

ARIZONA'S WIN-WIN SHORT-TERM CREDIT SOLUTION: Assisting Arizona's Unbanked and Underbanked While Supporting Tribal Self-Determination

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INTRODUCTION

Imagine a recent college graduate that is the sole breadwinner for a small family and has an annual income of \$50,000. This person lives paycheck-to-paycheck, with virtually zero dollars in his bank account, and has accrued over \$100,000 in student loans and over \$30,000 in credit card debt. As a result of these financial hindrances, his credit score is not high enough to qualify him for a loan or any other source of funding. Our college professional relies on his car to get to work, and as his luck would have it, one day, his car breaks down. Public transportation is not a reasonable option, as he does not live near a bus stop. It is now impossible for him to get to work. In the length of time it would take him to scrape together enough money to repair his car, he would likely no longer have a job. Luckily, our college grad qualifies for a short-term loan and, as a result, is able to repair his car quickly, thereby keeping his job. In taking this short-term loan, this individual is making a sound business decision that payment of fees on the interest of the loan is of greater benefit to him financially and professionally than losing his job and, in turn, the livelihood of himself and his family.

This is just one of many examples of financial hardship that thousands of Arizonans face each day in this turbulent economic climate. There is the uninsured single mother of three who, if faced with a medical emergency, would be unable to make her mortgage payments. There is also the blue-collar father, supporting a family of five, who now faces unforeseen funeral expenses and needs to choose between making a car payment and paying for a proper burial. The need for short-term access to funds arises for millions of Americans every day and the unavailability of such loans could lead to life-altering consequences.

Current Arizona law makes these drastic consequences a foreseeable reality for thousands of Arizona citizens. For ten years, from April 2000 to June 2010, an Arizona statute permitted consumer lenders—termed “deferred presentment companies”—to provide loans between \$50 and

\$500 and charge closing costs, underwriting fees and interest on those loans; when considering such closing costs and underwriting fees, said loans could effectively reach an Annual Percentage Rate (APR) of 1288%.¹ On July 1, 2010, the Arizona statute ceased to authorize these interest rates.² Today, the maximum APR that an Arizona lender may charge is 36%.³ Efforts to reinstate the deferred presentment license program have thus far been unsuccessful.⁴

While industry opponents have applauded Arizona's renewed prohibition of so-called payday lending,⁵ these same groups may not recognize the practical consequences of the law's expiration. When the exemptions to the 36% APR cap expired, instead of modifying their business to conform to the 36% cap, deferred presentment companies mostly closed up shop.⁶ As a result, Arizonans looking for short-term loans have been forced to look elsewhere.⁷ The alternatives to legitimate short-term credit—pawnbrokers, car title loans, and loan sharks—are demonstrably worse for the borrower.⁸ Fortunately, Indian tribes have recently provided a solution to the unintended consequences of Arizona's well-intentioned law and policy. Legitimate short-term consumer loans, comparatively the most attractive credit option for the unbanked and underbanked, are now readily available through the tribally-regulated and tribally-owned online short-term lending companies.

1. See ARIZ. REV. STAT. ANN. § 6-1260 (2013); Allison S. Woolston, *Neither Borrower Nor Lender Be: The Future of Payday Lending in Arizona*, 52 ARIZ. L. REV. 853, 854 (2010).

2. ARIZ. REV. STAT. ANN. § 6-1263 (2013) (“The deferred presentment licensing program established by the chapter ends on July 1, 2010 pursuant to § 41-3102.”).

3. ARIZ. REV. STAT. ANN. § 6-632 (2013).

4. See *infra* discussion in Part I.C.

5. Chris Casacchia, *Arizona payday lenders hit end of the road*, PHOENIX BUSINESS JOURNAL (July 1, 2010), <http://www.bizjournals.com/phoenix/stories/2010/06/28/daily66.html>.

6. Michelle Price, *Arizona Payday Lenders Leave State After Voters, Legislature Let High-Interest Loans Expire*, HUFFINGTON POST (July, 9, 2010), http://www.huffingtonpost.com/2010/07/09/arizona-payday-lenders-le_n_641676.html (reporting Arizona Attorney General Terry Goddard's statement that “They could have amended their business practices like other companies and charged lawful rates, but they chose to fold their tent here.”).

7. Woolston, *supra* note 1, at 875–77; Howard Fischer, *Measure Would Fill Payday-Lending Gap*, AZCENTRAL.COM (Feb. 10, 2011), <http://www.azcentral.com/business/abg/articles/2011/02/10/20110210abg-loans0210.html> (reporting Representative Jim Weiers's position that “the 2008 decision by voters to kill payday lending in Arizona left a ‘huge void’ in the market”); Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 886–94 (2007) (“Rather, the evidence suggests that bans may well cause consumers to borrow from sources that provide products that are less beneficial—products that consumers are more likely to avoid in markets that tolerate payday lending.”).

8. See Mann & Hawkins, *supra* note 7, at 886; discussion *infra* Part III.A.

Part I of this Article will provide background on consumer lending in Arizona. It will examine the state laws, the policies underlying those laws, and the actual effect of those laws. It will also discuss the failed efforts to bring short-term consumer lending back to Arizona.

Part II of this Article will turn the discussion to tribal lending businesses. It will first explain the historical underpinnings of tribal sovereignty and how those principles, as an established body of federal Indian law, have defined the essential right of tribal self-governance and self-determination, free from state intrusion. It will then discuss tribal sovereignty within the context of gaming and explain how, similar to gaming, the tribes' authority to regulate their own economic development initiatives extends to the e-commerce industry. Tribes have created their own financial regulatory commissions to ensure that internet lending is conducted in an ethically and professionally responsible manner. The businesses are held accountable and are required to comply with all tribal and applicable federal regulations. At the federal level, the Dodd-Frank Act recognizes and reaffirms tribal authority to regulate their own financial services activities,⁹ just as tribes have proficiently done for over twenty years in the context of gaming.

Part III explains the benefits of short-term consumer financial services provided through tribally owned entities. First, tribally owned online lending companies offer a service previously unavailable to hardworking unbanked and underbanked Arizonans. This large group of Arizona citizens now has a reasonable alternative to credit sources such as pawnbrokers and car title loans. Clearly, for Arizonans faced with a short-term financial emergency, tribal lending companies offer an invaluable service. The second benefit conferred by tribal lending companies is the much needed revenues for tribal governments. These businesses have enabled tribes to develop infrastructure, high-quality education systems, social welfare programs, and other beneficial government services. In sum, because they provide Arizona consumers with a reasonable option in times of crisis, and because they support tribal economic development and self-determination, tribal lending companies are a true "win-win."

I. CONSUMER LENDING UNDER ARIZONA LAW

As noted above, the State of Arizona regulated short-term consumer loans from 2000–2010.¹⁰ When the legislation expired, Arizona's previous

9. See Dodd-Frank Act § 1002(27), 12 U.S.C. § 5481(27) (2012) (including tribes within the definition of "State").

10. Woolston, *supra* note 1, at 853; see also Price, *supra* note 6.

limits on interest rates kicked in, and all progress in the consumer finance arena was lost.¹¹

A. *The Introduction and Enactment of the Deferred Presentment Companies Legislation*

Beginning in January of 2000, Arizona considered legislation regulating short-term consumer loans.¹² The Senate Committee on Financial Institutions and Retirement heard testimony from several industry proponents in favor of the bill.¹³ A lawyer representing an entity called EZ Pay Day Loan Companies stated that the law would protect Arizonans; that it did not allow excessive interest rates; that deferred presentment companies do not “target the poor”; and that in order to gain credibility, this was an area that needed to be regulated.¹⁴ A lobbyist for the Arizona Community Financial Services Association also spoke out in favor of the law. He pointed out that the “industry exists because there is a vacuum created by banks because they do not want any part of this type of lending activity. It is too expensive for the banks to do.”¹⁵

Three persons gave testimony expressing concern. A representative from the Attorney General’s office was concerned that there was no minimum length of time that a loan had to be offered to a customer and that the interest rate was too high.¹⁶ The Executive Director of the Arizona Justice Institute had basically the same concerns. While she recognized that there is a need for these businesses, she felt the bill was not “the best tool” for regulating the industry.¹⁷ Additionally, a representative from the Arizona Pawn Brokers Association suggested the bill be changed to allow pawnbrokers to receive licenses to make these types of loans.¹⁸ After hearing the arguments for and against the bill, the committee recommended that the bill pass.¹⁹

11. Fischer, *supra* note 7.

12. See COMM. ON FIN. INST. AND RET., 44th Leg., 2nd Regular Session, *Minutes of Meeting* (Ariz. 2000), available at http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/44leg/2R/comm_min/Senate/0126FIR.doc.htm&Session_ID=63.

