

# Caught on the Wrong Side of the Line: An Examination of the Relationship Between the Payday Loan Industry and American Indian Tribal Sovereignty

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“Down here it’s just winners and losers  
And don’t get caught on the wrong side of that line.”<sup>1</sup>

- Bruce Springsteen

## I. INTRODUCTION

At first glance, payday loan companies and American Indian<sup>2</sup> tribes appear to have very little in common with each other. The former are companies that act similar to banks, while the latter are a set of over 500 indigenous cultural and governmental institutions whose status as such is recognized by the federal government.<sup>3</sup> The former are part of an industry that is currently experiencing a great deal of negative public backlash for some of their lending practices,<sup>4</sup> while the latter have been subject to a negative public view for hundreds of years.<sup>5</sup> However, after exploring the relation

1. BRUCE SPRINGSTEEN, *Atlantic City, on NEBRASKA* (Columbia Records 1982).

2. The author has elected to use the term “American Indian” throughout this Note. Proper terms for the First Peoples have come in and out of favor throughout American society. The term American Indian—once derided as an ugly colonialist connotation—has become the term of choice for many Native activists and activist groups. *E.g.*, NAT’L CONG. AM. INDIANS, <http://www.ncai.org> (last visited Oct. 26, 2016); Native Sun News Editorial Board, *Native American vs. American Indian: Political Correctness Dishonors Traditional Chiefs of Old*, NATIVE SUN NEWS, reprinted in NATIVE TIMES (Apr. 12, 2015, 5:08 PM), <http://www.nativetimes.com/index.php/life/commentary/11389-native-american-vs-american-indian-political-correctness-dishonors-traditional-chiefs-of-old>. *But see* Amanda Blackhorse, *Blackhorse: Do You Prefer ‘Native American’ or ‘American Indian’? 6 Prominent Voices Respond*, INDIAN COUNTRY TODAY (May 21, 2015), <http://indiancountrytodaymedianetwork.com/2015/05/21/blackhorse-do-you-prefer-native-american-or-american-indian-6-prominent-voices-respond> (demonstrating that among Native individuals there are several preferences for identification, including “American Indian,” “Indian,” “Native,” “Native American,” “First Americans,” and “indigenous,” as well as names of the tribe or tribes they belong to, spoken either in English or in the tribe’s original language). There is no “one-name-fits-all” that can be applied to all situations, so to strike a balance between respect and efficiency the term “American Indian” will be used as a demonym when necessary, while the word “tribal” will be used as often as possible when referring to governments of federally-recognized Native tribes.

3. *Tribal Nations and the United States: An Introduction*, NAT’L CONG. OF AM. INDIANS, [www.ncai.org/about-tribes](http://www.ncai.org/about-tribes) (last visited Oct. 26, 2016) (stating that there are 566 “federally recognized Indian Nations” even though they may go by organizational names such as band, tribe, nation, community, etc.).

4. There is no lack of articles about customers’ and lawmakers’ negative reactions to payday loan practices, especially in the last couple years. *E.g.*, Martin, *infra* note 8; Joe Patrice, *The Legal Trick Payday Lenders are Using to Skirt the Law*, ABOVE THE LAW (Sept. 12, 2014, 2:17 PM), <http://abovethelaw.com/2014/09/the-legal-trick-payday-lenders-are-using-to-skirt-the-law/>; Editorial, *Out-Of-State Tribal Loan Sharking Shouldn’t Fly in CT*, HARTFORD COURANT (Sept. 14, 2015), <http://www.courant.com/opinion/editorials/hc-ed-payday-lending-scam-20150911-story.html>; Julia Harte et al., *Dissatisfied Customers*, AL JAZEERA AM. (June 17, 2014), <http://projects.aljazeera.com/2014/payday-nation/complaints.html>. But one of the most interesting (and entertaining) editorial pieces critical of payday loan interest rates came from HBO’s “Last Week Tonight with John Oliver.” Oliver, *infra* note 153.

