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IT'S NONE OF YOUR BUSINESS: STATE REGULATION OF TRIBAL BUSINESSES UNDERMINES SOVEREIGNTY AND JUSTICE

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The U.S. Constitution grants the federal government plenary power over American Indian affairs, yet states are increasingly attempting to assert regulatory and tax jurisdiction over tribal businesses. This overreach threatens tribal sovereignty and contravenes the terms of treaties entered between the United States and American Indian tribes. This Article begins by examining the legal foundations of federal, state, and tribal relations. It then examines recent cases across four business sectors—gaming, tobacco sales, petroleum sales, and online lending—in order to illustrate the pervasive jurisdictional challenges faced by courts in cases involving tribal businesses. This Article offers three recommendations. First, it argues that the proper first forum for resolving disputes involving tribal businesses is the tribal court system; federal and state courts should be prepared to consider this issue sua sponte if it is not raised by the parties. Second, this Article calls for periodic, systematic audits of federal compliance with Indian treaties, which should evaluate both the federal government's activities and the federal government's obligation to prevent state interference with tribes' treaty-protected rights. Finally, in light of recent legislative proposals and executive actions, this Article asserts that removing barriers to American Indian participation in the political process at all levels will support economic development and self-determination in Indian Country. We contend that all Americans—indigenous or not—have a stake in seeing the federal government uphold its constitutional and treaty-bound commitments to American Indian tribes.

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I.
INTRODUCTION

The heightened discourse of late regarding decolonization and reconciliation with Native Americans[1] has done little to fix the persistent problem of state overreach into tribal lands and businesses. In an era of global and online com-

1. This paper uses the terms "Indian," "American Indian," and "Native American" interchangeably to refer to the indigenous peoples of the mainland United States at the time of European colonization. Given the complex and on-going narratives around indigenous identity and terminology, we chose to utilize the terms found in U.S. federal Indian law for simplicity. This paper focuses on such issues as they relate to Native Americans; these topics are also relevant to Alaska Natives and Native Hawaiians. For more information on the business enterprises of Alaska Native Corporations, see *Alaska Native Corporations*, RESOURCE DEVELOPMENT COUNCIL OF ALASKA, https://www.akrdc.org/alaska-native-corporations#Sources. For more information on the legal status of Native Hawaiians, see John Heffner, *Between Assimilation and Revolt: A Third Option for Hawaii as a Model for Minorities World-Wide*, 37 TEX. INT'L L.J. 591 (2002).

merce, states have increasingly attempted to assert regulatory and tax jurisdiction over tribal businesses. In some recent cases, federal courts have upheld principles of self-determination and tribal autonomy. In others, they have allowed states to impose settler norms and values on tribal businesses, impeding economic development, interfering with cultural practices, and undermining sovereignty.[2]

The federal government has long recognized that Native American tribal governments have authority over their members, their lands, and, in certain instances, non-tribal members who enter their lands.[3] However, the federal government has not always acted in accordance with this legal reality.[4] Native American tribes' inherent sovereignty has been confirmed through their status as domestic dependent nations in the U.S. Constitution, two centuries of U.S. Supreme Court rulings, treaties between the federal government and tribes, and generations of customary practices between tribes and their neighbors.[5] As sovereign, domestic dependent nations, the tribes have rights to self-governance, to manage tribal lands, to own and operate tribal businesses, and to regulate non-tribal individuals and businesses operating on their lands.[6]

The status of a sovereign, domestic dependent nation is a unique one, and the relationship between tribes, states, and

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2. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty In Day-to-Day Business Operations: What the Key Players Need to Know*, 49 WASHBURN L. J. 661, 674–75 (2010).

3. *See, e.g.*, Williams v. Lee, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."). *See generally* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, 40 HUM. RTS. 3, 3–6 (2015).

4. *See, e.g.*, Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 856 (2014) ("Yet, despite the ways in which tribal governance is inextricably linked to effective governance, the Supreme Court nearly always neglects this relationship. Instead, the Court frames tribal governance as dangerously divergent, disruptive, and unnecessary. In doing so, the Court paradoxically stymies effective governance and creates unnecessary barriers to the promotion of federalism's values."); Thompson, *supra* note 2, at 674.

5. *See generally* Fletcher, *supra* note 3, at 3.

6. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978); Turner v. United States, 248 U.S. 354, 357–58 (1919); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

the federal government is complicated.[7] This is progressively true as tribes increase their participation in the national and international marketplaces.[8] As evidenced by the COVID-19 pandemic, national, state, tribal, and local economies are interconnected by national supply chains.[9] It is well-settled that states cannot regulate business activities occurring on Indian reservations.[10] However, this notion has become markedly more complex as more elements of tribal businesses must occur off-reservation. That leaves us to wonder, what does "on-reservation" really mean in an era of expanded national and online commerce? And is the notion that Indian commerce is under the exclusive jurisdiction of tribal governments and the federal government still being upheld if there is space for state integration and interference?

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7. Nathan R. Margold, *Introduction* to FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, at viii (1942) ("For more than a century, Supreme Court Justices, Attorneys General, and Commissioners of Indian Affairs have commented on the intricate complexity and peculiarity of federal Indian law.").

8. *See* Erin Tindell, *FAS Programs Help Promote Native American Foods Worldwide,* U.S. DEP'T OF AGRIC. (Feb. 21, 2017), http://blogs.usda.gov/2013/11/26/fas-programs-help-promote-native-american-foods-worldwide. Tribes have promoted economic development projects outside of international agricultural exports, as well, see Robert J. Miller, *Inter-Tribal and International Treaties for American Indian Economic Development,* 12 LEWIS & CLARK L. REV. 1103, 1108–09 (2008) (discussing examples such as the acquisition of Hard Rock Cafe by the Seminole Tribe of Florida, an automotive wiring harness plant owned by the Mississippi Band of Choctaw Indians, and the Navajo Nation's trade agreement with Cuban food purchasing agency Alimport, among others).

9. *See* Elizabeth Hoover, *Native Food Systems Impacted by COVID*, 37 AGRIC. & HUM. VALUES 569 (2020).

10. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973) (citations omitted) ("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."); *see also* United States v. Lara, 541 U.S. 193, 200 (2004) (citations omitted); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 837 (1982) (citations omitted); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–43 (1980) (citations omitted); Bryan v. Itasca Cnty., 426 U.S. 373, 376 n.2 (1976) (citations omitted); United States v. Mazurie, 419 U.S. 544, 553–56 (1975) (citations omitted); Morton v. Mancari, 417 U.S. 535, 551–53 (1974) (citations omitted).

Economic development is a critical issue in Indian Country.[11] From a strictly fiscal perspective, American Indians are both the most impoverished race group in the United States[12] and the least likely to be business owners.[13] Historically, federal policies of dealing with tribes and tribal businesses have reflected capitalist values, which may conflict with tribal cultural practices and norms.[14] Although treaties between tribes and the federal government promised to honor tribal rights to self-determination, the contemporary reality is that many tribal businesses must operate within a capitalist framework.[15]

The effects of these policies and pressures affect many facets of tribal business operation today. For example, the remote locations and fragmentation of many Indian reservations, far from potential customers and suppliers, has added to the difficulty of establishing successful tribal businesses.[16] Even though some reservations are rich in natural resources, outside investors are often reluctant to partner with tribal businesses to develop these resources, because they are often reluctant to submit themselves to tribal laws and regulations, and to the jurisdiction of tribal court systems.[17] Even when tribes agree to resolve disputes in state or federal courts, tribal sovereign immunity can raise concerns for business counterparties.[18]

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11. *See* Miller, *supra* note 8, at 1103; Joseph Patterson, *The Native American Struggle Between Economic Growth and Cultural, Religious, and Environmental Protection: A Corporate Solution*, 92 NOTRE DAME L. REV. ONLINE 140 (2016).

12. *See* Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, ATLANTIC (July 30, 2016), https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/ ("The 2 million Natives in the U.S. have the highest rate of poverty of any racial group—almost twice the national average."); *see also What Drives Native American Poverty?*, NW. INST. FOR POL'Y RES. (Feb. 24, 2020), https://www.ipr.northwestern.edu/news/2020/redbird-what-drives-native-american-poverty.html; John Koppisch, *Why Are Indian Reservations So Poor? A Look at the Bottom 1%*, FORBES (Dec. 13, 2011, 7:32 PM), https://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/#19aceb123c07.

13. *See* Robert J. Miller, *American Indian Entrepreneurs: Unique Challenges, Unlimited Potential*, 40 ARIZ. STATE L.J. 1297, 1297 (2008).

14. *See id.* at 1300–01.

15. *See id.* at 1305–06.

16. *See* Patterson, *supra* note 11, at 143 n.19.

17. *See* Miller, *supra* note 13, at 1309–14.

18. *See* Koppisch, *supra* note 12.

There are examples of profitable brick-and-mortar tribal businesses operating on Indian reservations in sectors ranging from gaming operations to convenience stores to renewable energy generators.[19] Tribes are also increasingly seeking to develop online businesses to reach a wider customer base. Online enterprises, primarily in the financial services sector, have helped tribes generate significant revenues to fund tribal services and provide employment opportunities for their members.[20] Yet some Native Americans have observed that these business ventures do not comport with their tribal values and may expose their tribe to predatory schemes from outside actors.[21]

Commensurate with growth of tribal businesses that have an online or off-reservation component are state attempts to assert regulatory and tax jurisdiction over these businesses. Some recent federal cases have rejected state attempts to regulate tribal businesses, whereas others have legitimized them. Treaty interpretation has been at the core of these recent legal decisions. Treaties are not merely reminders of the past. They are contracts that are legally binding in the present day. These bilateral agreements shaped the formation of the United States, and they continue to dictate how land, natural re-

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19. The 500-member Mashantucket (Western) Pequots in southeastern Connecticut generate over one billion dollars a year from their Foxwoods Casino and Resort and are one of the state's highest revenue contributors and largest employers, see *Foxwoods Resort Casino Announces $33.6 Million in Slot Revenue for June 2020, Contributes $8.4 Million to the State of Connecticut*, TRIBAL GAMING AND HOSP. (2020), https://tgandh.com/news/tribal-stories/foxwoods-resort-casino-announces-33-6-million-in-slot-revenue-for-june-2020-contributes-8-4-million-to-the-state-of-connecticut/. The Confederated Salish and Kootenai Tribes have launched numerous enterprises, including S&K Technologies, S&K Electronics, and Energy Keepers, Inc., see *Tribal Enterprises*, CSK TRIBES, https://csktribes.org/home/tribal-businesses (last updated 2021). For examples of Native American entrepreneurs, see Gabrielle Pickard-Whitehead, *8 Native American Entrepreneurs*, SMALL BUS. TRENDS (Oct. 8, 2019), https://smallbiztrends.com/2019/10/native-american-entrepreneurs.html.

20. *See* Mary Jackson, *Tribal Lending Provides More Opportunities for America's Indigenous Peoples*, FORBES (Nov. 26, 2019, 8:00 AM), https://www.forbes.com/sites/forbesfinancecouncil/2019/11/06/tribal-lending-provides-more-opportunities-for-americas-indigenous-peoples/?sh=6ecb84f274ba.

21. Miller, *supra* note 13, at 1300–01.

sources, and other rights are to be effectuated within the context of a nation-to-nation paradigm.

In entering treaties with American Indian tribes, the federal government recognized the inherent sovereignty of tribal nations. We are troubled by ongoing attempts by state governments to infringe the rights of these separate sovereigns, and by the federal government's lackluster efforts to uphold its end of the bargain—a bargain that it made on our behalf. When the federal government allows the constitutional rights of any group of Americans to be systematically disregarded by state governments, or otherwise, this poses a threat to *all* Americans, not just those who are directly impacted. In this Article, we advocate for the restoration of rule of law in the form of honoring treaty commitments and constitutional rights.

This Article argues that the federal government's plenary power over Indian affairs precludes state attempts to assert regulatory and tax jurisdiction over tribal businesses. The United States has a duty, under the Constitution and treaties entered with Indian tribes, to guard against this overreach. Part II begins by examining the legal foundations of federal, tribal, and state relations. Part III then examines recent cases across four business sectors—gaming, tobacco, petroleum, and online lending—to illustrate the pervasive jurisdictional challenges faced by courts in cases involving tribal businesses. Part IV offers three recommendations on how the federal government can uphold its constitutional and contractual duty to tribes. First, this Article argues that the proper first forum for resolving disputes involving tribal businesses or conflicts regarding tribal and state jurisdiction is the tribal court system; federal and state courts should be prepared to consider this issue *sua sponte* if it is not raised by the parties. Second, this Article calls for the enactment of law that would require periodic systematic audits of federal compliance with the terms of Indian treaties, including the federal government's activities and the federal government's obligation to prevent state interference with tribes' treaty-protected rights. Finally, in light of recent legislative proposals and executive actions, this Article asserts that removing barriers to Indian participation in the political process at all levels will support economic development and self-determination in Indian Country. This Article concludes that all Americans—indigenous or not—have a stake in seeing the

federal government uphold its constitutional and treaty-bound obligations to American Indian tribes, and that, as tribes increasingly enter the national and global marketplace, the time to act is now.[22]

II.
Legal Foundations of Federal, Tribal, and State Relations

A. *From Time Immemorial: Indigenous Relationships to Place*

Indigenous peoples have inhabited and thrived in the space we now know as the United States since time immemorial.[23] Tribes had—and continue to have—their own knowledge systems comprised of cultural practices, languages, traditions, spiritual beliefs, and forms of government.[24] However, the formation of federal laws and policies surrounding American Indians and their land have rarely, if ever, been constructed using indigenous knowledge.[25] Few written records exist which document indigenous relationships to the land prior to colonization; what we do know has been passed down through the practice of oral tradition. In *Braiding Sweetgrass*, Robin Wall Kimmerer offers the following depiction of indige-

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22. Before continuing, let us, as authors, explain our interest in this Native American sovereignty and economic development. We do not have a tribal affiliation. We do not purport to speak for any tribe or group. Although we consulted with Native American scholars and attorneys in preparing this manuscript, we do not personally offer a native voice. We felt drawn to write this Article because we are American citizens and, as such, we have an interest in seeing the United States uphold the constitutional and contractual commitments that it made on behalf of all Americans when entering treaties with native peoples.

23. Roxanne Dunbar-Ortiz, An Indigenous Peoples History of The United States 14 (2015).

24. *See generally* Sharon O'Brien, American Indian Tribal Governments 14–33 (1989) ("These governments ranged from highly centralized (Creek Nation) to highly decentralized (Yakama Nation) . . . each tribe, exercising its inherent sovereignty, structured its government according to its special needs, made and enforced its own laws, and conducted relations and trade with other tribes."); Hyojung Cho, *Conservation of Indigenous Heritage in the United States: Issues and Policy Development*, 38 J. Arts Mgmt. L. & Soc'y 187, 188 (2008).

25. *See* Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 Lewis & Clark L. Rev. 847, 849 (2011).

nous relationships to place and space and how they differ from settler colonist views of land:

> In the settler mind, land was property, real estate, capital, or natural resources. But to our people, it was everything: identity, the connection to our ancestors, the home of our nonhuman kinfolk, our pharmacy, our library, the source of all that sustained us. Our lands were where our responsibility to the world was enacted, sacred ground. It belonged to itself; it was a gift, not a commodity, so it could never be bought or sold. These are the meanings people took with them when they were forced from their ancient homelands to new places.[26]

As we examine the history of the legal interactions between federal, state, and tribal governments, particularly ones relating to land and place, we must keep in mind that the U.S. legal system has been developed from a singular perspective—the one offered by settler colonialism.[27]

B. *The Colonial Period*

Long before European colonization of what we now know as the Americas, American Indian Tribes existed as independent nations.[28] In the 1600s, at the time of European contact, approximately 12 million Native Americans, from more than 600 tribes, inhabited what is now North America.[29] Tribes often traded with and aligned with European powers, long before the formation of the United States.[30] In these interactions, England followed official governmental policies of deal-

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26. Robin Wall Kimmerer, Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teachings of Plants 17 (2013).

27. *See* Brenna Bhandar, Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership (2018); Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 Decolonization: Indigeneity, Educ. & Soc'y 1 (2012). *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1757–58 (1993) ("The essential character of whiteness as property remains manifest in two critical areas of law and, as in the past, operates to oppress Native Americans and Blacks in similar ways."); Naomi Mezey, *Law as Culture*, 13 Yale J.L. & Human. 35, 44 (2001).

28. *See* O'Brien, *supra* note 24, at 14; Nassima Dalal, *The Impact of Colonial Contact on the Cultural Heritage of Native American Indian People*, 4 Diffusion: UCLan J. Undergraduate Res. 1 (2011).

29. *See* O'Brien, *supra* note 24, at 14.

30. *See id.* at 41.

ing with tribes, and recognized them as distinct, sovereign governmental entities, often making treaties with them.[31] Although it is thought that this may have been out of an effort to minimize legal liability, British law was explicit in its regard for tribal sovereignty.[32] In fact, some Native Americans even allied with the British in the Revolutionary War.[33]

Following the colonists' victory in the Revolutionary War, the newly formed United States inherited modicums of the British legal principles which considered tribes to be foreign nations and continued to recognize tribal possessory rights in western territories.[34] While these inherited principles established some guidance for the young nation, the United States needed to figure out for itself how Indian tribes would be regarded within the federal system.

The U.S. Constitution does not speak to the question of whether tribes are subject to federal regulation, state regulation, or both. The constitutional provisions that most directly address Indian tribes are the Indian Commerce Clause and the two Treaty Clauses, which are discussed in detail below. Federal Indian law is largely judge-made law. The first cases to consider federal–state–tribal relations are known as the Marshall Trilogy.

C. *Marshall Trilogy*

In the 1830s, SCOTUS was called upon to interpret the nature and scope of tribal sovereignty in relation to the controlling constitutional provisions.[35] Through a series of three decisions known as the Marshall Trilogy, SCOTUS accomplished a fundamental shift in federal Indian law, no longer treating tribes as fully sovereign and transitioning them to a

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31. *See* Robert J. Miller, *American Indians and the United States Constitution*, FLASHPOINT MAG. (2006); *see also* Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 97 (2017).

32. *See* Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, AM. L. REG. 553 (1882); Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 1, 112–13 (1991).

