevens, Jr., Chairman, Nat'l Indian Gaming Ass'n, to Deb Haaland, U.S. Rep. & Tom Cole, U.S. Rep. (Mar. 17, 2020), https://files.constantcontact.com/dccc8a0a001/bccf384a-d6eb-4b0a-b1df-812a7c9c0502.pdf ("Indian gaming facility closures will deeply impact tribal government treasuries, forcing some tribes to cut back on the provision of essential government services, including community health, education, public safety and social services."); *see also* Minter, *Indian Country Reels*, *supra* note 51.

56. *See, e.g.*, Conrad Wilson, *Native American Tribes Venture Out Of Casino Business*, NPR (Feb. 21, 2013, 4:07 PM), https://www.npr.org/2013/02/21/172630938/native-american-tribes-venture-out-of-casino-business; Stevens, *The Next Wave*, *supra* note 8; Thomas Zitt & Christopher Irwin, *True Economic Diversification*, TRIBAL GOV'T GAMING, https://tribalgovernmentgaming.com/article/true-economic-diversification/ (last visited Nov. 6, 2021).

57. *See generally* 18 U.S.C. § 1151 (defining "Indian country").

58. *See, e.g.*, NETT LAKE WILD RICE, http://www.nettlakewildrice.com/ (last visited May 23, 2021) (produced by the Bois Forte Band of Chippewa); RED LAKE NATION

arisen with these products yet; contrarily, online tribal cigarette sales have been the subject of controversy.[61] This is nothing new. States and tribes have fought over cigarette taxes since the 1970s because hundreds of millions of dollars in tax revenue are at stake.[62] States claim exempting reservation cigarette purchases from state taxes denies them revenue.[63] Tribes counter that state taxes of tribal commerce undermine tribal economies and self-governance.[64] The Supreme Court has sided with the states in tribal tax disputes,[65] and the principles from these cases are highly germane to the future of tribal e-commerce.

Many people think Indians don't pay taxes. This is more fiction than fact. Tribes, like all other sovereigns, are tax-exempt.[66] An individual Indian's income is exempt from state taxes if the income is earned on her tribe's reservation,[67] as are an Indian's purchases made on her own tribe's

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FOODS, https://redlakenationfoods.com/ (last visited Nov. 6, 2021) (produced by the Red Lake Band of Chippewa Indians); WHITE EARTH WILD RICE, http://real wildrice.com/ (last visited Nov. 6, 2021) (produced by White Earth Nation).

59. *See, e.g.*, TAKELMA ROASTING CO., https://takelmaroasting.com/collections/ coffee (last visited Nov. 6, 2021) (produced by the Cow Creek Band of Umpqua Tribe of Indians).

60. *See, e.g.*, REMEDY TULALIP, https://remedytulalip.com/ (last visited Nov. 6, 2021) ("partnering with emerging and affiliated Native American Cannabis brands").

61. *See* ASSOCIATED PRESS, *Despite Law, Tribe Sells 1.7 Tons of Cigarettes Online*, NYPOST (Dec. 2, 2013, 10:11 AM), https://nypost.com/2013/12/02/despite-law-tribe-sells-1-7-tons-of-cigarettes-online/ (noting that the Prevent All Cigarette Trafficking Act, which banned shipping cigarettes, did not stop the Seneca Nation from shipping cigarettes across the United States); Michael Triplett, *Internet Cigarette Sales and Native American Sovereignty*, INTERNET TOBACCO VENDORS STUDY (May 7, 2015), https://internettobaccovendorsstudy.com/2015/05/07/internet-cigarette-sales-and-native-american-sovereignty/ ("Cigarettes are often sold tax-free on the Internet by companies claiming affiliation with Native American tribes.").

62. *See* HILLARY DELONG ET AL., STATE REGULATION OF TRIBAL TOBACCO SALES: A HISTORICAL STATE-BY-STATE ANALYSIS, 2005-2015 11 (2016), https://tobacco nomics.org/wp-content/uploads/2016/12/tobacconomics_tribal_template_FINAL-VER SION.pdf (noting Washington's claim that tribal on-reservation tobacco sales cost the state $80 million in 2000, and on-reservation tobacco sales supposedly cost New York "between $436 million and $576 million in 2004").

63. *Id.* ("This has been an issue for some time, and some states continue to see significant losses in tax revenue.").

64. Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1014 (2020) [hereinafter Crepelle, *Taxes, Theft, & Indian Tribes*].

65. *Id.* at 1007 ("The Supreme Court has all but shattered the once mighty tribal armor against state taxation.").

66. 26 U.S.C. § 7871.

67. McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 164 (1973) (finding it "unlawful" to impose personal income tax on income earned "wholly from reservation sources").

reservation.[68] However, Indians must pay state taxes when on another tribe's reservation.[69] States can also tax non-Indians who make purchases or engage in business on reservations.[70] The Supreme Court even requires tribes to collect state taxes because it is a "minimal burden" on tribes.[71] Thus, reservation businesses must verify whether buyers are enrolled in the tribe in order to determine the price of the good.[72] This increases the cost of doing business in Indian country[73] and prevents tribes from imposing taxes on businesses that operate on tribal lands.[74] This tributary task is all

68. Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 160 (1980) ("It was, of course, quite clear after *Moe* and *McClanahan* that the sales tax could not be applied to similar purchases by tribal members . . . .").

69. *Id.* at 161 ("Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe.").

70. *See, e.g.*, *id.* at 157 ("Washington's taxes are reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers . . . ."); Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046, 1062 (W.D. Wash. 2018) (holding that tribes have minimum "sovereignty interests" in "transactions between non-Indians"); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 206 (1989) ("[T]here is sufficient state activity to support the State's claimed authority to tax.").

71. Dep't of Tax'n & Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 73 (1994) (emphasis added) ("In particular, these cases have decided that States may impose on reservation retailers *minimal burdens* reasonably tailored to the collection of valid taxes from non-Indians."); Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv., 425 U.S. 463, 483 (1976) (emphasis added) ("The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a *minimal burden* designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.").

72. *Milhelm Attea & Bros*., 512 U.S. at 76 (noting New York's requirement of an exemption certificate to receive an untaxed cigarette); *Confederated Tribes of Colville Indian Rsrv*., 447 U.S. at 160–61; *Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. at 483.

73. Adam Crepelle, *White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self-Government*, 54 U. MICH. J.L. REFORM 563, 578 (2021) [hereinafter Crepelle, *White Tape*]; Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PENN. J. BUS. L. 683, 725-727 (2021) [hereinafter Crepelle, *How Federal Indian Law Prevents*].

74. *See* Crepelle, *Taxes, Theft, & Indian Tribes*, *supra* note 64, at 1017–18; Brief for Nat'l Cong. of Am. Indians & Indian Tribes in S.D. as Amici Curiae in Support of Neither Party at 4, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494) [hereinafter NCAI Amici Curiae Brief] ("[G]iven the unequal size, fiscal strength, and enforcement capabilities of the competing sovereigns, and given the practical impossibility of imposing both state and tribal taxes concurrently without driving away business and thus pushing Indian reservations deeper into poverty, it typically is the Tribe, not the State, that is forced to forgo exercising its sovereign power to tax.").

the more demeaning because states take the tax revenue generated by tribes and spend it outside of Indian country.[75]

Tribal transactions with non-Indians can escape state taxes in a few ways. State taxes of tribal commerce with non-Indians are invalid when the burden of the tax falls upon the tribe or its citizens.[76] States determine the legal incidence of the tax by simply declaring who bears the burden[77] — economic reality plays no part in the test.[78] Tribal commerce is exempt from state taxes if a federal law preempts the state tax;[79] however, preemption of state taxes is a herculean feat.[80] States merely have to allege they provide a service on the reservation, and the value of the service need

75. *Select Revenue Measures Subcommittee: Hearing on Examining The Impact of the Tax Code on Native American Tribes Before the H. Ways & Means Comm.*, 116th Cong. (2020) (statement of Rodney Butler, Chairman, Mashantucket Pequot Tribal Nation) ("This inequity is further compounded by the fact that the diverted tax revenues from on-reservation businesses are used by state and local governments to serve non-Indian populations in neighboring communities, rather than our citizens on our reservation."); Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L.J. 115, 121 (2017) [hereinafter Morgan, *Rise & Fall*] ("In the tribal economic area, the core dispute is often with the powers federal Indian law has granted to the states. The states use this power to directly and indirectly control tribes.").

76. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) ("Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country.").

77. *See id.* at 460 ("And if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence."); Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 102 (2005) (quoting *Chickasaw Nation*, 515 U.S. at 461) ("We have suggested that such 'dispositive language' from the state legislature is determinative of who bears the legal incidence of a state excise tax.").

78. Coeur d'Alene Tribe v. Hammond, 384 F.3d 674, 681 (9th Cir. 2004) ("The person or entity bearing the legal incidence of the tax is not necessarily the one bearing the economic burden."); *see also* Squaxin Island Tribe v. Stephens, 400 F. Supp. 2d 1250, 1255 (W.D. Wash. 2005) (quoting *Coer d'Alene Tribe* in establishing who bears the legal and economic burden of a tax); Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1189 (9th Cir. 2008) (noting the same).

79. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 338 (1983) ("Furthermore, the exercise of concurrent state jurisdiction in this case would completely 'disturb and disarrange,' the comprehensive scheme of federal and tribal management established pursuant to federal law."); Ramah Navajo Sch. Bd. v. Bureau of Rev. of N.M., 458 U.S. 832, 841–42 (1982) ("The direction and supervision provided by the Federal Government for the construction of Indian schools leave no room for the additional burden sought to be imposed by the State through its taxation of the gross receipts paid to Lembke by the Board."); *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980); WILLIAM CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 304 (7th ed. 2020) [hereinafter CANBY, NUTSHELL].

80. *See* Crepelle, *Taxes, Theft, & Indian Tribes*, *supra* note 64, at 1009 ("At present, self-sufficient tribes have essentially no chance at preventing states from taxing commercial activity the tribes have created within their borders.").

bear no relation to the size of the tax.[81] Though it is far from a guarantee, tribes' best chance at preemption is creating consumer value on the reservation.[82] Accordingly, some tribes have started manufacturing their own cigarettes on reservation[83] and have offered them for sale online.[84] The trouble is federal law expressly forbids tribes from selling cigarettes online.[85] Outside of cigarettes, tribes' ability to sell other products produced on reservation over the internet sans state taxes is a mystery.

The Supreme Court addressed state taxes in online retail for the first time in 2018 and held online retailers must collect state taxes when shipping

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81. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 189 (1989) ("Cotton's most persuasive argument is based on the evidence that tax payments by reservation lessees far exceed the value of services provided by the State to the lessees, or more generally, to the reservation as a whole."); Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046, 1062 (W.D. Wash. 2018) (holding that through providing services such as public education, health services, and roads, the state can impose taxes on the reservations).

82. *See* Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 155 (1980) ("It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest."); Salt River Pima-Maricopa v. Arizona, 50 F.3d 734, 736 (9th Cir. 1995) (finding the state tax preempted "because the Community's activities did not contribute to the value of the goods sold, and because Arizona provides most of the governmental services used by the non-Indian taxpayers"); Morgan, *Rise & Fall*, *supra* note 75, at 128 (stating that the Omaha Tribe was recently exempt from paying the state excise tax as "its tobacco manufacturing process was a value added event and the state tax was preempted").

83. HILLARY DELONG ET AL., COMMON STATE MECHANISMS REGULATING TRIBAL TOBACCO TAXATION AND SALES, THE USA, 2015 36 (2016), https://tobaccocontrol.bmj.com/content/tobaccocontrol/25/Suppl_1/i32.full.pdf ("[T]ribes increased their manufacturing efforts; cigarettes manufactured on-reservation bypassed stamping agents, and allowed tribes to sell them untaxed."); David Hendee, *Omaha Tribe Was First in the U.S. to Make Cigarettes on Reservation*, OMAHA WORLD-HERALD (Mar. 11, 2018), https://omaha.com/state-and-regional/omaha-tribe-was-first-in-the-u-s-to-make-cigarettes-on-reservation/article_f94c117b-366b-5c19-a091-bcb0c261fdd3.htm (stating that the Omaha Tribe was the first tribe to begin manufacturing cigarettes on its reservation); Thomas Kaplan, *In Tax Fight, Tribes Make, and Sell, Cigarettes*, CNBC, https://www.cnbc.com/2012/02/23/in-tax-fight-tribes-make-and-sell-cigarettes.html (last updated Sept. 13, 2013, 4:33 PM) (stating "industry experts believe there are now at least a dozen Indian cigarette manufacturers operating across upstate New York").

84. Arielle Sloan, *Tribal Sovereignty and Tobacco Control in State-Tribe Cigarette Compacts*, 2017 BYU L. REV. 1261, 1272 (2018) ("Some tribal retailers have even taken to selling their products tax free online, using language like 'NO STATE TAXES, NO REPORTS to anyone EVER and NO Surprise Tax Bills.'"); Kari A. Samuel et al., *Internet Cigarette Sales and Native American Sovereignty: Political and Public Health Contexts*, 33 J. PUB. HEALTH POL'Y 173, 176–77 (2012) (noting one study that found that online cigarette sales created millions of dollars of revenue for tribes).

85. Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, § 3, 124 Stat. 1087, 1109–10 (2010).

products into a state.[86] Parity between storefront and online retailers drove the majority's opinion.[87] Nowhere in the opinion does the Court mention how the decision applies to tribes, despite tribal interests briefing the court on the magnitude of the issue.[88] Following the Court's rationale, digital reservation sales beyond tribal borders are almost certainly subject to taxes in the jurisdiction where the product is shipped.[89] However, following that same reasoning, online sales made within Indian country should be subject solely to tribal taxation.[90] If this reasoning holds, then e-commerce between reservations is entirely exempt from state taxation. This would be a game changer for tribes, but the fate of tribal taxes in e-commerce remains uncertain.

B. Online Gaming

Tribes have sought to use technology to enhance their gaming operations since the 1990s.[91] The first great foray into telecommunications gaming was the Coeur D'Alene Tribe's attempted National Indian Lottery which would have allowed individuals located outside the boundaries of the Tribe's reservation to purchase lottery tickets telephonically[92] and online.[93] However, all of the technology and machinery used to conduct the lottery

86. *See generally* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (holding that a physical presence is not required to collect state sales tax).

87. *Id.* at 2095 ("And that it allows remote sellers to escape an obligation to remit a lawful state tax is unfair and unjust.").

88. *States Win Big Victory With Supreme Court Ruling on Online Taxation*, INDIANZ (June 21, 2018), https://www.indianz.com/News/2018/06/21/states-win-big-victory-with-supreme-cour.asp (noting that "neither Kennedy, nor any of his colleagues, addressed issues that tribal interests had raised in a brief to the high court").

89. *See Wayfair, Inc.*, 138 S. Ct. at 2096 ("But there is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection.").

90. *See* NCAI Amici Curiae Brief, *supra* note 74, at 6 (arguing "[t]o the extent that States are permitted to tax remote sales, they cannot tax items delivered to the tribal government or tribal members in the Tribe's Indian country"); *States Win Big Victory*, *supra* note 88 (quoting Professor Gavin Clarkson: "Tribal governments should now be able to insist that online sales to on-reservation residents should be exclusively subject to tribal sales tax.").

91. *See* Cabazon Indians v. Nat'l Indian Gaming Comm'n, 14 F.3d 633, 636–37 (D.C. Cir. 1994); Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 542–43 (9th Cir. 1994); Spokane Indian Tribe v. United States, 972 F.2d 1090, 1093 (9th Cir. 1992).