5. It is no secret that the United States federal government and Anglo-American society has held a general social view of American Indian peoples that historically has been at best patronizing and at worst genocidal. *See* Adrian Jawort, *Genocide by Other Means: U.S. Army Slaughtered Buffalo in Plains Indian Wars*, INDIAN COUNTRY TODAY (May 9, 2011), <http://indiancountrytodaymedianetwork.com/2011/05/09/genocide-other-means-us-army-slaughtered-buffalo-plains-indian-wars-30798> (describing how the U.S. Army and United States government as a whole destroyed buffalo herds to quell Indian rebellions, thus removing both a significant cultural asset and a major food staple for the people); *see also* Drew Pollom, *Killing the Policy to Save the Child: Comparing the Historical Removal of Indigenous Children in Australia to the United States and How the Countries Can Learn from Each Other*, 4 AM. INDIAN L.J. 252, 258–63 (2016) (giving an account of

between the two groups, the discovery of their increasingly prevalent cooperation will seem less strange. This Note addresses the movement of payday loan companies onto tribal reservations, both physically and through incorporation, in order to avoid state interest rate cap laws and endangering the payday loan industry itself, the customers, and tribal sovereignty.

In Part II, this Note will explore the current state of payday loan companies, their role in and effect on society, their contemporary public reception, and their standing among individual state usury laws. This includes recent legislative and judicial restrictions placed on payday loan operations in several states. This Note will also establish the basics of tribal sovereignty and immunity, two long-standing but often-misunderstood aspects of Indian law. Next, in Part III, this Note will examine the several recent and pending court cases that may affect or threaten the protection tribal sovereignty and immunity provides to payday loan companies operating within reservation borders. Lastly, in Part IV, this Note will recommend that a) for their own sake, payday loan companies should make an effort to act more ethically and customer-friendly; b) American Indian tribes should avoid close corporate coordination with payday loan companies and cut off any current ties from the industry for both social and legal reasons; and c) payday loan customers should become more aware of the true financial long-term costs of the short-term loans that they may feel they need to take out.

## II. BACKGROUND

Although “short-term loans” and “payday loans” are used synonymously in everyday speech—and often operate in similar manners—payday loans are actually a type of short-term loan.<sup>6</sup> Payday loans are typically defined as loans of no more than about \$500 and are meant to be paid back relatively quickly.<sup>7</sup> As their name suggests, payday loans are meant to act as buffer money for an individual or family to supplement household income until the next paycheck arrives, at which point the recipient is required to pay back the loan.<sup>8</sup> However, this lending system has now seen interest rates reach four digits and thus has come under the scrutiny of several states.<sup>9</sup> To continue their

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the history of the Indian Removal Policy and boarding schools); REEL INJUN (Domino Film 2009) (documenting American Indians’ stereotypical portrayal in films).

6. *What is a Payday Loan?*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/askcfpb/1567/what-payday-loan.html> (last visited Oct. 26, 2016).

7. *Id.* There is slight disagreement in the definition. The actual definition of a payday loan is not universally agreed upon, but definitions typically fall into a certain range. *How Payday Loans Work*, CONSUMER FED’N AM., <http://www.paydayloaninfo.org/facts#1> (last visited Oct. 26, 2016) (“Payday loans range in size from \$100 to \$1,000, depending on state legal maximums. The average loan term is about two weeks. Loans typically cost 400% annual interest (APR) or more. The finance charge ranges from \$15 to \$30 to borrow \$100. For two-week loans, these finance charges result in interest rates from 390 to 780% APR. Shorter term loans have even higher APRs.”). For the purposes of this Note, a payday loan not only fits a requisite dollar amount but also charges a certain minimum interest rate (37.5%—the maximum annual interest rates set by many states).

8. Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 564 (2010).

9. *Id.* at 567. The most notable change in circumstances from 2010 (when Martin’s article was published) to today is the development of state regulations. At that time, interest rate-capping regulations were ineffective in controlling payday lenders. But today such state regulations have been beefed up, either through stronger language or better enforcement, and as a result some payday lenders are trying to avoid state

business operations, some payday loan companies have relocated to Indian reservations or incorporated with tribes. The first half of this Part will focus on the payday loan companies and the second half will focus on American Indian tribes.

### A. Payday Loan Companies

#### 1. The Function of Payday Loans in the Lending Market

In the free market, payday loans serve to fill a need of a demographic of people—typically, but not always, the indigent—to whom traditional banks do not lend.<sup>10</sup> Payday loan apologists often claim that there is no lending alternative for people who cannot or do not want to receive a loan from a bank.<sup>11</sup> For example, an individual who has poor credit, is only in need of \$100, or both, may find it difficult, if not impossible, to acquire a loan from a bank.<sup>12</sup> Payday loan companies then address the portion of consumers who want to enter the loan market but for whatever reason cannot obtain a loan from a bank.<sup>13</sup> This inaccessibility of loans from banks, whether real or perceived,<sup>14</sup> is furthered by recent strategies and advertising campaigns by payday loan companies that brand their market niche as accessible and convenient.<sup>15</sup>

#### 2. The Problems with Payday Loans

Payday loans do serve a role in the lending market, and many people recognize, if not celebrate, the value of such accessible loans.<sup>16</sup> There are now payday loans that have interest rates over 1000% annually.<sup>17</sup> Even less extreme interest rates can still result in

jurisdiction altogether. *Id.*

10. This gap comes from a combined issue of people who do not have a bank account or do not have full access to lending services, Press Release, FDIC, *infra* note 14, but yet still need small loans for expenses that come up and no other institution to turn to for money. Riddell, *infra* note 11.