13. *See id.*

14. *Id.* (testimony of Michael Green, Lawyer, EZ Pay Day Loan Companies).

15. *Id.* (testimony of Norman Miller, Lobbyist, Arizona Community Financial Services Association).

16. *Id.* (testimony of Mr. Hugh Hegyi, Attorney General’s Office).

17. *Id.* (testimony of Eddie Sissions, Executive Director, Arizona Justice Institute).

18. *Id.* (testimony of John K. Mangum, Arizona Pawn Brokers Association).

19. *Id.* (“Senator Bee moved S.B. 1266 be returned with a DO PASS recommendation. The motion CARRIED with a roll call vote of 5-2-0.”).

Because S.B. 1266 imposed application fees for various financial institutions, it required a two-thirds vote in each house of the legislature.²⁰ The bill was overwhelmingly approved: the House of Representatives voted it through 45 in favor, 13 against, and 2 non-votes.²¹ The Senate voted it through 24 in favor, 6 against.²² It was signed into law on April 4, 2000.²³

B. *The Substantive Provisions of the Legislation*

Arizona's legislation authorized deferred presentment companies, upon acquisition of a license, to engage in short-term lending.²⁴ To obtain a license, the applicant had to meet several criteria, mainly involving character.²⁵ For example, if the applicant had ever been convicted of a crime that involved moral turpitude, he would be denied a license.²⁶ The statute also required licensees to have a minimum net worth of \$50,000 and "[t]he financial responsibility, character and experience to warrant a belief that the business is operated lawfully, honestly, fairly and efficiently."²⁷

Licensees were allowed to make short-term loans between fifty and five hundred dollars.²⁸ The licensees could not loan to any borrower who already had one loan outstanding with any licensee in the state; however, the licensee was permitted to take the borrower's word as to whether the borrower actually had any such outstanding loans.²⁹ The statute allowed fees up to fifteen percent on each loan, and each loan could be rolled over up to three times.³⁰

20. See ARIZ. CONST., art. IX, § 22; S.B. 1266, 44th Leg., 2nd Reg. Sess. (Ariz. 2000), available at <http://www.azleg.gov/legtext/44leg/2r/bills/sb1266s.pdf>.

21. S.B. 1266 Bill Status Overview, http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/44leg/2r/bills/sb1266o.asp&Session_ID=63 (last visited April 6, 2013).

22. *Id.*

23. *Id.*

24. S.B. 1266, 44th Leg., 2nd Reg. Sess. (Az. 2000), available at <http://www.azleg.gov/legtext/44leg/2r/bills/sb1266s.pdf>.

25. The statute provided: "An applicant for a license: (1) Shall be a citizen of the United States; (2) Shall be a person of honesty, truthfulness and good moral character; (3) Shall not have been convicted of a crime that involves moral turpitude; (4) Shall not have defaulted on payment of money collected or received for another person; (5) Shall not have been a former licensee pursuant to this chapter whose license was suspended or revoked and not subsequently reinstated." ARIZ. REV. STAT. ANN. § 6-1254(A) (2013).

26. *Id.*

27. *Id.* § 6-1254(C).

28. *Id.* § 6-1260(A).

29. *Id.* § 6-1260(C)–(D).

30. *Id.* § 6-1260(F), (I).

C. *Expiration of the Statute and Current State of the Law in Arizona*

Arizona's deferred presentment licensing program contained a built-in "sunset date" of July 1, 2010.³¹ As that date neared, the consumer lending industry made several attempts to prevent their business from once again being statutorily barred. First, the industry placed Proposition 200 on the ballot for the November 2008 election.³² Proponents summarized the purposes and content of the initiative:

Arizonans use payday lending services everyday [sic] to meet unforeseen expenses and financial emergencies. The payday lending industry is set to be eliminated and the Arizona Legislature refuses to enact reforms to benefit borrowers while preserving this important financial option. This measure will bring dramatic pro-consumer reform to payday lending and preserve consumer choice. It includes a substantial rate cut, eliminates rolling-over principal to extend a loan, creates a repayment plan at no cost to customers that can't meet their obligations, and inhibits a borrower's ability to obtain more than one loan at a time.³³

Despite spending nearly fifteen times more than their counterparts, the industry proponents lost, and voters rejected Proposition 200.³⁴

After Proposition 200 failed, the industry next approached the legislature directly, seeking "to amend the then-existing deferred presentment statute and to prevent it from sunseting."³⁵ The first bill, H.B. 2161, introduced by Representative Andy Tobin, besides repealing the sunset provision, would also amend the then-existing statute by reducing the fees and putting in place certain consumer protections.³⁶ On January 25, 2010, the bill was pulled off the agenda of the House Committee on Banking and Insurance,

31. See *id.* § 6-1263; Woolston, *supra* note 1, at 871.

32. Application for Initiative or Referendum Petition Serial Number, ARIZONANS FOR FINANCIAL REFORM 1 (Mar. 6, 2008), <http://www.azsos.gov/election/2008/general/ballotmeasuretext/i-16-2008.pdf>. See also Woolston, *supra* note 1, at 873-74.

33. Application for Initiative or Referendum Petition Serial Number, *supra* note 32, at *Summary*.

34. Leah A. Plunkett & Ana Lucia Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 SUFFOLK U. L. REV. 31, 38 n.26 (2011). Lending proponents spent \$14,763,892 while opponents spent only \$1,004,686. Tyler Evilsizer, *Lenders Couldn't Buy Laws*, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS 1 (August 18, 2009), <http://followthemoney.org/press/Reports/Payday.pdf>.

35. Woolston, *supra* note 1, at 874-75.

36. H.B. 2161, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* <http://www.azleg.gov/legtext/49leg/2r/bills/hb2161p.pdf>; Woolston, *supra* note 1, at 875.

presumably in response to pressure from opponents.³⁷ Less than two months later, State Senator Russell Pearce introduced a new measure to allow consumer lending to continue, in the form of a “[s]trike everything” amendment to H.B. 2370, an appropriations bill.³⁸ The amendment would have accomplished many of the same goals as H.B. 2161, but contained one notable difference: it required licensees to remit 1.5% of their total collected fees to “organizations that provide services to low-income and moderate-income individuals in communities in which the licensee operates a branch office.”³⁹ The amendment to H.B. 2370 was never adopted.⁴⁰

Soon after H.B. 2161 and H.B. 2370 both failed, the sunset provision kicked in, and the deferred presentment licensing program expired. However, the legislative history did not end there. In February 2011, Representative Jim Weiers introduced H.B. 2550,⁴¹ which was meant to reinstate the consumer lending industry under a new set of rules.⁴² Among the most substantive provisions were allowing licensed deferred presentment companies (licensees) to charge an “[a]cquisition fee for making the loan” that ranged from ten percent of the loan amount to \$75, whichever would be less.⁴³ The bill would have allowed licensees to make loans from a minimum of \$200 to a maximum of \$3,000.⁴⁴ The interest rate would depend on the amount of the loan.⁴⁵ Interest could be up to four percent per month for loans up to \$750; three percent per month on the dollar amounts loaned between \$750 and \$1,500; two percent per month for amounts loaned between \$1,500 and \$2,200; and one percent per month for

37. See COMM. ON BANKING AND INS., 49th Leg., 2d Reg. Sess., *Minutes of Meeting* (Ariz. 2010), available at http://www.azleg.gov/legtext/49leg/2R/comm_min/House/012510%20BI.PDF; Alia Beard Rau, *New Hope for Arizona Payday Lenders*, AZCENTRAL.COM (Mar. 14, 2010), <http://www.azcentral.com/news/election/azelections/articles/2010/03/14/20100314politics-paydayreturn0314.html>.