92. AT&T Corp., v. Coeur D'Alene Tribe, 295 F.3d 899, 901 (9th Cir. 2002).

93. Missouri *ex rel*. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1104 (8th Cir. 1999) (noting that the Coeur D'Alene Tribe offered the lottery via Internet to potential participants in thirty-six states).

were located within the Coeur D'Alene Indian Reservation.[94] The National Indian Gaming Commission approved the Tribe's use of telecommunication technology to project the lottery beyond reservation borders.[95] Despite the approval, AT&T refused to provide the telecommunications services necessary to facilitate the National Indian Lottery after over thirty states threatened legal action against the company, so the Tribe sought to enjoin AT&T from backing out of the telecommunications contract.[96] At the Ninth Circuit, the Tribe prevailed on procedural grounds,[97] but Judge Gould wrote separately to lament the court's failure to address the merits of the case.[98] Judge Gould believed uncertainty would result from the court's decision.[99]

Nearly two decades later, the legality of online gaming, both tribal and nontribal, remains uncertain.[100] Congress passed the Unlawful Internet Gambling Enforcement Act ("UIGEA") in 2006.[101] The UIGEA only renders internet gambling "unlawful" if the bet is illegal under the law of the jurisdiction it "is initiated, received, or otherwise made."[102] The UIGEA, unfortunately, has not provided much clarity on which categories of online gaming are prohibited.[103] Nevertheless, several states have

94. AT&T Corp., v. Coeur D'Alene Tribe, 45 F. Supp. 2d 995, 998 (1998) (D. Idaho 1998) ("The operations used to select the winning numbers, including the computer and associated software, are located on the Coeur d'Alene Indian Reservation.").

95. *AT&T Corp.*, 295 F.3d at 902 ("In the opinion of the NIGC, the Tribe's lottery proposal, which involves customers purchasing lottery tickets with a credit card both in person and by telephone from locations both inside and outside the state of Idaho, is not prohibited by the IGRA.").

96. *Id.* at 902–03.

97. *Id.* at 910 ("The states might have joined this litigation at its beginning in the district court to attack the NIGC's decision directly under 25 U.S.C. § 2714. They did not. [] Until such time, both the Tribe and AT&T may continue their activities — and in AT&T's case meet its legal obligations — without fear of prosecution.").

98. *Id.* (Gould, J., concurring in part and dissenting in part) ("All of the governments and other entities who will be affected by this case would benefit from an efficient and correct resolution of the important issue whether an Indian nation may run a national lottery that depends on off-reservation ticket purchases.").

99. *Id.* at 911 n.3 (Gould, J., concurring in part and dissenting in part).

100. Pamela M. Prah, *Indian Tribes Look to Online Gambling*, GOVERNING (Dec. 11, 2013), https://www.governing.com/news/headlines/indian-tribes-look-to-online-gambling.html.

101. Linda J. Shorey & Marsha A. Sajer, *The Uneasy Nexus Between Internet Gaming and Tribal Gaming*, 14 GAMING L. REV. & ECON. 239, 239 (2010).

102. 31 U.S.C. § 5362(10)(A).

103. Shorey & Sajer, *supra* note 101, at 240 ("Determining whether a transaction will involve an activity prohibited by federal, state, or tribal antigambling law is a challenge for banks, credit card companies, and other financial institutions.").

legalized some form of online gaming.[104] For example, New Jersey has legalized online gaming so long as the server used to host the game is located within the exterior boundaries of Atlantic City — the player's location is irrelevant.[105]

Tribes are split on whether to support or oppose online gaming.[106] Only a few tribes have pursued gaming to the extent that it has resulted in legal challenges, and the legal challenges resulted in completely divergent outcomes. By July of 2014, the Iipay Nation of Santa Ysabel's plans to offer online bingo gained California's attention.[107] California contacted Iipay about the matter, and Iipay rejected California's offer to talk. Months later, Iipay launched bingo online.[108] California filed suit to prevent the site's operation, arguing bingo had been projected outside of the tribe's reservation, and consequently was an illegal gaming operation.[109] Iipay countered that the gaming occurred on Indian lands because the server that hosted the game was located on tribal lands.[110] The district court and the Ninth Circuit both sided with California[111] with the latter reaching its 2018 holding because the wagers were made outside of Indian lands.[112]

In September of 2015, the Iowa Tribe of Oklahoma decided to try its luck in online gaming.[113] The matter was sent to arbitration, pursuant to the tribal-state compact, to resolve the issue of whether the tribe could use the

104. *Legal US Online Gambling Guide*, PLAYUSA, https://www.playusa.com/us/ (last updated Oct. 28, 2021) (listing states that have legalized online gambling).

105. N.J. STAT. ANN. § 5:12-95.17(1)(j) (West 2021); Iowa Tribe of Okla. v. Oklahoma, Disputes Under and/or Arising From the Iowa Tribe–State Gaming Compact, Arbitration Award (2015) (Chapel, Arb.) [hereinafter Iowa Tribe of Okla. Arb. Award], https://www.indianz.com/IndianGaming/2017/05/23/iowatribearbitration.pdf.

106. Shorey & Sajer, *supra* note 101, at 242 ("Although there is far from a uniform position amongst all tribes, most tribes have generally not been supportive of the current efforts to license and regulate Internet gaming.").

107. California v. Iipay Nation of Santa Ysabel, No. 14cv2724 AJB (NLS), 2015 U.S. Dist. LEXIS 67415, at *2 (S.D. Cal. May 22, 2015) ("In July 2014, the State wrote the Tribe about a recent article on the Tribe's intent to offer 'real money online poker,' asked about the Tribe's plans to provide internet bingo and poker, and requested to meet and confer.").

108. *Id.* at *3.

109. California v. Iipay Nation of Santa Ysabel, 898 F.3d 960, 963–64, 966 (9th Cir. 2018).

110. *Id.* at 965.

111. *Id.* at 966–69.

112. *Id.* at 968 ("However, the patrons' act of placing a bet or wager on a game of DRB while located in California constitutes gaming activity that is not located on Indian lands, violates the UIGEA, and is not protected by IGRA.").

113. Iowa Tribe of Okla. Arb. Award, *supra* note 105, at 2, 6 (noting C&A filed a complaint that was later voluntarily dismissed).

internet to offer gaming to patrons outside Oklahoma and abroad in jurisdictions that have legalized gaming.[114] Ruling for the Tribe, the arbitrator determined the host server's location on tribal lands meant the online gaming occurred on tribal lands, a point all but ceded by Oklahoma.[115] Additionally, the arbitrator read the IGRA broadly stating: "Congress intended that tribes should and could by that Act [IGRA] take every opportunity to use and take advantage of modern technology to promote participation among players and thereby increase tribal revenues for their people. The Internet is a modern technology that does precisely that."[116] A federal court certified the arbitration award in 2016.[117]

Though the legality of online gaming is uncertain, several tribes currently offer free online games.[118] The intent behind free online games is to build customer loyalty.[119] Whether this tactic works is yet to be determined.[120] Nevertheless, New Mexico attempted to get a cut of the tribal action. New Mexico acknowledged that free online gaming imposes no costs on state regulators[121] but still attempted to tax free tribal online gaming sites.[122] A federal court ultimately rejected New Mexico's effort.[123] This ruling did nothing to clarify the legality of tribal online gaming.

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114. *Id.* at 7–8.

115. *Id.* at 19.

116. *Id.* at 15.

117. Iowa Tribe of Okla. v. Oklahoma, No. 5:15-CV-01379-R, 2016 WL 1562976, at *3 (W.D. Okla. Apr. 18, 2016).

118. *Tribes Continue to Launch Free-Play Gaming Sites to Attract New Casino Customers*, INDIAN COUNTRY TODAY, https://indiancountrytoday.com/archive/tribes-continue-to-launch-free-play-gaming-sites-to-attract-new-casino-customers-Ty7NQUKQD0mxT0pk0y4Ybg (last updated Sept. 13, 2018) (highlighting one such launch, Pala Casino, Spa and Resort's "MyPalaCasino," an online social casino that will offer various games, including slots, blackjack, and Texas Hold'em).

119. *See id.* (quoting Jim Ryan, Pala Interactive's CEO: "Our platform allows Pala to integrate the social game experience into its land-based loyalty system thereby extending its brand beyond the physical casino and providing guests the opportunity to earn rewards towards their next visit").

120. Anthony F. Lucas & Katherine Spilde, *Estimating the Effect of Casino Loyalty Program Offers on Slot Machine Play*, 58 CORNELL HOSP. Q. 1, 1 (2017), http://katespilde.com/wp-content/uploads/2017/04/estimating-freeplay-slot-machine-play.pdf ("In spite of the industrywide popularity and considerable cost of these offers, little is known about their effect on customer behavior.").

121. Pueblo of Isleta v. Grisham, No. 17-654, 2019 U.S. Dist. LEXIS 55049, at *60 n.26 (D.N.M. Mar. 30, 2019) ("Defendants do not claim that the additional payments they seek are payments to reimburse the State for regulatory costs under Section 2710(d)(3)(C)(iii).").

122. *Federal Judge Rules New Mexico Pueblos Don't Owe Millions in Back Revenue for Free-Play Credits*, NATIVEBUS (Apr. 4, 2019), https://www.nativebusinessmag.com/federal-judge-rules-new-mexico-pueblos-dont-owe-millions-in-back-revenue-for-free-play-credits/.

C. Fintech

Fintech, the application of technology to financial services,[124] has spread rapidly throughout Indian country.[125] Of course, tribes accept credit cards and use digital tokens in casinos, but they have gone far beyond this. Tribes are using their sovereignty to push fintech's boundaries. Tribes have adopted cryptocurrencies and are major players in the online lending industry.[126] This Section explores tribal involvement in both.

i. Cryptocurrency

Cryptocurrency is a digital asset that is secured by cryptography and operates as a substitute for conventional currency.[127] Cryptocurrencies are not issued by a central bank; rather, they are "mined" via a complex computing process.[128] While Bitcoin is the most well-known

123. *Pueblo of Isleta*, 2019 U.S. Dist. LEXIS 55049, at *69 (holding that New Mexico's attempted tax violates the "'per se rule' prohibiting states from taxing federally recognized Indian tribes without express Congressional authorization").

124. Julia Kagan, *Financial Technology — Fintech*, INVESTOPEDIA, https://www.investopedia.com/terms/f/fintech.asp (last updated Aug, 27, 2020) ("Financial technology (Fintech) is used to describe new tech that seeks to improve and automate the delivery and use of financial services."); *see also Fintech Definition*, FINTECH WEEKLY, https://www.fintechweekly.com/fintech-definition (last visited Nov. 6, 2021); Anne Sraders, *What is Fintech? Uses and Examples in 2020*, THESTREET, https://www.thestreet.com/technology/what-is-fintech-14885154 (last updated Feb. 11, 2020, 3:02 PM).

125. Jenadee Nanini, *Tribal Sovereignty and FinTech Regulations: The Future of Co-Regulating in Indian Country*, 1 GEO. L. TECH. REV. 503, 504 (2017) ("Tribes have been quick to embrace financial technology in Indian Country.").

126. *See* Jairo Ramos, *A Native American Tribe Hopes Digital Currency Boosts Its Sovereignty*, NPR (Mar. 7, 2014, 2:50 PM) [hereinafter Ramos, *Digital Currency Boosts Its Sovereignty*], https://www.npr.org/sections/codeswitch/2014/03/07/287258968/a-native-american-tribe-hopes-digital-currency-boosts-its-sovereignty (stating that the Oglala Lakota Nation became the first to launch its own virtual currency, the "mazacoin"); Jennifer H. Weddle, *Nothing Nefarious: The Federal Legal and Historical Predicate for Tribal Sovereign Lending*, FED. LAW., Apr. 2014, at 58, 59 (counting over two dozen tribes who have engaged in online lending).

127. Jake Frankenfield, *Cryptocurrency*, INVESTOPEDIA [hereinafter Frankenfield, *Cryptocurrency*], https://www.investopedia.com/terms/c/cryptocurrency.asp (last updated Oct. 30, 2021); *What to Know About Cryptocurrency*, FED. TRADE COMM'N CONSUMER INFO. (Apr. 2021) [hereinafter FTC, *What to Know*], https://www.consumer.ftc.gov/articles/what-know-about-cryptocurrency.

128. *See* Euny Hong, *How Does Bitcoin Mining Work?*, INVESTOPEDIA, https://www.investopedia.com/tech/how-does-bitcoin-mining-work/ (last updated Sept. 21, 2021); Jeff John Roberts, *The American Heartland Needs Jobs. Could Bitcoin Mining Become its Next Savior?*, FORTUNE (Dec. 12, 2020, 7:00 AM), https://fortune.com/2020/12/12/bitcoin-jobs-cryptocurrency-mining-hiring-core-scientific/; Jordan Tuwiner, *What is Bitcoin Mining and How Does it Work?*, BUY BITCOIN WORLDWIDE, https://www.buybitcoinworldwide.com/mining/ (last updated Nov. 1,

cryptocurrency, thousands of others exist.[129] The combined worth of all the cryptocurrencies in existence exceeds $1.7 trillion as of February 2022.[130] More and more retailers accept cryptocurrency as payment for goods, including major retailers like Overstock.com and Newegg.[131]

Cryptocurrencies have both advantages and disadvantages. As cryptocurrencies are backed by block chain technology, they are thought to be extremely secure.[132] Nonetheless, the digital "wallet" where an individual stores her cryptocurrency can be robbed.[133] The value of cryptocurrency is subject to constant and extreme fluctuation,[134] meaning it can bring a windfall for users and shatter just as quickly.[135] Cryptocurrency is not issued by a central bank; therefore, it is not subject to government induced inflation.[136] On the other hand, cryptocurrencies are not backed by

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2021).

129. *See Today's Cryptocurrency Prices by Market Cap*, COINMARKETCAP, https://coinmarketcap.com/38/ (last visited Nov. 6, 2021) (listing current cryptocurrency prices); James Royal & Kevin Voigt, *What is Cryptocurrency? Here's What You Should Know*, NERDWALLET (Feb. 7, 2022) [hereinafter Royal & Voigt, *What is Cryptocurrency?*], https://www.nerdwallet.com/article/investing/cryptocurrency-7-things-to-know (stating that, as of February 2022, there are currently more than 17,000 publicly traded cryptocurrencies).

130. Royal & Voigt, *What is Cryptocurrency?*, *supra* note 129.

131. Yoni Blumberg, *Here's How You Can — and Can't — Spend Bitcoin*, MAKE IT, https://www.cnbc.com/2017/12/07/heres-how-you-can-and-cant-spend-bitcoin.html (last updated Dec. 7, 2017, 2:57 PM) (stating "over 100,000 merchants worldwide accept bitcoin"); Steve Fiorillo, *How to Use Bitcoin for Purchases*, STREET (Apr. 18, 2018, 11:13 AM), https://www.thestreet.com/investing/what-can-you-buy-with-bitcoin-14556706.

132. Frankenfield, *Cryptocurrency*, *supra* note 127 ("Cryptocurrency blockchains are highly secure . . . ."); Royal & Voigt, *What is Cryptocurrency?*, *supra* note 129 ("Part of the appeal of this technology is its security.").

133. ATT'Y GENERAL'S CYBER DIGITAL TASK FORCE, U.S. DEP'T OF JUST., CRYPTOCURRENCY ENFORCEMENT FRAMEWORK 15 (2020) [hereinafter CRYPTOCURRENCY ENFORCEMENT FRAMEWORK], https://www.justice.gov/archives/ag/page/file/1326061/download ("Criminals — and even rogue state actors — can steal cryptocurrency by exploiting security vulnerabilities in wallets and exchanges."); Frankenfield, *Cryptocurrency*, *supra* note 127 ("[B]ut other aspects of a cryptocurrency ecosystem, including exchanges and wallets, are not immune to the threat of hacking.").