11. See Kelly Riddell, *Florida to Feds: Leave Our Payday System Alone*, WASH. TIMES (Sept. 1, 2015), <http://www.washingtontimes.com/news/2015/sep/1/financial-regulators-in-florida-want-payday-lendor/> (responding to the criticism of payday loans' high interest rates, Drew Breakspear, Commissioner of the Florida Office of Financial Regulation, argued there was little alternative. "There's a large base of people who need the loans . . . . But if you take them away, what do you replace them with?").

12. See LESLIE PARRISH & URIAH KING, CTR. FOR RESPONSIBLE LENDING, PHANTOM DEMAND: SHORT-TERM DUE DATES GENERATE NEED FOR REPEAT PAYDAY LOANS, ACCOUNTING FOR 76% OF TOTAL VOLUME 5 (2009), <http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf> (mentioning that payday loan companies do not run credit checks).

13. See Jill Ament, *In 'Wild West' of Lending, Community Organizers Push for City Reform*, KWBU (Sept. 24, 2014), <http://kwbu.org/post/wild-west-lending-community-organizers-push-city-reform> (citing Alexis Christensen of the Waco Community Development, who stated that "[i]nitially payday . . . lenders do go to low income areas because most frequently there's not a financial institution or anywhere else where you can access capital").

14. Riddell, *supra* note 11; see Press Release, FDIC, FDIC Releases National Survey of Unbanked and Underbanked (Oct. 29, 2014), <https://www.fdic.gov/news/news/press/2014/pr14091.html> (showing that in 2013, 25 million Americans did not have a bank account and another 68 million did not have access to full banking services, such as loans).

15. See Martin, *supra* note 8, at 565 (stating that "[t]he ubiquitous presence of payday loan and other short-term loan outlets makes them a far easier method of accessing quick cash than other financing alternatives").

16. *Id.*; Riddell, *supra* note 11.

17. Martin, *supra* note 8, at 565.

the customer paying the principal loan many times over by the end of the payment cycles.<sup>18</sup>

Payday loan companies are able to charge interest rates significantly higher than traditional bank loans for several reasons. For a portion of the consumer base, a payday loan may be the only remaining option.<sup>19</sup> In the “Wild West” of the unregulated payday loan market,<sup>20</sup> these individuals’ highly inelastic demand can cause the price<sup>21</sup> of payday loans to rise dramatically.<sup>22</sup> It is the astronomical interest rates<sup>23</sup> that payday loan companies charge, coupled with the fact that most of their customers become trapped in a loan-debt cycle, which spark much of the criticism of payday loan companies.<sup>24</sup> Payday loan companies have been accused of using tricky wording<sup>25</sup> and seemingly innocuous interest rates<sup>26</sup> to lure customers and then trap them in a cycle of poverty, forcing them to take out more loans in order to pay off the first.<sup>27</sup>

### 3. Recent Development in Responses to Payday Loans

Legislation serves as the basis through which states can enact policies to address the social costs of payday loans.<sup>28</sup> The legislative process is an effective method when a situation has been brought to the state’s attention—a loophole in the banking code has

18. See *id.* at 564 & n.2 (stating that after one year of payments, a \$400 loan with a \$100 interest payment every two weeks costs the consumer \$2600 solely in interest payments).

19. Heather L. Petrovich, Comment, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. REV. 326, 326 (2012).

20. Ament, *supra* note 13.

21. Because the product being “sold” is money, the only way to increase a price (and the net profit) of any loan is through fees and interest rates, the latter of which are a more popular way to increase loan prices. Martin, *supra* note 8, at 613. This is presumably because they are less noticeable to the customer. *But see* Felix Salmon, *Loan Sharking Datapoints of the Day*, REUTERS (Jan. 7, 2010), <http://blogs.reuters.com/felix-salmon/2010/01/07/loan-sharking-datapoints-of-the-day/> (showing the requisite Truth In Lending Act disclosure, purporting an annual interest rate of 1147.14%, printed on the top of a payday loan; the customer still took out the loan).