33. *See* David Jaffee & Megan Mehr, *Native Americans and the American Revolution: Choosing Sides*, NAT'L ENDOWMENT FOR HUMAN. (Nov. 13, 2009), https://edsitement.neh.gov/lesson-plans/native-americans-role-american-revolution-choosing-sides; Savage, *supra* note 32, at 100.

34. Philip J. Smith, *Indian Sovereignty and Self-Determination: Is Moral Economy Possible?*, 36 S.D. L. REV. 299, 311–12 (1991).

35. *Id.* at 311.

unique status of protected domestic dependents within the federalist state.[36]

The first case in the Marshall Trilogy, *Johnson v. M'Intosh,* interpreted the Doctrine of Discovery to mean that land ownership lies with the governments whose subjects explored and occupied that land.[37] This interpretation is based on the idea that when Europeans conquered North America, their claims to the land superseded any Native American claims, and that further, when the United States won the territory from Great Britain in the Revolutionary War, all of the lands that the British purportedly owned were transferred to the United States.[38] However, more importantly, the case established federal supremacy in Indian affairs over that of states and individuals.[39] The ruling was based on the inherently racist logic that "'the superior genius of Europe might claim an ascendancy' over the 'character and religion' of the Natives . . . ."[40] The facts of the case involved a dispute over the ownership of parcels of land in the Ohio River Valley, which two parties claimed to have acquired from Indian nations in the area.[41] The Supreme Court held that Indians could not sell their property or title to anyone except the federal government.[42] This ruling made all previous sales of Indian property to individuals, states, or other nations void.[43]

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36. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (serving as the second case in the Marshall Trilogy, and summarizing the rationale for this shift in legal policy).

37. Johnson v. M'Intosh, 21 U.S. 543, 567 (1823) ("Not only has the practice of all civilized nations been in conformity with this doctrine, but the whole theory of their titles to lands in America, rests upon the hypothesis, that the Indians had no right of soil as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives.").

38. *Id.* at 562 ("The European governments asserted the exclusive right of granting the soil to individuale [sic], subject only to the Indian right of occupancy. . . . The exclusive right of the British government to the lands occupied by the Indians, has passed to that of the United States.").

39. *Id.* at 587–88.

40. M. Jordan Thompson & Chelsea L.M. Colwyn, *Living Sqélix: Defending the Land with Tribal Law*, 51 CONN. L. REV. 889, 899 (2019) (quoting *Johnson*, 21 U.S. at 573).

41. Fletcher, *supra* note 3, at 2.

42. *Id.*

43. *Id.*

The second case in the Marshall Trilogy, *Cherokee Nation v. State of Georgia,* involved the Cherokee Nation seeking an injunction to restrain the State of Georgia from enforcing the laws of the State within Cherokee territory.[44] Before reaching the merits, the issue of federal court jurisdiction had to be addressed. The Cherokee Nation argued that it was a distinct entity from the State of Georgia, capable of managing and governing itself.[45] The Cherokee Nation positioned itself as a foreign nation, therefore claiming the Court had diversity jurisdiction over its dispute with the State of Georgia.[46] But the Court disagreed, holding that the Cherokee were not a foreign nation, but rather a "domestic dependent nation"[47] and therefore did not have legal recourse against the Georgia laws being used to remove them from their land.[48] The classification of tribes and bands as "domestic dependent nations" would be used to justify the removal of indigenous people from ancestral lands, as well as the complete paternalistic authority by Congress over tribes.[49]

The *Cherokee Nation* court recognized that the "domestic dependent nation" concept would be a difficult one to implement, remarking that the "condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence"[50] but could most closely be analogized to that of a "ward to his guardian."[51] Further in the *Cherokee* decision, Justice Johnson would state in the concurrence "[b]ut I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly unknown to the books that treat of states,

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44. Cherokee Nation v. Georgia, 30 U.S. 1, 1 (1831); Fletcher, *supra* note 3, at 2.

45. *Cherokee Nation*, 30 U.S. at 2–3.

46. *Id.* at 11 ("The bill avers that this court has, by the constitution and laws of the United States, original jurisdiction of controversies between a state and a foreign state, without any restriction as to the nature of the controversy.").

47. *Id.* at 17.

48. *Id.* at 20.

49. *Id.* at 17 ("They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father."); *see* Thompson & Colwyn, *supra* note 40, at 899–900.

50. *Cherokee Nation*, 30 U.S. at 16.

51. *Id.* at 17.

and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state."[52]

The final case of the Marshall trilogy, *Worcester v. Georgia*, arose from a Georgia State Court case related to state professional licensure requirements and their application on American Indian lands. In this case, a non-Indian minister, Reverend Worcester, was convicted for ministering without a license. Worcester challenged the conviction on the basis that he was operating solely within the Cherokee Nation lands, and therefore was not bound by the Georgia state licensing requirement.[53] SCOTUS agreed. Unlike the events in *Cherokee Nation v. State of Georgia*, the Court found the Georgia law inapplicable by operation of the Supremacy Clause, concluding that the Cherokee Nation was a "distinct community occupying its own territory . . . 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."[54] Applying its prior holdings in *Johnson* and *Cherokee Nation*, the Court further held that "while the guardian–ward relationship did not extinguish tribal sovereignty, the federal government's assumption of fiduciary obligation towards tribes necessarily requires that tribal powers of self-government are limited by federal statutes, by the terms of treaties, and by restraints implicit within the protectorate relationship."[55]

In summary, the Marshall trilogy established three key principles of federal Indian law: (1) tribal sovereignty existed before the foundation of what we now know as the United States, and with the creation of the new nation it was not extinguished, but needed to be reinterpreted with the federal government holding the power to interpret this relationship; (2) tribes occupy a unique status within the federal structure as a domestic dependent nation; and (3) the status of tribes as domestic dependent nations creates a protectorate relationship in which the tribes' powers of self-government are limited and,

52. Cherokee Nation v. Georgia, 30 U.S. 1, 27–28 (1831).
53. Worcester v. Georgia, 31 U.S. 515, 537–41 (1832).
54. *Id.* at 561.
55. Smith, *supra* note 34, at 311.

thus, the United States has a fiduciary duty to them. Although federal Indian law has evolved and developed in the nearly 200 years since these decisions were issued, the core principles of the Marshall Trilogy are still utilized today.[56]

D. *Treaty Era*

As noted above, the European colonizers largely treated tribes as sovereign governments with authority over their peoples and territories. Generally, European settlers believed they held a right of occupancy of North America under the Doctrine of Discovery, but they did not believe this right was unbounded, and sought to negotiate treaties with Native Americans.[57] "Thus, England, France, and Spain, and later the United States, entered into numerous treaties with tribal governments to purchase land . . ." and secure access to other resources.[58]

Following the Revolutionary War, the United States followed the European model of creating treaties with tribes in the face of westward expansion.[59] The Articles of Confederation authorized the United States government to deal directly with tribes; between 1781 and 1789, the United States government entered into nine treaties with Indian tribes.[60] While the Articles provided Congress with the authority to manage American Indian affairs, the exclusivity of this power was unclear.[61] Thus, states also attempted to intervene.[62]

The early American government's attitude toward tribes can be regarded as one of indifference, reflecting a belief that fighting with tribes was a poor use of time and money that could have been better spent advancing settler colonialism.[63] In 1783, George Washington relayed this attitude to James

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56. *See* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627 (2006).

57. *See* Sorenson, *supra* note 31, at 97.

58. Robert J. Miller, The History of Federal Indian Policies 2 (Mar. 17, 2010) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573670.

59. *See* Miller, *supra* note 31.

60. *See Treaties Between the United States and Native Americans*, YALE L. SCH. (2008), https://avalon.law.yale.edu/subject_menus/ntreaty.asp.

61. *See* Miller, *supra* note 31.

62. *See id.*

63. *See* Miller, *supra* note 58, at 5–6.

Duane, a delegate in the Congress of the Confederation, stating, "[T]he gradual extension of our Settlements will as certainly cause the Savage, as the Wolf, to retire; both being beasts of prey, tho' they differ in shape."[64] But as white American populations grew in the late 1700s and fueled westward expansion, the United States government began to cast off the British legal principles in favor of ones that would advance the interests of settlers at the expense of the Native peoples.[65] The early approach of relative indifference towards tribes was no longer viable. Disputes with tribes became more common, and even erupted into violent clashes in states such as Georgia and South Carolina.[66] Such disputes, caused by states meddling in Indian affairs, demonstrated the need for a stronger federal government, and were therefore one driving force that motivated the adoption of the U.S. Constitution.[67]

Article II, Section II of the U.S. Constitution, also known as the Treaty Clause, gives the President power to enter treaties with Indian tribes and foreign nations: "[The President] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."[68] Under this provision, all treaties between the federal government and an Indian tribe or foreign nation must be signed by all parties and then ratified by Congress in order to have effect.[69] Article VI, Section II established that treaties carry the same force in effect as an act of Congress and are deemed the "supreme Law of the Land."[70]

Beginning with The Ordinance of 1785, legislation was executed that required the removal of Indians.[71] With the Northwest Ordinance in 1787, the federal government estab-

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64. Letter from George Washington, Commander in Chief of the Cont'l Army, to James Duane (Sept. 7, 1783), https://founders.archives.gov/documents/Washington/99-01-02-11798.

65. *See* Miller, *supra* note 58, at 6.

66. *See* Miller, *supra* note 31.

67. *Id.*

68. U.S. CONST. art. II, § 2.

69. Although the U.S. Constitution vests treaty-making power with the President, it did not entirely devoid states of their voice in the treaty-making process; by requiring Congressional ratification, states continue to have some control over the process.

70. U.S. CONST. art. VI, § 2.

71. THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY, at vii (Fredrick D. Williams ed., 1988).

lished the Northwest Territories, which "set the pattern for territorial governance and statemaking that was ultimately applied to thirty-one of the fifty states."[72] In 1790, Congress enacted the Trade and Intercourse Act, which, in pertinent part, asserted federal control over all commercial and other interactions between Indians and non-Indians.[73] As noted above, in *Worcester v. Georgia*, the U.S. Supreme Court had affirmed that the federal, not state, government has control over commerce with Indian tribes.[74]

The period from 1790 to 1830 was marked by relatively good relations between the United States government and American Indian tribes. The Bureau of Indian Affairs ("BIA") was established in 1824 to serve as trustee for all federally recognized Indian tribes through a fiduciary relationship.[75] But, as westward expansion pressed onward with an ever-increasing pace, so did the mounting conflicts between American Indians and non-Indian settlers.

Under pressure from President Andrew Jackson, in 1830, Congress passed the Indian Removal Act.[76] The Act authorized the President to negotiate "treaties" with Indian tribes in order to remove tribes from their homeland and relocate

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72. Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 930 (1995).

73. Act of June 30, 1834, Pub. L. No. 23-161, § 12, 4 Stat. 729, 730 (codified as amended at 25 U.S.C. § 177 (2006)).

74. *See* Worcester v. Georgia, 31 U.S. 515, 573 (1832) (M'Lean, J., concurring) (quoting ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4) ("[T]he United States, in congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck, by their own authority, or by that of the respective states; fixing the standard of weights and measures throughout the United States; regulating the trade and management of all affairs with the Indians, not members of any of the states: Provided, that the legislative right of any state, within its own limits, be not infringed or violated.").

75. *See* Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 4, 9 (2004); *Mission Statement*, BUREAU OF INDIAN AFFAIRS (Sept. 5, 2021, 5:26 PM), https://www.bia.gov/bia.

76. Ch. 148, 4 Stat. 411 (1830); 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, 564 (2021) ("Elected in 1828, President Jackson actively worked to ensure the passage of the Indian Removal Act of 1830 which empowered the president to negotiate the removal of tribes from the Eastern United States.").

them to Indian territories located west of the Mississippi.[77] These "treaties" were frequently entered by tribes under duress. Under the Indian Removal Act, tribes were compelled to sign a number of treaties in which they forfeited their homelands in exchange for new lands west of the Mississippi.[78] Throughout the 1830s and 1840s, thousands of Indians migrated west under a program that was "voluntary in name and coerced in fact."[79] The forced migration, termed the "Trail of Tears" by the Cherokee Nation, was ordered by Congress and championed by President Jackson.[80] The program was responsible for the loss of thousands of lives and has come to be regarded as an act of systematic genocide.[81]

With the discovery of gold in California, along with the opening of the Oregon Trail, the 1840s witnessed rapid migration west by non-Indians. In 1851, as removal of all tribes into Indian Territories became impractical, Congress passed the Indian Appropriations Act.[82] This Act introduced the concept of Indian reservations, to be located in Oklahoma and also in other (largely undesirable) locations primarily in the American West.[83] In the "Reservation Era" between 1850 and 1887, nearly 300 reservations were established by tribal governments and the United States.[84]

For the most part, reservations were significantly smaller than the lands that the tribes had originally held, and in some cases, the reservation was in an entirely new location completely unfamiliar to the tribe.[85] This period was marked by a

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77. Ch. 148, 4 Stat. 411 (1830).

78. *See* Miller, *supra* note 58, at 11.

79. William C. Canby, Jr., American Indian Law in a Nutshell 19 (6th ed. 2015).

80. *See* Miller, *supra* note 58, at 11.

81. National Museum of the American Indian, *The "Indian Problem,"* YouTube (Mar. 3, 2015), https://www.youtube.com/watch?v=IF-BOZgWZPE.

82. Ch. 14, 9 Stat. 574 (1851); Miller, *supra* note 58, at 13.

83. *See* Miller, *supra* note 58, at 11; James J. Lopach, Tribal Government Today: Politics on Montana Indian Reservations 1 (2019).

84. *See* Charlene Koski, *The Legacy of* Solem v. Bartlett*: How Courts Have Used Demographics to Bypass Congress and Erode the Basic Principles of Indian Law*, 84 Wash. L. Rev. 723, 728 (2009); Miller, *supra* note 58, at 13.

85. *See* Miller, *supra* note 58, at 13; Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 Vt. L. Rev. 713, 763 (2004).

staggering number of deaths as indigenous people struggled to adjust to the practice of farming rather than hunting, as well as the rampant spread of disease by non-Indians.[86] And yet, in the mid-1800s, and even by some people today, reservations were improperly regarded as a gift from the United States government to tribes, rather than a retention of tribes' lands and sovereignty that predates colonization.[87]

Members of the U.S. House of Representatives began to voice opposition to the United States entering treaties with American Indian tribes. The opposition was not grounded in ethical concerns, but, paradoxically, in the notion that after decades of conflicts with settlers, forced migration, and the rampant spread of new disease, the Native American population had dwindled too much to be called a "nation."[88] In 1871, after entering 370 treaties with American Indian tribes,[89] Congress ceased to recognize tribes as independent nations with which the United States could contract by treaty, ending the

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86. *See* Miller, *supra* note 58, at 14; Kyle Whyte, *The Dakota Access Pipeline, Environmental Injustice, and U.S. Colonialism*, RED INK: AN INTERNATIONAL JOURNAL OF INDIGENOUS LITERATURE, ARTS, & HUMANITIES, Feb. 28, 2017, at 154 (describing how tribal lands were broken up "into private property (often 160-acre parcels) for tribal members, an effort intended to force Indigenous peoples to adopt farming lifestyles that would pose less resistance to settlement.").

87. Marilyn J. Ward Ford, *Indian Country and Inherent Tribal Authority: Will They Survive ANCSA?*, 14 ALASKA L. REV. 443, 469 (1997) ("Much of the understanding regarding tribal sovereignty stems from the mistaken idea that it is a gift granted by the federal government to American Indian tribes."); Nicholad Vrchoticky, *The Untold Truth of the Trail of Tears*, GRUNGE (Sept. 2, 2021, 10:56 PM), https://www.grunge.com/135049/the-untold-truth-of-the-trail-of-tears/?utm_campaign-clip (explaining how reservations are now often regarded as stolen land. "American Indian reservations were built on a messed up history of colonization by an invading government. Reservations themselves are a reminder that the United States sits on stolen land through attempted genocide and rose to its heights on the backs of broken treaties. Reservations symbolize the killing of whole traditions and languages; the end of the old Indigenous way of life and the start of a new one controlled by an uninvited force.").

88. Mark Hirsch, *1871: The End of Indian Treaty Making*, MAG. OF SMITHSONIAN'S NAT'L MUSEUM OF THE AM. INDIAN (Summer/Fall 2014), https://www.americanindianmagazine.org/story/1871-end-indian-treaty-making.

89. Hansi Lo Wang, *Broken Promises on Display at Native American Treaties Exhibit*, NAT'L PUB. RADIO (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.

tradition of treaty-making.[90] Notably, Congress agreed to continue to honor all existing treaties.[91]

However, in 1903, the Supreme Court confirmed that Congress held the power to "abrogate the provisions of an Indian treaty."[92] In *Lone Wolf v. Hitchcock,* a case was brought against the US government by a Kiowa chief who charged that tribes under the Medicine Lodge Treaty had lost land due to a Congressional action in violation of the treaty.[93] The Court held that the plenary power held by Congress gave it the ability to abrogate, or lessen, treaty responsibilities, or even negate treaties entirely.[94] Since the decision in *Lone Wolf v. Hitchcock*, treaties have been abrogated or broken by Congress in several instances; however, while Congress may terminate tribal and treaty rights, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."[95] Following the end of the treaty-making era, Indian reservations have been established by presidential designation, and federal Indian policy has been made through statutes and executive actions.[96]

Although no new treaties between the federal government and tribes have been entered for the past 150 years, treaties are still one of the primary instruments grounding the recognition of tribal sovereignty.[97] Treaties continue to delineate land borders and define the political relationship between

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90. Indian Appropriations Act of 1871, 25 U.S.C. § 71 ("No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . .").

91. *Id.*

92. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

93. *Id.* at 564.

94. *Id.* at 566.

95. Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968) (citing Pigeon River Improvment, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934)). *See generally* Jeri Beth K. Ezra, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705 (1989); Robert Laurence, *Thurgood Marshall's Indian Law Opinions*, 27 HOW. L.J. 3 (1984); Catherine M. Ovsak, *Reaffirming the Guarantee: Indian Treaty Rights to Hunt and Fish Off-reservation in Minnesota*, 20 WM. MITCHELL L. REV. 1177 (1994).

96. Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 764 n.333 (2004).