38. H.B. 2370, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (Proposed Amendment 2010), available at <http://www.azleg.gov/legtext/49leg/2R/proposed/S.2370.pdf>.

39. *Id.* (proposed amendment to ARIZ. REV. STAT. ANN. § 6-1256(A)(3), (D) (West, Westlaw through 2012 2d Sess.)).

40. See ARIZ. STATE S., 49th Leg., 2d Reg. Sess., *Minutes of Committee on Appropriations* (Ariz. 2010), available at http://www.azleg.gov/legtext/49leg/2R/comm_min/Senate/031610%20APPROPS.PDF (indicating the disposition of H.B. 2370 as “FAILED”).

41. H.B. 2550, 50th Leg., 1st Reg. Sess. (Ariz. 2010), available at http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/50leg/1r/bills/hb2550p.htm&Session_ID=102.

42. See Fischer, *supra* note 7.

43. H.B. 2550 (proposed amendment to ARIZ. REV. STAT. ANN. § 6-639(A)(1)).

44. *Id.* (proposed amendment to § 6-639(A)).

45. *Id.* (proposed amendment to § 6-639(A)(2)(a)–(d)).

amounts loaned between \$2,200 and \$3,000.⁴⁶ The bill called for a minimum term of five months; the maximum term would be twelve months for loans up to \$1,500 and twenty-four months for loans between \$1,500 and \$3,000.⁴⁷ Late fees, totaling the greater of ten percent of the amount due or \$10 dollars, were permitted if payment was ten days past due.⁴⁸ Loans could be renewed up to three times per year, and no licensee could provide the same borrower with more than one loan at a time.⁴⁹ Licensees would be required to prepare a consumer budget to “determine if the consumer has the ability to pay for the loan.”⁵⁰ Borrowers would be granted a three-day rescission period and would be allowed to repay the loan early with no penalty.⁵¹

These rules were criticized by Representative Debbie McCune Davis as “just one more form of predatory lending.”⁵² On February 16, 2011, the bill was scheduled for a hearing before the House Committee on Commerce, which was chaired by Representative Weiers himself.⁵³ However, the committee failed to even discuss the bill.⁵⁴ Since then, no action has been taken. To date, all legislative efforts to provide unbanked and underbanked Arizonans with a short-term credit solution for their financial emergencies have failed, leaving hard working Arizona citizens without any recourse.

II. INDIAN TRIBES AND SOVEREIGNTY IN THE CONTEXT OF INTERNET LENDING

Indian tribes have long been recognized as inherently sovereign, self-governing entities.⁵⁵ Their governments “exist independent of federal or state authority.”⁵⁶ Tribal sovereignty is subject to diminishment by Congress

46. *Id.*

47. *Id.* (proposed amendment to § 6-639(B)).

48. *Id.* (proposed amendment to § 6-639(K)).

49. *Id.* (proposed amendment to § 6-639(I), (M)).

50. *Id.* (proposed amendment to § 6-639(C)).

51. *Id.* (proposed § 6-639(F), (J)).

52. Fischer, *supra* note 7.

53. See *Small Installment Loans: Hearing on H.B. 2550 Before the H. Comm. on Commerce*, 2011 Leg., 50th Sess. 1 (Ariz. 2011).

54. *Id.* (“Vice Chairman Mesnard announced that HB 2550 will be HELD.”).

55. Angela R. Riley, (*Tribal*) *Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 821–22 (2007) (“Tribal sovereignty is embodied in hundreds of treaties between Indian nations and the colonial powers, referenced in the U.S. Constitution, recognized by a vast body of Supreme Court jurisprudence, and affirmed by numerous congressional acts.”).

56. ROBERT N. CLINTON, CAROLE E. GOLDBERG & REBECCA TSOSIE, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 247 (5th ed. 2007).

pursuant to its “plenary power” over Indian affairs;⁵⁷ however, states have no similar powers over Indian tribes.⁵⁸ Generally, states cannot impose their laws on Indian tribes unless the federal government provides explicit authorization to do so.⁵⁹

Possessed of inherent sovereignty and generally unrestricted by state regulations, Indian tribes have the authority to conduct businesses and regulate those businesses effectively and responsibly pursuant to tribal law. This principle of tribal regulatory authority pre-exists any legal precedent but is famously associated with the landmark Indian gaming case of *California v. Cabazon Band of Mission Indians*.⁶⁰ Indeed, because Indian tribes have inhabited North America and governed themselves since time immemorial, their self-governing authority derives from within.

Tribal sovereignty in the form of self-regulation is beneficially exercised now more than ever. Many tribes have developed sophisticated court systems, high-quality schools, and other valuable government programs.⁶¹ They manage a wide variety of social services and “are engaged in a range of economic development initiatives (including natural resource based industries, agriculture, tourism, and even manufacturing and telecommunications)”⁶² None of these essential core functions—nor frankly any meaningful future for Indian Country—would be possible without tribal sovereignty and freedom to self-regulate.

Tribes across the country have expanded their economic development activities outside of gaming—specifically, in the emerging field of e-commerce—and, in doing so, have made invaluable options available to both Arizona citizens as well as citizens of other states where short-term consumer financing is not accessible. Pursuant to well-established federal precedent, tribes operate these businesses within their own established regulatory framework, with careful adherence to applicable federal laws. The Dodd–Frank Act, a more recently enacted federal statute pertaining to consumer protection in the lending industry, explicitly recognizes tribal regulatory authority over tribally owned online consumer lending businesses and envisions that tribes work with the federal government in this area on a regulator-to-regulator basis. Such statutory treatment is consistent with that of other federal statutes and is in harmony with the

57. See U.S. CONST., art. I, § 8, cl. 3; *United States v. Kagama*, 118 U.S. 375, 382–85 (1886).

58. See *Worcester v. Georgia*, 31 U.S. 515, 594 (1832).

59. See *Bryan v. Itasca Cnty.*, 426 U.S. 373, 377 (1976).

60. 480 U.S. 202 (1987).

61. Sarah Krakoff, *The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47 (2005).

62. *Id.*

federal government's support of and adherence to the policy of tribal self-determination.

A. *History of Tribal Sovereignty and the Freedom from State Regulation*

By virtue of their status as self-governing entities present in North America since time immemorial, Indian tribes are vested with inherent sovereignty.⁶³ Tribal sovereignty has been repeatedly recognized and respected by the federal government for nearly two centuries in cases spanning a broad spectrum of subject matters. Without it, any meaningful tribal economic development would be impossible.

When considering whether an Indian tribe has acted within its governing authority, the analysis should always begin with the presumption that the tribe has in fact acted legally. Put simply, the legal analysis is a narrow inquiry of whether there is an express limitation on tribal sovereignty. "The relevant inquiry is whether any federal limitation exists to prevent the tribe from acting within the sphere of its sovereignty, not whether any authority exists to permit the tribe to act."⁶⁴ This view of tribal sovereignty is the foundation of federal Indian law, and the precedent in this subject matter is firmly established.⁶⁵

Beyond the recognition of the tribes' inherent rights to make laws and be governed by them, it is axiomatic that States generally lack regulatory authority in Indian country.⁶⁶ State regulatory power is limited by (1) inherent tribal sovereignty,⁶⁷ (2) preemption of state law by federal and tribal interests,⁶⁸ and/or (3) federally supported tribal authority.⁶⁹

63. *Worcester*, 31 U.S. at 519.

64. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 79 (5th ed. 2009).

65. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (searching for a justification for State regulatory authority).

66. *See Bryan v. Itasca County*, 426 U.S. 373, 388 (1976) (holding that Public Law 280 granted States criminal and civil adjudicatory jurisdiction, but did not constitute a grant of full regulatory authority).

67. *See, e.g., Williams v. Lee*, 358 U.S. 217 (1959).

68. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

69. *See, e.g., U.S. v. Mazurie*, 419 U.S. 544 (1975).