134. FTC, *What to Know*, *supra* note 127 (noting that a cryptocurrency's value may change frequently, even by the hour, due to a variety of factors).

135. Royal & Voigt, *What is Cryptocurrency?*, *supra* note 129 ("For example, while Bitcoin traded at close to $20,000 in December 2017, its value then dropped to as low as about $3,200 a year later. By December 2020, it was trading at record levels again.").

136. *Id.* ("Some supporters like the fact that cryptocurrency removes central banks from managing the money supply, since over time these banks tend to reduce the value of money via inflation."); Frankenfield, *Cryptocurrency*, *supra* note 127 ("Nonetheless,

government.[137] Accordingly, if an individual's cryptocurrency is hacked or otherwise disappears, a government is unlikely to be there for a rescue.[138] Cryptocurrencies can provide users with a high degree of privacy and anonymity.[139] Robust privacy can enhance individual liberty but can also be used to facilitate illegal activity.[140] For example, governments can seize a criminal's bank accounts and other physical assets relatively easily; however, governments struggle mightily to control cryptocurrency in a criminal's digital wallet.[141]

Cryptocurrency has made its way to Indian country. In 2014, the Oglala Lakota Nation adopted Mazacoin.[142] Mazacoin's founder, Payu Harris, sees the cryptocurrency as a way to strengthen tribal sovereignty.[143] The federal government can control tribes by seizing their bank accounts, and Mazacoin will make it more difficult for the federal government to use finances to interfere with tribes' autonomy.[144] Use of cryptocurrency in Indian country transactions will also make it more difficult for states to

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many observers see potential advantages in cryptocurrencies, like the possibility of preserving value against inflation . . . .").

137. FTC, *What to Know*, *supra* note 127 (pointing out that cryptocurrencies do not have the protections of U.S. bank deposits, namely federal insurance).

138. *Id.* (stating that the government may not be able to help recover hacked or lost cryptocurrency as it would with a bank or credit union).

139. *See* Frankenfield, *Cryptocurrency*, *supra* note 127 ("[C]ryptocurrency advocates often highly value their anonymity, citing benefits of privacy like protection for whistleblowers or activists living under repressive governments.").

140. CRYPTOCURRENCY ENFORCEMENT FRAMEWORK, *supra* note 133, at 13 (acknowledging cryptocurrency's increasing popularity amongst criminals).

141. Brian Martucci, *What is Cryptocurrency — How it Works, History & Bitcoin Alternatives*, MONEY CRASHERS (May 18, 2021), https://www.moneycrashers.com/cryptocurrency-history-bitcoin-alternatives/ (stating this access difficulty is a result of the cryptocurrency's "political independence and essentially impenetrable data security").

142. *Lakota Nation Adopts MazaCoin Crypto-Currency as Legal Tender*, RT (Mar. 3, 2014, 8:53 PM), https://www.rt.com/usa/native-american-nation-bitcoin-632/.

143. Ramos, *Digital Currency Boosts Its Sovereignty*, *supra* note 126.

144. Danny Bradbury, *Mazacoin Aims to be Sovereign Altcoin for Native Americans*, COINDESK [hereinafter Bradbury, *Mazacoin*], https://www.coindesk.com/mazacoin-sovereign-altcoin-native-americans (last updated Sept. 11, 2021, 6:19 AM) (noting that a tribe's independent cryptocurrency would make it more difficult for the state and federal government to interfere with tribal finances); *see also* Lance Gumbs, *Free Indian Country From Operation Choke Point*, THE HILL (Jan. 7, 2015, 7:22 PM), https://thehill.com/opinion/op-ed/228844-free-indian-country-from-operation-choke-point (discussing a House report that found "alarming actions" whereby the FDIC "pressured banks to cut ties with legal and regulated e-commerce businesses . . . specifically target[ing] businesses owned and operated by Native American tribal governments").

impose their taxes on tribal commerce.[145] Rather than pay state taxes, Mazacoin is structured so the tribe collects revenue on each transaction.[146] Additionally, the tribe's adoption of Mazacoin may help stimulate the tribal economy as Mazacoin can be more easily spent on the reservation than off.[147] The adoption of a currency also projects sovereignty as nations choose their own currency.[148] To date, little has come of Mazacoin; nonetheless, the FBI has warned the Oglala that legal trouble may arise from the cryptocurrency's use.[149]

ii. Tribal Lending

Approximately 25 of the 574 federally recognized tribes participate in the online lending industry.[150] The tribes engaged in online lending tend to be geographically isolated, rendering most in-person economic ventures, like gaming, infeasible.[151] With poor locations, tribes often have only one asset — their sovereignty.[152] Tribes have the right to make their laws and be governed by them;[153] furthermore, state law is presumed to stop at the reservation's edge.[154] Although the Supreme Court's decision in *California*

145. Bradbury, *Mazacoin*, *supra* note 144.

146. Lynnley Browning, *Oglala Sioux Hope Bitcoin Alternative, Mazacoin, Will Change Economic Woes*, NEWSWEEK (Aug. 14, 2014, 2:47 PM), https://www.newsweek.com/2014/08/22/tribe-brought-you-custers-last-stand-sitting-bulls-bitcoin-264440.html.

147. Adrianne Jeffries, *Native American Tribes Adopt Bitcoin-like Currency, Prepare to Battle US Government*, VERGE (Mar. 5, 2014, 9:00 AM), https://www.theverge.com/2014/3/5/5469510/native-americans-assert-their-independence-through-cryptocurrency-mazacoin ("Tribes using MazaCoin automatically make it easier to spend money at the local reservation general store than changing it into dollars to spend at Walmart, for example.").

148. *Id.* ("But perhaps more than that, it will give the Lakota people a sense of unity and independence.").

149. Jasper Hamill, *The Battle of Little Bitcoin: Native American Tribe Launches Its Own Cryptocurrency*, FORBES (Feb. 27, 2014, 2:41 PM), https://www.forbes.com/sites/jasperhamill/2014/02/27/the-battle-of-little-bitcoin-native-american-tribe-launches-its-own-cryptocurrency/?sh=200c4d6247c5 (noting that the FBI informed the tribe that cryptocurrencies are not yet legal).

150. Weddle, *supra* note 126, at 59.

151. *See Lending vs. Gaming Fact Sheet*, NATIVE AM. FIN. SERVS. ASS'N, https://www.mynafsa.org/lending-gaming-fact-sheet/ (last visited Nov 6, 2021) (stating the importance of online lending as an "economic lifeline" for tribes located in remote areas); Weddle, *supra* note 126, at 59 (noting that many online lending tribes are in remote areas and have had few economic development opportunities otherwise).

152. Clarkson et al., *supra* note 15, at 5–6.

153. Williams v. Lee, 358 U.S. 217, 220 (1959) ("Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

154. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (holding the laws of

v. Cabazon Band of Mission Indians[155] was superseded by the IGRA,[156] the general principle underlying *Cabazon* remains valid — a state cannot prohibit tribes from engaging in activities that are civilly regulated within the state's borders, but states can prohibit tribes from authorizing behaviors that are criminally forbidden within the surrounding state.[157]

Relying on the civil regulatory framework, tribes have turned to lending.[158] While criminal prohibitions on collecting interest are not unheard of,[159] no state currently bans lending at interest.[160] This means charging interest falls into the civil regulatory rather than criminal prohibitory category.[161] Likewise, tribes charging interest rates above state caps should be permissible because *Cabazon* recognized tribes' ability to offer larger jackpots than the surrounding state.[162] Tribal gaming revenue comes overwhelmingly from non-Indians, so tribes lending to non-Indians should not be an issue.[163] Tribes are also treated as "states" under Dodd-Frank,[164] and states are the primary overseers of the lending industry.[165]

Georgia "have no force" inside the Cherokee Nation); 42 C.J.S. *Indians* § 92 (2021) ("A state is preempted by operation of federal law from applying its own laws to land held by the United States in trust for the tribe.").

155. 480 U.S. 202 (1987).

156. *Id.* at 219 (1987), *superseded by statute*, Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988).

157. *See* Kevin Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 292–93 (2004) (noting states can prohibit tribal gaming only if a state prohibits all forms of gaming within its borders); Matthew L.M. Fletcher, California v. Cabazon Band: *A Quarter-Century of Complex, Litigious Self-Determination*, FED. LAW., Apr. 2012, at 50, 53 ("The second foundation of the Cabazon Band decision, the interpretation of Public Law 280 through the civil-regulatory/criminal-prohibitory distinction, remains intact."); *State Jurisdiction*, U.S. DEP'T OF JUST. ARCHIVES, https://www.justice.gov/archives/jm/criminal-resource-manual-688-state-jurisdiction (last updated Jan. 22, 2020).

158. *See* Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 17–18 (2018) [hereinafter Crepelle, *Tribal Lending*] (noting how tribes have attempted to use their sovereignty to further economic development).

159. *See* Steven Mercatante, *The Deregulation of Usury Ceilings, Rise of Easy Credit, and Increasing Consumer Debt*, 53 S.D. L. REV. 37, 39 (2008) ("Medieval Christians condemned usury or even taking interest on money, finding the practice immoral."); Robin A. Morris, *Consumer Debt and Usury: A New Rationale for Usury*, 15 PEPP. L. REV. 151, 153 (1988) ("Early Christians, for example, incorporated Old Testament law against usury into their faith.").

160. *See* Clarkson et al., *supra* note 15, at 15–18.

161. Crepelle, *Tribal Lending*, *supra* note 158, at 19.

162. *See id.* ("Likewise, the reasoning in *Cabazon* suggests that states are not able to bar tribes from offering interest rates above state caps.").

163. *See id.* ("Since the bulk of tribal casino money comes from non-Indians, it is not a problem that the majority of tribal lending customers are non-Indian.").

164. 12 U.S.C § 5481(27).

Furthermore, tribes have developed legal regimes to regulate lenders[166] much like tribes have developed their own commissions to oversee their gaming operations.[167]

Although lending falls plainly in the civil regulatory category, states have taken issue with tribes charging interest rates above state interest rate caps.[168] Voluminous litigation has resulted from tribal online lending, and three main issues have arisen: (1) Are arbitration agreements in tribal lending contracts enforceable; (2) Can tribes assert civil jurisdiction over non-Indian borrowers; and (3) Are tribal lenders entitled to sovereign immunity?

Arbitration has been the most common issue in recent tribal lending cases, but this issue is not really an Indian law one. The dispute turns on whether arbitration provisions in the loan agreements are enforceable. In several cases, courts have refused to enforce the arbitration agreements between tribal lenders and online borrowers. Courts have denied motions to compel arbitration in online lending because the tribe at issue had not enacted laws authorizing arbitration in consumer disputes[169] and because the arbitrator was not qualified or neutral.[170] However, the main reason courts have rejected arbitration agreements in online lending cases is

165. PEW CHARITABLE TRS., PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 29 (2012) ("To date, payday loans have been regulated primarily at the state level.").

166. *See* Crepelle, *Tribal Lending*, *supra* note 158, at 19 (noting how tribes have created lending ordinances, regulatory bodies, and infrastructure to engage in lending activities); Weddle, *supra* note 126, at 60, 63.

167. *See Functions of a Tribal Gaming Commission*, NAT'L INDIAN GAMING COMM'N (Apr. 20, 1994), https://www.nigc.gov/compliance/detail/functions-of-a-tribal-gaming-commission (describing the myriad of regulatory duties that tribal gaming commissions can perform on behalf of tribes).

168. *See* Crepelle, *Tribal Lending*, *supra* note 158, at 16–18 (acknowledging that skeptics of tribal lending practices have long existed).

169. *See, e.g.*, Inetianbor v. CashCall Inc., 962 F. Supp. 2d 1303, 1309–10 (S.D. Fla. 2013) ("At the August 16, 2013 hearing, CashCall conceded that, while the Tribe has rules concerning consumer relations — e.g., usury statutes — it does not have any consumer dispute rules. Without such rules, it is obvious that arbitration cannot be conducted 'in accordance with [Tribal] consumer dispute rules' as required by the arbitration agreement."); Hayes v. Delbert Servs. Corp., 811 F.3d 666, 672 (4th Cir. 2016); MacDonald v. CashCall, Inc., No. 16-2781, 2017 U.S. Dist. LEXIS 64761, at *11 (D.N.J. Oct. 31, 2017) ("Several courts interpreting this provision held that it was unenforceable because it was illusory, in that the CRST did not actually conduct arbitrations and had no rules for the conduct of the arbitration.").

170. *See, e.g.*, Jackson v. Payday Fin., LLC, 764 F.3d 765, 770–71, 779–801 (7th Cir. 2014); Heldt v. Payday Fin., LLC, 12 F. Supp. 3d 1170, 1190 (D.S.D. 2014) (finding the arbitration clause unenforceable because "[t]he term 'tribal elder' is not defined in the loan agreement").

because the arbitration agreement waived federal law.[171] Absent a waiver of federal law, courts have enforced even poorly drafted arbitration agreements[172] in tribal online lending cases.[173] Additionally, a provision in the arbitration agreement allowing the borrower to select the arbitrator can save an arbitration agreement.[174]

Sovereign immunity and tribal jurisdiction are both uniquely Indian law issues. Accordingly, the remainder of this Section provides general background on both, then examines how courts have addressed each issue in the online lending context. However, it must be noted that many of the cases cited involved Western Sky, an entity that claimed to be tribal but in actuality was not.[175]

a. Tribal Sovereign Immunity

Sovereign immunity prevents sovereigns from being brought into court without their consent,[176] and tribes have long possessed sovereign immunity.[177] Sovereign immunity helps shield tribes from state efforts to

171. *See, e.g.*, Gingras v. Think Fin., Inc., 922 F.3d 112, 127 (2d Cir. 2019); Smith v. W. Sky Fin., LLC, 168 F. Supp. 3d 778, 784 (E.D. Pa. 2016); *MacDonald*, 2017 U.S. Dist. LEXIS 64761, at *13 ("Accordingly, numerous courts have held that the Loan Agreement's wholesale renunciation of federal and state law renders the arbitration agreement unenforceable.").

172. *See* Gibbs v. Stinson, 421 F. Supp. 3d 267, 304 (E.D. Va. 2019) (noting how even though the agreement in question contained numerous typographical errors, the strong policy favoring arbitration enforcement "required [the] Court to compel arbitration").

173. *Id.* at 305 ("Importantly, the Tunica-Biloxi Arbitration Code also expressly contemplates the application of federal law.").

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

175. *Western Sky and the Importance of Proper Legal Counsel in Online Lending*, NATIVE AM. FIN. SERVS. ASS'N (Apr. 24, 2017), https://nativefinance.org/news/western-sky-and-the-importance-of-proper-legal-counsel-in-online-lending/ ("Western Sky was not a creation of the Cheyenne River Sioux Tribe, but rather a wholly-owned business of one of its citizens."); News Release, Ark. Att'y Gen., Rutledge Reaches Settlement With Online Payday Lender (Dec. 16, 2016), https://arkansasag.gov/news_releases/settlement-with-online-payday-lender/ (stating that Western Sky "was not owned or operated by a tribe").

176. *Sovereign Immunity*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/sovereign_immunity (last visited Nov. 6, 2021); Julea Lipiz, *Eye See What You're Doing: An Analysis of Allergan's Use of Tribal Sovereign Immunity to Evade IPR of Their Eye Product, Restasis*, 34 BERKELEY TECH. L.J. 1057, 1059 (2019).