97. Frank Pommersheim, *Tribal-State Relations: Hope for the Future*, 36 S.D. L. REV. 239, 242 (1991).

tribes and the federal government today.[98] However, disputes still arise over the interpretation. The U.S. Supreme Court has developed three canons of construction for resolving treaty disputes: treaties are to be construed as the participating Indians understood them at the time of signing, ambiguous expressions are to be resolved in favor of the Indians, and treaties are generally to be construed liberally in favor of Indians.[99]

E. *Separate Sovereigns*

The United States Constitution speaks to the relationship between the federal and state governments, and between the federal government and American Indian tribal governments, but it does not address the relationship between states and Indian tribes. Federal Indian law, therefore, is grounded in the concept that because the Constitution granted plenary power over Indian affairs to Congress,[100] and treaty-making power to the President and the Senate,[101] states have no authority over tribal governments unless expressly authorized by Congress.[102]

Tribes and states are parallel sovereigns, meaning that tribal governments are not subordinate to state governments, and state governments are not subordinate to tribal governments. States and tribes are separate sovereigns with proximal geographic territories that share common citizens.[103] In the modern era, states and tribes have government-to-government relations and cooperate in areas such as taxation, education, and law enforcement.[104]

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98. *Id.*

99. Jill De La Hunt, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM, 17 U. MICH. J. L. REFORM 681, 708–09 (1984).

100. U.S. CONST. art. I, § 8, cl. 3.

101. U.S. CONST. art. II, § 2.

102. Jackie Gardina, *Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts*, 35 AM. INDIAN L. REV. 1, 1 (2010).

103. Tribal citizens who reside on-reservation are citizens of both the Tribe and the State however, non-Indian residents of the reservation are State citizens, but not tribal citizens.

104. SUSAN JOHNSON ET AL., GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES 18, 69 (2d ed. 2009).

Questions of federal, state, and tribal jurisdiction persist in the present day.[105] Generally speaking, states do not have authority over tribes unless a federal statute is found to support the contrary.[106] A tribe has authority over its members on its reservation unless a federal statute dictates otherwise.[107] If a tribe asserts authority over non-members on reservation, unless there is a federal statute addressing the issue, authority will be determined on a case-by-case basis, in which the individual or parties affiliation with the tribe is considered, as well as the potential effect upon essential tribal political, economic, or social interests.[108] Until recently, in instances when a State and a tribe asserted the same authority over non-member interests on a reservation, the two-prong *Bracker* test was used to determine who held authority,[109] asking: (1) is the state law preempted by a federal law; and (2) would state authority infringe upon tribal self-government? In recent cases, however, the Court appears to be trending towards upholding state authority over non-Indian activity on reservations.[110]

It should be noted that there are significant exceptions to these general rules in the areas of criminal and family law, which are beyond the scope of this paper. Most notably, Public Law 280 confers—from the federal government to six state governments—criminal jurisdiction over tribal lands located within each respective state; it also contains an option for

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105. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 520 (1832) (describing the limits of state authority in Indian Country); United States v. Wheeler, 435 U.S. 313, 319 (1978) (recognizing the plenary authority of the federal government in Indian Country); Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 336–37 (2008) (defining the limits of tribal jurisdiction); David M. Blurton, *ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country*, 13 ALASKA L. REV. 211, 227–28 (1996) (describing the shifting policies).

106. *See* United States v. McBratney, 104 U.S. 621 (1881); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Montana v. United States, 450 U.S. 544 (1981); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

107. *See* Montana, 450 U.S. 544.

108. *Id.* The Court subsequently upheld the exclusive authority of tribes over hunting and fishing by members *and* non-members within the reservation. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

109. White Mountain Apache v. Bracker, 448 U.S. 136, 142 (1980).

110. *See* Cty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 257–58 (1992); Strate v. A-1 Contractors, 520 U.S. 438, 452–53 (1997).

other states and tribes to adopt the policy fully or partially.[111] Moreover, the Indian Child Welfare Act created federal minimal standards to justify the removal of an Indian child from their family and placement into foster or adoptive homes.[112]

Further complicating jurisdiction in Indian Country is the fact that many parts of Indian Country are "checkerboarded"—or divided in ownership between indigenous and non-indigenous peoples—as an effect of the allotment policies of the late 1800s and early 1900s. The Dawes Act of 1887 divided Native American tribal communal land holdings into allotments for Native American families, retroactively altering the community traditions of tribes and forcing them to assume a "capitalist and proprietary relationship with property."[113] After parcels of land were allotted to Native American families, the remainder was sold off to non-Indians. Between 1887 and 1934, nearly 100 million acres, or two-thirds of lands held by Native Americans, were forfeited as a result of the Dawes Act.[114]

The 1934 passage of the Indian Reorganization Act prohibited further allotment and restored the rights of American Indians to manage their own land.[115] However, the Indian Reorganization Act still allowed for the fundamentally problem-

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111. 18 U.S.C. §§ 1162, 1360 (2010); *Public Law 280*, TRIBAL LAW AND POLICY INSTITUTE, http://www.tribal-institute.org/lists/pl280.htm.

112. For more information on Public Law 280, *see, e.g.*, *Construction and Application of § 2 of Federal Public Law 280, Codified At 18 U.S.C.A. § 1162, Under Which Congress Expressly Granted Several States Criminal Jurisdiction Over Matters Involving Indians*, 55 A.L.R. Fed. 2d 35 (2011) [hereinafter *Construction and Application of § 2 of Federal Public Law 280*]; for more information on the Indian Child Welfare Act, *see Construction and Application of Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C.A. §§ 1901 et seq.) Upon Child Custody Determinations*, 89 A.L.R.5th 195 (2001); *see also* Kathryn Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 7 AM. INDIAN L.J. 20 (2019).

113. THE SETTLEMENT OF AMERICA: AN ENCYCLOPEDIA OF WESTWARD EXPANSION FROM JAMESTOWN TO THE CLOSING OF THE FRONTIER 161–362 (James Crutchfield et al. eds., 2d ed. 2015).

114. ENCYCLOPEDIA OF MINORITIES IN AMERICAN POLITICS: VOLUME 2, HISPANIC AMERICANS AND NATIVE AMERICANS 608 (Jeffrey Schultz et al. eds. 2000).

115. Indian Reorganization Act of 1934 ch. 576, §1, 48 Stat. 984. (codified as amended at 25 U.S.C. § 461).

atic parts of the Dawes Act to remain in effect.[116] Since the land base has remained checkerboarded, Indians can no longer assume the same jurisdictional authority that they would have had on a reservation or land entirely populated by tribe members. Because their lands are held in trust by the federal government, Native Americans do not hold typical occupancy or possessory rights to the land, but rather own an interest in the proceeds received from the land.[117] They cannot perform real estate transactions, which, in turn, has stifled their ability to acquire capital.[118]

F. *Tribal Sovereign Immunity*

American Indian tribes retain a right to immunity from suit traditionally provided to other sovereign entities.[119] This right was made apparent in the 1895 case *Thebo v. Choctaw Tribe of Indians,* which further explained the position of tribes as sovereign entities protected from suit by the state without their consent, or in some rare cases, the authorization of the Congress.[120]

Congress initially recognized tribal sovereign immunity because it believed the immunity was necessary to protect Indian tribes from encroachment by the individual states.[121] Tribal sovereign immunity can only be waived by a tribe itself or by an act of Congress.[122] A lawsuit against a sovereign entity

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116. The Act did not change some parts of the General Allotment Act that had made the use of allotments increasingly difficult among Indian people. *See Land Tenure History*, INDIAN LAND TENURE FOUNDATION (Sep. 5, 2021, 4:03 PM), https://iltf.org/land-issues/history/.

117. Patterson, *supra* note 11, at 150.

118. *Id.*

119. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978);*S see* United States v. U.S. Fid. & Guar. Co.*,* 309 U.S. 506, 512 (1940) (holding that an Indian tribe should retain the same level of immunity that it possessed when it was considered a separate sovereign); *see also* William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1594 (2013).

120. Thebo v. Choctaw Tribe of Indians, 66 F. 372, 375 (8th Cir. 1895) ("It has been the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual.").

121. *See* Kiowa Tribe v. Mfg. Techs, 523 U.S. 751, 758 (1998).

122. *Id.* at 754 (stating that an Indian tribe can only be sued under federal law if the tribe has waived its tribal immunity, or if Congress has taken an

can be authorized by Congress only if their intent to abrogate immunity is "unequivocal[ ]."[123] The power of sovereign immunity has become extensive because of the growth in economic activity between tribes and states, leading to numerous implications for both parties.[124] In the following section, we will examine recent cases involving disputes between states and tribes regarding business activities.

III.
Recent Legal Developments in Leading Tribal Industries

A. *Gaming*

Tribal gaming may be the industry most thought of by non-indigenous people when discussing on-reservation tribal businesses. Tribal gaming operations generated approximately $105 billion in 2018—nearly half of all gaming revenue generated in the United States.[125] There are more than 400 Indian gaming establishments in the United States, on reservations lo-

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action to authorize the suit); Thebo, 66 F. at 373–74 (explaining that Congress's power to pass acts that authorize lawsuits against Indian tribes has never been in doubt and that Congress has done so numerous times in the past).

123. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) (describing how the requirement of an unequivocal expression mandates a presumption that Indian tribes possess this tribal sovereign immunity); *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980) (explaining that any ambiguity in a federal law is construed in a manner that favors the tribe).

124. *Kiowa Tribe*, 523 U.S. at 758 (1998) (noting that tribal immunity was originally interpretated as a protection of a tribe's ability to self-govern, but now covers a number of off-reservation commercial activities); *see also* Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. Rev. 597, 601–02 (2004) (explaining that Indian tribes have begun offering an increasing number of commercial services). The doctrine of tribal immunity has continually come under increased scrutiny. *See* Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc., 585 F.3d 917, 922 (6th Cir. 2009); *see also* Hunter Malasky, Note, *Tribal Sovereign Immunity and the Need for Congressional Action*, 59 B.C.L. Rev. 2469, 2475, 2481 (2018).

125. *The Economic Impact of Tribal Gaming: A State-By-State Analysis*, Am. Gaming Ass'n (Nov. 8, 2018), https://www.americangaming.org/wp-content/uploads/2018/11/Economic-Impact-of-Tribal-Gaming-Two-Pager-11.5.18.pdf; *The Economic Impact of Tribal Gaming: A State-By-State Analysis*, Am. Gaming Ass'n (Nov. 8, 2018) (Nov. 8, 2018), https://www.americangaming.org/resources/the-economic-impact-of-tribal-gaming-a-state-by-state-analysis-2/.

cated across 28 different states.[126] These businesses have created approximately 676,000 jobs[127] —an impressive feat for communities that are often geographically isolated. While casino-type gaming has become a major modern industry for many tribes, other forms of Native American gaming have existed for centuries.[128] Traditionally, many tribes have used games to redistribute wealth, teach traditional values, and preserve culture.[129]

Yet, gaming is not a panacea. As we explore in this section, the development of gaming compacts between state and tribal governments is often contentious, time-consuming, and expensive for tribal governments. Even when these negotiations are successful, on-reservation casinos sometimes fail due to inexperienced management and/or a lack of customers.[130] While tribal casinos close to urban areas can draw customers and tourists from far and wide, tribal casinos in remote areas often draw heavily on their own tribal membership as a customer base.[131] In this scenario, the prosperity of the tribal casino can come at the expense of the tribe's own members. Further, some casinos have been associated with a rise in drug and alcohol use as well as criminal activity on reservations (though they also generate revenue that supports tribal law enforcement, health care, and other social services).[132]

The merits of the case that got the dice rolling on the now multibillion-dollar Indian gaming industry involved the misapplication of less than $200 in taxes by states. In 1973, Rosalind McClanahan, a Navajo woman who lived on the Navajo Reservation in Arizona, sought to reclaim her withheld state income tax, around $16, from a job she worked on the reservation.[133]

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126. *Id.*

127. *Id.*

128. Eileen M. Luna-Firebaugh & Mary Jo Tippeconnic Fox, *The Sharing Tradition: Indian Gaming in Stories and Modern Life*, 25 WICAZO SA REV. 75, 75 (2010).

129. *Id.*

130. Danielle Slawny, *Taking a Gamble: Considering Potential Problems and Effects on Indigenous Gaming Communities*, BOSTON UNIVERSITY ARTS AND SCIENCE WRITING PROGRAM, https://www.bu.edu/writingprogram/journal/past-issues/issue-10/slawny/.

131. Randall K. Akee et al., *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSP. 185, 199 (2015).

132. Slawny, *supra* note 130.

133. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 166 (1973).

McClanahan claimed, and the Supreme Court unanimously agreed, that Arizona did not have the right to tax her because Indian reservations were exempt from state authority.[134] *McClanahan* recognized that, with some exceptions, "state law could have no role to play within the reservation boundaries"[135] which gave way to the notion that tribes would be exempt from state gaming laws.

Two years later, a similar case was presented to the Minnesota court system; however, the case was unique because Minnesota was (and remains) a Public Law 280 state.[136] Broadly, as explained above, Public Law 280 confers criminal jurisdiction over American Indians on reservations from tribes to the state. The Bryan family, members of the Chippewa tribe, brought suit against the state seeking a declaratory judgement that Itasca County (and by extension the State of Minnesota) lacked the authority to levy a personal property tax of approximately $160 on their mobile home, which was located on land held in trust by the United States for members of the Chippewa tribe on the Leech Lake Reservation.[137] In another unanimous decision, the Supreme Court held that Public Law 280 did not grant States the authority to levy taxes against Indians on-reservation because the law was intended to confer state criminal jurisdiction— not to authorize state civil regulatory control over American Indians.[138] While *McClanahan* and *Bryan* were both largely tax cases, the opinions emboldened tribes to take advantage of the federal protections provided to them on their own land—specifically, by beginning gaming operations.[139]

It is important to understand that what made the emerging industry of Indian gaming successful was not federal Indian policy, but restrictive state policy.[140] States maintain strict

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134. *Id.* at 179–80.

135. Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 285 (2004) (quoting *id.* at 168).

136. For more information on Public Law 280, *see Construction and Application of § 2 of Federal Public Law* 280, *supra* note 112.

137. *Bryan*, 426 U.S. at 373.

138. "Public Law 280 relates primarily to the application of state civil and criminal law in court proceedings, and has no bearing on programs set up by the States to assist economic and environmental development in Indian territory." *Id.* at 387 (quoting Senator Sam Ervin).

139. Washburn, *supra* note 135, at 285.

140. *Id.* at 286.

restrictions or even prohibitions on commercial gaming, largely for political reasons.[141] However, these restrictions did not prevent states from maintaining an interest in collecting tax revenue from gaming occurring on Indian reservations—even after the opinions in *McClanahan* and *Bryan* had been issued.

The modern Indian gaming movement began with high-stakes bingo operations in California and Florida.[142] While milder forms of bingo were legal at the time in both states, officials began to object to the more successful and lucrative tribal bingo operations.[143] Litigation throughout the Florida and California court systems culminated to the 1987 Supreme Court case *California v. Cabazon Band of Mission Indians*.[144]

Like many tribes in the 1980s, the Cabazon and Morongo Bands of Mission Indians were subject to scrutiny by state and local officials after their small bingo parlors and card clubs began to be frequented by non-Indians visiting the reservations.[145] In 1987, California attempted to minimize, and ultimately shut down, the Bands' gaming operations under the pretense of violating state law.[146] The Cabazon Band fought against California's ordinances and brought suit against the state, arguing that the Band's status as a sovereign nation with civil regulatory authority protected it from state interference. The State of California argued that Public Law 280 had granted broad criminal jurisdiction over American Indians and Indian country to the state, and that gaming should fall into the realm of criminal activity.[147] The Supreme Court in a 6-3 decision determined that because the State of California permitted and even encouraged some forms of gambling throughout the state, that gambling regulations were a type of civil law and were therefore not enforceable on-reservation without express consent from Congress.[148] The Court further elucidated that even though "an otherwise [state] regulatory

141. *See id.* at 289.
142. *Id.* at 287.
143. Steven Andrew Light, *The Cabazon Decision: Opening the Door to Indian Gaming - 20 Years Later*, INDIAN GAMING, Apr. 2007, at 22.
144. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).
145. Light, *supra*, note 143.
146. *Id.*
147. *Id.*
148. *Cabazon Band of Mission Indians*, 480 U.S. at 220–21 (1987).

law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law" enforceable on an Indian reservation pursuant to Public Law 280.[149]

Ultimately, *Cabazon* signaled that if states with jurisdiction over tribal lands through Public Law 280 did not have the power to impose regulations on on-reservation gaming, then no state did.[150] The decision did leave Public Law 280 states with the theoretical option of passing stricter, criminally enforceable gaming regulations, but states were unwilling to do that, fearing the negative effects to their own gaming industry.[151]

Congress had begun hearings on Indian Gaming issues at the insistence of state and local governments even before the *Cabazon* decision.[152] Intense lobbying from numerous parties led Congress to enact the Indian Gaming Regulatory Act ("IGRA") in 1988 under the claim of providing "a statutory basis for the operation of gaming by Indian tribes."[153] But in reality, the Act was likely an attempt to pacify state governments and roll back the freedom afforded to tribes in the *Cabazon* decision.[154] With the enactment of the IGRA came the creation of the National Indian Gaming Commission ("NGIC"), a federal regulatory body designed to regulate and support on-reservation tribal gaming.[155]

The IGRA also established a three-class structure that sets forth the roles of tribal, state, and federal governments in gaming regulation.[156] Class I gaming includes traditional Native American games of chance that are typically low stake; these games are exclusively regulated by tribal governments.[157] Class II applies to games like bingo, pull-tabs, and non-banked card games, like poker; these games are regulated jointly by the

149. *Id.* at 211.
150. Washburn, *supra* note 135, at 289.
151. *Id.*
152. *Id.*
153. 25 U.S.C. § 2702(1) (2000).
154. Washburn, *supra* note 135, at 289.
155. *About Us*, NAT'L INDIAN GAMING COMM'N, https://www.nigc.gov/ commission/about-us.
156. Indian Gaming Regulatory Act, 25 U.S.C. § 2703(6) ("The term 'class I gaming' means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.").
157. *Id.*

NIGC and tribal governments.[158] Finally, Class III games include all other forms of gaming not mentioned in Class I or II such as blackjack and slot machines.[159] In order to follow the IGRA, Class III games are only legal if: (1) they are authorized by the tribal government; (2) they are located in a state that permits the games for any purpose; and (3) they are performed in compliance with tribal-state gaming compacts.[160]

Compacts for Class III gaming are created in conjunction by the tribe and the state. Compacts may include provisions on:

> (1) the application of state or tribal criminal and civil laws that relate to gaming; (2) who holds jurisdiction between the tribe and the state; (3) payments to the state for their regulation of gaming; (4) taxation by the tribe on gaming activities; (5) remedies for breach of compact; (6) standards of operation for gaming facilities; and (7) any other relevant subjects.[161]

Once compacts are agreed upon by the tribe and the state, they are approved or disapproved by the Secretary of the Interior.[162] Compact negotiation disputes are within the exclusive jurisdiction of federal district courts.[163]

Conflict over compacts can arise when a party tries to use means other than those specified in the compact to settle a dispute. One such example is the Mohegan tribe, whose COVID-19 response measures were challenged by the state of Connecticut when it attempted to reopen the Mohegan Sun casino.[164] At the Federal Bar Association's 2020 D.C. Federal Indian Law Conference, Sarah Harris, the Vice Chairwoman of the Mohegan Tribe, gave a presentation on state pushback that occurred as her tribe attempted to reopen their casino.[165]

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158. *Id.* at cl. 7.
159. *Id.* at cl. 8.
160. Akee, *supra* note 131, at 192.
161. *Id.*
162. *Id.* at 201.
163. *Id.*
164. Sarah Harris, Vice Chairwoman, Mohegan Tribal Council, Mohegan Tribe and COVID-19 address at Federal Bar Association (Nov. 5, 2020).
165. *Id.*

The Mohegan reservation is located near Uncasville, Connecticut and has been federally recognized since 1994.[166] Shortly after receiving federal recognition, in 1996, the Mohegan Tribe opened the Mohegan Sun, a luxury resort and casino.[167] Since its inception, the Mohegan Sun has fallen under the purview of a gaming compact between the Mohegan tribe and the State of Connecticut, which posits that in exchange for the exclusive right to offer Class III gaming, the Mohegan must contribute a portion of their slot revenue to the state.[168] This contribution totaled $8 million in 2019.[169] Pre-COVID, the Mohegan Sun was a robust operation, netting revenues of $251 million in 2019 despite the year being a largely unsuccessful one for the industry.[170] Additionally, Mohegan Sun created immense employment opportunities, employing a staff of 4,500 full time employees and 2,000 part-time and seasonal employees.[171]

It goes without saying that COVID had profound effects on the gaming industry, tribal and non-tribal. Following the first reported case of COVID in Connecticut in early March of 2020, the Governors of Connecticut, New York, New Jersey and Massachusetts announced a regional response plan on March 17th and asked the Mohegan Tribe to join in the effort.[172] On March 17th, the Mohegan Tribe issued a Tribal Council Emergency Declaration, and the Mohegan Sun closed its doors for the first time in twenty-four years.[173]

Promptly following the issuance of the statewide response plan, the Mohegan Tribe invited the governor's office to collaborate on the design of safety protocols for an eventual reopening. But, the governor's office did not respond. Without

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166. *Recognition*, MOHEGAN TRIBE, https://www.mohegan.nsn.us/about/information/recognition.

167. *About Mohegan Sun*, MOHEGAN SUN, https://mohegansun.com/about-mohegan-sun.html.

168. Sarah Harris, Vice Chairwoman, Mohegan Tribal Council, Mohegan Tribe and COVID-19 address at Federal Bar Association (Nov. 5, 2020).

169. *Id.*

170. Joe Cooper, *Mohegan Sun's 3Q profits fall 21% amid declining gaming revenues*, HARTFORD BUS. J. (Aug. 8, 2019), https://www.hartfordbusiness.com/article/mohegan-suns-3q-profits-fall-21-amid-declining-gaming-revenues.

171. Harris, *supra* note 168.

172. *Id.*

173. *Id.*

state direction, the Mohegan Tribe proceeded by establishing a relationship with the advisors to the State of Connecticut to devise their own safety protocols.[174] The Mohegan Sun developed a plan that would reopen the Mohegan Sun on June 1, 2020.[175]

On May 20th, Connecticut Governor Ned Lamont issued a statement in response to the Mohegan Sun's reopening plan, warning that it was too early to reopen and outlining avenues the state might take to force the Mohegan Sun to comply with state law.[176] The Governor mentioned involving the casino workers union or pulling the casino's liquor licenses if the Mohegan Sun were to continue with its plans to reopen.[177] On May 22nd, the Connecticut Consumer Protection Commissioner sent a letter demanding a comprehensive account of the Mohegan Sun's reopening plans by the following day, citing the Mohegan Gaming Compact as a source of state authority.[178]

It is understood that the states' input into the health and safety standards of gaming compacts serves to protect the nonmembers who venture on-reservation to utilize these facilities. However, when disputes occur over the implementation of such standards, the parties should resolve them using means established in the compact, rather than resorting to indirect avenues of pressuring compliance. As states and tribal gaming operations continue to navigate the uncertainty imposed by COVID-19, it is important they both use the established methods of dispute resolution.

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174. These advisors included a Dean of Yale Medical School Occupational Health, the Army National Guard, the Mohegan Chief Medical Officer, the Mohegan Tribal Health Department, and a panel of experts who worked on the SARS epidemic in Macau. *Id.*

175. Harris, *supra* note 168.

176. Pat Eaton-Robb & Susan Haigh, *Tribes Plan to Partly Open Casinos; Lamont Opposes the Move,* US NEWS (May 20, 2020, 6:57 PM), https://www.usnews.com/news/best-states/connecticut/articles/2020-05-20/connecticut-restaurants-can-begin-outdoor-dining-service.

177. *Id.*

178. The Mohegan Tribe – State of Connecticut Gaming Compact § 14(a) ("Tribal ordinances and regulations governing health and safety standards applicable to the gaming facilities shall be no less rigorous than standards generally imposed by the laws and regulations of the State relating to public facilities with regard to building, sanitary, and health standards and fire safety.").

Although contemporary issues surrounding tribal gaming more often surround their operations on and off reservation, in some instances, their very construction is the point of dispute. Such has been the case for the Mashpee Wampanoag tribe, which is engaged in an ongoing legal battle regarding its reservation status that was initiated by the Mashpee's desire to construct a casino.[179]

The Mashpee Wampanoag were a consistent presence in the Massachusetts area for thousands of years, but they were left out of federal recognition during the 1934 Indian Reorganization Act due to their low population and because they had not entered into a treaty with the federal government.[180] In 1976, the Mashpee tribe filed a land ownership claim which would grant them land in trust.[181] "Land in trust" has historically been a mechanism employed by the U.S. government to provide protection to tribal nations who have lost large portions of their traditional lands throughout the 19th and 20th century.[182] In 2007, the tribe was granted federal recognition.[183] They were finally granted land in trust on September 2015, when the Department of Interior took into trust 170 acres of Mashpee, Massachusetts.[184] In 2016, shortly following the receipt of the land, the Mashpee announced their plans to open a gaming complex.[185]

However, tension around the proposed gaming complex arose immediately. The non-indigenous Littlefield family, joined by other members of the town of Mashpee, brought forth a suit with the intention of barring the construction of the casino by seeking federal revocation of the tribe's land in

179. Anna Kate E. Cannon & Maya H. McDougall, *The Mashpee Wampanoag Tribe's Crisis Within a Crisis*, THE HARV. CRIMSON (Apr. 17, 2020), https://www.thecrimson.com/article/2020/4/17/mashpee-wampanoag-scrutiny/.

180. *Id.*

181. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

182. *Fee to Trust*, US DEPT. OF INTERIOR INDIAN AFFAIRS, https://www.bia.gov/bia/ots/fee-to-trust (last visited).

183. Mashpee Wampanoag Tribe, Mashpee Wampanoag Tribe, https://mashpeewampanoagtribe-nsn.gov/.

184. Cannon & McDougall, *supra* note 179.

185. *Id.*

trust.[186] The litigation against the Mashpee was also funded in part by Neil Bluhm, a developer who had sights on constructing his own casino just 20 miles from the proposed Mashpee casino site.[187]

The case was heard in the United States District Court for the District of Massachusetts, where both parties filed for cross-motions for summary judgement.[188] The plaintiffs brought action against the United States, the Department of Interior, the Bureau of Indian Affairs, and the Assistant Secretary of Indian Affairs, challenging, under the Administrative Procedure Act, the Secretary of Interior's acquisition of the land in trust for the Mashpee pursuant to the Indian Reorganization Act.[189]

Under the Indian Reorganization Act, the Secretary of the Interior has the authority to hold land in trust for American Indians.[190] The plaintiffs argued, and the court agreed, that the Mashpee people failed to meet the definition of "Indian" set forth in the Indian Reorganization Act ("IRA") and that the interpretation of the definition is not up to Secretary of the Interior.[191] Relying on the controversial holding in *Carcieri v. Salazar*, the court held that since the Mashpee people were not federally recognized before 1934, they do not fit the definition of Indian and are thus ineligible for a land in trust.[192] An appeal was filed by the Mashpee Wampanoag tribe (which had joined the case) and the case was heard by the United States Court of Appeals for the First Circuit in February of 2020, where the decision of the lower court was affirmed.[193]

While, on the surface, the casino appears to be the point of contention between the tribe and the town, what is truly

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186. Littlefield v. U.S. Dep't of Interior, 199 F. Supp. 3d 391, 394 (D. Mass. 2016), *aff'd sub nom*, Littlefield v. Mashpee Wampanoag Indian Tribe, 951 F.3d 30 (1st Cir. 2020).

187. Cannon & McDougall, *supra* note 179.

188. Littlefield, 199 F. Supp. 3d at 394.

189. *Id.* at 392.

190. G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri "Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 583–84 (2009).

191. Littlefield, 199 F. Supp. 3d at 392–97.

192. In the opinion, Justice Thomas clarifies that the phrase "now" refers to the time following the passing of the IRA in 1934. Carcieri v. Salazar, 555 U.S. 379, 380 (2009).

193. Littlefield v. Mashpee Wampanoag Indian Tribe, 951 F.3d 30, 40 (1st Cir. 2020).

being threatened is the Mashpee's ability to act as a sovereign nation, free from the regulations that the town and state had imposed on it for the preceding centuries.[194] The progress the tribe has been able to achieve in the past five years, such as the establishment of a criminal court, a Mashpee preschool where traditional language is taught, and plans to establish new businesses, could be stifled by the loss of their land in trust.[195]

At the time of writing, it is unclear whether the Mashpee tribe will attempt to appeal the case further. It is worth noting, however, that President Biden has backed a congressional "Carcieri fix" of the Supreme Court's 2009 decision, which would allow any federally-recognized American Indian tribe to apply to have land taken into trust, regardless of when the tribe became federally recognized.[196]

Although tribal gaming is a longstanding industry, questions still arise over whether the federal protections of tribal gaming laid out in the IGRA preempt certain state laws. Such was the question explored in the case *Rogers County Board of Tax Roll Corrections v. Video Gaming Technologies*. At issue in the case was whether Video Gaming Technologies ("VGT"), a non-Indian owner of electronic gaming equipment who leased to Cherokee Nation Entertainment, a business entity of the Cherokee nation, was preempted from paying an *ad valorem* tax on the leased gaming equipment used for tribal gaming operations.[197] In 2012, Video Gaming Technologies was charged *ad valorem* taxes on equipment leased to the Cherokee Nation.[198] VGT appealed the tax to the Tax Roll Corrections Board of Rogers County, claiming that electronic equipment leased to a tribal entity for gaming was preempted from taxation under federal law.[199] The Rogers County Tax Roll Board denied re-

194. Olivia Miller, *The Post-Carcieri Struggle For Tribal Land and The Case of the Mashpee Wampanoag*, 73 ADMIN. L. REV. 101, 102–107 (2021).

195. Cannon & McDougall, *supra* note 179.

196. Andrew Westney, *How A Biden Presidency Could Shape Native American Law*, LAW360 (Oct. 30, 2020, 7:49 PM), https://www.law360.com/articles/1322099/how-a-biden-presidency-could-shape-native-american-law.

197. Video Gaming Techs., Inc. v. Rogers Cty. Bd. of Tax Roll Corr., 475 P.3d 824, 826 (Okla. 2019), *cert. denied*, 141 S.Ct. 24 (2020).

198. *Id.*

199. *Id.*

lief from the *ad valorem* tax, finding that VGT was not exempt.[200]

VGT and the Rogers County Tax Roll Board then filed motions for summary judgement to the Rogers County District Court. In its countermotion for summary judgement, the Rogers County Tax Roll Board argued that VGT had not provided evidence that it actually passed through these tax liabilities to the Tribe, and therefore was not preempted by IGRA.[201] The Rogers County District Court, upholding the finding of the Rogers County Tax Roll Board, invoked *Mashantucket Pequot Tribe v. Town of Ledyard ("Mashantucket II")*, which held that the "State of Oklahoma's *ad valorem* tax statutes are not preempted or barred by the Indian Trader Statutes, the Indian Gaming Regulatory Act, or pursuant to the balancing test set forth by the United States Supreme Court in *White Mountain Apache Tribe v. Bracker*."[202] The District Court denied VGT's motion for summary judgment and sustained the Roger County Tax Roll Board's countermotion for summary judgement.[203]

VGT filed an appeal to the Oklahoma Supreme Court. On appeal, VGT argued that the District Court erred in relying on the precedent in *Mashantucket II* and in failing to grant VGT's motion for summary judgement, arguing that the *ad valorem* tax is preempted by IGRA and the Bracker balancing test.[204] The Bracker balancing test is designed to assess the validity of state assertions of authority over "non-Indians engaging in activity on the reservation."[205]

The Oklahoma Supreme Court held that *ad valorem* taxes on gaming equipment are preempted by IGRA.[206] The Oklahoma Supreme Court found the following: "Due to the comprehensive nature of IGRA's regulations on gaming, the federal policies which would be threatened, and County's failure to justify the tax other than as a generalized interest in raising revenue, we find that *ad valorem* taxation of gaming

200. *Id.*
201. *Id.*
202. *Id.* (quoting Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457 (2nd Cir. 2013)).
203. *Id.*
204. *Id.*
205. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980).
206. *Video Gaming Techs., Inc.*, 475 P.3d at 825.

equipment here is preempted."[207] The Oklahoma Supreme Court reversed and remanded.[208]

The Rogers County Board of Tax Roll filed a petition for writ of certiorari to the United States Supreme Court. The petition was denied but is still noteworthy because Justice Thomas issued a dissent from the denial of certiorari. His dissent took the position that the designation of Oklahoma as tribal land by *McGirt v. Oklahoma* destabilized the governance of eastern Oklahoma and left uncertainty on even basic government functions, like taxation.[209]

McGirt v. Oklahoma is a criminal case that raises broader jurisdictional questions. In 1997, Jimcy McGirt was convicted by the State of Oklahoma for three counts of sexual assault and was sentenced to one thousand years plus life in prison.[210] McGirt appealed to the Oklahoma Court of Criminal Appeals, which affirmed.[211] McGirt then appealed to the U.S. Supreme Court, arguing that the Oklahoma courts lacked the jurisdiction to hear his case because he is a member of the Creek Nation and the alleged crimes occurred on what constituted Indian Country under the Indian Major Crimes Act.[212]

The land in question was designated by Congress as the Creek Reservation in 1833.[213] However, when Oklahoma was granted statehood in 1907, the State of Oklahoma took the position that the Creek Nation had ceded ownership of the land to the state.[214] The Court in *McGirt* critically held that Congress had established a reservation for the Creek Nation and the government's allotment agreement with the Creek Nation did not silently terminate the Creek Reservation.[215]

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207. *Id.* at 834.

208. *Id.*

209. Rogers Cty. Bd. of Tax Roll Corr. v. Video Gaming Techs., Inc., 141 S. Ct. 24, 24 (2020).

210. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020).

211. *Id.*

212. David K. TeSelle, *Review of McGirt v. Oklahoma – How the Supreme Court and Justice Gorsuch's Revolutionary Textualism Brought America's "Trail of Tears" Promise to the Creek Nation Back From the Dead*, NATI'L L. REV. (Aug. 5, 2020), https://www.natlawreview.com/article/review-mcgirt-v-oklahoma-how-supreme-court-and-justice-gorsuch-s-revolutionary.

213. *McGirt*, 140 S. Ct. at 2461.

214. *Id.* at 2477.

215. *Id.* at 2482.

While the land has been owned and controlled by the State of Oklahoma for over 100 years, this control was based on the assumption that when legislation granted Oklahoma statehood in 1907, the Creek Nation ceded ownership of the land.[216] The U.S. Supreme Court in this case held that only Congress can dissolve an Indian Reservation, and given that it had not dissolved the Creek Reservation, the Reservation exists to this day.[217] Further, the Court held that the potential transformative effects were deemed an insufficient justification to disestablish the Creek Reservation.[218] The decision has revealed that the Muscogee Creek Nation and four neighboring tribal nations have jurisdiction over most criminal cases in eastern Oklahoma, but civil regulatory jurisdiction and taxation authority are unlikely to be affected by the ruling.[219]

In Justice Thomas's view, *McGirt* presents a conflict on an important question: "Does federal law silently pre-empt state laws assessing taxes on ownership of electronic gambling equipment when that equipment is located on tribal land but owned by non-Indians?"[220] In his dissent, Justice Thomas stated that the split between the Oklahoma Supreme Court's ruling in *Video Gaming Technologies* and the Second Circuit Court in *Mashantucket II* warranted review.[221] Further, Justice Thomas stated that the case presented an opportunity to provide clarity to courts on how pre-emption principles should be applied at the intersection of federal law, state law, and tribal land.[222] Time will tell whether the issues identified by Justice Thomas will have implications for tribal gaming going forward.

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216. TeSelle, *supra* note 212.

217. *Id.*

218. McGirt, 140 S. Ct. at 2480 ("In any event, the magnitude of a legal wrong is no reason to perpetuate it.").

219. Katie Bart, *Educational seminar: Debrief of McGirt v. Oklahoma*, SCOTUSBLOG, at 26:55 (May 12, 2020, 9:19AM), https://www.scotusblog.com/2020/05/educational-seminar-debrief-of-mcgirt-v-oklahoma/.

220. Rogers Cty. Bd. of Tax Roll Corr., *supra* note 209 at 24–25.

221. *Id.* at 25.