22. See CONSUMER FED’N AM., *supra* note 7 (calculating that annual interest rates for payday loans come out to 400%).

23. In some states, like Connecticut, banks can charge no more than 12% for an annual interest rate. CONN. AGENCIES REGS. § 36a-585-1 (1995). Payday loan companies, on the other hand, when unregulated, charge up to 1000% annually. Martin, *supra* note 8.

24. E.g., Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 5, 25–55 (2002) (citing extensively various “unfair, albeit technically legal” practices); Harte et al., *supra* note 4; Oliver, *infra* note 153.

25. 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, 762–63 (2012).

26. See Karen E. Francis, Note, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday-Loan Industry*, 88 TEX. L. REV. 611, 612 (2010) (pointing out that interest rates of 15 cents on the dollar sound like 15%, but that is just for a two-week period—such an interest rate comes out to about 400% annually); CONSUMER FED’N AM., *supra* note 7.

27. Julia Harte & Joanna Zuckerman Bernstein, *Payday Nation: When Tribes Team Up With Payday Lenders, Who Profits?*, AL JAZEERA AM. (Jun. 17, 2014), <http://projects.aljazeera.com/2014/payday-nation/index.html>; see Allison S. Woolston, Note, *Neither Borrower Nor Lender Be: The Future of Payday Lending in Arizona*, 52 ARIZ. L. REV. 853, 867 (stating that a typical payday customer will renew a loan almost a dozen times in order to pay it off).

28. Customers who take out loans could end up paying that loan several times over in interest. Johnson, *supra* note 24, at 3. In one instance, a woman who took out a \$300 loan ended up paying \$1800 in interest payments alone. *Id.*

been exposed or a situation arose to which state laws did not legally extend.<sup>29</sup> As of October 2015, 18 states and Washington, D.C. have outlawed payday loans outright.<sup>30</sup> Some legislation is reactionary to the outcome of court cases, enacted to address or supplement a recent court ruling.<sup>31</sup> Most banking regulations that affect payday lenders lie within state jurisdiction, so this structure creates a hodge-podge of statutes, regulatory schemes, and requirements that blanket the country. The fact that most banking regulations vary from state to state—there are few federal laws that regulate payday lender operations—allows payday loan companies to skirt the threshold of the law, finding new methods of attracting customers and issuing loans that have not been restricted or outright prohibited.<sup>32</sup>

Customers have brought lawsuits against the payday loan companies, with complaints ranging from not providing required information<sup>33</sup> to illegal terms and interest rates.<sup>34</sup> Although this Note will not cover the success rates of particular fields of claims brought against payday loan companies, the general trend shows that plaintiffs are becoming more likely to win their case.<sup>35</sup>

Litigating against payday loan companies has become a state affair.<sup>36</sup> In place of individual or class-action suits, states or state agencies have brought lawsuits against

29. See Martin, *supra* note 8, at 578 (giving New Mexico as an example of a state that dealt with payday lenders getting around loopholes throughout the 1990s); see generally Livingston v. Fast Cash USA, Inc., 753 N.E.2d 572 (Ind. 2001) (rejecting the defendant payday lender's argument—that IND. CODE § 24-4.5-3-508(7) (2013) nevertheless allows lenders to charge a \$33 fee for a \$200 loan—the Indiana Supreme Court created the same result as a reactive legislature would have done).

30. See *Legal Status of Payday Loans by State*, CONSUMER FED'N AM., <http://www.paydayloaninfo.org/state-information> (last visited Oct. 28, 2016) (listing the states that have either outright banned payday loan companies or effectively limited their operations by capping interest rates. All the states with some variation of a ban are Arizona, Arkansas, Colorado, Connecticut, Georgia, Maine, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Vermont, and West Virginia, as well as Washington, D.C.); see also Timothy E. Goldsmith & Nathalie Martin, *Interest Rate Caps, State Legislation, and Public Opinion: Does the Law Reflect the Public's Desires?*, 89 CHI.-KENT L. REV. 115, 117 (2014) (listing the same states).

31. An example of a state passing regulation in response to a rapid increase in payday lending is New Mexico. N.M. STAT. ANN. § 58-15-1 (2016).