177. United States v. U. S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940) ("Indian

undermine their sovereignty[178] and can further tribal economic development and self-government;[179] indeed, entire tribal budgets would be jeopardized if tribes were subjected to private lawsuits.[180] On the other hand, sovereign immunity can deter private business development because corporations value the ability to protect their investments.[181] Thus, tribes often waive their sovereign immunity in order to engage in commercial relationships.[182] Sovereign immunity is also perceived as producing unfair outcomes because aggrieved individuals may have no recourse against tribes.[183]

Nations are exempt from suit without Congressional authorization."); *see also* Parks v. Ross, 52 U.S. 362, 374 (1851) (stating that "the government has delegated no power to the courts . . . to arrest the public representatives or agents of Indian nations").

178. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998) (noting sovereign immunity has been necessary to protect tribes from state invasions of their jurisdiction); Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 753 (2012) [hereinafter Martin & Schwartz, *Alliance*] ("Sovereign immunity is a corollary of tribal sovereignty, and protects tribes from enforcement of state law.").

179. *Kiowa Tribe of Okla.*, 523 U.S. at 757 ("Congress had failed to abrogate [tribal sovereign immunity] in order to promote economic development and tribal self-sufficiency."); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991) (noting sovereign immunity has been used by Congress to further "tribal self-sufficiency and economic development"); Gregory J. Wong, *Intent Matters: Assessing Sovereign Immunity for Tribal Entities*, 82 WASH. L. REV. 205, 211–12 (2007) (stating that Congress has recognized tribal sovereign immunity as a means of promoting self-government and economic development).

180. Thebo v. Choctaw Tribe of Indians, 66 F. 372, 376 (1895) ("As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it."); Christopher B. Phillips, *Patently Unjust: Tribal Sovereign Immunity at the U.S. Patent Office*, 92 S. CAL. L. REV. 703, 722 (2019) ("While the protection of sovereign funds has been mostly abandoned as a reason to protect states and the federal government via sovereign immunity, it still provides a normative basis for tribal sovereign immunity.").

181. ROBERT J. MILLER, RESERVATION "CAPITALISM:" ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 96 (2012) ("Due to fears of sovereign immunity, many businesses shy away from reservation opportunities due to the impression that tribal immunity is a major problem.").

182. *See, e.g.*, Am. Vantage Cos. v. Table Mt. Rancheria, 292 F.3d 1091, 1098 (9th Cir. 2002) (noting that Congress allowed Section 17 corporations to waive sovereign immunity for the purpose of "facilitating business transactions and fostering tribal economic development and independence"); Meyer & Assocs., Inc., v. Coushatta Tribe of La., 2007-2256, p. 8 (La. 9/23/08); 992 So.2d 446 ("The Chairman testified that the waivers found in the various contracts and MOU's were necessary to induce the contracting entities to do business with and make substantial financial commitments to the Tribe.").

183. *Kiowa Tribe of Okla*., 523 U.S. at 758 ("In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of

Tribal sovereign immunity extends to tribal commercial activity within Indian country as well beyond its borders[184] and flows to tribal corporations.[185] Several commentators have accused tribes of renting their sovereignty in exchange for profit.[186] For example, Allergan, a pharmaceutical company, transferred one of its patents to St. Regis Mohawk, hoping tribal sovereign immunity would prevent challenges to its patent.[187] Federal courts ultimately struck down the deal, holding tribal sovereign immunity did not preclude such challenges.[188] However, tribal immunity in the online lending industry is more complicated than the Allergan case.

The St. Regis Mohawk made no contribution to the creation of the drug at issue;[189] contrarily, tribes are directly involved with their online lending enterprises. Tribes establish the legal regimes that make the loans possible,[190] and the enterprise is typically based on tribal lands.[191] Revenue

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tribal immunity, or who have no choice in the matter, as in the case of tort victims."); *see also* Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1655 (2018) (Roberts, C.J., concurring); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 814 (2014) (Thomas, J., dissenting).

184. *Kiowa Tribe of Okla*., 523 U.S. at 754 (acknowledging that tribal immunity has applied to suits "without drawing a distinction based on where the tribal activities occurred"); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

185. Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty., 538 U.S. 701, 705 n.1 ("The United States maintains, and the County does not dispute, that the Corporation is an 'arm' of the Tribe for sovereign immunity purposes.").

186. *See* James Williams, Jr., *Respect Indian Country, Retire 'Rent-a-Tribe*,' NATIVE BUS. (Oct. 21, 2019), https://www.nativebusinessmag.com/respect-indian-country-retire-rent-a-tribe/ ("One of the ugliest assertions is that a Tribe's success occurs by 'renting' itself to non-Tribal members, who abuse it for iniquitous purposes.").

187. Mylan Pharm. Inc., v. Saint Regis Mohawk Tribe, No. IPR2016-01127, 2018 WL 1100950, at *3 (P.T.A.B. Feb. 23, 2018) ("During the royalty term of the License, Allergan will also pay the Tribe a nonrefundable and noncreditable amount of $3.75 million each quarter ($15 million annually)."); *see also* Adam Davidson, *Why is Allergan Partnering With the St. Regis Mohawk Tribe?*, NEW YORKER (Nov. 13, 2017), https://www.newyorker.com/magazine/2017/11/20/why-is-allergan-partnering-with-the-st-regis-mohawk-tribe; Lydia Ramsey Pflanzer, '*That Should Be Illegal:' Lawmakers are Taking Aim at Pharma Giant Allergan Over an Unusual Deal With a Native American Tribe*, BUS. INSIDER (Oct. 10, 2017, 3:19 AM), https://www.businessinsider.com/allergan-mohawk-tribe-patent-deal-2017-10.

188. Saint Regis Mohawk Tribe v. Mylan Pharm. Inc., 896 F.3d 1322, 1326 (Fed. Cir. 2018) (holding "tribal sovereign immunity cannot be asserted in IPRs").

189. Phillips, *supra* note 180, at 705 (noting that Allergan transferred the patent rights after the patent began to face challenges).

190. Crepelle, *Tribal Lending*, *supra* note 158, at 19 ("Lending is analogous to gaming because the lending structures developed by tribal governments are what generate the value to non-Indian borrowers.").

191. *See* Adam Mayle, *Usury on the Reservation: Regulation of Tribal-Affiliated Payday Lenders*, 31 REV. BANKING & FIN. L. 1053, 1057 (2012) ("But as state

generated by tribal lenders fund tribal governments.[192] Even if tribal lenders may share profits with non-Indian partners,[193] tribal involvement means tribes are not merely leasing out their sovereignty. Thus, online lenders may legitimately qualify as "arms of the tribe," entitling them to sovereign immunity.[194]

Courts have conjured various tests to determine whether an entity qualifies as an arm of the tribe, and the differing tests can produce different results.[195] For example, the Colorado Supreme Court asks: "(1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty."[196] The California Supreme Court uses a slightly different test consisting of the following five factors to determine whether an entity is an arm of the tribe: "(1) the entity's method of creation, (2) whether the tribe intended the entity to share in its immunity,

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governments and regulators reign in industry excesses, online payday lenders have sought refuge from oversight by negotiating with Native American tribes to charter their companies on tribal land to operate as 'tribal enterprises' and thereby operate pursuant to tribal — not state — regulation."); *see also* Joe Mont, *Tribal-Land Payday Loans Spark Reservations,* THE STREET (July 6, 2011, 8:00 AM), https://www.thestreet.com/personal-finance/tribal-land-payday-loans-spark-reservations-11174918; *Big Picture Loans is Still Your Favorite Tribal Lender*, CASTLE PAYDAY, BIG PICTURE LOANS, https://www.bigpictureloans.com/castlepaydayredirectlanding (last visited Nov. 6, 2021).

192. Clarkson et al., *supra* note 15, at 7 (noting that online lending has provided desperately needed revenues to impoverished tribes); *see* Nanini, *supra* note 125, at 504; *see also The Truth About Tribal Lending*, NATIVE AM. FIN. SERVS. ASS'N, https://nativefinance.org/truth-tribal-lending/ (last visited Nov. 6, 2021) (discussing how online lending benefits geographically isolated tribes).

193. *See* Solomon v. Am. Web Loan, 375 F. Supp. 3d 638, 654 (E.D. Va. 2019) ("Additionally, Curry testified that before the Tribe acquired MacFarlane Group, he received an estimated total of $110 million in profits, while the Tribe received only $8 million."); Gibbs v. Plain Green, LLC., 331 F. Supp. 3d 518, 523 (E.D. Va. 2018) ("The non-tribal entity retains the majority of the profits and controls the lending entity, from major business decisions to day-to-day operations."); Martin & Schwartz, *Alliance*, *supra* note 178, at 767 (explaining that "under this version of the tribal affiliation model, tribes get the crumbs while the non-tribal outsiders use their tribal sovereignty to make huge profits").

194. *See* Bree R. Black Horse, *The Risks and Benefits of Tribal Payday Lending to Tribal Sovereign Immunity: Tribal Payday Lending Enterprises Are Immune Under A Proposed Universal Arm of the Tribe Test*, 2 AM. INDIAN L.J. 388, 400 (2013) [hereinafter Black Horse, *Arm of the Tribe Test*]; Crepelle, *Tribal Lending*, *supra* note 158, at 24; Brianne M. Glass, *Tribal Lending Under CFPB Enforcement: Tribal Sovereign Immunity and the "True Lender" Distinction*, 23 N.C. BANKING INST. 401, 410 (2019).

195. *See, e.g.*, Black Horse, *Arm of the Tribe Test*, *supra* note 194, at 399–400.

196. Cash Advance & Preferred Cash Loans v. State, 242 P.3d 1099, 1110 (Colo. 2010).

(3) the entity's purpose, (4) the tribe's control over the entity, and (5) the financial relationship between the tribe and the entity."[197] The Fourth and Ninth Circuits have used these five factors;[198] however, the Tenth Circuit has added a sixth factor, "whether the purposes of tribal sovereign immunity are served by granting [the entity] immunity."[199] The Tenth Circuit explicitly notes these factors are not exhaustive.[200]

Although courts consider similar factors to determine sovereign immunity, some of the factors are malleable. For example, the entity's purpose will usually be to make the tribe money; otherwise, the tribe probably would not be involved with the enterprise. The California Supreme Court interprets this factor according to the tribe's stated purpose but also examines whether the entity is primarily benefitting outside investors.[201] Utilizing this lens, the California Supreme Court ruled the Miami Tribe of Oklahoma and Santee Sioux Nation lenders were not entitled to sovereign immunity.[202] However, Colorado courts applied a slightly different test and ruled the same lenders were entitled to sovereign immunity.[203] The ambiguous nature of jurisprudential sovereign immunity inquiries leads to time consuming and costly litigation.[204]

b. Jurisdiction and Forum Selection Clauses

Forum selection clauses are a topic of controversy in tribal lending cases because the United States has a strong national policy that favors enforcing forum selection clauses.[205] Hence, forum selection clauses enjoy a strong

197. People v. Miami Nation Enters., 386 P.3d 357, 365–66 (Cal. 2016).

198. Williams v. Big Picture Loans, LLC, 929 F.3d 170, 177 (4th Cir. 2019) (adopting the five "*Breakthrough* factors" and pointing out that the Ninth Circuit has done the same).

199. Finn v. Great Plains Lending, LLC, 689 F. App'x 608, 610 (10th Cir. 2017).

200. Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1187 n.10 (10th Cir. 2010) ("We have *not* concluded that those factors constitute an exhaustive listing or that they will provide a sufficient foundation in every instance for addressing the tribal-immunity question related to subordinate economic entities.").

201. *Miami Nation Enters*., 386 P.3d at 373 ("By contrast, evidence that the entity engages in activities unrelated to its stated goals or that the entity actually operates to enrich primarily persons outside of the tribe or only a handful of tribal leaders weighs against finding that the entity is an arm of the tribe.").

202. *Id.*

203. *See* State *ex rel*. Suthers v. Cash Advance & Preferred Cash Loans, No. 12CA1406, 2013 WL 6683373, at *1 (Colo. App. Dec. 19, 2013).

204. Martin & Schwartz, *Alliance*, *supra* note 178, at 778 ("This inconsistency and lack of authority has led to expensive, inefficient litigation.").

205. *See* Atl. Marine Constr. Co. v. U. S. Dist. Court W.D. Tex., 541 U.S. 49, 66 (2013) (holding that "the interest of justice," in the vast majority of cases, will require the enforcement of forum selection clauses); *see also* David K. Duffee et al., *U.S.*

presumption of validity[206] and are upheld even if the selected forum is in a foreign country.[207] Forum selection clauses increase certainty, so they theoretically result in reduced costs for products and services.[208] While forum selection clauses are common,[209] they cannot imbue courts with subject matter jurisdiction over an action.[210] Lack of subject matter jurisdiction may prevent a tribal court from being a valid forum even if named.[211]

Tribes once asserted jurisdiction over all persons in their territory.[212] In

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Supreme Court Reaffirms that Forum-Selection Clauses Are Presumptively Enforceable, BUS. L. TODAY, (Jan. 23, 2014) [hereinafter Duffee et al., *Forum-Selection Clauses*], https://www.americanbar.org/groups/business_law/publications/blt/2014/01/keeping_current_duffee/ ("The Court in *Atlantic Marine* reinforced the strong federal policy favoring the enforcement of such clauses, and clarified the mechanism for their enforcement.").

206. *See, e.g.*, Carnival Cruise Lines, Inc., v. Shute, 499 U.S. 585, 589 (1991) (noting that forum-selection clauses "are prima facie valid").

207. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) ("Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.").

208. *See Carnival Cruise Lines, Inc.*, 499 U.S. at 593–94; Stewart Org., Inc., v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring) ("The federal judicial system has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions."); *Bremen*, 407 U.S. at 13 n.15 (1972) ("At the very least, the clause was an effort to eliminate all uncertainty as to the nature, location, and outlook of the forum in which these companies of differing nationalities might find themselves.").

209. Duffee et al., *Forum-Selection Clauses*, *supra* note 205.

210. Brenner v. Manson, 383 U.S. 519, 523 (1966) ("This concert of opinion does not settle the basic question because jurisdiction cannot be conferred by consent of the parties."); Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167 (1939) ("The jurisdiction of the federal courts — their power to adjudicate — is a grant of authority to them by Congress and thus beyond the scope of litigants to confer."); *see also* Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 553, 596 (1993).

211. *See, e.g.*, MacDonald v. CashCall, Inc., No. CV 16-2781, 2017 WL 1536427, at *7 (D.N.J. Apr. 28, 2017), *aff'd*, 883 F.3d 220 (3d Cir. 2018) ("The forum selection clause is unenforceable because the CRST Court does not have subject matter jurisdiction over Plaintiff's claims."); Brown v. W. Sky Fin., LLC, 84 F. Supp. 3d 467, 473 n.11 (D.N.C. 2015) ("Plaintiffs also argue that the forum selection clause would be unreasonable to enforce, but this argument is based again on the lack of tribal court jurisdiction."); Heldt v. Payday Fin., LLC, 12 F. Supp. 3d 1170, 1179 (D.S.D. 2014) ("Thus, the effect of the forum-selection clause turns on whether tribal court jurisdiction exists under federal law . . . .").

212. CANBY, NUTSHELL, *supra* note 79, at 161 ("In colonial days, the Indian territory was entirely the province of tribes, and they had jurisdiction in fact and theory over all persons and subjects present there."); G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty"*, 76 MARQUETTE L. REV. 401, 420 (1993) (noting that tribes could exercise criminal jurisdiction over non-Indians prior to the Supreme Court's decision in *Oliphant*).

fact, the United States acknowledged that tribal regulation of commerce was more important than federal regulation in the early 1800s.[213] Tribes continued to assert jurisdiction over non-Indians well into the mid-1800s.[214] Following the Civil War, tribal jurisdiction began to erode.[215] Congress expanded federal criminal law over reservation crimes involving only Indians in 1885.[216] The rationale for the expansion was that Indians were too incompetent to punish for major crimes.[217] Despite Congress abolishing tribal courts in 1898,[218] the Supreme Court affirmed the Chickasaw Nation's assertion of jurisdiction over non-Indians in 1904.[219] Congress officially authorized tribal courts in 1934.[220]

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213. Matthew L.M. Fletcher & Leah Jurss, *Tribal Jurisdiction — A Historical Bargain*, 76 MD. L. REV. 101, 107 (2017) ("Even Congress, at times, seemed to understand that tribal regulations were of greater import than federal Indian trader statutes, which proved to be an ineffective means to govern Indian trade.").