222. *Id.*

B. *Tobacco and Petroleum Sales*

Smoke shops and gas stations are two of the most common tribal businesses.[223] Both tobacco and gasoline are excise products, which means that the tax questions presented around the two products sold from reservations are often similar. Not surprisingly, states often wish to collect as much tax revenue as possible, and therefore may change their tax codes to extract tax revenue from tribal businesses selling tobacco and petroleum, or at least to level the playing field for on- and off-reservation businesses.[224] In this section, we will begin by discussing the history of disputes between the tribes and states regarding the tobacco industry. Currently, there are no major tobacco cases in litigation, so this section will serve to give an overview of the industry issues broadly. Next, we will explore a fuel tax dispute between the state of Washington and the Yakama tribe that was resolved through a lengthy litigation, finally arriving at the Supreme Court in 2018.

1. *Tobacco Sales*

Historically, Native Americans have used tobacco for ceremonial, spiritual, and medicinal purposes.[225] While the high tobacco usage rates amongst Native American may in part be attributed to customary use, commercial tobacco has also gained prevalence on reservations.[226] Prior to the passage of the Indian Religious Freedoms Act of 1978, many aspects of Native American religious and cultural ceremonies had been prohibited by law, including the use of traditional tobacco.[227] However, some tribes were able to circumvent the law and

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223. Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 903 (2010).

224. *Washington's Tax Code is an Untapped Resource to Advance Racial Justice*, PROGRESS IN WASHINGTON (2019), https://budgetandpolicy.org/resources-tools/2019/10/2019-Brief-WA-Tax-Code-is-untapped-resource-for-racial-justice.pdf; Kelly S. Crosman and Jonathan B. Taylor, W*hy Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation of Indian Country* 11–12 (Bureau of Indian Affairs, Working Paper, 2016), www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/raca/pdf/2016_Croman_why_beggar_thy_Indian_neighbor.pdf.

225. Dina Fine Maron, *The Fight to Keep Tobacco Sacred*, SCI. AM. (Mar. 29, 2018) https://www.scientificamerican.com/article/the-fight-to-keep-tobacco-sacred/.

226. *Id.*

227. *Id.*

hold onto their historical practices by substituting traditional tobacco for commercial cigarettes.[228] Another factor underlying Native Americans' use of cigarettes is the economic reality that reservation gas stations and smoke shops sell tobacco to tribal members for a low price.[229]

Cigarette taxes, which are a form of an excise tax, exist for two primary reasons: (1) as a public health strategy to discourage smoking and (2) to increase state tax revenues.[230] Although any consumer of legal age can purchase tobacco on tribal land, not all consumers are taxed in the same manner. In 1976, a Supreme Court ruling held that states do not have the power to collect cigarette sales taxes on reservation sales by a tribal business to an Indian, or to impose vendor license fees on Indians selling cigarettes on reservation land through tribal businesses.[231] However, the state could require Indian retailers to add the tax on cigarettes to sale prices when the products were sold to non-Indians.[232]

States have tried to address potential jurisdictional conflicts or tax revenue loss from tribes and have developed two strategies for tax enforcement and collection, often used together: negotiating compacts, which legally dictate the behavior on tribal lands through contract law, and codifying laws that function outside of compacts.[233] Additional measures have been incorporated to bridge the gap between compacts and codified laws, although they are used at a lower frequency.

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228. *Id.*

229. Kari A. Samuel et al., *Internet Cigarette Sales and Native American Sovereignty: Political and Public Health Contexts*, 33 J. PUB. HEALTH POL'Y. 173 (2012); Lauren K. Lempert and Stanton A. Glantz, *Tobacco Industry Promotional Strategies Targeting American Indians/Alaska Natives and Exploiting Tribal Sovereignty*, 21 NICOTINE & TOBACCO RESEARCH 940, 942 (2019).

230. Hillary DeLong et al., *Common State Mechanisms Regulating Tribal Tobacco Taxation and Sales, the USA, 2015*, 25 TOBACCO CONTROL i32, i32 (2016) https://tobaccocontrol.bmj.com/content/25/Suppl_1/i32.

231. Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv., 425 U.S. 463, 480–81 (1976).

232. *Id.* at 483 ("Such a requirement 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 lawful tax, and it does not *frurate* [sic] tribal self-government or run afoul of any federal statute dealing with reservation Indians' affairs.").

233. *See* DeLong et al., *supra* note 230, at i32–33.

These measures include tax stamps, record-keeping, and tax rates.[234]

States do, however, have the power to collect taxes when tribal businesses sell goods to non-tribal members on-reservation.[235] Of the thirty-four states where Indian reservations are located, twenty of these states address tribal tobacco tax collection from non-members.[236] Intergovernmental compacts are the most popular means of addressing tribal tobacco sales to non-members.[237] Compacts function in much the same ways as contracts and are negotiated between state and tribal officials. Compacts allow both parties to protect their interests in tax revenue and self-governance and can be especially effective when tribal lands are near large off-reservation population centers. However, they are often time- and cost-intensive and hinge on a preexisting positive relationship between a state and tribe.[238]

Codified laws, by comparison, exist to diminish the availability of tax-free cigarettes available to the tribes and in the tribal marketplace.[239] One method of reduction is through tax prepayment. Almost two-thirds of all tribal tobacco retailers are required to prepay a tax, collected by the state at a point within the distribution process prior to the ultimate sale to consumers, often using a tax stamp.[240]

While compacts and codified laws have clear applications in instances where the tribal retailer is located on an Indian reservation within the exterior boundaries of the state, when the supply chain extends outside of the state, the matter becomes more complex. Such was the case of Native Wholesale Supply Company ("NWS"). At issue in *Native Wholesale v. California, ex rel. Becerra* was a contract for the purchase of goods and services that was fully performed by Native Wholesale Supply, a tribal tobacco retailer chartered under the laws of the Sac and Fox Nation of Oklahoma and headquartered on the

234. *Id.* at i33.
235. *Id.* at i32.
236. *Id.* at i33.
237. *Id.* at i34.
238. *Id.* at i35.
239. *Id.* at i34.
240. Samuel et al., *supra* note 229; DeLong et al., *supra* note 230, at i35.

Seneca Nation in New York.[241] The U.S. Supreme Court recently denied a petition for writ of certiorari on the case.[242]

In 2008, the State of California sued NWS in the California Superior Court for allegedly violating state laws on cigarette distribution and cigarette fire safety.[243] The complaint challenged NWS's sale of cigarettes to the Band of the Western Mono Indians of the Big Sandy Rancheria, which is located within California, that were not listed in California's Tobacco Directory.[244] The question presented was whether NWS became subject to the personal jurisdiction and tobacco regulations of the State of California when it sold cigarettes to the Band of the Western Mono Indians of the Big Sandy Rancheria, located within California.[245] NWS filed a motion to remove the case to federal court, but the motion was denied.[246] The Superior Court of California granted NWS's motion to quash for lack of personal jurisdiction, finding that the plaintiff had not provided sufficient evidence that sales between the out-of-state corporation and the Indian tribe constituted minimum state contacts sufficient to warrant personal jurisdiction.[247]

The State of California appealed the decision to the California Court of Appeals for the Third District.[248] This court held that California did have personal jurisdiction, because ultimately NWS had derived benefit from California activities under the stream of commerce theory,[249] sufficient to invoke personal jurisdiction of the State of California.[250] NWS ap-

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241. People *ex rel.* Becerra v. Native Wholesale Supply Co., 37 Cal. App. 5th 73, 77, 249 Cal. Rptr. 3d 445, 449 (2019).

242. Native Wholesale Supply Co. v. California *ex rel.* Becerra, 141 S. Ct. 233 (2020).

243. People *ex rel.* Becerra v. Native Wholesale Supply Co., 37 Cal. App. 5th at 77, 249 Cal. Rptr. 3d at 449. *Id.* at 363.

244. *Id.* at 78; Native Wholesale Supply Co. v. California ex rel. Becerra, 141 S. Ct. at 262–63.

245. People *ex rel.* Harris v. Native Wholesale Supply Co., 196 Cal. App. 4th 357, 360 (2011).

246. Native Wholesale Supply Co. v. California *ex rel.* Becerra, 141 S. Ct. 233 (2020).

247. People *ex rel.* Becerra v. Native Wholesale Supply Co., 37 Cal. App. 5th at 81, 249 Cal. Rptr. 3d at 451.

248. *Id.*

249. People *ex rel.* Harris v. Native Wholesale Supply Co., 196 Cal. App. 4th 357 at 360 ("We see not just a stream of commerce, but a torrent.").

250. People *ex rel.* Becerra v. Native Wholesale Supply Co., 37 Cal. App. 5th at 84.

pealed this jurisdictional determination to the California Supreme Court which denied review, and the U.S. Supreme Court which denied certiorari.[251]

This case illustrates that jurisdictional uncertainties are still contentious for on-reservation business, particularly when the exchange of goods and services happen outside of a state but still enter its stream of commerce. Given the expansion of online businesses in the global pandemic, it is becoming increasingly likely for conflicts such as with *Native Wholesale* to arise between separate sovereigns. This issue further illustrates that the definition of on-reservation business needs clarification.

2. *Petroleum Sales*

The Yakama Tribe[252] and the State of Washington have a long history of disagreements surrounding taxation and other legal matters relating to state-tribal relations. The latest iteration is a dispute regarding Cougar Den Inc., a fuel importer and distributor operating on the Yakama Reservation. Cougar Den has operated on the Reservation since the 1990s.[253] It buys fuel at wholesale in Oregon and transports it by truck, crossing the border into Washington, and then traveling a further twenty seven miles on public highway in Washington to the Yakama Reservation, where it is sold at retail at an on-reservation gas station.[254] Cougar Den is incorporated under Yakama law and is owned by Kip Ramsey, a member of the

251. *Id.*, *cert. denied*, 141 S. Ct. 233 (2020).

252. Throughout this section, the name "Yakima" will refer to the city and county in Washington. The name "Yakama" will be used when referring to the tribe or reservation of the Yakama people. In 1994, the Yakama Tribal Council voted to change the spelling of the tribe's name from Yakima to Yakama to match the spelling of the 1855 treaty. *See 'Yakamas' Alter Spelling of Tribe*, SEATTLE TIMES, (Jan. 26, 1994), https://archive.seattletimes.com/archive/?date=19940126&slug=1891713.

253. *About*, COUGAR DEN, https://cougardeninc.com/about (last visited Sept. 1, 2021, 2:13:00 PM).

254. Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1004 (2019).

Yakama Nation.[255] Cougar Den employs over 150 employees[256] and generates $770,000 (USD) in sales annually.[257] As discussed further below, Washington State has long desired to extract tax revenue from these sales.

In 1995, the Washington State Legislature enacted Substitute House Bill 1271, which "granted the Department of Licensing the authority to enter into an agreement with any federally recognized Indian tribe regarding the taxation of fuel on the reservation.[258] Certain tribes entered into agreements with the Department of Licensing pursuant to which the on-reservation gas stations would collect state tax on fuel sales, and then the Department of Licensing would remit a portion of those tax receipts to the tribe.[259] The amount to be remitted was based on a formula that accounts for the percentage of on-reservation fuel sales to tribal members versus non-tribal members.[260]

However, disputes arose over this method of fuel tax collection and, in 2003, the Squaxin Island Tribe and Swinomish Indian Tribal Community sued the Department of Licensing after the Department found that the legal incidence of the tax improperly fell on the tribal retailer, rather than non-Indian customers, and therefore was an overreach of the state's au-

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255. Phil Ferolito, *U.S Supreme Court: Yakamas do not have to pay state tax on wholesale fuel*, YAKIMA HERALD (Mar. 20, 2019), https://www.yakimaherald.com/news/local/u-s-supreme-court-yakamas-do-not-have-to-pay-state-tax-on-wholesale-fuel/article_07fd346e-4a7d-11e9-8aaf-eb520011d82d.html.

256. COUGAR DEN, *supra* note 253.

257. *Cougar Den, Inc. – Company Profile*, DUN & BRADSTREET, https://www.dnb.com/business-directory/company-profiles.cougar_den_inc.46a7cb28dedb680a199a05192927f612.html (lasted visited Sept. 1, 2021).

258. WASH. REV. CODE § 82.38.320 (amended 2013); WASH. REV. CODE § 82.38.320 (amended 2013); WASH. STATE DEP'T OF LICENSING, 2018 TRIBAL FUEL TAX AGREEMENT REPORT (2019), https://www.dol.wa.gov/about/docs/leg-reports/2019-tribal-fuel-tax-agreement-report.pdf.

259. *Cougar Den*, 139 S. Ct. at 1008; WASH. STATE DEP'T OF LICENSING, 2012 TRIBAL FUEL TAX AGREEMENT REPORT (2012), https://www.dol.wa.gov/about/docs/TribalFuelTaxAgreementReport.pdf

260. WASH. STATE DEP'T OF LICENSING, 2018 TRIBAL FUEL TAX AGREEMENT REPORT (2019), https://www.dol.wa.gov/about/docs/leg-reports/2019-tribal-fuel-tax-agreement-report.pdf; Washington State Dept. of Licensing v. Cougar Den Inc., No. 16-1498, 2017 WL 3098553, at *10 (Wash. July 17, 2017).

thority.[261] This incident led to the drafting of Senate Bill 5272, An Act Relating to the Administration of Fuel Taxes, in 2007, which provided that the tax would be assessed at the point at which the fuel enters Washington State by ground transportation—in other words, an importation tax.[262] Cougar Den refused to collect or remit the tax.[263] In 2013, the Washington State Department of Licensing assessed Cougar Den owed $3.6 million in back taxes, penalties, and licensing fees for importing fuel.[264]

Cougar Den contested the assessment by the Washington Department of Licensing, based on the legal theory that the 1855 Yakama Treaty between the federal government and the Yakama Tribe shielded the Yakamas from any importation taxes for moving goods in commerce to or from the Yakama Reservation via public highway.[265] The Yakama Treaty expressly provides the tribe "the right, in common with citizens of the United States to travel upon all public highways."[266]

The matter was initially adjudicated by a Department of Licensing Administrative Law Judge, who agreed with Cougar Den that the tax was preempted.[267] However, on October 15, 2014, the Department of Licensing's Director, Pat Kohler, disagreed and overturned the Administrative Law Judge's order.[268] Cougar Den appealed the Department of Licensing decision to the Yakima County Superior Court.[269] The Superior Court reviewed the case de novo and held that the tax as applied to the Yakama was preempted, on grounds that it would

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261. Squaxin Island Tribe v. Stephens, 400 F. Supp. 2d 1250 (W.D. Wash. 2005); WASH. STATE DEP'T OF LICENSING, TRIBAL FUEL TAX AGREEMENT REPORT (2015), https://www.dol.wa.gov/about/docs/leg-reports/2016-tribal-fuel-tax.pdf.

262. WASH. REV. CODE § 82.36.010(4), (12), (16); An Act Relating to the Administration of Fuel Taxes, S.B. 5272, 60th Leg., 2007 Regular Session (Wa. 2007).

263. *Cougar Den*, 139 S. Ct. at 1007.

264. *Id.*

265. *Id.*

266. Treaty between the United States and the Yakama Nation of Indians, art. 3, June 9, 1855, 12 Stat. 951.

267. Cougar Den Inc. v. Dept. of Licensing Yakima County, No. 14-2-03851-7, 2015 WL 13762926, at *1 (Wash. Super. Ct. July 22, 2015).

268. Brief at 9, Cougar Den v. Wash. State Dep't of Licensing, 188 Wash.2d 55 (2017).

269. Cougar Den Inc. v. Dept. of Licensing Yakima County, No. 14-2-03851-7, 2015 WL 13762926, at *1 (Wash. Super. Ct. July 22, 2015).

be impossible for Cougar Den to transport fuel to the reservation without using a highway and, thus, the Yakama Treaty would not have secured a right to travel unless it intended to use it for a purpose such as trade.[270] The Department of Licensing petitioned for direct review by the Washington State Supreme Court, which accepted the case and affirmed the decision of the lower court.[271] The Department, in turn, filed a petition for certiorari with the United States Supreme Court.[272] Certiorari was granted on June 25, 2018.[273] The oral argument was heard on October 30th, 2018.[274]

Before the U.S. Supreme Court, the Washington State Department of Licensing argued that the state tax applied to petroleum, not highway travel.[275] It claimed that the tax was nondiscriminatory, applying to all who import fuel into Washington, and that its legal incidence occurs off-reservation.[276] The state asserted that the tax should apply to Cougar Den unless it is expressly preempted by federal law.[277] Washington State further claimed that the Yakama Treaty did not preclude application of the tax; the state argued that the Treaty guarantees the right of the Yakama to travel in common with others via public highway, but says nothing that would preempt a generally applicable tax on importation of goods.[278]

The Tribe argued that the travel provision of the 1855 Yakama Treaty protected Cougar Den from importation taxes.[279] Since the motor vehicle fuel tax was rewritten in 2007, the law provided that motor fuel licensees pay a per-gallon tax when fuel enters the state via ground transportation.[280] Cougar Den argued, and the lower courts affirmed, that "travel

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270. *Id.* at *2.

271. Cougar Den, Inc. v. Wash. State Dep't of Licensing, 392 P.3d 1014 (Wash. 2017), *aff'd,* 139 S. Ct. 1000 (2019).

272. WASH. STATE DEP'T OF LICENSING, *supra* note 260.

273. *Washington State Department of Licensing v. Cougar Den Inc.*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/washington-department-licensing-v-cougar-den-inc.

274. *Cougar Den*, 139 S. Ct. 1000.

275. *Id.* at 1009.

276. *Id.* at 1012, 1014.

277. *Id.* at 1007.

278. *Id.*

279. *Id.* at 1004.

280. WASH. REV. CODE § 82.36.010(4), (12), (16); Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1004 (2019).

upon public highways is directly at issue because the tax was an importation tax."[281] While the Department of Licensing argued that the tax would apply as long as the fuel entered by a means other than pipeline or vessel, the lower courts agreed that this was irrelevant because "it was impossible for Cougar Den to import fuel without using the highway."[282] Cougar Den argued that as a question of state law, the Washington Supreme Court's interpretation of the statute is entitled to deference.[283] It also explained that the United States Court of Appeals for the 9th Circuit has interpreted the travel provision of the Yakama Treaty several times and found the Yakama exempt from some state requirements on taxes and fees collected during travel for trade.[284]

The Court received an array of briefs from numerous amici. The Multistate Tax Commission filed a brief in support of the Washington Department of Licensing, emphasizing the importance of developing a uniform tax collection system in the United States, which they expressed would be undermined by a victory for Cougar Den.[285] Twelve other states and the city of New York filed a brief which argued that affirming the decision of the lower court would permit the Yakama and other tribes with similar treaties to evade taxes on a plethora of goods that are imported by highway.[286] The State of Idaho issued a brief in support of the petitioner, as it also has tribes with similarly worded treaty travel provisions within its borders and feared a victory would extend an exemption from state authority to tax on any activity associated with highway use.[287] The Washington Oil Marketers Association, which lobbies for petroleum marketers, and the Washington Association of

281. *Cougar Den*, 392 P.3d at 1019, *aff'd*, 139 S. Ct. 1000 (2019).