1. Inherent Tribal Sovereignty

a. Tribal Sovereignty as Recognized in the Marshall Era

Chief Justice John Marshall developed the foundation of federal Indian law in three opinions which became known as the Marshall Trilogy.⁷⁰ In the latter two cases, each dealing with the Cherokee Nation, the United States Supreme Court, through opinions authored by Justice Marshall, explicitly recognized and gave teeth to tribal sovereignty.⁷¹

In *Cherokee Nation v. Georgia*,⁷² the Supreme Court held that Indian tribes are not “foreign nations” for the purposes of Article III of the U.S. Constitution and, therefore, could not invoke original jurisdiction in the Supreme Court.⁷³ However, even though they could not be considered a foreign nation, the Court acknowledged that the Cherokees had clearly demonstrated their status as “a distinct political society separated from others, capable of managing its own affairs and governing itself.”⁷⁴ Thus, Justice Marshall’s opinion expressly recognized tribal sovereignty, and while he famously referred to the Indian tribes as “domestic dependent nations,”⁷⁵ that term was not intended to be pejorative. Instead, the term was meant to “indicate that the federal government had treaty and other legal obligations to protect such dependent nations against the intrusion of state law.”⁷⁶ Put another way, the term “domestic dependent nations” is protective of tribal sovereignty against state interference.

In the final case of the trilogy, *Worcester v. Georgia*,⁷⁷ the Supreme Court held that the Cherokee Nation was immune from state laws.⁷⁸ The case involved missionaries who entered the Cherokee Nation with a permit granted by the United States under the Trade and Intercourse Acts but without permits from the State of Georgia.⁷⁹ In rejecting Georgia’s exercise of prosecutorial jurisdiction over the missionaries, the Court recognized that the Cherokee Nation was

70. The three opinions are: *Worcester v. Georgia*, 31 U.S. 515 (1832), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

71. See *infra* notes 73–83 and accompanying text.

72. 30 U.S. 1 (1831).

73. *Id.* at 17.

74. *Id.* at 16.

75. *Id.* at 17.

76. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 131 (1993).

77. 31 U.S. 515 (1832).

78. *Id.* at 520.

79. *Id.* at 537–38.

“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 congress.”⁸⁰

In the words of one prominent Indian law scholar, Indian tribes retained “their pre-constitutional powers of self-governance.”⁸¹ These powers were subject to abrogation by the federal government, but not by the states.⁸²

Through the Marshall Trilogy, the Supreme Court clearly recognized tribal sovereignty. Future cases would only reaffirm the undeniable existence of tribal sovereignty and demonstrate that “tribes are not bound by the Constitution or by general federal laws except to the extent that Congress has expressly imposed such limitations.”⁸³

b. The Source of Tribal Sovereignty, the Infringement Test, and the Power to Exclude

The source of tribal sovereignty is the tribe itself. “Indian tribes are . . . self-authenticating, because their will and integrity were created by and are sustained by no source other than their own internal beliefs and arrangements.”⁸⁴ The Indian tribes’ powers of governance are not “federal powers created by and springing from the constitution of the United States.”⁸⁵

The United States Supreme Court described this inherent nature of tribal sovereignty in *Talton v. Mayes*.⁸⁶ The case involved a Cherokee Indian convicted of murder in Cherokee Tribal Court. Pursuant to Cherokee law, the grand jury consisted of only five persons.⁸⁷ The federal case was thus a habeas action challenging the constitutionality of the five-person grand jury. The Supreme Court rejected the claim, holding that the Fifth Amendment

80. *Id.* at 520.

81. Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1118 (2004).

82. *Id.*

83. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 193 (2001).

84. Stephen B. Young, *Indian Tribal Sovereignty and American Fiduciary Undertakings*, 8 WHITTIER L. REV. 825, 827 (1987).

85. *Talton v. Mayes*, 163 U.S. 376, 382–83 (1896).

86. *Id.*

87. *Id.* at 378–79.

requirement of a 21-person grand jury did not apply because “the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution.”⁸⁸

In 1959, the Supreme Court reaffirmed the essential principles it set forth in *Worcester*—this time in the context of adjudicatory jurisdiction. In *Williams v. Lee*,⁸⁹ the Court was confronted with a challenge to the jurisdiction of the Arizona state courts. A non-Indian operator of a general store located on the Navajo reservation brought suit in Arizona state court against a Navajo Indian for non-payment for goods sold on credit.⁹⁰ The Arizona Supreme Court held that it had jurisdiction because no act of Congress expressly prevented it from exercising jurisdiction over civil suits by non-Indians against Indians, even when the action arises on an Indian reservation.⁹¹ Basing its analysis heavily on *Worcester v. Georgia*, the U.S. Supreme Court reversed.⁹² The Court found that if the tribe’s general right to self-governance were to be taken away, “it is for Congress to do it,” not the States.⁹³ The result became known as the *Williams v. Lee* infringement test, which prohibits application of State law to an Indian tribe if it infringes on the right of Indians to make their own laws and govern themselves.⁹⁴

In *Merrion v. Jicarilla Apache Tribe*,⁹⁵ the Supreme Court recognized that tribes possess regulatory authority that derives not just from inherent sovereignty but also from a tribe’s right to exclude others from their reservations.⁹⁶ The Jicarilla Apache Tribe had entered into long-term leases with several companies to extract oil and gas from tribal land.⁹⁷ The companies challenged a later-enacted ordinance imposing a severance tax on oil and gas severed, saved, and removed from tribal lands.⁹⁸ Although the Court upheld the tax based on the right to exclude, it further held that the power to tax also derives from a tribe’s inherent sovereignty.⁹⁹ Thus, *Merrion* demonstrates dual sources of sovereign power: inherent sovereignty and the right to exclude.

88. *Id.* at 384.

89. 358 U.S. 217 (1959).

90. *Id.* at 217–218.

91. *Id.* at 218.

92. *Id.* at 223.

93. *Id.*

94. Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 416 (2008).

95. 455 U.S. 130 (1982).

96. *Id.* at 149.

97. *Id.* at 133.

98. *Id.* at 135–36.

99. *Id.* at 137.

Congress has also expressly affirmed the principle of inherent tribal sovereignty. After the Supreme Court, in *Duro v. Reina*,¹⁰⁰ ruled that Indian tribes “no longer possess[] inherent or sovereign authority to prosecute a ‘nonmember Indian,’”¹⁰¹ Congress responded by passing legislation that specifically authorized such prosecutions. The legislation “recognized and affirmed” the “inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians.”¹⁰² In *United States v. Lara*,¹⁰³ the Supreme Court affirmed the constitutionality of this exercise of jurisdiction, finding that the legislation merely lifted a restriction on the tribes’ inherent authority.¹⁰⁴ Congress’s so-called plenary power over Indian affairs therefore included the power to lift restrictions on the tribes’ inherent sovereignty.¹⁰⁵

2. The Trust Relationship and Protection of Tribal Self-Governance

The federal precedent detailed above has been among the plethora of authority that has developed the trust doctrine—a central feature of Indian jurisprudence—which ensures that the federal government will act in a manner so as to protect the fundamental aspects of tribal sovereignty. The fiduciary, or trust relationship between the federal government and federally-recognized Indian tribes, is a cornerstone of federal Indian law.¹⁰⁶ Over the years, courts have drawn upon many sources of law in the development of the Indian trust doctrine, including treaties, various federal statutes and statements of congressional policy, and judicial doctrines.¹⁰⁷ Pursuant to the trust doctrine, the federal government is obligated to act in the tribes’ best interests.¹⁰⁸ Four specific attributes of sovereignty have been identified to warrant protection as beneficiary interests under the trust doctrine, including the tribes’ right to self-governance.¹⁰⁹ The 566 federally

100. 495 U.S. 676 (1990).

101. *United States v. Lara*, 541 U.S. 193, 197 (2004) (emphasis omitted) (citation omitted).

102. 25 U.S.C. § 1301(2) (2012).

103. 541 U.S. 193 (2004).

104. *Id.* at 200.

105. *Id.*

106. FELIX COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4][a] (Nell Jessup Newton et al. eds., 2005).

107. Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 123–26 (1995).

108. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

109. Wood, *supra* note 107, at 180 (“In light of the clear role self-government plays in native sovereignty and the recognition of its importance by tribes, Congress, the executive

recognized Indian tribes¹¹⁰ located in the United States have utilized their inherent right to self-governance in a variety of ways and through many different governmental structures to further the best interests of their tribal citizens. In exercising this right, tribes often work with the federal government, through the context of various federal contracts, to ensure that their tribal governments are provided with the necessary resources to operate seamlessly and independently. Through its trust responsibility owed to federally recognized Indian tribes, it is well established that the federal government must act in a manner to ensure that the tribal sovereign right to self-governance is preserved and protected—not only through the implementation of various federal contracts but also in the day-to-day interaction with tribal governments on a government-to-government basis.¹¹¹ Thus, just as over 100 years of federal Indian jurisprudence has recognized and repeatedly reaffirmed the fundamental tribal sovereign right to self-governance, such precedent has also recognized the federal government's responsibility to protect tribal sovereignty and tribal self-governance vis-à-vis the trust doctrine.

3. Tribal Sovereignty in the Context of Gaming

*California v. Cabazon Band of Mission Indians*¹¹² is the definitive case demonstrating federal recognition and affirmation of the exercise of tribal sovereignty and self-governance in the context of economic development.¹¹³ In *Cabazon*, the Supreme Court restricted California's authority to enforce certain state gambling laws.¹¹⁴ Specifically, the Court held that California could not prohibit non-charitable bingo on Indian land.¹¹⁵

The Court reaffirmed that tribal sovereignty can only be abrogated by the federal government and not by the States.¹¹⁶ California law could be applied to the tribe only "if Congress has expressly so provided."¹¹⁷ California argued that this permission was granted by both Public Law 280 and the

branch, and the courts, self-government should be considered a protectable interest for purposes of trust analysis.").

110. Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47868-01 (Aug. 10, 2012).

111. *Id.*

112. 480 U.S. 202 (1987).

113. *See supra* notes 60–62 and accompanying text.

114. *Cabazon*, 480 U.S. at 221–22.

115. *Id.*

116. *Id.* at 207 ("tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States" (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980))).

117. *Id.*

Organized Crime Control Act.¹¹⁸ Public Law 280 extended California and certain states' criminal laws into the boundaries of a tribal reservation.¹¹⁹ With regard to Public Law 280, the Court found that it was not a grant of express congressional consent to apply the California bingo statute on the reservation because the statute was civil/regulatory—as opposed to criminal/prohibitory—in nature.¹²⁰ The Court rejected the Organized Crime Control Act as a basis for the application of the state bingo statute for similar reasons—namely that the statute made it clear that bingo does not violate the “public policy” of the state.¹²¹

Ruling in favor of the tribe, the Court concluded that the federal and tribal interests at stake outweighed California's interest in “preventing the infiltration of the tribal bingo enterprises by organized crime.”¹²² The federal and tribal interests, pertaining to tribal economic development, were vital to self-determination because gaming was the main source of employment and the tribe lacked other means of economic development (for example, there were no available natural resources to exploit), and this outweighed California's desire to prohibit gaming on Indian land.

a. The Enactment of IGRA and the Tribal Regulatory Role

Following *Cabazon*, tribes increased their economic development activities through the expansion of casinos, and states recognized that they could not regulate Indian gaming, absent Congressional intervention.¹²³ Pursuant to well-established federal law and policy, such regulation was left to the tribes, subordinate only to Congress's plenary power over Indian affairs.¹²⁴ In response, the states went to Congress and sought a legislative limitation on the scope of the holding in *Cabazon*.¹²⁵ Shortly thereafter, Congress enacted the Indian Gaming Regulatory Act of 1988 (“IGRA”).¹²⁶

IGRA granted states a role in Indian gaming through the negotiation of compacts with the tribes for the conduct of Class III gaming on Indian lands.¹²⁷ Through IGRA, Congress also “sought to insure the lasting integrity of the Indian gaming industry, so that it would endure as a viable

118. 18 U.S.C. § 1955 (2012).

119. 67 Stat. 588 (1953) (codified at 28 U.S.C. § 1322 (2012)).

120. *Cabazon*, 480 U.S. at 207–12 (applying *Bryan v. Itasca County*, 426 U.S. 373 (1976)).

121. *Id.* at 209–12.

122. *Id.* at 220.

123. *See, e.g.*, G. William Rice, *Some Thoughts on the Future of Indian Gaming*, 42 ARIZ. ST. L.J. 219, 221–23 (2010).

124. *Id.*

125. *Id.*

126. 25 U.S.C. § 2710 (2012).

127. *Id.* at § 2710(d).

tool for tribal economic development. . . . To effectuate this mandate, Congress established an independent federal regulatory agency called the National Indian Gaming Commission (“NIGC”).”¹²⁸

Most significantly, even in exercising its plenary power over Indian affairs, Congress expressly recognized the power of tribes to self-regulate economic development activities when it declared that the NIGC’s stated purpose is: “to provide a statutory basis for the regulation of gaming by an Indian tribe”¹²⁹ In doing so, tribes, through the enumerated powers set forth in their tribal gaming ordinances, established tribal gaming commissions for the effective regulation of gaming on tribal lands and to ensure compliance with tribal and federal laws. The duties and responsibilities of the tribal gaming commissions can include formulating and administering sound regulatory controls over tribal gaming matters; the interpretation and implementation of the contents of the NIGC’s Minimum Internal Controls Standards (“MICS”), IGRA, and the specific tribal gaming ordinance relating to Class III gaming.¹³⁰ It is also the responsibility of these gaming commissions to stay apprised of current activities, problems, and developments relevant to the regulation of tribal gaming.¹³¹ Tribal gaming commissions also provide advice and consultation on the NIGC’s regulations to individuals, employees, and local, state, and federal agencies.¹³² Further, tribal gaming commissions are responsible for licensing, investigations of theft, regulation, compliance, as well as the direction and oversight of all regulatory and criminal investigations, through coordination with appropriate federal agencies when required.¹³³

Tribes have demonstrated their ability to effectively regulate sophisticated gaming operations throughout Indian Country. Tribal regulatory bodies ensure compliance with tribal, federal, and state law (to the extent required pursuant to the compacts) and are given great deference

128. Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 431 (2001).

129. 25 U.S.C. § 2702(2) (2012).

130. See 25 U.S.C. § 2710; *Colorado River Indian Tribes v. Nat’l Indian Gaming Comm’n*, 383 F. Supp. 2d 123, 136 (D.D.C. 2005); *Artichoke Joe’s v. Norton*, 216 F. Supp. 2d 1084, 1095–96 (E.D. Cal. 2002).

131. See 25 U.S.C. § 2701(4) (“[A] principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.”).

132. See *Artichoke Joe’s*, 216 F. Supp. 2d at 1095–96; Habematolel Pomo of Upper Lake Gaming Code, § 4, available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/habematolel/20120706ltrtoTribereApprvdAmdTrbGagCode.pdf>.

133. See, e.g., Habematolel Pomo of Upper Lake Gaming Code, § 4, available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/habematolel/20120706ltrtoTribereApprvdAmdTrbGagCode.pdf>.

by federal and state governmental agencies, thereby affirming that the regulatory body best poised to regulate tribal economic development activities is the tribe itself.

B. Diversification of Tribal Economic Development

In the twenty-five years since *Cabazon*, the tribal gaming industry has grown exponentially. The revenues generated from casino activities have enabled tribes to develop self-sufficiency, promote tribal economic development, generate jobs, and support the tribes' government and governmental services and programs—including child care and health care for tribal members.¹³⁴ Unfortunately, however, not all tribes have had the opportunity to benefit from casino gaming. Many tribal reservations are located great distances from metropolitan areas and are, therefore, unable to gain access to a customer base necessary to run a profitable casino. Consequently, gaming presents no meaningful opportunity to provide revenue for the operation of their tribal governments.¹³⁵ These remotely located tribes have been forced to diversify their economic development opportunities and, in doing so, have begun to utilize one of the most expansive sources of revenue generation for companies throughout the world: the internet. Through the establishment of tribally owned and operated e-commerce activities, including consumer financial services and internet lending, tribes have quickly become leaders in a growing and sophisticated industry. In doing so, tribes have sought to ensure that, similar to their conduct of gaming operations, tribally-operated e-commerce activities are properly and effectively regulated.