214. *See* Nat'l Farmers Union Ins. v. Crow Tribe, 471 U.S. 845, 855 (1985) (quoting 7 Op. Atty. Gen 175, 179-81 (1855)) ("By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Chocktaw Nation."); MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 349 (2016); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1086 n.400 (2015); Sarah Deer & Mary Kathryn Nagle, *Return to* Worcester: Dollar General *and the Restoration of Tribal Jurisdiction to Protect Native Women and Children*, 41 HARV. J.L. & GENDER 179, 180 (2018); Paul Spruhan, *"Indians, in a Jurisdictional Sense:" Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*, 1 AM. INDIAN L. J. 79, 79 (2017) (noting that Jacob West, a white man, was sentenced to hang by a Cherokee court, and the federal court refused to grant West habeas corpus in 1844).

215. Crepelle, *Taxes, Theft, & Indian Tribes*, *supra* note 64, at 1003.

216. 18 U.S.C. § 1153.

217. AMY L. CASSELMAN, INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE WOMEN 31 (2016).

218. An Act for the Protection of the People of the Indian Territory, Pub. L. No. 55-517, ch. 517, 30 Stat. 495 (1898). This was named the Curtis Act after Charles Curtis, the author of the act. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2476 (2020) (citing Curtis Act of 1898, §28, 30 Stat. 504–505) ("A year later, Congress abolished tribal courts and transferred all pending criminal cases to U.S. courts of the Indian Territory."); M. Kaye Tatro, *Curtis Act (1898)*, OKLA. HIST. SOC'Y, https://www.okhistory.org/publications/enc/entry.php?entry=CU006 (last visited Nov. 7, 2021).

219. Morris v. Hitchcock, 194 U.S. 384, 393 (1904); *see also* Buster v. Wright, 135 F. 947, 952 (8th Cir. 1905) ("The establishment of town sites and the organization of towns and cities within the limits of this Indian nation present no persuasive reason why any other rule should prevail in the measurement of its power to fix the terms upon which noncitizens may conduct business within its borders.").

220. Indian Reorganization Act of 1934, ch. 576, §1, Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5121 (2018)); Eugene K. Bertman, *Tribal Appellate Courts: A Practical Guide to History and Practice*, 84 OKLA. B.J., 2115, 2116 (2013) ("It was not until 1934, with the passage of the Indian Reorganization Act, that Indian tribes were encouraged by Congress to create or re-

The Supreme Court has recognized tribal courts "as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."[221] Nevertheless, the Supreme Court has greatly curtailed tribal jurisdiction over non-Indians. In 1978, the Supreme Court held that tribal courts had been implicitly divested of criminal jurisdiction over non-Indians.[222] Although the opinion is overtly wrong on legal and historical grounds,[223] this reasoning has been used to limit tribal civil jurisdiction over non-Indians.[224] Tribes now possess civil jurisdiction over non-Indians in only two circumstances: one is when non-Indians engage in a consensual relationship with the tribe or its members, and the other is when non-Indians are engaged in conduct that imperils the tribe's economic or general welfare.[225] Both exceptions have been construed unreasonably narrowly;[226] notwithstanding, those contesting tribal court jurisdiction must first exhaust their tribal remedies.[227]

In online lending cases, most federal courts have rejected tribal court

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establish their own courts and judicial systems."); Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752, 1765–66 (2016) (noting the IRA led to the replacement of CFR courts and the establishment of tribal courts).

221. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978).

222. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 204 (1978) ("While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.").

223. *See* Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); Crepelle, *Lies, Damn Lies*, *supra* note 32, at 556–67; Adam Crepelle, *Tribal Courts, The Violence Against Women Act, and Supplemental Jurisdiction: Expanding Tribal Court Jurisdiction to Improve Public Safety in Indian Country*, 81 MONT. L. REV. 59, 67 (2020) ("The Court's Oliphant opinion is loaded with errors and misleading statements.").

224. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 358–60 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 445–46 (1997); Montana v. United States, 450 U.S. 544, 565 (1981).

225. *Montana*, 450 U.S. at 565–66; Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 329 (2008) (quoting Montana v. United States, 450 U.S. 544, 565 (1981)) ("We have recognized two exceptions to this principle, circumstances in which tribes may exercise 'civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.'").

226. Crepelle, *How Federal Indian Law Prevents*, *supra* note 73, at 709 ("This unnaturally narrow construction of consensual relations transforms what should be a straightforward basis for tribal court jurisdiction into a roll of the dice.").

227. *See* Iowa Mutual Ins. v. LaPlante, 480 U.S. 9, 16 (1987); Nat'l Farmers Union Ins. v. Crow Tribe, 471 U.S. 845, 857 (1985).

jurisdiction over loans with non-Indians.[228] The economic and general welfare exception has been dismissed outright by courts.[229] Under the consensual relations hook, federal courts have held that tribal courts lack jurisdiction over loans because the non-Indian borrower never physically set foot on tribal land.[230] Also, some courts have noted that entities purporting to be tribal are not; thus, the tribal court lacked jurisdiction over the non-Indian borrower and non-Indian lender.[231] These courts have reasoned that consent cannot grant a tribal court subject matter jurisdiction over non-Indians.[232]

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228. *See* Crepelle, *Tribal Lending*, *supra* note 158, at 31 ("In lending cases, federal courts have generally taken a narrow view if tribal jurisdiction.").

229. *See, e.g.*, Jackson v. Payday Fin., LLC, 764 F.3d 765, 781–82 (7th Cir. 2014) (noting that *Montana* only permits tribal jurisdiction over non-Indian conduct that affects tribal sovereignty); Heldt v. Payday Fin., LLC, 12 F. Supp. 3d 1170, 1182 (D.S.D. 2014) ("Applying the analysis under *Montana* to the circumstances here, this Court deems the second *Montana* exception — based on the inherent power of a tribe to exercise civil authority over the conduct of non-Indians on fee lands within the reservation 'when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe' — not to support tribal jurisdiction here.").

230. *See, e.g.*, MacDonald v. CashCall, Inc, No. CV 16-2781, 2017 WL 1536427, at *7 (D.N.J. Apr. 28, 2017), *aff'd*, 883 F.3d 220 (3d Cir. 2018) ("The Court agrees with the reasoning in these opinions, and likewise holds that the forum selection clause is unenforceable due to the Tribe's conspicuous lack of connections to the underlying dispute."); Pearson v. United Debt Holdings, LLC, 123 F. Supp. 3d 1070, 1075 (N.D. Ill. 2015) ("No party argues that Pearson ever entered on Indian land or that the dispute presents any serious issues of self-governance of tribal land."); CashCall, Inc. v. Mass. Div. of Banks, 33 Mass. L. Rep. 5, 9 (2015) (quoting Nevada v. Hicks, 533 U.S. 353, 367 (2001)) ("These loans are not related to 'on-reservation activity' and are not necessary to protect tribal self-government or internal relations."); *Jackson*, 764 F.3d at 782 ("Here, the Plaintiffs have not engaged in any activities inside the reservation. They did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents. They applied for loans in Illinois by accessing a website. They made payments on the loans and paid the financing charges from Illinois. 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.").

231. Hayes v. Delbert Servs. Corp., No. 3:14-CV-258, 2015 WL 269483, at *8–9 (E.D. Va. Jan. 21, 2015) ("The conduct at issue in this action did not involve an Indian-owned entity, did not occur on the CRST reservation, and did not threaten the integrity of the tribe."); FTC. v. Payday Fin., LLC, 935 F. Supp. 2d 926, 936 (D.S.D. 2013) ("The Lending Companies here are all limited liability companies organized under the laws of the state of South Dakota. Although each company is licensed with the Cheyenne River Sioux Tribe to do business and is owned by tribal member Martin Webb, the fact remains that these are South Dakota limited liability companies.").

232. *MacDonald*, 2017 WL 1536427, at *7 (holding consent to tribal jurisdiction in a forum selection clause did not confer jurisdiction upon the tribal court); Smith v. W. Sky Fin., LLC, 168 F. Supp. 3d 778, 782 (E.D. Pa. 2016) (citation omitted) ("While consent may be sufficient to establish personal jurisdiction over a party to a contract, 'a

This position is predicated upon an interpretation of the Supreme Court's 2008 opinion in *Plains Commerce Bank v. Long Family Land & Cattle Co*.[233] The Seventh Circuit latched onto *Plains Commerce*'s statement that even if a party consents to tribal court jurisdiction, "*the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations*."[234] Other federal courts have cited this passage to prevent consent from serving as a basis for tribal court jurisdiction.[235] This is a questionable reading of *Plains Commerce*.

Plains Commerce concerned a tribal court's jurisdiction over a discrimination claim stemming from a loan.[236] The majority held the tribal court did not have jurisdiction over this claim;[237] however, the majority did not address whether the tribal court had jurisdiction over Plains Commerce for the related breach of contract and bad faith claims.[238] In fact, Plains Commerce did not contest the tribal court's jurisdiction over these two claims,[239] possibly because under Supreme Court precedent, the claims were obviously within the tribal court's jurisdiction. Ergo, some courts have acknowledged that *consent is a basis for tribal court jurisdiction* and have held tribal court jurisdiction over online transactions is possible.[240]

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tribal court's authority to adjudicate claims involving nonmembers concerns its subject matter jurisdiction, not personal jurisdiction.'"); *Jackson*, 764 F.3d at 783 ("Therefore, a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court.").

233. 554 U.S. 316 (2008).

234. *Jackson*, 764 F.3d at 783 (quoting Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008)).

235. *Smith*, 168 F. Supp. 3d at 782 (quoting Jackson v. Payday Fin., 764 F.3d 765, 783 (7th Cir. 2014)) ("Therefore, a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court."); *MacDonald*, 2017 WL 1536427, at *7 (quoting Jackson v. Payday Fin., 764 F.3d 765, 782 n.42 (7th Cir. 2014)) ("A tribe's ability to exercise jurisdiction is 'tethered to the *nonmember's* actions, specifically the *nonmember's actions on the tribal land.*'").

236. *Plains Com. Bank*, 554 U.S. at 320.

237. *Id.* at 340 ("The Longs' discrimination claim, in short, is an attempt to regulate the terms on which the Bank may sell the land it owns. Such regulation is outside the scope of a tribe's sovereign authority.").

238. *Id.* at 339 (refusing to address the breach of contract and bad faith claims by noting "only the discrimination claim is before us and that claim is tied specifically to the sale of the fee land").

239. *See id.* at 348 (Ginsburg, J., dissenting) ("Today's decision, furthermore, purports to leave the Longs' breach-of-contract and bad-faith claims untouched.").

240. *See* Brown v. W. Sky Fin., LLC, 84 F. Supp. 3d 467, 479 (M.D.N.C. 2015) ("Using the *Heldt* analysis, however, Plaintiffs' logic can be used to assert a colorable claim of tribal jurisdiction, because some of Defendants' actions involved alleged tribal entities and/or tribal members."); Heldt v. Payday Fin., LLC, 12 F. Supp. 3d 1170,

These courts reasoned one need not physically enter a reservation in order to be subject to tribal jurisdiction because contemporary commerce often occurs virtually and at a distance.[241]

Nevertheless, subject matter jurisdiction is irrelevant if the forum is unreasonable, and this has been an issue in some tribal lending cases.[242] For example, courts have shot down forum selection clauses that place the non-Indian borrower's fate in the hands of a tribal elder or members of the tribe's council.[243] Courts have also invalidated forum selection clauses because the named forum does not have laws relating to consumer disputes.[244] Thus, tribal jurisdiction was not so much the issue as trouble with the particular tribal court at issue.

IV. RECOMMENDATIONS

The federal rules and regulations governing Indian commerce are in drastic need of modernization.[245] Indeed, the current rules governing

1186 (D.S.D. 2014) ("Here, the Court's skepticism about tribal court jurisdiction is not sufficient to establish that invocation of tribal court jurisdiction is 'patently violative of express jurisdictional prohibitions.'"); FTC v. Payday Fin., LLC, 935 F. Supp. 2d 926, 943 (D.S.D. 2013) (noting consent is a basis for tribal court jurisdiction; nevertheless, refusing to uphold consent based jurisdiction because of the contract's lack clarity regarding tribal jurisdiction).

241. *Brown*, 84 F. Supp. 3d at 479; *Heldt*, 12 F. Supp. 3d at 1186 ("The borrower certainly does not enter onto a reservation, but in today's modern world of business transactions through internet or telephone, requiring physical entry on the reservation, particularly in a case of a business transaction with a consent to jurisdiction clause, seems to be requiring too much."); *FTC*, 935 F. Supp. 2d at 939–40 (quoting Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 329–30 (2008)) (citing Att'y's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa, 609 F.3d at 927, 937 (8th Cir. 2010)) ("But, in cases involving a contract formed on the reservation in which the parties agree to tribal jurisdiction, treating the nonmember's physical presence as determinative ignores the realities of our modern world that a defendant, through the internet or phone, can conduct business on the reservation and can affect the Tribe and tribal members without physically entering the reservation. The proper focus is on the nonmember Borrower's '*activities*' or '*conduct*,' not solely the nonmember Borrower's *physical location*.").

242. *E.g.*, Jackson v. Payday Fin., LLC, 764 F.3d 765, 776 (7th Cir. 2014) ("Applying this standard, we believe enforcement of the forum selection clause contained in the loan agreements is unreasonable.").

243. *E.g.*, MacDonald v. CashCall, Inc., 883 F.3d 220, 229 (3d Cir. 2018) ("To construe the Choice of Arbitrator provision to allow arbitration by someone other than a CRST representative would be irreconcilable with the forum selection clause's requirement that a CRST representative conduct the arbitration."); *see also Jackson*, 764 F.3d at 776.

244. *E.g.*, *MacDonald*, 883 F.3d at 228 ("Here, the Loan Agreement repeatedly references CRST law, but the parties have not provided the Court with any such law."); *Jackson*, 764 F.3d at 776 (stating the Tribe did not have consumer dispute rules).

245. *See* NAT'L CONG. OF AM. INDIANS, CALLING UPON CONGRESS TO SUPPORT THE

Indian trade have their genesis in the 1790 Indian Trade and Intercourse Act.[246] These laws were enacted because Indians were deemed too nitwitted to engage in business with white people.[247] Although the Indian Trader laws have been tweaked over the years, the last revision occurred in 1984.[248] The Department of Interior has noted the current Indian trader regulations are not in accord with contemporary federal policies on tribal self-determination or present day tribal economic needs.[249] Furthermore, the Indian trader laws are overtly racist in their classifications of "an Indian of the full blood" and "white person"[250] and are likely unconstitutional.[251]

Congress needs to revamp the rules governing Indian commerce. While

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MODERNIZATION OF FEDERAL INDIAN TRADERS LICENSE STATUTE AND REGULATIONS IN KEEPING WITH THE INDIAN SELF-DETERMINATION POLICY, RESOLUTION #PDX-20-013 2 (Nov. 13, 2020), https://www.ncai.org/attachments/Resolution_CgXJIfhPqDSujrbBxPZODRRBfrnnakYmryOlVkxMwmgIRyRwvoA_PDX-20-013%20SIGNED.pdf (listing resolutions in which Indian Country has asked the Executive Branch to modernize Indian Trader regulations); Letter from W. Ron Allen, CEO/Chairman, Jamestown S'Klallam Tribe, to Elizabeth K. Appel, Dir., Off. of Reg. Aff. & Collaborative Action, Indian Affairs, U.S. Dep't of the Interior (Apr. 10, 2017), https://www.tribalselfgov.org/wp-content/uploads/2017/04/SGAC-Comments-on-Trader-Regulations-Regs-4.10.2017-FINAL.pdf ("As a whole, these regulatory provisions are outdated and do not support modern Tribal economies, nor are they written in such a way that DOI could easily implement them."); *NAFSA Submits Comments on Indian Trader Regulations*, NATIVE AM. FIN. SERVS. ASS'N (Apr. 10, 2017), https://nativefinance.org/news/nafsa-submits-comments-on-indian-trader-regulations/ (stating that it is "critical that federal laws keep pace with the rapidly digitizing word and the growing ability of tribes to conduct business from tribal lands").

246. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. § 177).

247. Cent. Mach. Co. v. Ariz. Tax Comm'n, 448 U.S. 160, 163 (1980); Ewert v. Bluejacket, 259 U.S. 129, 136 (1922) ("The purpose of the section clearly is to protect the inexperienced, dependent and improvident Indians from the avarice and cunning of unscrupulous men in official position and at the same time to prevent officials from being tempted, as they otherwise might be, to speculate on that inexperience or upon the necessities and weaknesses of these '[W]ards of the [N]ation.'"); United States v. Hutto, 256 U.S. 524, 528 (1921) ("The purpose was to protect the Indians from their own improvidence; relieve them from temptations due to possible cupidity on the part of persons coming into contact with them as representatives of the United States; and thus to maintain the honor and credit of the United States, rather than to subserve its pecuniary interest."); Ashcroft v. U.S. Dep't of Interior, 679 F.2d 196, 198 (9th Cir. 1982).

248. Traders with Indians, 81 Fed. Reg. 89015, 89016 (Dec. 9, 2016) ("The current Indian Trader regulations were promulgated in 1957, revised in 1965, and modified in 1984 in a piecemeal fashion.").

249. *Id.* (noting that "the current regulations largely reflect policies that ignore Tribal self-determination and the growth of Tribal economies").

250. 25 U.S.C. § 264.

251. Crepelle, *White Tape*, *supra* note 73, at 593–96.

Congress's power over Indian affairs is often dubious,[252] Congress has clear constitutional authority to regulate commerce with Indian tribes.[253] In the past decade, Congress has passed several laws strengthening tribal sovereignty.[254] Congress has a policy of fostering tribal economic development[255] and enacted legislation specifically designed to foster tribal economic activity with entities located outside of Indian country.[256] E-commerce gives tribes access to the world.[257] Hence, Congress should act to affirm tribal sovereignty in the digital realm.

The remainder of this Section sets forth suggestions on how Congress may address various aspects of tribal e-commerce. This Section does not address gaming because tribes are already included in online gaming discussions and legislation.[258]

A. Tribal Jurisdiction

Congress needs to clarify the boundaries of tribal court jurisdiction in e-commerce. While jurisdictional issues have plagued Indian country for decades, the internet has added a new crease to an already wrinkled canvas. Subject matter jurisdiction is a court's ability to issue binding judgments relating to particular subjects,[259] and tribal courts now presumptively lack this authority over non-Indians.[260] However, personal jurisdiction, a court's ability to issue binding judgments against a particular person or

252. FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 46 (2009) ("Plenary authority in Indian affairs is not rooted in the text or history of the Constitution but in the text and history of colonialism — a colonialism in which a 'conquered people' only has authority at the 'sufferance' of the 'conqueror.'").

253. U.S. CONST. art. I, § 8, cl. 3.

254. *E.g.*, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54; Nat'l Def. Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 2870, 133 Stat. 1907 (2019) (Little Shell Tribe of Chippewa Indians of Montana); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Pub. L. No. 115-121, 132 Stat. 40; HEARTH Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150.

255. 25 U.S.C. §§ 3601, 1451, 2702(1), 4351(3).

256. *Id.* § 4301(a)(9), (b)(5).

257. Clarkson et. al., *supra* note 15, at 7 ("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.").

258. *E.g.*, Removing Federal Barriers to Offering of Mobile Sports Wagers on Indian Lands Act, H.R. 5502, 116th Cong. (2019).

259. *Subject Matter Jurisdiction*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/subject_matter_jurisdiction (last visited Nov. 7, 2021).

260. Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008).

property,[261] has not been a major issue in tribal courts to date as every tribal jurisdiction case to reach the Supreme Court arose from conduct occurring within the borders of a reservation.[262] Given the rapid growth of e-commerce, personal jurisdiction will inevitably become an issue in Indian country too.

Personal jurisdiction used to be a simple matter of territoriality; that is, states could only assert jurisdiction over persons and property physically within their borders.[263] Geographical personal jurisdiction worked well in the days of the horse and buggy, but the concept has become complicated due to technology nationalizing and internationalizing the economy.[264] For example, the Court's recent precedent on the issue resulted in a plurality opinion with the plurality holding that New Jersey courts could not assert personal jurisdiction over a British company that targeted the entire United States but did not specifically target New Jersey.[265] Accordingly, personal jurisdiction requires "purposeful[ly] availing" oneself to the forum state[266]

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261. Zainab R. Qureshi, *If the Shoe Fits: Applying Personal Jurisdiction's Stream of Commerce Analysis to E-Commerce — A Value Test*, 21 N.Y.U.J. LEGIS. & PUB. POL'Y 727, 730 (2019) (defining personal jurisdiction as "the power of a court to enter a binding judgment over the parties in a case").

262. *E.g.*, Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 2159 (2016); Atkinson Trading Co., v. Shirley, 532 U.S. 645 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997).

263. Hess v. Pawloski, 274 U.S. 352, 355 (1927) ("The process of a court of one State cannot run into another and summon a party there domiciled to respond to proceedings against him."); Pennoyer v. Neff, 95 U.S. 714, 722 (1878) ("[N]o State can exercise direct jurisdiction and authority over persons or property without its territory."); Curry v. Revolution Labs., LLC, 949 F.3d 385, 393 (7th Cir. 2020) ("Notions of personal jurisdiction traditionally have been based on the defendant's territorial presence within the adjudicating forum.").

264. *See* Burger King v. Rudzewicz, 471 U.S. 462, 476 (1985) ("[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted."); Hanson v. Denckla, 357 U.S. 235, 250–51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved . . . ."); McGee v. Int'l Life Ins., 355 U.S. 220, 222–23 (1957) ("Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.").

265. J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873 (2011).

266. *Id.* at 877 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) ("As a

although some Justices believe placing a product in the "stream of commerce" suffices.[267]

In e-commerce, determining whether a court has personal jurisdiction over an out-of-state defendant is often one of the most difficult issues in the case.[268] The Supreme Court has not addressed online personal jurisdiction yet,[269] so various tests have emerged in lower courts.[270] Some courts have applied a "sliding scale" approach, meaning personal jurisdiction is more likely where the defendant repeatedly conducts business in the forum state via the internet and less likely when the defendant conducts no business via its website.[271] In 2020, the Seventh Circuit declared online personal jurisdiction requires no modification of long established personal jurisdiction principles.[272] It concluded that Illinois courts could assert personal jurisdiction over an out-of-state online retailer that solicited sales over the internet then sent products to Illinois addresses.[273] However, online personal jurisdiction riddles can usually be solved by including a

general rule, exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'").

267. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 306 (1980) (Brennan, J., dissenting) ("The stream of commerce is just as natural a force as a stream of water, and it was equally predictable that the cars petitioners released would reach distant States.").

268. *Jurisdiction Issues Generally*, 4F N.Y. PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 139:3 (5th ed. 2021) ("As a result, whether a court has personal jurisdiction over physically distant website operators and other parties engaged in online commerce is often a threshold issue in e-commerce litigation."); *Comparisons of Approach to Personal Jurisdiction — GENERALLY*, DOCUMENTING E-COMMERCE TRANSACTIONS § 10:8 ("Personal jurisdiction is another complicated issue on the international scene, and its shadow looms large over the realm of e-commerce.").

269. Qureshi, *supra* note 261, at 728 ("Exacerbating the problems created by this volatility, the Supreme Court has yet to define the parameters of personal jurisdiction vis-à-vis Internet activity.").

270. *Id.* at 729.

271. Revell v. Lidov, 317 F.3d 467, 470 (5th Cir. 2002) (noting that this circuit implements the *Zippo* approach, wherein a "passive website, one that merely allows the owner to post information on the internet is at one end," and on the other end of the sliding scale are "sites whose owners engage in repeated online contacts with forum residents over the internet"); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) ("This sliding scale is consistent with well developed personal jurisdiction principles.").

272. Curry v. Revolution Labs., LLC, 949 F.3d 385, 397–98 (7th Cir. 2020) ("We now apply the principles articulated by the Supreme Court to the case before us. This task does not require that we break new ground.").

273. *Id.* at 399 (reasoning that the seller's establishment of "commercial contacts with Illinois fairly can be described as purposeful").

forum selection clause in the contract.[274] The forum selection clause probably does not even need to be in the purchase agreement provided the website user checks a box submitting to the forum.[275]

Subject matter jurisdiction in tribal courts works a lot like personal jurisdiction in state and federal courts.[276] Indeed, fairness underpins the limits of tribal court jurisdiction over non-Indians as the Supreme Court believes it would be unfair for a non-Indian to be tried in a tribal court.[277] While there a few examples of tribal courts acting improperly[278] — which unfortunately happens in other U.S. court systems too[279] — the unfairness

274. Yelp Inc. v. Catron, 70 F. Supp. 3d 1082, 1092 (N.D. Cal. 2014); Automattic Inc. v. Steiner, 82 F. Supp. 3d 1011, 1022 (N.D. Cal. 2014); Nat'l Union Fire Ins. v. Williams, 637 N.Y.S.2d 36, 38–39 (App. Div. 1996); *see also* Sherry H. Flax & Sarah F. Lacey, *Access It, and You're Stuck with It: Court Broadly Enforces Forum Selection Clause in Online Terms of Use*, MD. B.J., May/June 2010, at 40, 45 ("These cases illustrate an unmistakable trend toward increasing judicial enforcement of forum selection clauses in online TOU agreements according to traditional contract principles and concepts of reasonableness.").

275. Ekaterina Schoenefeld, *Internet Commerce in Foreign Countries*, 28 GPSOLO, May/June 2011, at 22, 24 (2011) ("Another, and now the most common, way of selling over the Internet is by using a standardized agreement to which a customer must consent in order to complete a transaction.").

276. Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1138 (9th Cir. 2006) ("The Court's 'consensual relationship' analysis under *Montana* resembles the Court's Due Process Clause analysis for purposes of personal jurisdiction."); *see also* Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CAL. L. REV. 1499, 1549 (2013); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction Over Nonmenbers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1229 (2010).

277. *See* Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008) ("[T]hose [tribal] laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions."); Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997) (describing a tribal court as an unfamiliar court"); Jesse Sixkiller, *Procedural Fairness: Ensuring Tribal Civil Jurisdiction After Plains Commerce Bank*, 26 ARIZ. J. INT'L & COMP. L. 779, 796 (2009) ("Essentially, *Oliphant* was beginning to rear its horns within the civil context. The underlying reason for change seemed to be couched in an idea that tribal adjudicatory jurisdiction would be unfair to nonmembers.").

278. *See, e.g.*, Scott Keyes, *Top GOP Senator: Native American Juries Are Incapable of Trying White People Fairly*, THINKPROGRESS (Feb. 21, 2013, 6:30 PM), https://archive.thinkprogress.org/top-gop-senator-native-american-juries-are-incapable-of-trying-white-people-fairly-c399c20454cd/.

279. *E.g.*, Eyder Peralta, *Pa. Judge Sentenced to 28 Years in Massive Juvenile Justice Bribery Scandal*, NPR (Aug. 11, 2011, 11:29 AM), https://www.npr.org/sections/thetwo-way/2011/08/11/139536686/pa-judge-sentenced-to-28-years-in-massive-juvenile-justice-bribery-scandal; Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remined on the Bench*, REUTERS INVESTIGATES (June 30, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-judges-misconduct/; Press Release, U.S. Dep't of Just., Texas Judge Convicted of Bribery and Obstruction (July 11, 2019), https://www.justice.gov/opa/pr/texas-judge-convicted-bribery-and-obstruction.

argument contains a not so subtle tint of racism.[280] For example, Senator Chuck Grassley declared, "On an Indian reservation, it's going to be made up of Indians, right? So the non-Indian doesn't get a fair trial."[281] However, state and federal courts commonly reject Indian defendants' pleas for a jury of their peers.[282] The racism argument is so pervasive that Dollar General made no effort to conceal its belief that tribal courts cannot treat non-Indians fairly in its 2016 brief to the United States Supreme Court;[283] in fact, Dollar General quoted the following rabidly racist passage from the 1891 case of *In re Mayfield*[284] in its Supreme Court brief: "[The] policy of [C]ongress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact . . . ." [285] Professor Judith Royster answered this argument by stating, "To the extent that distrust of tribal authority over non-Indians is rooted in ethnocentrism, the country simply ought to get over it."[286]

Nearly fifty years ago, the Supreme Court admitted the Indian Civil Rights Act — which provides protections analogous to those in the Bill of Rights[287] — eliminates fears of non-Indian rights being trampled in tribal court.[288] The overwhelming majority of evidence shows tribal courts treat non-Indians fairly.[289] The best example of this is tribal courts' prosecution

280. Crepelle, *Lies, Damn Lies*, *supra* note 32, at Part VI.

281. Keyes, *supra* note 278.

282. Cynthia Castillo, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 312 (2014); Thomas F. Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians be Subject to Criminal Authority Under VAWA?*, 13 FEDERALIST SOC'Y 40, 42 (2012) (admitting "the irony that Indians themselves hauled into federal court often fail to have this right respected"); Kevin Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 761 (2006).

283. Brief for the Petitioners, Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (No. 13-1496).

284. 141 U.S. 107 (1891).

285. Brief for the Petitioners, *supra* note 283, at 35.

286. Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 73 (1995).

287. Adam Crepelle, *Shooting Down Oliphant: Self-Defense As An Answer to Crime In Indian Country*, 22 LEWIS & CLARK L. REV. 1284, 1312 (2018).

288. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) ("We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to *anyone* tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared.").

289. *See, e.g.*, *Tribal Courts and the Administration of Justice in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 32 (2008) (statement of Hon. Theresa M. Pouley, Judge, Tulalip Tribal Court, President, Nw. Tribal Court

of non-Indians under the Violence Against Women Act of 2013.[290] Over 100 non-Indians have been arrested by tribal police for abusing their Indian partner or violating a protective order.[291] No non-Indian has alleged that the tribe has treated him inequitably.[292] The Supreme Court even acknowledged the legitimacy of tribal courts in 2016 by holding that tribal court convictions count as valid predicate offenses in state and federal courts.[293] Due to the proven effectiveness of tribal courts, congressional efforts are underway to expand their jurisdiction over non-Indians for sex trafficking, stalking, and other serious crimes.[294]

Congress should enact legislation affirming tribal court jurisdiction over non-Indians who engage in e-commerce with businesses located in Indian country. Failure to recognize tribal jurisdiction over non-Indians in e-commerce is the equivalent of stating tribal governments cannot function in the modern world.[295] The internet enables tribes to overcome their remote locations and access global markets.[296] Individuals who purchase items online routinely consent to jurisdiction of states and foreign countries the individual has never physically entered.[297] Accordingly, mandating

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Judges Association); NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 40 (2018) [hereinafter VAWA SDVCJ FIVE-YEAR REPORT], http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf; Nell J. Newton, *Tribal Court Praxis: One Year in the Life of Twenty Tribal Courts*, 22 AM. INDIAN L. REV. 285, 352 (1998).