282. *Id.*

283. *Cougar Den*, 139 S. Ct. at 1010 (2019).

284. Cree v. Flores, 157 F.3d 762 (9th Cir. 1998) (holding that the Yakama are exempt from logging truck license and overweight vehicle fees); S*ee also* United States v. Smiskin, 487 F.3d 1260 (9th Cir. 2007) (holding that the Yakama are exempt from a requirement to notify the state before transporting unstamped cigarettes).

285. Brief for Multistate Tax Commission and Federation of Tax Administrators as Amici Curiae Supporting Petitioner, Cougar Den, 139 S. Ct. 1000 (No. 16-1498), 2018 WL 3993391, at *7–9.

286. Brief for Idaho et al. as Amici Curiae Supporting Petitioner, Cougar Den, 139 S. Ct. 1000 (No. 16-1498), 2018 WL 3993390 at *1.

287. *Id.*

Neighborhood Stores, which lobbies for convenience stores, jointly issued a brief in support of the petitioner.[288]

The Confederated Salish and Kootenai Tribes and Nez Perce tribes expressed their support for the respondent.[289] As the only other American Indian tribes with an expressly reserved right to travel in their treaty, they wrote to emphasize the historical and modern significance of this right.[290] The Confederated Tribes and Bands of the Yakama Nation filed a brief in support of Cougar Den, as a regulated and licensed business of the nation exercising their treaty right and provided historical context on the tribe's reliance on travel in trade.[291] Additional briefs in support of the defendant were submitted by the National Congress of American Indians and Sacred Ground.[292]

In a 3-2-4 plurality decision, the Court ruled in favor of Cougar Den.[293] It concluded that Washington's fuel tax burdened the treaty-protected right of the Yakama Nation to travel upon all public highways in common with citizens of the United States, and Washington's application of its fuel tax on Cougar Den was preempted by the treaty's reservation of the right to travel on public highways.[294]

Justice Breyer's plurality opinion, joined by Justices Sotomayor and Kagan, concluded that the 1855 Yakama Treaty, which guarantees "the right, in common with citizens

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288. Brief for Washington Oil Marketers Association and Washington Association of Neighborhood Stores as Amici Curiae Supporting Petitioner, Cougar Den, 139 S. Ct. 1000 (No. 16-1498), 2018 WL 3969556 at *1.

289. Brief for Nez Perce Tribe and Confederated Salish and Kootenai Tribes as Amici Curiae Supporting Respondent, Cougar Den, 139 S. Ct. 1000 (No. 16-1498), 2018 WL 4808849 at *2.

290. *Id.*

291. Brief for Confederated Tribes and Bands of the Yakama Nation as Amici Curiae Supporting Respondent, Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (No. 16-1498), 2018 WL 4739661 at *2.

292. *See, e.g.*, Brief for Nat'l Cong. of Am. Indians as Amicus Curiae Supporting Respondent, Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019) (No. 16-1498), 2018 WL 4659224; Brief for Sacred Ground Legal Services as Amicus Curiae Supporting Respondent, Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S.Ct. 1000 (2019) (No. 16-1498), 2018 WL 4405428.

293. Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019).

294. *Id.*

of the United States, to travel upon all public highways,"[295] preempted the Department's fuel importation tax.[296] Because the tax exempted importation by pipeline or vessel, it was found to be targeting the right to travel by highway with fuel.[297] The plurality's conclusion that the fuel tax is preempted by the treaty rests on three considerations. First, the Court had previously interpreted the Yakama Treaty four times; each time it stressed that the language of the treaty should be interpreted as the Yakama would have understood it at the time of signing.[298] The plurality found that the words "in common with" should be understood in the context of the Yakama's understanding at the time of signing, rather than the colloquial meaning.[299] The second consideration of the plurality is the historical record, which further indicates that the treaty negotiations between the United States and the Yakama would have led the Yakama to believe that the treaty's protection of the right to travel on public highways would include the right to travel with goods for trade.[300] The third and final consideration by the plurality is that to impose a tax upon traveling with certain goods inherently burdens travel.[301] And the right to travel on public highways, without burden, is exactly what the treaty protects from. Therefore, precedent would dictate that the tax is preempted.[302]

In the plurality opinion, the Justices addressed their concerns that the ruling would potentially permit the travel of hazardous goods that threatened health and safety, such as "dis-

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295. *Id.* at 1007 (quoting Treaty Between the United States and the Yakama Nation of Indians, art. 3, 12 Stat. 951 (1855)).

296. *Id.* at 1015.

297. *Id.* at 1014.

298. *See* United States v. Winans, 198 U.S. 371, 380–381 (1905); Suefert Bros. Co. v. United States, 249 U.S. 194, 196–198 (1919); Tulee v. Washington, 315 U.S. 681, 684–685 (1942); Washington v. Wash. Com. Passenger Fishing Vessel Ass'n., 443 U.S. 658, 677–678 (1979).

299. *Cougar Den,* 139 S. Ct. at 1012.

300. *Id.* at 1013.

301. *Id.* at 1013.

302. *See, e.g.*, *Tulee*, 315 U.S. at 684 (holding that the fishing right reserved by the Yakamas in the treaty preempted the application to the Yakamas of a state law requiring fishermen to buy fishing licenses. ("Such extraction of fees as a prerequisite to the enjoyment of" a right reserved in treaty "cannot be reconciled with a fair construction of the treaty.")).

eased apples," onto the reservation.[303] The plurality emphasized that "we do not say or imply that the treaty grants protection to carry any and all goods,"[304] or that "the treaty deprives the State of the power to regulate to prevent danger to health and safety."[305] In their emphasis, the plurality suggests that the treaty negotiations may have allowed for state regulation for the purposes of health and safety, but do not explicitly grant this power to the state of Washington,[306] leaving the issue with a sense of ambiguity.

Justice Gorsuch, joined by Justice Ginsburg, issued a concurrence that was even more vehement about the 1855 treaty being interpreted in the manner it would have been understood by the Yakama at the time of signing, and that the court must "give effect to the terms as the Indians themselves would have understood them."[307] As the concurrence notes, the treaty between the Yakama and the United States was drafted in Chinook jargon, a trading language that the Yakama could not read.[308] They suggest, like the plurality, that the language regarding a right to travel would have been understood to provide them "with the right to travel on all public highways 'in common with' without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods."[309] The concurrence asserts that while the treaty supplies the Yakama with special rights to travel with goods to and from market, the language "in common with" indicates that tribal members knew they would have to share the road with non-Indians and accept regulations that would allow the two groups safe coexistence.[310]

The concurrence drew its attention to a counterfactual hypothetical, discussing why the treaty would have allowed the state to regulate Cougar Den in the interest of public safety,

303. *Cougar Den,* 139 S. Ct. at 1021.
304. *Id.* at 1015.
305. *Id.* at 1015.
306. *Id.* at 1015.
307. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1998).
308. Yakama Indian Nation v. Flores, 955 F. Supp. 1229, 1243 (E.D. Wash. 1997).
309. *Cougar Den,* 139 S. Ct. at 1017.
310. *Id.* at 1020.

though that was not actually at issue in the case.[311] The concurrence observed that tribes should have assumed that some concessions to their treaty rights would have to be made in order for peaceful coexistence between the two groups to occur.[312] Using an example of bad apples, the concurrence finds that should the apples somehow pose a threat to safe travel on highways, then it would be within the scope of power for the state to regulate them.[313]

However, the matter of health and safety is not at issue in this case, which leads to the question of why the plurality and concurrence chose to only concur in judgement, rather than opinion. The dissent suggests that while the plurality held that the treaty preempts all laws that attempt to burden travel on highways by the Yakama, the concurrence found the treaty more specifically preempted laws that attempted to burden travel with goods.[314] The contention between the plurality and the concurrence is not explicitly examined in either opinion.

The dissent is authored by Chief Justice John Roberts, joined by Justices Thomas, Alito, and Kavanaugh. The dissent argues that just because a state law affects the Yakamas while they are exercising a treaty right does not mean the law prohibits exercise of the right.[315] Further, the dissent claims that the right to travel with goods is just an application of the Yakama's right to travel and does not ensure them the right to possess whatever goods they want free from taxation and regulation.[316] Because the tax is collected on each gallon of motor vehicle fuel imported, not on the miles traveled over Washington State highways, they take the position that it is a tax on a product, and not an obstruction to travel, like a blockade, toll, or "no trespassing" sign.[317] The dissent argues that the time and place of the imposition of the tax does not change what is being taxed, which, in this case, they believe is the possession of goods.[318] They further assert that the historical context was

311. *Id.* at 1021.
312. *Id.* at 1020.
313. *Id.* at 1021.
314. *Id.* at 1021 (Roberts, C.J., dissenting).
315. *Id.* at 1022.
316. *Id.* at 1022.
317. The dissent refers to issues in *United States v. Winans*, 198 U.S. 371 (1905), and *Seufert Bros. Co. v. United States,* 249 U.S. 194 (1919).
318. *Cougar Den*, 139 S. Ct. at 1023.

wrongfully construed by the plurality, stating, "[n]othing . . . supports the conclusion that the right 'to travel on public highways' transforms the Yakamas' vehicles into mobile reservation, immunizing their contents from any state interference."[319] The dissent is skeptical of the plurality's assertion that the treaty would allow for regulations for the purposes of health and safety.[320]

In the second dissent, Justice Kavanaugh, joined by Justice Thomas, proposes a strict and narrow interpretation of the right to travel clause, arguing that the language "in common with" secured the Yakama only equal rights of travel that are on par with other U.S. citizens.[321] Justice Kavanaugh believes that the tax is nondiscriminatory in nature, and, thus, attempts to interpret the treaty by the judiciary are misplaced and better handled by Congress.[322]

Cougar Den and the Yakama Tribe have experienced no significant changes in operation since the decision. At the time of writing, there have been no changes to the Washington tax code following the decision, as fuel importers that are not owned by the Yakama Nation or its members were unaffected by the ruling. Cougar Den remains in operation and continues to provide fuel to the Yakama reservation.

While few tribes have explicit treaty travel provisions like the Yakama, approximately 368 treaties were made between tribes and the United States.[323] The decision in *Cougar Den* is being used to demonstrate that treaty interpretation must reflect historical context and the understanding of the parties at the time of signing.[324] The decision in *Cougar Den* can be used to prevent narrow interpretations of treaty rights, which would blatantly ignore not only the discrepancies in understanding

319. *Id.* at 1024.
320. *Id.* at 1025.
321. *Id.* at 1026 (Kavanaugh, J., dissenting).
322. *Id.* at 1027.
323. Mark Hirsch, *1871: The End of Indian Treaty Making*, 15 MAG. OF SMITHSONIAN'S NAT'L MUSEUM OF THE AM. INDIAN, https://www.americanindianmagazine.org/story/1871-end-indian-treaty-making.
324. *See, e.g.*, Rosebud Sioux Tribe v. Trump, 428 F. Supp. 3d 282, 293 (D. Mont. 2019); Confederated Salish & Kootenai Tribes v. Lake Cty. Bd. of Comm'rs, 454 F. Supp. 3d 957, 971 (D. Mont. 2020).

for the Indian signees, but also a history of corruption in dealings with American Indians on the part of the United States.[325]

The decision in Cougar Den has been cited as precedent in cases where treaty interpretation is a consideration. In *Confederated Salish and Kootenai Tribe v. Lake County Board of Commissioners*, the Confederated Salish and Kootenai Tribes prevailed in the United States District Court for the District of Montana against the Lake County Board of Commissioners, who had aimed to build a 40 acre RV park on property within the boundary of the Flathead Indian Reservation, when the judge ruled that the tribes were entitled to summary judgement and the defendants did not have jurisdiction to develop.[326] The ruling relied on the United States District Court for Montana's interpretation of the 1855 Hell Gate Treaty.[327] Although the parts of the reservation had been platted and sold in lots in 1913, the court found that this did not remove the lands from tribal control.[328] *Cougar Den* was cited as precedent for the finding that treaty language must be interpreted as it would have been understood by tribes at the time of signing, and all ambiguities should favor the signer of the treaty.[329]

In another case heard by the United States District Court for the District of Montana, *Rosebud Sioux Tribe v. Trump,* the federal court denied the efforts by the United States federal government (Trump) and TransCanada to dismiss the Rosebud Sioux's case against the Keystone XL Pipeline and found that the issuance of the presidential permits to construct the pipeline violated Indian treaties and the tribe's inherent sovereign powers.[330] In *Rosebud Sioux,* Indian tribes brought action against President Trump and various governmental agencies seeking declaratory and injunctive relief for claims that the defendants had violated: the 1851 Fort Laramie Treaty, the 1855 Lame Bull Treaty, the 1868 Treaty of Fort Laramie, the Foreign Commerce Clause of the United States Constitution, the tribes' inherent sovereign powers, and various federal statutes

325. *See, e.g.*, *Rosebud Sioux Tribe*, 428 F. Supp. 3d at 293; *Salish & Kootenai*, 454 F.Supp. 3d at 971.

326. *Salish & Kootenai*, 454 F. Supp. 3d 957 at 961.

327. *Id.* at 961.

328. *Id.* at 969.

329. *Id.* at 978 n.7.

330. Matthew L. Campbell et al., Keystone XL Pipeline, Native Am. Rts. Fund (Jan. 20, 2021), https://www.narf.org/cases/keystone/.

and regulations when he issued a Presidential Permit in 2019 to TransCanada Keystone Pipeline, LP and TC Energy Corporation for the construction of the oil pipeline known as Keystone XL.[331] In the case, the court focuses their interpretation of treaties "upon the historical context in which it was written and signed," citing *Cougar Den* as precedent.[332] TransCanada announced the termination of the Keystone XL pipeline project on June 9, 2021. Rosebud Sioux Tribe President Rodney M. Bordeaux said of this announcement "this is great news for the Tribes who have been fighting to protect our people and our lands. The treaties and laws guarantee us protections, and we are committed to see that those laws are upheld."[333]

In the case of *Unkechaug Indian Nation v. New York State Department of Environmental Conservation*, the United States District Court for the Eastern District of New York found that the New York State Department of Environmental Conservation's ability to regulate fishing rights in a designated reservation and in customary fishing waters was barred by both the May 24, 1676 treaty entered between the Unkechaug Nation and Virginian Governor Andros as well as the protection of the First Amendment's freedom of religious expression.[334] The court relied on the interpretation canon in *Cougar Den*, which states that "the language of [an Indian] treaty should be understood as bearing the meaning that the [Indian tribe] understood it to have," barring the New York State Department of Environmental Conservation's attempts to regulate the Unkechaug customary waters.[335] *Cougar Den* has already proven to shape decisions that pertain to upholding treaties and protecting the rights of indigenous people.

C. *Online Lending*

Tribes are major players in the rapidly growing online financial services industry. Tribal lending enterprises (TLEs") typically offer small-dollar loans to consumers in need of

331. Rosebud Sioux Tribe v. Trump, 428 F. Supp. 3d 282, 286 (D. Mont. 2019).

332. *Id.* at 293.

333. Campbell et al., *supra* note 330.

334. Unkechaug Indian Nation v. New York State Dep't of Env't. Conservation, No. 18-CV-1132 (WFK), 382 F. Supp. 3d 245, 2019 WL 1872952, at *20, *22 (E.D.N.Y. Apr. 23, 2019).

335. *Id.* at *20.

money quickly or who were turned away by traditional lenders.[336] TLEs now constitute 10% of the online financial services industry—an industry with a current annual origination volume of $20 billion, which is expected to grow to $73.7 billion by 2022.[337]

The growth of online TLEs has relied, at least in part, on the legal premise that tribal lenders are not subject to state usury laws, because the loans are processed on-reservation[338] and consumers typically consent to the application of tribal law, rather than state law, in the loan documentation.[339] Not surprisingly, this view has not been universally accepted. Many TLEs operate in partnership with non-tribal enterprises.[340] In fact, it is common for non-tribal enterprises to perform almost

336. The primary users of tribal online-lending are "underbanked" customers not adequately serviced by traditional lenders. *See Is Sovereign Immunity for Tribal Lending Coming to an End?*, PYMNTS.COM (June 30, 2015), https://www.pmnts.com/indepth/2015/is-sovereign-immunity-for-tribal-payday-lending-coming-to-an-end/. The 2013 FDIC National Survey of Unbanked and Underbanked Households defines the underbanked as individuals with a checking or savings account who still must rely on alternative financial services such as check-cashing services, payday loans, rent-to-own agreements, or pawn shops. One in five households were underbanked in 2013, consisting of an estimated sixty-eight million people. *See* Susan Burhouse et al., *2013 National Survey of Unbanked and Underbanked Households*, 4 (2014), https://www.fdic.gov/householdsurvey/2013report.pdf. Alternative financial services (AFS) exist to meet the needs of those left behind by traditional banking, and comprise an estimated $144 billion industry in 2016. Gary Davis, *Strong Hearts to the Front Native Financial Services and the New Tribal Economy*, TRIBAL BUS. J. http://tribalbusinessjournal.com/news/financial-services-strong-hearts-front-native-financial-services-new-tribal-economy/.

337. Davis, *supra* note 336.

338. Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 1001-1100H, 124 Stat. 1376, 1955-2113 (2010); Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 15–16 (2018) ("Online lending has provided isolated tribes with an opportunity to improve their economies. State law typically does not apply on tribal land, and states are the primary payday-loan regulators. Since the Dodd-Frank Act considers tribes "States," poor and isolated tribes have seen online payday lending as an opportunity to use their sovereignty to promote economic development. Indeed, payday lending provides some tribes with the majority of their budgets.")

339. Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 16 (2018).