1. Pursuant to Their Powers of Self-Governance, Tribes Maintain Regulatory Bodies for the Effective Regulation and Oversight of Their Internet Lending Activities

In order to ensure the proper oversight for compliance with tribal and federal laws and for the protection of consumers in their operation of e-commerce activities, tribes across the country have carefully established tribal regulatory commissions. Pursuant to tribal law, these commissions

134. See Krakoff, *supra* note 61.

135. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218–19 (1987) (“The Cabazon and Morongo Bands contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services.”).

have been established to ensure compliance with both tribal and federal laws and licensing requirements.

Similar to their state counterparts, tribes maintain a strict licensure process to uphold the integrity of internet lending activities within their jurisdictions. Tribal regulatory commissions are also charged with investigating complaints regarding alleged violations of tribal financial services laws.¹³⁶ Many of these tribal regulatory commissions are also vested with the power to issue cease and desist orders, injunctions, restraining orders, or writs of mandamus if they believe any person has engaged or is about to engage in any act or practice constituting a violation of tribal law.¹³⁷ Further, similar to tribal gaming commissions, these tribal regulatory commissions are also primarily responsible for promulgating and adopting regulations, issuing orders, rulings, findings and demands as may be necessary to carry out the purposes of the tribal financial services laws.¹³⁸

The tribal entities which provide financial services are wholly owned by the tribes and established pursuant to tribal law, with the tribal government retaining full control over their operation and with the revenues of the entities inuring to the benefit of the tribes. Accordingly, these wholly owned tribal entities are considered to be instrumentalities and arms of the tribe, created for the purpose of carrying out tribal directives pursuant to tribal law and regulatory requirements, and their officers and employees are considered officers and employees of the tribe. In response to the growth of the tribal financial services industry, the Native American Financial Services Association (“NAFSA”) was formed in 2012 to advocate on behalf of tribal sovereign rights and to promote the responsible conduct of tribal financial service activities.¹³⁹ NAFSA was also formed to establish uniformity and “best practices” for tribal financial service providers nationwide, with consumer protection as the primary focus.¹⁴⁰

136. NATIVE AMERICAN FINANCIAL SERVICES ASSOCIATION, FINANCIAL LENDING BEST PRACTICES, available at <http://www.mynafsa.org/best-practices/>.

137. See *id.* (listing best practices); *NAFSA Fact Sheet*, NAFSA, <http://www.mynafsa.org/useful-information/nafsa-fact-sheet/> (last visited Apr. 4, 2013) (“NAFSA member tribes and service providers are required to follow NAFSA’s established Best Practices and Bylaws to ensure responsible lending and advance industry-standard consumer protection safeguards.”).

138. *NAFSA Fact Sheet*, *supra* note 137.

139. *Id.*

140. *Id.*

2. The Recently Enacted Dodd-Frank Act Recognizes Tribal Regulatory Authority Over Tribal E-Commerce Activities

In July 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Act”) for the stated purpose of “promot[ing] the financial stability of the United States by improving accountability and transparency in the financial system . . . [and] protect[ing] consumers from abusive financial services practices.”¹⁴¹ The Act established the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) to protect consumers by carrying out Federal consumer financial protection laws.¹⁴²

Notwithstanding CFPB’s consumer protection purpose and goals, it is evident through the plain language of the Act that Congress did not intend for the Bureau’s regulatory role to extend to federally-recognized Indian tribal governments. Indeed, the only reference to Indian tribes in the Dodd-Frank Act appears in the definition of “State”:

The term “State” means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 479a-1(a) of title 25.¹⁴³

Thus, every reference to “State” in the Act demonstrates Congress’ explicit intent for those provisions to apply equally to Indian tribes and states. Treating tribes as states falls squarely within the “general federal policy of encouraging tribes ‘to revitalize their self-government’ and to assume control over their ‘business and economic affairs.’”¹⁴⁴

All of the references to states throughout Title X of the Act highlight the cooperation Congress envisioned between the federal government and the states, including, by definition, tribal governments. For example:

- The Act requires the Bureau to coordinate “fair lending efforts of the Bureau with other Federal agencies and State regulators, as appropriate, to promote consistent, efficient, and effective enforcement of Federal fair

141. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended at 12 U.S.C. §§ 5301–5641 (2010)).

142. 12 U.S.C. § 5491 (2012).

143. Dodd-Frank Act § 1002(27), 12 U.S.C. § 5481(27) (2012).

144. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973)).

lending laws,”¹⁴⁵ and “coordinate with . . . Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.”¹⁴⁶

- The Act gives states a significant role in collecting and tracking consumer complaints,¹⁴⁷ mandates that the Bureau share the data it collects with state agencies,¹⁴⁸ and requires the Bureau to give state regulators “any report of examination made by the Bureau with respect to [a] person” over which the state has jurisdiction.¹⁴⁹
- The Act requires that, “[i]n developing and implementing registration requirements [for covered persons],” the Bureau must “consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration), where appropriate.”¹⁵⁰

Further reinforcing that Congress intended states (and thus tribes) to be co-regulators, the Act promotes enforcement of state consumer protection laws and State power to directly enforce state and federal law. For example:

- The Act provides that, but for a few exceptions, Title X “may not be construed as annulling, altering, or affecting, or exempting any person subject to the provisions of this subchapter from complying with, the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this title, and then only to the extent of the inconsistency.”¹⁵¹
- The Act provides that “[n]o provision of this subchapter, except as provided in section 1083, shall be construed as modifying, limiting, or superseding the operation of any

145. 12 U.S.C. § 5493(c)(2)(B) (2012).

146. 12 U.S.C. § 5495 (2012).

147. 12 U.S.C. § 5493(b)(3)(B) (2012).

148. 12 U.S.C. § 5493(b)(3)(D) (2012).

149. 12 U.S.C. § 5512(c)(6)(C)(i) (2012).

150. 12 U.S.C. § 5512(c)(7)(C) (2012).

151. 12 U.S.C. § 5551(a)(1) (2012).

provision of an enumerated consumer law that relates to the application of a law in effect in any State with respect to such Federal law.”¹⁵²

- The Act provides that “the attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State” in federal or state court to enforce the Act and associated regulations.¹⁵³

In short, Congress intended tribes to be the Bureau’s partners in regulation. Nowhere does the Act suggest that states or tribes are subject to Bureau oversight or enforcement. In fact, in a public statement regarding how the Bureau will interact with Indian tribes, it explained that the Act: “[e]mpower[s] tribal government . . . to enforce the [Bureau]’s rules in areas under their jurisdiction, the same way that states will be permitted to enforce those rules.”¹⁵⁴ This co-regulation is further evidenced by the fact that the tribes have enacted their own laws authorizing the responsible conduct of financial service activities within the jurisdiction of their respective tribal lands and have established tribal regulatory agencies to oversee, require compliance, and regulate tribal lenders.

Moreover, when viewed in light of the trust relationship between the federal government and Indian tribes, it is clear that in including tribes as regulators within the Dodd-Frank Act, Congress recognized the federal responsibility in ensuring that the protectable beneficiary interest of tribal self-governance is safeguarded. As stated above, the federal government has a fiduciary obligation to protect Indian tribes’ rights to self-governance. The Dodd-Frank Act is just one of many federal laws that indicate Congress’ support for tribal self-determination.¹⁵⁵ In fact, similar to the Dodd-Frank Act, some federal environmental laws also clearly treat tribes as states.¹⁵⁶ Such provisions were drafted to encourage tribal self-determination by allowing for tribal implementation of pollution control programs on reservations.¹⁵⁷ Similarly, the Dodd-Frank Act’s treatment of tribes as states

152. 12 U.S.C. § 5551(b) (2012).

153. 12 U.S.C. § 5552(a)(1) (2012).

154. *The Wall Street Reform and Consumer Protection Act of 2010 is Beneficial for Native Americans*, U.S. DEP’T OF THE TREASURY, (Jan. 26, 2011, 10:03 AM), <http://www.treasury.gov/initiatives/wsr/Pages/Native-Americans.aspx>.