290. 25 U.S.C. § 1304.

291. VAWA SDVCJ FIVE-YEAR REPORT, *supra* note 289, at 10.

292. Angela Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1616–17 (2016); VAWA SDVCJ FIVE-YEAR REPORT, *supra* note 289, at 19.

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

294. Violence Against Women Act Reauthorization Act of 2021, H.R. 1620, 117th Cong. (2021).

295. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093 (2018) (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992)) ("'[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted . . . [with no] need for physical presence within a State in which business is conducted.'"); Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 17 (2015) (Kennedy, J., concurring) ("In *Quill*, the Court should have taken the opportunity to reevaluate *Bellas Hess* not only in light of *Complete Auto* but also in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy.").

296. *See Wayfair, Inc.*, 138 S. Ct. at 2095 ("A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores."); *Brohl*, 575 U.S. at 18 (Kennedy, J., concurring) ("Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.").

297. *See* Schoenefeld, *supra* note 275, at 25 ("Any business selling goods or providing services over the Internet to customers located in another state or a foreign

physical presence for tribal jurisdiction while excluding every other jurisdiction on the planet from this requirement does nothing but exhibit a grotesque hostility toward tribes.[298] After all, tribes can put non-Indians *who have not expressly consented to tribal jurisdiction* in jail for nine years.[299] Surely, tribes should be able to adjudicate consumer disputes with individuals who expressly consent to tribal jurisdiction.[300]

Any doubts about tribes' ability to provide due process in consumer disputes can be addressed by providing baseline standards in the legislation.[301] To be sure, congressionally-imposed standards can degrade tribal sovereignty,[302] but safeguards in this situation actually benefit tribal economies.[303] Tribal compliance with congressional standards is a strong signal to consumers and investors that tribal courts are legitimate.[304]

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country will likely find itself one day subject to the jurisdiction of that state or country as a result of its activities there.").

298. *Compare* Jackson v. Payday Fin., LLC, 764 F.3d 765, 782 (7th Cir. 2014) ("Here, the Plaintiffs have not engaged in *any* activities inside the reservation. They did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents. They applied for loans in Illinois by accessing a website. They made payments on the loans and paid the financing charges from Illinois. 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."), *with* Heldt v. Payday Fin., LLC, 12 F. Supp. 3d 1170, 1186 (D.S.D. 2014) ("The borrower certainly does not enter onto a reservation, but in today's modern world of business transactions through internet or telephone, requiring physical entry on the reservation particularly in a case of a business transaction with a consent to jurisdiction clause, seems to be requiring too much.").

299. 25 U.S.C. § 1302(a)(7)(D); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54; Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261.

300. Crepelle, *Decolonizing Reservation Economies*, *supra* note 25, at 460 ("Compliance with federal guidelines that enables tribes to sentence non-Indians to nine years in jail is a strong signal to private investors that a tribal court will fairly and effectively adjudicate disputes."); Crepelle, *Tribal Lending*, *supra* note 158, at 38–40.

301. Crepelle, *How Federal Indian Law Prevents*, *supra* note 73, at Part V.C.

302. *See* Jessica Allison, *Beyond VAWA: Protecting Native Women From Sexual Violence Within Existing Tribal Jurisdictional Structures*, 90 U. COLO. L. REV. 225, 246 (2019); Mary K. Mullen, *The Violence Against Women Act: A Double-Edged Sword for Native Americans, Their Rights, and Their Hopes of Regaining Cultural Independence*, 61 ST. LOUIS U. L.J. 811, 812 (2017); Catherine M. Redlingshafer, *An Avoidable Conundrum: How American Indian Legislation Unnecessarily Forces Tribal Governments to Choose Between Cultural Preservation and Women's Vindication*, 93 NOTRE DAME L. REV. 393, 410 (2017).

303. Crepelle, *How Federal Indian Law Prevents*, *supra* note 73, at Part V.

304. *Id.* at Part V.C; Crepelle, *Decolonizing Reservation Economies*, *supra* note 25, at 460 (noting that complying with federal guidelines signals the ability of a tribal court to "fairly and effectively adjudicate disputes").

Moreover, the requirements should be minimal. One requirement should be tribes promulgate and publish laws relating to e-commerce. Another is the individual presiding over the dispute should meet some baseline qualifications for competency and objectivity, such as possessing a bachelor's degree and not being a member of the tribe's governing body. Tribes should also record the proceeding, as this serves as powerful evidence of whether the non-Indian was treated fairly. There is precedent for these criteria in the Violence Against Women Reauthorization Act[305] and the Tribal Law and Order Act.[306] Additionally, concerns about tribal courts' fairness in e-commerce disputes should be minimal because there is a digital record of the transaction.[307] And if blockchain is involved, forging the record is immensely difficult.[308] These criteria combined with a clickwrap agreement should make consent an easy solution to facilitating tribal jurisdiction in e-commerce.

B. Arbitration Agreements

Congress should enact legislation declaring that arbitration agreements in tribal e-commerce contracts must be respected. The Federal Arbitration Act of 1925[309] established a policy strongly supporting arbitration,[310] one that should include tribal commerce. After all, arbitration agreements are commonplace in the United States. Professor Imre Szalai estimated that there were over 800 million consumer arbitration agreements in force in 2018 and that over sixty percent of retail e-commerce transactions were subject to arbitration agreements.[311] Although consumer rights advocates have raised concerns about arbitration,[312] the Supreme Court has upheld

305. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

306. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261.

307. Crepelle, *Tribal Lending*, *supra* note 158, at 38–39 (noting online loan disputes should be easy to resolve because there is a digital record of the loan's terms and whether it was paid).

308. *How does blockchain work? Everything there is to know*, COINTELEGRAPH, https://perma.cc/RN2X-9BE3 (last visited Feb. 3, 2021) ("A Blockchain is essentially a diary that is almost impossible to forge.").

309. Act of Feb. 12, 1925, Pub. L. No. 68-401, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. § 2).

310. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) ("We have described this provision as reflecting . . . a 'liberal federal policy favoring arbitration . . . .'").

311. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019), https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf.

312. *See* Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPS. (Jan. 30, 2020), https://www.consumerreports.org/mandatory-binding-arb

arbitration agreements in consumer disputes generally[313] and specifically in lending cases.[314] In fact, the Supreme Court has affirmed arbitration agreements naming foreign arbitration forums.[315] Given the prevalence of arbitration and the Supreme Court's consistent enforcement of arbitration agreements, the use of such arrangements in tribal e-commerce should be a noncontroversial matter.

C. Sovereign Immunity

Determining which entities should qualify as arms of the tribe and receive the benefits of sovereign immunity has vexed courts for years; therefore, legislation should clarify the standard for which entities qualify as an arm of the tribe. Congress enacted criteria for various business qualifications, including the 8(a) program,[316] which has specific requirements for tribes.[317] Moreover, Congress has authorized tribal

itration/forced-arbitration-clause-for-concern/ ("[I]ndividuals are far less likely to prevail when their grievances are heard in arbitration vs. court, research shows.").

313. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013) ("The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938 . . . ."). *See generally Concepcion*, 563 U.S. 333 (upholding the arbitration clause and citing to the FAA's primary purpose of enforcing such agreements).

314. *E.g.*, CompuCredit Corp. v. Greenwood, 565 U.S. 95, 104 (2012) ("Because the [Credit Repair Organizations Act] is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms."); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006) ("Applying them to this case, we conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court."); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) ("It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum.").

315. *E.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639 (1985) ("[I]t will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration."); Scherk v. Albert-Culver Co., 417 U.S. 506, 516–17 (1974) ("A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.").

316. *8(a) Business Development Program*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program#section-header-2 (last visited Nov. 9, 2021) (stating that the program will "help provide a level playing field for small businesses owned by socially and economically disadvantaged people or entities").

317. 13 C.F.R. § 124.109(b)–(c) (2020).

Section 17 corporations,[318] and Section 17 corporations are entitled to sovereign immunity.[319] These criteria can be blended with the various tests hobbled together by courts to craft a definitive arm of the tribe standard.[320]

The first and most easily identifiable ingredient in determining whether an entity qualifies as an arm of the tribe should be the entity's method of incorporation. An entity should either incorporate under tribal law or federal law if it wishes to share in the tribe's sovereign immunity.[321] Incorporating under tribal law or as a federally chartered Section 17 corporation evinces an entity's desire to avail itself of the benefits of the tribe's sovereign status.[322] This single factor is sufficient to sink some entities' sovereign immunity claims.[323]

In order for an entity to qualify as an arm of the tribe, the tribe must be the majority owner and control the corporation. Majority tribal ownership accords with other business certification standards, including those found in the tribal 8(a) program.[324] While a higher percentage may make the presumption stronger, fifty-one percent tribal ownership should be sufficient to qualify an entity as an arm of the tribe. Control of the corporation is a bit more difficult to gauge because hiring outside managers is a common practice in business; in fact, other federal business certifications permit outside managers.[325] Similarly, the IGRA expressly authorizes outside management of tribal casinos.[326] Although the corporation may have an outside manager, it should still be treated as an

318. 25 U.S.C. § 5124.

319. KAREN J. ATKINSON & KATHLEEN M. NILLES, OFF. OF INDIAN ENERGY & ECON. DEV., TRIBAL BUSINESS STRUCTURE HANDBOOK I-5 (2008 ed.), https://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf ("Several courts have held that tribal sovereign immunity applies to the business activities conducted by a Section 17 Corporation . . . ."); U.S. DEP'T OF THE INTERIOR, CHOOSING A TRIBAL BUSINESS STRUCTURE 4, https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/bia/pdf/idc1-032915.pdf (last visited Nov. 9, 2021) (listing advantages and disadvantages to organizing as a Section 17 corporation).

320. Black Horse, *Arm of the Tribe Test*, *supra* note 194, at 399–405; Martin & Schwartz, *Alliance*, *supra* note 178, at 776 ("Courts have articulated numerous variations on the test for whether a tribal business enterprise is entitled to the tribe's immunity.").

321. Crepelle, *Tribal Lending*, *supra* note 158, at 30–34.

322. Black Horse, *Arm of the Tribe Test*, *supra* note 194, at 398–400.

323. *E.g.*, Parnell v. CashCall, Inc., 804 F.3d 1142, 1144 (11th Cir. 2015); Jackson v. Payday Fin., LLC, 764 F.3d 765, 772 n.15 (7th Cir. 2014).

324. 13 C.F.R. § 124.109(c)(3) (2020).

325. *Id.* § 124.109(c)(4).

326. 25 U.S.C. § 2711.

arm of the tribe if the tribe has final say in management decisions, such as the corporation's strategic plan and budget decisions.[327]

Lastly, the majority of the entity's profits should go to the tribe if the entity is to be regarded as an arm of the tribe. This does not necessarily mean fifty-one percent of the entity's profit must go to the tribe every year; rather, the tribe may structure a deal such that the non-tribal entity receives the lion's share of the profits during the first year of operation. Tribes often have few assets, so developing a favorable legal environment may be the only thing the tribe has to offer an outside investor. If the investor fronts the bulk of the capital with the plan that the tribe will acquire greater interest in the corporation over time, the entity is tribal in nature. Undoubtedly, the larger the percentage of profits the tribe keeps, the stronger the case for the entity qualifying as an arm of the tribe. Nonetheless, a bright line fifty-one percent rule does not make sense because outside investors may need most of the profits for a few years to make the deal worth their time.[328]

If an entity satisfies the above criteria, it is a bona fide arm of the tribe. Thus, subjecting the arm of the tribe to outside lawsuits erodes tribal sovereignty.[329] Tribes cannot sue states, even when states act in bad faith toward tribes.[330] Following this rationale, states and private individuals should not be able to sue a tribe. However, the federal government should retain the ability to intervene if tribal entities are acting improperly. Tribes will adjust their behavior if given clear guidelines on how to structure entities as arms of the tribe.[331]

D. Tribal Interest Rate Exportation

Trouble arises with tribal lenders and states because state interest caps are lower than the rates offered by tribal lenders,[332] yet varying interest

327. 13 C.F.R. § 124.109(c)(4)(i)(B).

328. *Id.* (noting non-Indians can manage a corporation so long as the tribe itself is developing managerial skills while outside management is taking place).

329. Crepelle, *Tribal Lending*, *supra* note 158, at 22 ("The primary purpose of tribal sovereign immunity is to prevent states from infringing upon tribal sovereignty.").

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

331. *See In re* Internet Lending Cases, 267 Cal. Rptr. 3d 783, 795 (Ct. App. 2020) ("The court also credited AMG's newly produced, undisputed evidence concerning significant changes made to AMG's structure and governance since the prior court ruling — changes that, in effect, removed the nontribal actors . . . from positions of authority and control and ended its involvement in the business of financial lending. Applying these new facts to the *Miami Nation* test, the court found AMG entitled to immunity as an arm of the tribe.").

332. *E.g.*, *Michigan AG Nessel Files Lawsuit to Stop Online Lender Charging More*

limits are an inherent feature of federalism in financial markets. Consequently, the common law has evolved to address this issue. One such common law doctrine is "valid when made," which means "a loan that is valid from the start cannot become usurious after the loan is sold or transferred to another person."[333] This principle is nearly 200 years old[334] and is considered one of the cardinal rules of usury.[335] Another widely accepted principle is the "exportation doctrine," which permits national banks to "export" the maximum interest rate of the bank's state of incorporation when lending beyond that state's borders — even if this violates another state's usury laws.[336] The exportation doctrine applies to state-chartered banks too.[337] While controversy surrounds both doctrines,[338] the federal government continues to support them.[339]

Than 300 Percent in Interest Rates, MICH. DEP'T OF ATT'Y GEN. (Oct. 31, 2019), https://www.michigan.gov/ag/0,4534,7-359-92297_47203-511310--,00.html.

333. Dawn Causey et al., *A Surge of Support for 'Valid When Made'*, ABA BANKING J. (Dec. 2, 2019), https://bankingjournal.aba.com/2019/12/a-surge-of-support-for-valid-when-made/.

334. *Id.*

335. Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33530, 33532 (June 2, 2020) ("Well before the passage of the [National Bank Act], the Supreme Court recognized one of the 'cardinal rules in the doctrine of usury' and described it as follows: 'a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction.'").

336. 12 U.S.C. § 1831d(a); Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 301 (1978).

337. 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, 705 (2005); Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1121–22 (2008); LAUREN K. SAUNDERS, NAT'L CONSUMER L. CTR., WHY 36%? THE HISTORY, USE, AND PURPOSE OF THE 36% INTEREST RATE CAP 2 (2013), https://www.nclc.org/images/pdf/pr-reports/why36pct.pdf ("The decision led some states to repeal their interest rates in exchange for banks' relocating their headquarters. Other states were forced to follow suit or lose their banking industry.").

338. See Jeremy T. Rosenblum & Mindy Harris, *Federal Court Rejects Madden and Finds Loan Valid When Made Per OCC Final Rule, But Remands Case to Allow Discovery On True Lender Question*, CONSUMER FIN. MONITOR, BALLARD SPAHR LLP (Aug. 17, 2020), https://www.consumerfinancemonitor.com/2020/08/17/federal-court-rejects-madden-and-finds-loan-is-valid-when-made-per-occ-final-rule-but-remands-case-to-allow-discovery-on-true-lender-question/.