340. Kate Berry, *CFPB's Mulvaney Shows Lighter Touch with Tribal Lenders*, AM. BANKER (Mar. 19, 2018) (detailing "rent-a-tribe" schemes as non-tribal lender strategies in which lenders establish relationships with tribes to bene-

all the key aspects of the lending operation—from advertising to website design to underwriting to providing the loan capital—all with minimal input from the tribe or its members.[341] In these so called "rent-a-tribe" arrangements, only a small number of tribal members are employed by the TLE, and they perform only basic administrative functions related to loan processing.[342] In some arrangements, tribes are entitled to as little as 1-2% of the profits[343]— all while potentially jeopardizing their sovereign immunity.

However, when done right, TLEs can create professional employment opportunities on reservations, while bringing in significant financial returns to tribes.[344] Revenue that is returned to the reservation allows for continued growth and in-

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fit from their immunity from state usury laws) https://www.americanbanker.com/news/cfpbs-mulvaney-shows-lighter-touch-with-tribal-lenders.

341. James Williams Jr., *Respect Indian Country, Retire "Rent-A-Tribe*," CAGLE (Aug. 28, 2018), https://www.cagle.com/james-williams-jr/2018/08/respect-indian-country-retire-rent-a-tribe; 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, 784 (2012) ("We suspect that many of the current connections between tribes and internet payday lenders are tenuous, and further, that tribes generally receive minimal compensation relative to their non-tribal partners.").

342. Jayne Munger, Student Note, *Crossing State Lines: The Trojan Horse Invasion of Rent-a-Bank and Rent-a-Tribe Schemes in Modern Usury Law*, 87 GEO. WASH. L. REV. 468, 478 (2019) ("It operates similarly to a rent-a-bank scheme, in that the lender markets, advertises, and provides funds for the service, then the tribal entity originates the loan to the borrower, which can be done nation-wide over the internet, and subsequently sells the loan to the lender according to a prior arrangement."). The term "rent-a-tribe" is a controversial one. The term originated in gaming, where attacks started as soon as tribes became a competitive threat to non-tribal casinos. Opponents suggested that tribes' practice of hiring capable vendors to provide services related to casino operations was akin to "renting" sovereignty and detracted from the tribal ownership of the business, even though many non-tribal entrepreneurs engage in identical outsourcing practices when starting a new business in a regulated industry. *See also* Williams Jr., *supra*, note 341.

343. Leslie Bailey, *"Tribal Immunity" May No Longer Be a Get-Out-of-Jail Free Card for Payday Lenders*, THE PUB. JUST. FOUND. (Jan. 2, 2018), https://www.publicjustice.net/tribal-immunity-may-no-longer-get-jail-free-card-payday-lenders/.

344. Mary Jackson, Tribal Lending Provides More Opportunities for America's Indigenous Peoples, Forbes (Nov. 6, 2019, 8:00 AM), https://www.forbes.com/sites/forbesfinancecouncil/2019/11/06/tribal-lending-provides-more-opportunities-for-americas-indigenous-peoples/?sh=104e69c74ba8.

vestment.[345] Although we cannot yet discern the long-term effects of the following examples on tribes, they are currently engaged in employing tribe members and generating revenue.

The Habematolel Pomo of Upper Lake in California and the Lac Vieux Desert in Michigan's Upper Peninsula are two tribes who are seeing growth of tribal economies by providing online loans.[346] Tribal authorities like Sherry Treppa, chairperson of the Habematolel Pomo Tribe, say that the funds generated by lending are important to the lives and livelihoods of the tribes.[347] Treppa says the lending business "has been transformative," providing funds for tribal government services, stipends for seniors and scholarships for students, and that "without tribal lending, these programs would be impossible."[348] In 2018, the Habematolel Pomo TLE was able to open a call center that could provide eighty jobs in the area.[349]

On the Lac Vieux Desert Reservation, approximately 42% of the Nation's General Fund comes from revenue associated with tribal lending operations.[350] The Lac Vieux Desert Reservation's TLE, Castlepay, employs 11 of its 648 tribe members.[351] While the number may not seem significant, the lending operations still brought a handful of decent jobs to one of America's most remote regions, Michigan's Upper Peninsula, where winter temperatures often fall to −20°F.[352] Castlepay loans are funded by a third-party hedge fund.[353] However, Castlepay does not seem to experience the same lopsided benefits some tribes do in their operation with an outside finan-

345. *Id.*

346. *Does Tribal Lending Have a Future?*, PYMNTS.COM (Jan. 16, 2018), https://www.pymnts.com/news/alternative-financial-services/2018/tribal-lending-scott-tucker-racketeering/.

347. *Id.*

348. *Id.*

349. *California Tribe Creates New Jobs with Opening of Call Center*, NATIVE AM. FIN. SERVS. ASS'N. (Dec. 20, 2018), https://nativefinance.org/ news/california-tribe-creates-new-jobs-with-opening-of-call-center.

350. Chico Harlan, *Indian tribes gambling on high-interest loans to raise revenue*, WASH. POST (Mar. 1, 2015), https://www.washingtonpost.com/business/economy/indian-tribes-gambling-on-high-interest-loans-to-raiserevenue/2015/03/01/8551642d-e51b-4d3a-89c6-4de0d3bdf385_story.html.

351. *Id.*

352. *Id.*

353. *Id.*

cier.[354] Additionally, the Lac Vieux Desert Band was able to pay off a $30 million loan that financed the construction of their casino with revenues from the tribal lending business.[355]

However, Castle Payday has encountered obstacles from regulators, too. The tribe received cease and desist orders from New York's financial services superintendent, Benjamin Lawsky, who said they and other online lenders were violating New York's 25% annual interest cap by dealing with borrowers in the state.[356] The Lac Vieux Desert Band, along with the Otoe Missouria Tribe of Indians in Oklahoma, together challenged Lawsky's power to regulate the loans.[357] The case was dropped after they lost twice in court.[358] Castlepay no longer issues loans to consumers in New York, Pennsylvania, Arkansas, Vermont, West Virginia, or Colorado—states that either banned high-rate lending or have challenged online lenders.[359] As of January 2021, a class action suit is pending against Big Picture Loans, owner of Castle Payday, by plaintiffs in Virginia.[360] In the complaint filings, the plaintiffs allege that Matt Martorello, a venture capitalist and non-tribal member, used an association with the Lac Vieux Desert Band to establish a rent-a-tribe business model for his own company, Bellicose Capital.[361] Because Castlepay is deeply integrated into the Band's society, the case is one to follow. With much of the Lac Vieux Desert Band's ability to provide services for its members currently contingent on Castlepay, should the court determine

354. *Id.*

355. *Revenues from Tribal Lending Enterprise and Investments into Economic Enterprises Lead Lac Vieux Desert to Historic Milestone: Payment in Full of Casino Debt*, NATIVE AMERICAN FINANCIAL SERVICES ASSOCIATION (Jan. 13, 2020), https://nativefinance.org/news/revenues-from-tribal-lending-enterprise-and-investments-into-economic-enterprises-lead-lac-vieux-desert-to-historic-milestone-payment-in-full-of-casino-debt/.

356. Chico Harlan, *supra* note 350.

357. *Id.*

358. *Id.*

359. *Id.*

360. Emma Whitford, *Borrowers Want Sanctions in Tribe-Linked Lending Row*, LAW360 (Jan. 21, 2021), https://www.law360.com/articles/1346953/print?section=Banking; Frank Green, *Court to consider case involving alleged 'rent-a-tribe' loan operation charging high interest*, RICHMOND TIMES DISPATCH (May 2, 2019), https://richmond.com/news/local/crime/court-to-consider-case-involving-alleged-rent-a-tribe-loan-operation-charging-high-interest/article_01e85a4a-a088-58e2-9879-214f0dc3158d.html.

361. *Id.*

that its arrangement with Bellicose Capital is in some manner predatory, the potential effects on the Lac Vieux Desert Band would be great.

The Habematolel Pomo is another tribe currently experiencing success from their operation. In 2018, the Consumer Financial Protection Bureau under the Trump Administration withdrew a lawsuit against lending companies owned by the Habematolel Pomo of Upper Lake.[362] The tribe views this dismissal as a sign of progress.[363]

However, some TLE arrangements do little to assist tribes and may even damage tribal sovereignty. The prevalence of "rent-a-tribe" arrangements was brought into the public eye in 2018 through the Netflix documentary series *Dirty Money*.[364] This series exposed the activities of Scott Tucker, a non-Indian, professional race car driver, who had amassed a small fortune through his work with TLEs.[365] Starting in 2003, Tucker entered agreements with several Native American tribes, including the Santee Sioux Tribe of Nebraska, the Miami Tribe of Oklahoma, and the Modoc Tribe of Oklahoma.[366] Under these agreements, the tribes became nominal owners of Tucker's online lending businesses, so that when states sought to enforce laws prohibiting the high-interest loans offered by these businesses, the businesses could claim to be protected by sovereign immunity.[367] The Tribes made no payment to Tucker to acquire the portions of the businesses they purported to own.[368]

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362. *Trump administration signals major changes for tribal lending industry*, INDIANZ (Jan. 19, 2018), https://www.indianz.com/News/2018/01/19/trump-administration-signals-major-chang.asp.

363. *Id.*

364. DIRTY MONEY: PAYDAY (Netflix 2018).

365. David Heath, *Payday Lending Bankrolls Auto Racer's Fortune*, CTR FOR PUB. INTEGRITY (Feb. 10, 2016), https://publicintegrity.org/2011/09/26/6605/ payday-lending-bankrolls-auto-racers-fortune; *See* Leslie Bailey, *Payday Lending: Boon or Boondoggle for Tribes?*, THE PUB. JUST. FOUND. (Mar. 5, 2015), https://www.publicjustice.net/payday-lending-boon-or-boondoggle-for-tribes/.

366. *Scott Tucker Sentenced To More Than 16 Years In Prison For Running $3.5 Billion Unlawful Internet Payday Lending Enterprise*, U.S. DEP'T OF JUST. (Jan. 5, 2018), https://www.justice.gov/usao-sdny/pr/scott-tucker-sentenced-more-16-years-prison-running-35-billion-unlawful-internet-payday.

367. *Id.*

368. *Id.*

While Tucker's lending businesses were "owned" by the Miami and Modoc Tribes of Oklahoma as well as the Santee Sioux Tribe of Nebraska, it appeared that the bulk of the operations occurred at his office in Kansas, not on the reservation.[369] Operating under names including Ameriloan, Cash Advance, One Click Cash, United Cash Loans, and 500 FastCash, Tucker's enterprises employed approximately 600 people, only a small fraction of which were tribal members.[370] In order to deceive borrowers into believing that they were dealing with Native American tribes, Tucker directed call center employees to state that they were located on Indian reservations in Oklahoma and Nebraska, when in fact they were working out of Tucker's corporate office in Kansas.[371] In exchange for participating in these arrangements, the tribes received payments, typically 1% of the revenues from the TLEs that they purportedly owned.[372]

The contrast between Tucker's lifestyle and those of the tribes that "owned" the TLEs was stark. Tucker garnered over $380 million in profit from these arrangements, which he spent on a fleet of Ferraris and Porsches, a professional auto racing team, a private jet, and a luxury home in Aspen, Colorado.[373] Meanwhile, even at the height of the lending operations, members of the Modoc Tribe of Oklahoma and Santee Sioux Tribe of Nebraska struggled with continued poverty.[374]

Consumers borrowing from these operations were routinely charged interest rates of 600-700%, and sometimes higher than 1000%.[375] Between 2006 and 2011, the Better Business Bureau of Eastern Oklahoma received more than 2,000 complaints about Scott Tucker's TLEs.[376] And the Federal Trade Commission reported that between 2007 and 2012,

369. *Id.*

370. DIRTY MONEY: PAYDAY, *supra* note 364.

371. Some managers located in Kansas City would insist that employees never reveal that they were located outside of Oklahoma, going as far as sending out weather reports for the state each day. *Id.*

372. U.S. DEP'T OF JUST., *supra* note 366.

373. *Id.*

374. The Miami Tribe have been able to achieve a higher standard of living. In 2010, however, the chief stated in a tribal newsletter that hard times were forcing the tribe to consider layoffs and other budget cutting measures. CTR. FOR PUB. INTEGRITY, *supra* note 365.

375. U.S. DEP'T OF JUST., *supra* note 366.

376. CTR. FOR PUB. INTEGRITY, *supra* note 365.

more than 7,500 other complaints were filed in other jurisdictions throughout the country.[377]

The State of Colorado attempted to sue Tucker' business, Cash Advance, in state courts for violation of state usury regulations and other abusive lending practices.[378] Each of these state courts dismissed the claims on the grounds that the TLEs were protected by the tribes' sovereign immunity.[379] Yet, the tribes held only an indicium of ownership over the TLEs and performed only a small amount of the TLEs' business functions.[380]

In 2011, the Federal Trade Commission filed a Complaint in the U.S. District Court for the District of Nevada against Tucker, his online lending businesses, and several related businesses and affiliated individuals.[381] This was the first federal enforcement action the FTC filed against Tucker.[382] The five-count Complaint alleged that Tucker had violated the Federal Trade Commission Act ("FTC Act"), and the Electronic Funds Transfer Act ("EFTA").[383] Tucker's businesses had allegedly engaged in a number of abusive lending practices such as giving inaccurate loan information to borrowers, requiring borrowers to preauthorize electronic withdrawals from their bank accounts as a condition of obtaining loans, improperly garnishing wages, and threatening borrowers with arrest and lawsuits in debt collection calls.[384] The defendants moved to dis-

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377. *FTC Charges Payday Lending Scheme with Piling Inflated Fees on Borrowers and Making Unlawful Threats When Collecting*, FED. TRADE COMMISSION (Apr. 2, 2012), https://www.ftc.gov/news-events/press-releases/2012/04/ftc-charges-payday-lending-scheme-piling-inflated-fees-borrowers.

378. Cash Advance and Pref. Cash Loans v. State, 242 P.3d 1099 (Colo. 2010); State *ex rel* Suthers v. Cash Advance, 205 P.3d 389, 399 (Colo. App. Ct. 2008).

379. U.S. DEP'T OF JUST., *supra* note 366.

380. *Id.*

381. *FTC Charges that Payday Lender Illegally Sued Debt-Burdened Consumers in South Dakota Tribal Court Without Jurisdiction*, FED. TRADE COMMISSION (Mar. 17, 2012), https://www.ftc.gov/news-events/press-releases/2012/03/ftc-charges-payday-lender-illegally-sued-debt-burdened.

382. *Id.*

383. Complaint for Permanent Injunction and Equitable Relief, Fed. Trade Comm'n v. Payday Financial, LLC (D. S.D. Sept. 6, 2011), https://www.ftc.gov/sites/default/files/documents/cases/2011/09/110912paydaycmpt.pdf.

384. *FTC Charges Payday Lending Scheme with Piling Inflated Fees on Borrowers and Making Unlawful Threats when Collecting*, FED. TRADE COMMISSION (Apr. 2,

miss on the grounds that they were an on-reservation business and were not subject to state jurisdiction.[385] Their motion was denied.[386]

Ultimately, AMG Services entered a Partial Settlement Agreement with the FTC in July 2013, in which Tucker's businesses, AMG Services and MNE Services Inc., agreed to stop these abusive lending practices and to pay $21 million in restitution, with another $285 million waived in charges that were assessed but not collected.[387] In January of 2015, the U.S. District Court for the District of Nevada approved and issued the permanent injunction.[388] The injunction barred the settling defendants from using threats of arrest and lawsuits as a tactic for collecting debts, and from requiring all borrowers to agree in advance to electronic withdrawals from their bank accounts as a condition of obtaining credit.[389] In January of 2016, two of the defendants, Red Cedar Services Inc. and SFS Inc., paid a total of $4.4 million to resolve the case against them.[390]

Finally, in October of 2017, after having engaged with TLEs for close to twenty years, Tucker was found guilty by the United States District Court for the District of Nevada on 14 counts, including racketeering, wire fraud, money laundering, and TILA offenses; he was sentenced to 200 months in prison.[391] In addition to the conviction, the judge ruled that Tucker and his corporate defendants pay a $1.3 billion pen-

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2012), www.ftc.gov/news-events/press-releases/2012/04/ftc-charges-payday-lending-scheme-piling-inflated-fees-borrowers.

385. Fed. Trade Comm'n v. AMG Services, Inc., No. 2:12-cv-00536-GMN-VCF, 2015 WL 10738453 (D. Nev. May 26, 2015).

386. *Id.*

387. *U.S. Court Finds in FTC's Favor and Imposes Record $1.3 Billion Judgment Against Defendants Behind AMG Payday Lending Scheme*, Fed. Trade Commission (Oct. 4, 2016), www.ftc.gov/news-events/press-releases/2016/10/us-court-finds-ftcs-favor-imposes-record-13-billion-judgment.

388. *Online Payday Lending Companies to Pay $21 Million to Settle Federal Trade Commission Charges that They Deceived Consumers Nationwide*, Fed. Trade Commission (Jan. 16, 2015), www.ftc.gov/news-events/press-releases/2015/01/online-payday-lending-companies-pay-21-million-settle-federal.

389. *Id.*

390. Fed. Trade Commission., *supra* note 387.

391. David Heath, *Payday Lending Bankroll's Auto Racer's Fortune*, Public Integrity (Feb. 10, 2016), https://publicintegrity.org/2011/09/26/6605/payday-lending-bankrolls-auto-racers-fortune.

alty, the largest figure ever obtained by the FTC in a litigated case.[392]

Following the 2012 FTC victory against Tucker, the Modoc Tribe agreed to forfeit $2 million to the federal government, the Santee Sioux tribe forfeited another $1 million, and the Miami tribe forfeited $48 million.[393] As of 2018, 25% of the Modocs' 253 members and 25% of the Santee Sioux' 355 members are living below the poverty line.[394] For the Miami tribe, who had a diversified safety net of income from gaming and a handful of other endeavors, 95% of the tribe's ninety-three on-reservation members live above the poverty line.[395]

Tribal lending enterprises have displayed instances of success in creating careers and a source of revenue for impoverished rural tribal communities. Tribal lending has also responded to a demand by underbanked consumers for alternative financial services.[396] In return, tribal lending enterprises have the burden of proving that the majority of the business activity occurs on-reservation.[397] By proving this, tribes not only prevent state infringement on tribal sovereignty, but protect themselves from non-tribal affiliates who intend to use their sovereignty to skirt state usury laws without establishing a meaningful business relationship with the tribe. In proving that tribal business is occurring on-reservation, TLEs might also bar themselves from being challenged by state attorneys general and state agencies in court.[398] However, this is complicated by the fact that federal courts test to determine whether a business is an arm of the tribe vary in complexity and emphases.[399] Until a unilateral test is adopted, TLEs must be pre-

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392. Steve Vockrodt, *American Indian tribes used by convicted payday lender Scott Tucker settle with feds*, KAN. CITY STAR (June 26, 2018), https://www.kansascity.com/article213852304.html.