155. See Wood, *supra* note 107, at 178 (referring to the Indian Reorganization Act, the Indian Self-Determination and Education Assistance Act, and the Tribal Self-Governmental Act).

156. See *id.*

157. *Id.* at 178, 188–89.

was obviously meant to recognize the right and ability of tribes to implement their own financial regulatory systems.

a. Tribes Are Not “Covered Persons” Under the Act, and, Therefore, Are Not Subject To Regulatory Oversight

In order for the Bureau to directly regulate tribes, Congress must have vested the Bureau with that authority.¹⁵⁸ Such authority was not included in the Dodd-Frank Act. Quite the contrary: it directed the Bureau to interact and work together with tribes and tribal entities on a government-to-government basis, and it affirmatively distinguished between the “covered persons” over whom the Bureau would exercise regulatory control, and fellow regulators, including tribes and States.¹⁵⁹

Nowhere does the Act suggest that tribes (or states) are subject to Bureau oversight. Instead, it merely charges the Bureau with “supervising covered persons for compliance with Federal consumer financial law,”¹⁶⁰ and it defines “person” as “an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.”¹⁶¹ This language does not suffice to give the Bureau regulatory authority over sovereigns such as tribes or states. As the Supreme Court has made clear, if Congress intends to include a sovereign within the reach of a regulatory provision, it must say so clearly and specifically.¹⁶² The term “person,” as defined, does not do so.¹⁶³

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,¹⁶⁴ the respondent argued that provisions of the False Claims Act applicable to “persons” also covered states.¹⁶⁵ The Supreme Court rejected that proposition in part. The Court relied on a “longstanding interpretive presumption that ‘person’ does not include the sovereign.”¹⁶⁶ Analyzing the statute in light of that presumption, the Court concluded that (i) a provision making “persons” liable under the False Claims Act did not apply to States because it made no specific mention of States, while (ii) another provision

158. *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).

159. *See supra* notes 150–53 and accompanying text.

160. Dodd-Frank Act § 1021(c)(4), 12 U.S.C. § 5511(c)(4) (2012).

161. Dodd-Frank Act § 1002(19), 12 U.S.C. § 5481(19) (2012).

162. *See* *Vt. Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000) (utilizing the “longstanding interpretive presumption that ‘person’ does not include the sovereign”) (citations omitted).

163. *See id.*

164. 529 U.S. 765 (2000).

165. *Id.* at 782.

166. *Id.* at 780 (citations omitted).

authorizing the Attorney General to issue CIDs to “persons” did apply to States precisely because it “expressly defin[ed] person . . . to include States.”¹⁶⁷

Applying this framework, the Bureau cannot regulate federally-recognized Indian tribes under the Dodd-Frank Act. Nothing in the Act mentions tribal immunity, let alone explicitly abrogates it. To the contrary, the Act treats tribes as States, thus reinforcing their sovereign authority. Congress, in sum, has plenary power over Indian affairs.¹⁶⁸ Where Congress has spoken clearly—as it has in this instance by explicitly including tribes within the Act’s purview as regulators but declining to include them within the definition of “covered persons”—courts and the executive branch are bound to follow its mandate.¹⁶⁹

b. The Dodd-Frank Act is Not a Law of General Applicability

Federal laws of general applicability (those statutes which apply to all persons, property, or groups throughout the United States) “will not apply [to Indians or Indian tribes] if application would adversely impact rights reserved by treaty or statutes or tribes’ inherent rights of self-government.”¹⁷⁰

In *Donovan v. Coeur d’Alene Tribal Farm*,¹⁷¹ the Ninth Circuit held that the Occupational Safety and Health Act (“OSHA”) applied to the commercial activities of an Indian tribal farm.¹⁷² *Coeur d’Alene* arose out of citations and a \$185 fine levied upon the tribe following a consensual inspection of two grain elevators on the Farm.¹⁷³ The tribe challenged OSHA’s authority to conduct health and safety inspections.¹⁷⁴ The case was initially referred to an Administrative Law Judge (“ALJ”) who affirmed the citations.¹⁷⁵ Following a second petition to the Occupational Safety and Health Review Commission for review, the Commission reversed the

167. *Id.* at 783–84 (citations omitted) (quotation marks omitted).

168. *Rice v. Rehner*, 463 U.S. 713, 719 (1983) (citations omitted).

169. *See Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (citations omitted); *see also Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011) (citations omitted), *aff’d*, 132 S. Ct. 2181 (2012).

170. FELIX COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 129 (Nell Jessup Newton et al. eds., 2005).

171. 751 F.2d 1113 (9th Cir. 1985).

172. *Id.* at 1116.

173. *Id.* at 1114.

174. *Id.* at 1115.

175. *Id.*

decision of the ALJ and vacated the citations and fine.¹⁷⁶ The Secretary of Labor appealed the matter to the Ninth Circuit.¹⁷⁷

The narrow issue on appeal was “whether congressional silence should be taken as an expression of intent to exclude tribal enterprises from the scope of an Act to which they would otherwise be subject.”¹⁷⁸ In its analysis, the Court recognized three distinct exceptions to the rule that federal laws of general applicability will apply to Indian tribes:

A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches ‘exclusive rights of self-governance in purely intramural matters’; (2) the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties’; or (3) there is proof ‘by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . .’¹⁷⁹

It is evident that, by its plain terms, the Dodd-Frank Act is not a federal statute of general applicability. Unlike other federal statutes which do not reference tribes, the Dodd-Frank Act specifically mentions the applicability of the Act to Indian tribes.¹⁸⁰ As stated above, the singular reference to Indian tribes in the Act explicitly includes federally recognized Indian tribes within the definition of “State.”¹⁸¹

Because tribes are specifically mentioned in the Act, the Act cannot be considered a federal statute of general applicability and, as referenced in the Act, federally recognized Indian tribes are to be treated as a “regulator” by the Bureau, no different than any other “State.”

3. Analogy to Environmental Laws with Tribal Implementation Provisions

The Dodd-Frank Act is just one of many federal laws that indicate Congressional support of tribal self-determination.¹⁸² In fact, the Act is not the first federal law to promote tribal sovereignty by treating tribes as states;

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 1116 (citations omitted).

180. See Dodd-Frank Act § 1002(27), 12 U.S.C. § 5481(27) (2012).

181. *Id.*

182. Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 178 (1995) (referring to the Indian Reorganization Act, the Indian Self-Determination and Education Assistance Act, and the Tribal Self-Governmental Act).

several environmental laws also do so.¹⁸³ To name a few examples: the Federal Insecticide, Fungicide, and Rodenticide Act; the Clean Water Act; the Safe Drinking Water Act; and the Clean Air Act all contain provisions drafted to encourage tribal self-determination by allowing tribal implementation of pollution control programs on reservations.¹⁸⁴

These “Treatment as States” (“TAS”)¹⁸⁵ provisions enhance tribal self-governance practically by definition. Akin to the federally delegated authority to regulate liquor that was at issue in *United States v. Mazurie*,¹⁸⁶ the TAS provisions only delegate power that would have existed anyway as an attribute of inherent sovereignty. Evidently, upon looking to federal environmental laws with TAS provisions, it becomes even clearer that by classifying tribes as “States” under the Dodd-Frank Act, Congress was attempting to encourage tribes to develop their own financial regulatory systems. This is consistent with the federal government’s obligation to fulfill its trust responsibility to and recognize the inherent sovereignty of federally-recognized Indian tribes.

III. THE BENEFITS OF TRIBALLY OWNED ONLINE LENDING COMPANIES

Though most existing scholarship on short-term consumer loans is against the practice, these scholars ignore the fact that there is a large unserved and underserved population who are in dire need of short-term financial services and, without such services available to them, would face drastic life-changing consequences. Such scholars also tend to cast tribal participation in internet lending and e-commerce in a negative light, erroneously asserting that tribes are being exploited by their non-tribal partners in these business structures, for the purpose of avoiding state regulation by hiding under the shield of sovereign immunity.¹⁸⁷ These misconceptions have no basis in reality. Indeed, short-term consumer lending not only serves a legitimate market need, but when the service is offered by the wholly owned and regulated entities of Indian tribes, the benefits are two-fold, as the revenues derived in the business increase tribal self-sufficiency and reinforce tribal self-determination.