32. Ben Walsh, *Outlawed by the States, Payday Lenders Take Refuge On Reservations*, HUFFINGTON POST (June 29, 2015, 10:07 AM), [http://www.huffingtonpost.com/2015/06/29/online-payday-lenders-reservations\\_n\\_7625006.html](http://www.huffingtonpost.com/2015/06/29/online-payday-lenders-reservations_n_7625006.html) (describing how state regulations in the 1990s caused some payday loan companies to turn to online services in order to avoid those regulations).

33. See *Payday Loan Lead Generators Settle FTC Charges*, CONSUMER AFF. (June 27, 2008), <http://www.consumeraffairs.com/payday-loans-and-lenders> (search "Payday Loan Lead Generators Settle FTC Charges" in the in-site search bar, then go to the page link that contains the article title and scroll down the page until reaching the article) (reporting on a payday company that was charged with not listing the interest rate on a loan agreement).

34. Jeff Stoecker, *Online Payday Loan Borrowers Charge Sky-High Rates*, NBC CONN. (Sept. 10, 2014), <http://www.nbcconnecticut.com/investigations/Online-Payday-Loan-Borrowers-Charge-Sky-High-Rates-274682251.html>.

35. Mark Huffman, *Is the Death Knell Sounding for Payday Lenders?*, CONSUMER AFF. (Oct. 7, 2013), <http://www.consumeraffairs.com/payday-loans-and-lenders?page=2>.

36. State agencies, rather than individual people or even class-action lawsuits, are now bringing claims against payday lenders. See *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 109 (2d Cir. 2014); see generally *People v. Miami Nation Enters.*, 166 Cal. Rptr. 3d 800 (Cal. Ct. App. 2014) (showing examples of state departments or agencies bringing suits against payday loan companies); *State v. W. Sky Fin.*, 2015 NCBC Lexis 87 (N.C. Super. Ct. Aug. 27, 2015).

payday loan companies.<sup>37</sup> For example, Connecticut's Department of Banking brought a lawsuit against Cash Call, one of the largest payday loan companies in the country, for preying on vulnerable citizens and issuing bonds with interest rates that exceeded the state maximum.<sup>38</sup> In this instance, the Department of Banking was successful: although the Department of Banking settled out of court with Cash Call, the payday loan company agreed to set up a \$4.5 million restitution fund to pay back the Connecticut consumers the interest they were charged above Connecticut's cap of 12%.<sup>39</sup>

#### 4. *Ways the Payday Loan Industry is Adapting*

State usury laws vary across the nation, but there is no doubt that state legislatures and agencies increasingly regulate payday loan companies, most commonly (and most effectively) through interest rate caps and other usury laws.<sup>40</sup> In the face of greater regulations, payday loan companies have looked for new methods that allow them to continue operating in as close a manner to the "good old days" as they can.<sup>41</sup> The best solution the industry has come up with for the time being is cooperating with American Indian tribes, by either incorporating with current companies on reservations or by merging with tribal companies.<sup>42</sup>

The flight of payday loan companies to tribal lands is not all that surprising, given the payday loan industries past ability to adapt to changing market and legislative trends.<sup>43</sup> In the 1990s, stricter legislation (seemingly a reaction to the laissez-faire atmosphere and regulation of Wall Street and the financial sector in the 1980s)<sup>44</sup> forced many payday loan companies to adopt the practice known as "hire-a-bank."<sup>45</sup> This practice was just as it sounds. Payday companies would hire a local bank that complied with all state regulations and continue to issue high-interest, short-term loans through that bank to its same customers.<sup>46</sup> Further legislation, most notably interest rate caps, eliminated the "hire-a-bank" option for payday loan companies.<sup>47</sup>

Around the same time the "hire-a-bank" scheme was being regulated out of practice, the Internet became increasingly popular, user-friendly, and capable of hosting business

37. Stoecker, *supra* note 34.

38. *Id.*

39. *Id.*

40. See CONSUMER FED'N AM., *supra* note 30 (demonstrating that legislative regulation of loan interest rates is popular in some states).

41. Walsh, *supra* note 32.

42. *E.g.*, Patrice, *supra* note 4; Walsh, *supra* note 32.

43. Walsh, *supra* note 32.

44. The 1980s saw a great deal of deregulation of usury laws and a wide deference granted to financial institutions, including payday loan companies. See *A Short History of Payday Loan Lending Laws*, PEW CHARITABLE TR. (July 18, 2012), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2012/07/a-short-history-of-payday-lending-law> (citing the result of *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978) as an opportunity for financial institutions to disregard the usury laws of the states they served).