393. *Id.*

394. *My Tribal Area*, U.S. CENSUS BUREAU, https://www.census.gov/tribal/index.html?aianihh=5740.

395. *Id.*

396. Gavin Clarkson et al., *Online Sovereignty: The Law and Economics of Tribal Electronic Commerce*, 19 VAND. J. ENT. & TECH. L. 1, 9 (2016) ("One in five (or twenty-four million) households were underbanked in 2013.").

397. Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 42 (2018); Bree R. Black Horse, *The Risks and Benefits of Tribal Payday Lending to Tribal Sovereign Immunity*, 1 AM. INDIAN L. J. 396, 400 (2013).

398. *Id.*

399. Black Horse, *supra* note 397.

pared to demonstrably prove their affiliation to the tribe on any number of points.

In this Article we have examined on-reservation businesses in four industries: gaming, tobacco, petroleum, and online lending. While the points of contention in each case are varied, the similarity in each is that a tribal business acted under the assumption that their actions were protected by virtue of being an extension of the tribe. Tribes' ability to act as sovereign entities has been confirmed through the U.S. Constitution, treaties, and agreements with the federal government, as well as centuries of case law. In each industry we explored, and in others we did not explore, when a part of a tribal business occurs off-reservation, disputes about the legality of its actions are often challenged by the state or individuals. We now turn our attention to recommendations that address pathways through which these disputes can be resolved in a manner that recognizes the unique position of tribes and tribal businesses in the US legal system.

IV.
RECOMMENDATIONS

The challenges to sovereignty for tribal businesses are numerous and far-reaching, as are the potential solutions to these challenges. In this section, we offer three ideas. First, we argue that federal and state courts must recognize that tribal courts— not state courts—are the appropriate forum for resolving disputes that involve tribal businesses as parties or that address questions of state jurisdiction over tribal businesses. Second, we call for the Government Accountability Office ("GAO") or another independent office to perform a comprehensive audit of the federal government's compliance with treaties with American Indian tribes. Finally, we contend that removing barriers to Native Americans participating in the political process, including certain state election law provisions, is an important step to promoting tribal sovereignty and economic development. Taken together with other efforts, these measures could potentially enhance the self-determination of tribes, in turn enabling tribes to conduct their business operations in a manner consistent with their beliefs and values.

A. *Exhaustion of Tribal Court Remedies*

As evidenced by a number of cases discussed in Section 3, a perennial question is which judicial forum(s) are appropriate for resolving disputes involving tribal businesses. We argue that the proper first forum for resolving disputes involving tribal businesses is the tribal court system. By subjecting tribal businesses to the jurisdiction of state regulatory bodies or state courts, or even federal courts, without first allowing the tribal court to adjudicate the matter, state or federal law improperly displaces tribal law.

The U.S. Supreme Court has recognized the jurisdiction of tribal courts and the development of tribal law is a vital aspect of tribal sovereignty.[400] The Court has acknowledged the "congressional policy promoting the development of tribal courts."[401] The development of tribal courts does not minimize the rights of litigants, as they still preserve their right to seek review of tribal court decisions by the federal courts.[402] Even when a tribal court applies state law, or a tribal court decision is ultimately appealed to a federal court, exhaustion of tribal court remedies allows tribal courts to "explain to [the] parties the precise basis for accepting jurisdiction, and . . . also provide[s] other courts with the benefit of their expertise in such matter in the event of further judicial review."[403] Opponents of tribal courts are quick to allege bias or incompetence, yet these allegations are entirely unsupported.[404] They are a thinly veiled excuse for attempting to circumvent tribal jurisdiction.[405]

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400. B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 499–500 (1998) (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15–16 (1987) which ruled that a tribal court should have the first opportunity to evaluate the facts, and National Farmers' Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985) which held that a tribal court should have an opportunity to determine its own jurisdiction).

401. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15–16 (1987).

402. Brown v. Washoe Hous. Auth, 835 F.2d 1327, 1329 (10th Cir. 1988).

403. Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1246 (9th Cir. 1991).

404. 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, 82 (2020).

405. *Id.*

Tribes have a right to "manage the use of [tribal] territory and resources by both members and nonmembers [and] to undertake and regulate economic activity within the reservation."[406] If non-tribal litigants challenge the jurisdiction of the tribal court, the tribal court itself should have the first opportunity to adjudicate its own jurisdiction. The U.S. Supreme Court has remarked that allowing tribal courts this opportunity "encourage[s] more efficient procedures" and promotes judicial economy.[407]

Many of the cases discussed in Section 3 were adjudicated in state court, with hardly a mention of whether exhaustion of tribal court remedies was appropriate. We point to the following examples across three industries to illustrate this question: *People ex. Rel. Becerra v. Native Wholesale Supply Company* (tobacco), *Washington State Department of Licensing v. Cougar Den* (petroleum), and *Littlefield v. Mashpee Wampanoag Tribe* (gaming).

A key issue in *People ex. Rel. Becerra v. Native Wholesale Supply Company* was whether the defendant, a cigarette wholesaler owned by a member of the Seneca Nation and incorporated under the laws of the Sac and Fox Nation, became subject to the regulatory jurisdiction of the State of California when it sold cigarettes to the Band of the Western Mono Indians of the Big Sandy Rancheria, located in California. The issue of whether the state court or the federal court was the appropriate forum for this case was debated over multiple levels of appeal; however, exhaustion of tribal court remedies does not appear to have been raised or considered. While the Big Sandy Rancheria Band of Mono Indians is a small tribe and does not have its own court system, the Seneca and Sac and Fox Nations both have their own courts, which could have provided an appropriate forum to begin proceedings. Particularly given the nature of the case, with questions of both tribal business operation and jurisdiction, exhaustion of tribal courts may have provided an opportunity to gain tribal perspective on Native Wholesale's operation.

The case of *Washington State Department of Licensing v. Cougar Den* addressed whether the Yakama's transport of fuel from Oregon to their reservation within the State of Washington

406. N.M. v. Mescalero Apache Tribe, 462 U.S. 324, 335 (1983).
407. *Crow Tribal Council*, 940 F.2d at 1246.

was protected under the Yakama Treaty and thus exempt from a Washington fuel importation tax. The proceeding began before a Washington State Department of Revenue Administrative Law Judge, and worked its way up through the state court system and eventually to the U.S. Supreme Court.[408] The Yakama tribal court did not have an opportunity to adjudicate the issue, even though the case centered on the understanding and historical context of the Yakama's treaty right, for which the tribe is the utmost authority.

The question of exhaustion of tribal remedies is also relevant to the federal courts. The case of *Littlefield v. United States Department of Interior* (later *Littlefield v. Mashpee Wampanoag Tribe*) illustrates this point. The plaintiffs in that case, the Littlefields, sued the United States Department of Interior (DOI) in federal District Court on grounds that the DOI's designation of land in trust for the Mashpee Tribe was contrary to federal law.[409] One wonders why the Littlefields did not initially include Mashpee Tribe as a defendant—perhaps it was to circumvent the tribal court. In any event, the United States District Court for Massachusetts ruled in favor of the Littlefields. DOI dropped their petition to appeal the decision, but having joined the case, the Mashpee Wampanoag petitioned the U.S. Court of Appeals for review. At such point in time, the Court of Appeals should have considered remanding the case to the Mashpee Wampanoag tribal court.

While the tribal businesses may have waived sovereign immunity and agreed to be sued in state court, or at the least not contested the jurisdiction of the state court on sovereign immunity grounds, we argue that the state and federal courts should have *sua sponte* considered the question of whether the tribal courts would have been an appropriate first forum for resolving the disputes. This is not to say that exhaustion of tribal court remedies should always be required, but rather that the court should at least consider the question.

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408. Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1007 (2019).

409. Littlefield v. United States Dep't of Interior, 199 F. Supp. 3d 391, 392 (D. Mass. 2016), *aff'd sub nom.* Littlefield v. Mashpee Wampanoag Indian Tribe, 951 F.3d 30 (1st Cir. 2020).

B. *Treaty Compliance Audits*

Treaties between the federal government and other nations are legally binding documents.[410] History has shown, and the recent cases discussed in Section 3 emphasize, that the federal government does not honor its treaties with American Indian nations to the same extent it honors treaties entered into with foreign nations. The federal government has not upheld its Indian treaty obligations regarding land boundaries, water rights, hunting and fishing rights, rights to engage in commercial activities, as well as many other rights.[411] The federal government has also been complicit in state violations of these rights.[412]

Treaty compliance is important to American Indians, whose nations made significant concessions in exchange for treaty promises. But it is also important—or at least, we argue, it should be important—to nonindigenous citizens of the United States, who became parties to the treaties when they were made on our behalf by the federal government.

As a mechanism of promoting federal government compliance with American Indian treaties, we recommend that Congress pass a law or otherwise adopt a standing request for periodic non-partisan audits of Indian treaty compliance. Regular treaty compliance audits would aid in keeping the federal government (and by extension U.S. citizens) in good relationship with tribal nations and be a logical step in repairing the damage that has been caused by disregarded treaty promises. These audits should review not only the federal government's own actions, but also its (in)actions in allowing states to infringe on tribes' treaty-protected rights.

An organization that is well-poised to conduct treaty audits is the U.S. Government Accountability Office ("GAO"). The GAO is Congress's "watchdog," and it produces non-partisan, objective audit reports on government operations at the

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410. U.S. CONST. art. VI; Seminole Nation v. United States, 316 U.S. 286, 296 (1942) ("[I]n carrying out its treaty obligations with the Indian Tribes the Government is something more than a mere contracting party. . . it has charges itself with moral obligations of the highest responsibility and trust.").

411. *See* Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 572 (1995).

412. *Id.*

request of the congressional committees.[413] Another potential avenue is the Congressional Research Service ("CRS"). The CRS analyzes policy and law for members of Congress from a non-partisan perspective and drafts frameworks for achieving policy goals.[414] While we believe that the federal government should assume responsibility for (and pay for) this internal audit function, non-government organizations such as the Native American Rights Fund could consider providing technical assistance to tribes that wish to perform an audit of compliance with the treaties that apply to them.

This recommendation is not without issue. The GAO and the CRS are not courts, and their determinations of what actions are and are not compliant with the terms of a treaty would not be legally binding. However, as the reports they produce are often treated as valid and credible, they may create an indirect political pressure for a company, state, or federal government to abandon a practice once it is deemed noncompliant.

C. *Voting Rights and Political Participation*

Voting rights and political participation may not be the first topic that comes to mind when analyzing tribal businesses, but, given the heightened focus on voter rights surrounding the 2020 Presidential election,[415] its inclusion in this article felt timely. In the modern day, Native Americans have the same right to vote as all other American citizens, but social, economic, and geopolitical factors inhibit Native American voters from accessing the polls. While these conditions persist, the interests of the Native American electorate—the interests of tribes and tribal businesses—are underrepresented.

In this section, we briefly examine the historic and current issues facing Native American voters and the federal government's efforts to mitigate these issues. To be clear—we are not suggesting that participation in the U.S. political system is or should be necessary for Native Americans to maintain their

413. *About*, U.S. GOV'T ACCOUNTABILITY OFF., www.gao.gov/about (last visited Sept. 4, 2021).

414. *About CRS*, LIBR. OF CONG., https://loc.gov/crsinfo/about (last visited Sept. 4, 2021).

415. Andrew Westney, *Justices Open Door to More Restrictive Voting Regs*, LAW360 (July 1, 2021, 10:19 AM), https://www.law360.com/nativeamerican/articles/1372410.

culture, practices, treaty rights, or self-determination. Rather, we are arguing that Native Americans who desire to participate in the U.S. political system should not face unique or undue hardships when doing so.

Political disenfranchisement of Native Americans has a lengthy history. The Fifteenth Amendment to the United States Constitution secured that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[416] However, many state constitutions were written prior to the passage of the Fifteenth Amendment and included stipulations that allowed only white citizens to vote.[417] Decades of political and social movements, court cases, and activism eventually led to the right to vote for all Native Americans, when in 1958 North Dakota became the last state to remove its ban on Native American voting.[418]

While voting access has improved substantially for all groups since the 1950s, today only two-thirds of eligible Native Americans are registered to vote, and voter turnout for Native Americans is the lowest of any demographic segment in the country.[419] Between 2008 and 2020, twenty lawsuits were filed on matters relating to Native American access to the polls.[420] Alaska Natives also face barriers in exercising their voting rights.[421]

The isolated nature of many Indian reservations can make it complicated and expensive for residents to visit state licensing offices to obtain approved voter identification and to access post offices to obtain voter registration cards and sample ballots.[422] Even after securing approved identification cards,

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416. U.S. CONST. amend. XV, § 1.

417. James Thomas Tucker et al., OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS, at 11 (2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

418. Patty Ferguson-Bohnee, *How the Native American Vote Continues to Be Suppressed*, AM. BAR ASS'N HUM. RTS. MAG., Feb. 9, 2020, www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/how-the-native-american-vote-continues-to-be-suppressed.

419. Tucker et al., *supra* note 417, at 6.

420. Ferguson-Bohnee, *supra* note 418.

421. Zachary R. Kaplan, *Unlocking the Ballot: The Past, Present, and Future of Alaska Native Voting Rights*, 37 ALASKA L. REV. 205, 207, 218 (2020).

422. Ferguson-Bohnee, *supra* note 418.

Native American voters have been turned away at the polls because some poll workers are not familiar with the unique residential addressing systems used on some reservations.[423]

Gerrymandering also contributes to this problem. Malapportioned districting, where Native Americans are placed into districts in a manner that reduces Native voting strength, is a contributing factor in the denial of equal access to representation and government services for many tribal members.[424]

Malapportioned districts may also be a challenge for those tribal citizens who wish to run for office.[425] Despite this, in the 2020 election, six Americans Indians were elected to Congress, and numerous indigenous candidates won state and local elections.[426] This is a sign of progress not only for indigenous individuals whose interests are supported by indigenous representation, but also for tribal businesses whose unique positionality may be best served by representatives who are familiar with the business operations and the tribe's legal rights.

In 2019, U.S. Senator Tom Udall (D-N.M.), vice chairman of the Senate Committee on Indian Affairs, and U.S. Representative Ben Ray Luján (D-N.M) introduced the Native American Voting Rights Act, with the objective of removing barriers to voting and improving access to the polls for Native Americans.[427] The legislation would improve Native American access to voter registration sites and polls, approve the use of tribal IDs for elections in all states, and require jurisdictions to consult with tribes prior to closing voter registration and polling sites on Indian Reservations.[428] The bill would also create a Native American Voting Task Force and a grant program to provide funding towards Native American voting access, as well as requiring the U.S. Department of Justice to consult with

423. *Id.*
424. *Id.*
425. *See* CONG. RSCH. SERV., RS21176, APPLICATION OF CAMPAIGN FINANCE LAW TO INDIAN TRIBES (2007).
426. Erica Belfi, *Historic Number of Native Americans Elected to U.S. Congress*, CULTURAL SURVIVAL (Nov. 17, 2020), https://www.culturalsurvival.org/news/historic-number-native-americans-elected-us-congress.
427. Ferguson-Bohnee, *supra* note 418.
428. *Id.*

tribes on voting issues.[429] However, the bill has been stuck in committee since 2019.[430]

On March 7, 2021, President Biden signed an Executive Order on Promoting Access to Voting.[431] It established a Native American Voting Rights Steering Group to determine the best practices for protecting voting rights of Native Americans; the Steering Group is directed to produce a report by early 2022.[432] The issues for the Steering Group to address are similar to those contained in the proposed Native American Voting Rights Act.[433] While it is promising that the Biden administration has taken steps to mitigate the discrimination faced by Native American voters, real change will likely hinge on implementation of the Steering Committee report.[434]

V.
CONCLUSIONS

Tribal businesses and the markets they serve have evolved over time, but their unique status as tribal entities remains. In an era of global and online commerce, states have increasingly attempted to assert regulatory and tax jurisdiction over tribal businesses. The federal government has, for the most part, sat idly by and allowed this abdication of its exclusive constitutional authority over Indian commerce. In this article, we discussed four industries—gaming, tobacco, petroleum, and online lending—to demonstrate the need for the federal government to live up to the promises it made in Indian treaties and to act in accordance with the principles of sovereignty and self-determination.

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429. Ferguson-Bohnee, *supra* note 418; *see also Native American Voting Rights: Barriers and Solutions Examined by Congress*, AM. BAR ASS'N WASH. LETTER (Feb. 1, 2020), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/feb-20-washington-letter/medicare-feb-2020/.

430. Native American Voting Rights Act of 2019, H.R. 1694, 116th Cong. (2019).

431. Exec. Order No. 14,019, 86 Fed. Reg. 13,623 (Mar. 7, 2021).

432. *Id.*

433. *Id.*; *see also* Ferguson-Bohnee, *supra* note 418.

434. As evidenced by a recent Supreme Court decision, the strength of certain provisions in the Voting Rights Act is still being contested. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2325 (2021).

We recognize that tribal scholars and attorneys are more than capable of advocating for themselves, and that indigenous individuals have unique insights that are linked to indigenous identity and relationality. Rather, as non-tribal members who strive to be allies of our Native colleagues, we seek to call attention to the continual overreach of state regulation over tribal businesses and to show that the federal government is not living up to its constitutional and treaty-bound obligations. To this end, we offered three recommendations in this Article. First, we argued that tribal courts are the proper forum to first consider disputes in which tribal businesses are parties or which address questions of state jurisdiction over tribal businesses. If the issue of tribal court exhaustion is not raised by the parties, state courts should consider raising it sua sponte. Second, we called for an independent office within the federal government to perform periodic, comprehensive audits of the federal government's compliance with American Indian treaties. Finally, in light of the current national discourse regarding voting rights, we contended that increasing access to the polls for Native Americans is an important step to promoting tribal sovereignty and economic development.

One does not need to be a tribal member or ally to have a stake in these issues. It is in the interest of all Americans for the federal government to prevent unconstitutional state overreach over business enterprises. It is in the interest of all Americans that when promises are made in our name, those promises are kept. In that sense, it's all of our business.