339. Federal Interest Rate Authority, 85 Fed. Reg. 44146 (July 22, 2020) (to be codified at 12 C.F.R. 331) ("The regulations also provide that whether interest on a loan is permissible under section 27 of the Federal Deposit Insurance Act is determined at the time the loan is made, and interest on a loan permissible under section 27 is not affected by a change in State law, a change in the relevant commercial paper rate, or the sale, assignment, or other transfer of the loan."); Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 85 Fed. Reg. 33530, 33530 (June 2,

Tribes should be permitted the same privilege as other lenders. The "exportation" and "valid when made" doctrines ensure that interest rates routinely exceed state rate caps;[340] indeed, South Dakota and Delaware have made exporting their financial laws to other states a major industry.[341] Even if State A were upset with State B's financial laws, State A would have no authority to interfere with State B's laws.[342] State A should have even less authority to interfere with a tribe's financial laws because, as the Supreme Court has noted:

> If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.[343]

Furthermore, lenders routinely charge interest rates in excess of state caps through clever phrasing like "checking account advances" while facing no opposition from states.[344] This, combined with the exportation and valid when made doctrines, suggests states have a relatively mild interest in preventing interest rates above state caps. On the other hand, tribes crafting lending laws and engaging in e-commerce further the federal

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2020) ("This rule clarifies that when a bank transfers a loan, the interest permissible before the transfer continues to be permissible after the transfer.").

340. *Marquette Nat'l Bank*, 439 U.S. at 318 ("Petitioners' final argument is that the 'exportation' of interest rates, such as occurred in this case, will significantly impair the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates.").

341. *See* Weddle, *supra* note 126, at 58, 62.

342. *Id.* at 62 ("Where a sovereign state disagrees with the regulations of another, the disputing sovereign cannot attack its payment systems to usurp regulatory authority. To the contrary, the federal electronic transfer system is an integral part of the federal banking and payment system and commerce. Its functioning cannot be subject to unilateral actions of the states. Such action, without court order, would impermissibly interfere with tribal lenders' rights as participants in the electronic funds transfer system and the smooth functioning of the payment system.").

343. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996).

344. *See* Clarkson et. al., *supra* note 15, at 28 ("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."); Weddle, *supra* note 126, at 63 n.37 ("The annualized interest rate charged by tribes is often between 200 to 900 percent, which is equivalent to, and in many cases lower than, what many banks charge for short-term loan products they often euphemistically label as 'overdraft protection' of 'checking account advances.'").

policies of tribal economic development and self-determination.[345] Therefore, tribal lenders should be able to export their interest rates beyond their borders.[346]

E. Cryptocurrency

Cryptocurrency is perhaps the most befuddling legal e-commerce issue for tribes. The Constitution grants the federal government the power "to coin Money"[347] and forbids states from establishing their own monetary systems.[348] This seems to leave the federal government with exclusive control of currency; however, the Constitution does not apply to Indian tribes.[349] While the Commerce Clause permits the United States to regulate commerce with tribes,[350] tribes presumably never surrendered the right to establish their own monetary systems.[351] Furthermore, tribes had their own currencies long before European arrival.[352] Some currencies, particularly wampum, even suffered from inflation[353] and counterfeiting.[354] Tribes may

345. *See* 25 U.S.C. § 2701(4); Nat'l Farmers Union Ins. v. Crow Tribe, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

346. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980) ("This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."); Weddle, *supra* note 126, at 62 ("Therefore, it follows that state laws that run counter to tribal economic development efforts — so strongly supported in federal law — are pre-empted.").

347. U.S. CONST. art. I, § 8, cl. 5.

348. *Id.* art. I, § 10, cl. 1.

349. Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991) (noting that tribes surrendered no powers at the Constitutional Convention); Talton v. Mayes, 163 U.S. 376 (1896) (holding the Bill of Rights does not apply to Indian tribes).

350. U.S. CONST. art. I, § 8, cl. 3.

351. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."); Las Vegas Tribe of Paiute Indians v. Phebus, 5 F. Supp. 3d 1221, 1228 (D. Nev. 2014) ("Congressionally recognized tribes retain all aspects of sovereignty . . . with three exceptions: (1) they may not engage in foreign commerce or foreign relations; (2) they may not alienate fee simple title to tribal land without the permission of Congress; and (3) Congress may strip a tribe of any other aspect of sovereignty at its pleasure." (internal citations omitted)).

352. Robert J. Miller, *Sovereign Resilience: Reviving Private-Sector Economic Institutions in Indian Country*, 2018 BYU L. REV. 1331, 1354 (2019).

353. Jeff Desjardins, *The History of Money in America: From Beads to Virtual Currency*, VISUAL CAPITALIST (June 6, 2016), https://www.visualcapitalist.com/the-

have even had fractional reserve banking.[355] Tribal currencies were widely used in early American society,[356] including for paying state taxes[357] and Harvard tuition.[358]

Tribal currencies clearly have precedent. What terminated their use was colonization — not joining the Union. Therefore, the historical use of indigenous currencies combined with their ignoble demise suggests tribes should be able to revitalize their currencies. Utilizing cryptocurrency to restore tribal currencies would strengthen tribal sovereignty, and strengthening tribal sovereignty aligns with federal policy.[359] Additionally, tribal currencies can promote tribal economic development by encouraging tribal citizens to buy from venues that accept tribal currencies.[360] Tribes and Indian-owned enterprises are probably more likely to accept tribal currencies than non-Indian businesses; hence, tribal cryptocurrency can

history-of-money-in-america-from-beads-to-virtual-currency/; *Native American Money: Native American Money Was Evidence of Sophisticated Trade Among Tribes and Colonists*, INDIANS.ORG., http://indians.org/articles/native-american-money.html (last visited Nov. 9, 2021) ("Wampum, the Native American money that became the most famous form of currency developed by American Indians eventually fell into disuse, initially among the colonists, because of inflation.").

354. Colin Nickerson, *Harvard Connecting To Its Indian Soul*, BOSTON.COM NEWS (Oct. 21, 2007), http://archive.boston.com/news/science/articles/2007/10/21/ ("One early president complained that college coffers contained too much 'counterfeit' wampum, according to Samuel Eliot Morison's 'Three Centuries of Harvard'"); WAMPUM LESSON FILES, ARIZ. GEOGRAPHIC ALL. 3 [hereinafter WAMPUM LESSON FILES], https://geoalliance.asu.edu/sites/default/files/LessonFiles/Munson/Wampum/MunsonWampumS.pdf (stating that counterfeiting by colonists resulted in the Wampum's value decreasing substantially).

355. *See* D. Bruce Johnsen, *The Potlatch as Fractional Reserve Banking*, *in* UNLOCKING THE WEALTH OF INDIAN NATIONS 61–83 (Terry Anderson ed., 2016).

356. WAMPUM LESSON FILES, *supra* note 354, at 3 ("The Massachusetts Bay Colony made wampum legal currency in 1641.").

357. Geoff Currier, *How it Works: Making Wampum Jewelry*, MARTHA'S VINEYARD MAG. (July 1, 2008) [hereinafter, Currier, *How it Works*], https://mvmagazine.com/news/2008/07/01/making-wampum-jewelery (stating that in the 17th century, Massachusetts taxes could be paid in beads); Alvin Rabushka, *The Colonial Roots of American Taxation, 1607-1700*, POL'Y REV. HOOVER INST. (Aug. 1, 2002), https://www.hoover.org/research/colonial-roots-american-taxation-1607-1700 ("Export duties of 10.5 percent were charged on peltries and 2*d*. per pound of tobacco, to be paid in beaver and wampum.").

358. Currier, *How it Works*, *supra* note 357.

359. Exec. Order No. 13175, 3 C.F.R. § 2(c) 13175 (2000); Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

360. Jeffries, *supra* note 147 ("A dedicated currency also boosts economic activity within a community, the impetus behind the (questionably legal) hyperlocal currency movement that has produced alternative monies such as BerkShares, IthacaHours, and the Brooklyn Torch.").

spur intertribal trade,[361] which is a federal objective.[362] Intertribal trade will also help reduce the economic leakage that has plagued Indian country for decades.[363] Use of a tribal cryptocurrency would also likely serve as consent to tribal jurisdiction because utilizing a tribal currency should clearly apprise the user that she is operating under tribal rules. Thus, tribal cryptocurrencies can promote tribal economic development and restore an aspect of indigenous culture.

F. Taxation

The law governing tribal taxation has been a mess for decades and will be even more vexing in online commerce unless legislation addresses the matter. In March of 2020, Congress held a hearing on tribes and taxation for the first time in years.[364] The hearing was a step towards tribes receiving equal tax treatment with other governments; nonetheless, e-commerce did not come up during the hearing. There is no precedent on taxation of tribal e-commerce outside of cigarettes, which federal legislation is specifically tailored to, rendering the cases of limited value to e-commerce as a whole. Tribes are not asking for special treatment. They are simply asking to be treated like the governments they are and always have been.

E-commerce can be a boon for tribal coffers if tribes are given tax parity. If tribes are recognized as states for tax purposes, as the Supreme Court's decision in *South Dakota v. Wayfair, Inc.*[365] suggests, tribes should have the exclusive right to collect taxes on items shipped to their reservations.[366]

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361. Ramos, *supra* note 126 (noting that the cryptocurrency, Mazacoin, could generate revenue for social programs and stimulate businesses, helping alleviate economic hardships); NATIVECOIN, *Native Coin White Paper* 6, https://native-coin.com/whitepaper/ (last updated Sept. 2, 2021) ("NativeCoin is designed to attract users from around the world to their doorsteps through online gaming platforms, and interconnecting Indigenous businesses and services in order to capture and incorporate a larger section of the world gaming market.").

362. 25 U.S.C. § 4301(b)(5).

363. *See generally* Gavin Clarkson & Alisha Murphy, *Tribal Leakage: How the Curse of Trust Land Impedes Tribal Economic Self-Sustainability*, 12 J.L. ECON. & POL'Y 177 (2016) (describing economic leakage as money leaving a local economy, in this case the tribe's economy, sooner than economically ideal).

364. *Examining the Impact of the Tax Code on Native American Tribes: Hearing Before the H. Ways & Means Subcomm. on Select Revenue Measures*, 116th Cong. (2020) (statement of Sharice Davids, Rep. Kan.) ("I would like to thank you especially for the committee's willingness to examine tribal tax issues, a subject which hasn't received a great deal of attention in past years.").

365. 138 S. Ct. 2080 (2018).

366. *See States Win Big Victory With Supreme Court Ruling on Online Taxation*, INDIANZ (June 21, 2018), https://www.indianz.com/News/2018/06/21/states-win-big-

Likewise, online businesses domiciled on reservations should be exempt from state taxation for activities that occur in Indian country. Ending dual taxation, thereby enabling tribes to use tax incentives to lure businesses to reservations, will ignite tribal economies.[367] Moreover, e-commerce helps tribes overcome their colonially-imposed, geographically isolated locations. State taxation of tribal business, however, prevents tribes from fully benefitting from the economic climates they create.[368]

A bright line rule declaring tribes equal to states in e-commerce taxation brings parity to a long distorted realm.[369] This is not a radical proposition; contrarily, this straightforward rule is in line with the foundational principles of Indian law.[370] State taxation of reservation commerce subverts tribal economies and self-government, which goes against Congress's declared Indian policy.[371] There is also legislative precedent for treating tribes as states for tax purposes.[372] Less desirable, but maybe more politically palatable, Congress could specifically exempt tribe-to-tribe

victory-with-supreme-cour.asp.

367. Crepelle, *How Federal Indian Law Prevents*, *supra* note 73, at 726; Crepelle, *Taxes, Theft, & Indian Tribes*, *supra* note 64, at 1032 ("Prohibiting state taxes of Indian country will allow tribes to recruit businesses to their land, levy taxes, and operate as the nations they are and always have been.").

368. *Examining the Impact of the Tax Code on Native American Tribes: Hearing Before the H. Ways & Means Subcomm. on Select Revenue Measures*, 116th Cong. (2020) (statement of Rodney Butler, Chairman, Mashantucket Pequot Tribal Nation) ("Since 2013, the Town of Ledyard, Connecticut, has aggressively assessed and collected taxes on leased slot machines and personal property owned by non-Indian businesses on my Tribe's reservation. We have worked diligently to diversify our economy and bring economic development to our Reservation, including the opening of Tanger Outlets at Foxwoods in 2015. However, instead of us collecting the tax revenue from this development, the Town of Ledyard has intrusively taxed these businesses, despite the tribe providing all on reservation governmental services and infrastructure maintenance."); Jerry Cornfield, *Deal Ends Legal Fight and Allows Tulalips a Cut of Sales Tax*, HERALDNET (Jan. 29, 2020, 9:13 PM), https://www.heraldnet.com/news/deal-ends-legal-fight-and-allows-tulalips-a-cut-of-sales-tax/.

369. Crepelle, *Taxes, Theft, & Indian Tribes*, *supra* note 64, at 1026 ("Barring state taxation as a baseline simply levels the bargaining power between tribes and states.").

370. *Id.* at 1022–23.

371. *Examining the Impact of the Tax Code on Native American Tribes: Hearing Before the H. Ways & Means Subcomm. on Select Revenue Measures*, 116th Cong. (2020) (statement of Deb Haaland, Rep. N.M.) ("Today, dual taxation exists for certain on-reservation commercial transactions because tribal tax immunity cannot fall below state tax rates. When Tribes are unable to offer tax incentives to attract profitable businesses, they have been forced to rely on business enterprises on tribal lands to promote private investments to fill in substantial revenue gaps.").

372. 26 U.S.C. § 7871.

transactions from state taxation, as there is precedent for this under the UIGEA.[373] Congress needs to bring fairness to tribal tax law.

V. CONCLUSION

The internet has transformed the economy and the way businesses operate. Tribes must be able to transform their economies too. Failure to acknowledge tribal sovereignty in electronic commerce is the equivalent of saying tribes should not exist in the twenty-first century. Tribes have always adapted their laws and economies to new technologies.[374] For example, it is impossible to imagine tribes like the Comanche and the Sioux without the horse, yet these tribes did not acquire the horse until European contact.[375] The internet is just the most recent technology in a long line of tribal cultural evolutions. If tribal sovereignty is respected, tribes can master e-commerce just adroitly as they mastered the horse.

373. 31 U.S.C. § 5362(10)(C)(i)(II).

374. *See* Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009, 1029–30 (2007) ("Many tribes pride themselves on their ability to adapt: the Navajos developed a thriving weaving industry using wool from sheep brought over by Europeans, the Plains Indians incorporated European horses into their culture, and the Choctaw claim that if the Europeans 'had brought aluminum foil with them Choctaws would have been cooking with it while the other tribes were still regarding it with suspicion.'"); Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 U. OR. L. REV. 757, 788 ("Tribes and individual Indians had no problem incorporating newly arrived Europeans into their trading networks."); Shane Lief, *Singing, Shaking, and Parading at the Birth of New Orleans*, JAZZ ARCHIVIST, 2015, at 15, 18, https://jazz.tulane.edu/sites/default/files/jazz/docs/jazz_archivist/JA%202015%20Web%20Copy_0.pdf (noting Jesuit missionary Father Pierre de Charlevoix's description of the Tunica Chief that he encountered in the early 1700s as "dressed in the French fashion [and] carr[ying] on trade with the French, supplying them with horses and poultry, and is [sic] very expert at business . . . . He ha[d] long since stopped wearing Indian clothes, and [took] great pride in always appearing well-dressed.").

375. *The Comanche and the Horse | Native America*, PBS LEARNING MEDIA, https://lpb.pbslearningmedia.org/resource/comanche-and-horse/comanche-and-horse/ (last visited Nov. 9, 2021) ("The image of American Indians on horseback is iconic, but indigenous populations didn't actually encounter horses until the 15th century, when Europeans ironically brought them to America as weapons of conquest.").