183. *See id.*

184. *Id.* at 178, 188–89, n.344.

185. *See id.* at 188.

186. 419 U.S. 544 (1975); *see supra* Part II.A.3.

187. *See, e.g.*, 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 (2012).

A. *Tribal Loans as a Reasonable Source of Short-term Credit for Unbanked and Underbanked Arizonans*

In *Midwest Title Loans, Inc. v. Mills*,¹⁸⁸ Judge Posner, without taking sides in the “fringe banking” debate, nevertheless acknowledged that there is a legitimate market need for short-term consumer loans:

[P]eople who cannot borrow from a bank because they have poor credit may need a loan desperately. If a ceiling is placed on interest rates, these unfortunates may be unable to borrow because the ceiling may be too low for the interest rate to compensate the lender for the risk of default. As a result, they may lose their house or car or other property or find themselves at the mercy of loan sharks. . . . An annual interest rate of 300 percent is astronomical. But a person who borrows \$5,000 at that rate and repays it two weeks later pays only \$577 in interest, and the loan may have enabled him to avert foreclosure on his house, or some other dire event that would have cost him more than \$577.¹⁸⁹

Indeed, the unbanked and underbanked population is identified as a very large and growing base, with approximately 25 percent of American adults—as many as 70 to 90 million individuals—lacking sufficient credit information to generate a traditional credit bureau score.¹⁹⁰ Although Arizona’s deferred presentment license program expired on July 1, 2010,¹⁹¹ Arizonans’ need for short-term credit remains. The only change which resulted from this statutory flux is that these individuals were forced to look elsewhere for their short-term credit needs—leaving only limited and undesirable alternatives for them.

For example, in a traditional car title loan, the lender holds the borrower’s car title as collateral for the loan.¹⁹² If the borrower fails to either make payments or “roll over” the loan, the lender can sell the car.¹⁹³ In turn, the borrower is unable get to work. He then loses his job, cannot pay his bills, and is evicted. Clearly, in the current credit and financial crisis,

188. 593 F.3d 660 (7th Cir. 2010).

189. *Id.* at 664.

190. *Successfully Lend to the Underbanked Consumer*, LEXISNEXIS, Feb. 2010, at 3, available at <http://insights.lexisnexis.com/creditrisk/wp-content/uploads/2012/04/Successfully-Lend-to-the-Underbanked.pdf>.

191. ARIZ. REV. STAT. ANN. § 6-1263 (2012) (“The deferred presentment licensing program established by the chapter ends on July 1, 2010 pursuant to § 41-3102.”).

192. Woolston, *supra* note 1, at 875–76. Car title loan companies currently operating in Arizona include Arizona Title Loans, www.autotitleloansarizona.com; Cash-N-Go, www.azcashngo.com; and Southwest Title Loans, www.southwesttitleloans.com.

193. Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 164–65 (2004).

unbanked and underbanked Arizonans are truly hurt when denied access to a legitimate source of short-term credit.

B. The Benefits of Internet Lending to Indian Country

Tribal expansion into the area of e-commerce not only provides much needed financial services to the unbanked and underbanked consumer, who would otherwise be left without any realistic options, but such diversification of tribal economic development into the vast sphere of e-commerce has also had a profound impact on tribal governments and their citizens, who have limited options to generate revenue for their communities.

Due to insufficient federal aid,¹⁹⁴ tribal governments throughout Indian Country have difficulty providing very basic governmental services, including education and healthcare, to their citizens. This is especially the case for tribes located in remote locations and without the ability to operate casinos on their lands. Indeed, even those tribes that have opened casinos after arduous time, effort, and expense are facing dire economic conditions as a result of the general economic downturn as well as an increasingly competitive gaming environment.¹⁹⁵

By diversifying their economic development initiatives into the internet lending arena, and through guidance of organizations such as NAFSA, tribes have greatly expanded their opportunities for growth and ability to support the vital needs of their citizens. Indeed, e-commerce initiatives have increased job growth for tribes; improved governmental programs such as education, housing and healthcare; and have provided tribes with an additional avenue to strengthen and stimulate their regulatory authority.¹⁹⁶ Similar to gaming, tribes, through their responsible and properly regulated lending entities, are able to increase their self-sufficiency and provide for their citizens through self-governance—a concept which demonstrates, in practice, the federal trust relationship to Indian tribes and the federal policy

194. For example, federal spending on vital healthcare provided to Indian Country through the Indian Health Service accounts for 0.12 percent of the federal budget, while only 0.07 percent is allotted to the Bureau of Indian Affairs. See *NCAI and Tribal Leaders Share Concerns About 'Fiscal Cliff' in Advance of White House Tribal Nations Summit*, INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 4, 2012), <http://indiancountrytodaymedianetwork.com/article/ncai-and-tribal-leaders-share-concerns-about-%E2%80%98fiscal-cliff%E2%80%99-advance-white-house-tribal>.

195. See *OTOE E-Commerce Initiative*, NATIVE AM. FIN. SERVS. ASS'N, <http://www.mynafsa.org/otoe-e-commerce-initiative-2/> (last visited Mar. 20, 2013).

196. See Katherine Spilde, *E-Commerce Opportunities for Tribal Governments*, INDIAN GAMING MAGAZINE, Oct. 2012, at 52, 52–53.

of safeguarding tribal self-governance and promoting economic development in Indian Country.¹⁹⁷

CONCLUSION

Since the United States Supreme Court first formally recognized tribal sovereignty nearly two centuries ago, tribes have developed extremely sophisticated forms of government. These tribal governments not only provide traditional government services such as education, healthcare, and social services, but they also effectively conduct and regulate a wide variety of businesses to further tribal governmental capabilities to their tribal citizens. Tribes have expanded the opportunities for their governments and citizens through the operation and regulation of consumer financial services and e-commerce activities. Tribal self-determination in the consumer financial services industry was clearly intended by Congress when it passed the Dodd-Frank Act, which includes tribes within the definition of “State.” The Dodd-Frank Act makes it clear that tribes are subject to federal law when federal law is applicable, but that the CFPB would not be charged with enforcement activities over the tribes. Rather, under the Act, the tribes—identical to states—would have the full authority to effectively regulate their financial services activities, just as they have proficiently done for over twenty years in the context of gaming.

In making the service of short-term consumer lending available to Arizona citizens, tribes are not seeking to evade or circumvent state statutory prohibitions. Rather, through their responsible regulation of e-commerce, tribes are providing a legitimate source of funding to an underserved demographic—many comprised of educated and technologically savvy students and young professionals¹⁹⁸—that would otherwise be left without a viable option to address their dire financial needs. Indian gaming has demonstrated that tribes not only have the legal right, by virtue of their inherent sovereignty and self-determination, to regulate their own businesses, but they also possess the requisite skill and expertise to regulate these businesses in a responsible manner. It is important that the public—including state regulators as well as legal and academic scholars alike—deviate from the misconceptions that currently surround Indian tribes and short-term consumer financial services and understand the facts at hand. The reality is that while tribally owned lending entities are not obligated to adhere to state regulations governing lending

197. See *Kiowa Tribe of Okla. v. Mfg. Techs, Inc.*, 523 U.S. 751, 757–58 (1998).

198. *Successfully Lend to the Underbanked Consumer*, *supra* note 190, at 5.

practices, they are certainly bound by their own regulations as well as those of the federal government. Therefore, in engaging in this form of e-commerce and economic development, tribes are not seeking to facilitate abusive lending practices upon consumers. Rather, tribes are making an active effort to refine and strengthen the regulations and regulatory practices of their lending entities for the purpose of responsibly serving a large unbanked and underbanked constituency in the United States. Such efforts not only serve to reinforce the fundamental principles of tribal self-determination and self-governance, but should also provide assurance to citizens of Arizona and the United States alike that short-term lending provided by tribal entities are a viable financial alternative, upon which they can rely.