45. Walsh, *supra* note 32. This has not been the first time the payday loan industry has looked outside the box for new partners to skirt court rulings and state regulations. PEW CHARITABLE TR., *supra* note 44.

46. Walsh, *supra* note 32.

47. *Is Sovereign Immunity for Tribal Payday Lending Coming to an End?*, PYMNTS.COM (June 30, 2015), <http://www.pymnts.com/in-depth/2015/is-sovereign-immunity-for-tribal-payday-lending-coming-to-an-end/>.

ventures.<sup>48</sup> By incorporating or reincorporating in “business friendly” states, payday loan companies could operate on the Internet from the safety of their physical location.<sup>49</sup> Advertising and operating online allowed payday loan companies to reach potential customers in states with more restrictive banking and lending laws.<sup>50</sup> The convenience of online payday loan websites attracted more customers than before.

But uninhibited online banking would not last. Again, challenges in court<sup>51</sup> and further changes in legislation diminished the payday loan industry’s ability to operate unhindered online.<sup>52</sup> Although it has not completely disappeared like the “hire-a-bank” model of the 1990s, the trend of payday lenders using the Internet to remain in operation in all states is waning.<sup>53</sup> Legislation and cases clearly indicate that state legislators and judges are no longer tolerating payday lenders.<sup>54</sup> In response to these changes, payday loan companies are turning to American Indian tribes to once again evade state banking and lending regulations.<sup>55</sup>

### B. American Indian Tribal Sovereignty and Immunity

Statistically, American Indians living on reservations experience the worst hardships of any ethnic group in the United States.<sup>56</sup> The average income of an American Indian household is \$36,252, only 70% of the national average household income.<sup>57</sup> Unemployment rates are much higher on reservations as well.<sup>58</sup> While the United States saw a sharp uptick in unemployment—it was up to 8.9% in 2011—reservations were experiencing an even higher unemployment rate of 14.6%.<sup>59</sup> Even in periods of economic growth for the nation, residual effects have not stretched into the reservations.<sup>60</sup> In fact, the *lowest* average unemployment rate on American Indian reservations since 2007 was

48. Walsh, *supra* note 32.

49. PEW CHARITABLE TR., *supra* note 44.

50. See Kelly Riddell, *Consumers Fear Online Lenders as Option if Feds Squeeze Paydays Out*, WASH. TIMES (Sept. 2, 2015), <http://www.washingtontimes.com/news/2015/sep/2/online-lenders-unconstrained-by-state-laws-fill-vo/> (focusing on a customer who took out an online loan from Note-favorite Plain Green LLC, despite living in Vermont, where payday loans were banned).

51. See *CFA Summary of FTC Actions Related To Online Payday Loans*, CONSUMER FED’N AM. (Aug. 2013), <http://consumerfed.org/pdfs/Studies.IPDL.FTC.Actions10.30.12.pdf> (detailing all the cases the Federal Trade Commission has brought against online payday loan companies that were heard in court in 2013, from January to August). Of the 18 cases, all of them either strapped the payday lender defendants with sanctions, injunctions, and/or restitution payments, or the payday loan companies settled out of court; not a single payday loan company won a case. *Id.*

52. Walsh, *supra* note 32.

53. PYMNTS.COM, *supra* note 47.

54. *Id.*

55. Harte & Bernstein, *supra* note 27.

56. Martin & Schwartz, *supra* note 25, at 755–56. For a devastating look at one of the poorest tribes, see Hon. John Yellow Bird Steele, *Testimony to The Senate Committee on Indian Affairs*, 110th Cong. 3–4 (Mar. 22, 2007), <http://www.indian.senate.gov/sites/default/files/upload/files/Steele032207.pdf> (giving statistics such as an 80% unemployment rate, average annual family incomes of \$3700, and a life expectancy of 50).

57. *Facts for Features: American Indian and Alaska Native Heritage Month: November 2014*, U.S. CENSUS BUREAU (Nov. 12, 2014), <http://www.census.gov/newsroom/facts-for-features/2014/cb14-ff26.html>.

58. BUREAU OF LABOR STATISTICS, RACIAL AND ETHNIC CHARACTERISTICS OF THE U.S. LABOR FORCE, 2011 (Sept. 5, 2012), [http://www.bls.gov/opub/ted/2012/ted\\_20120905.htm](http://www.bls.gov/opub/ted/2012/ted_20120905.htm).

59. *Id.*

60. Walsh, *supra* note 32.



7.5%, in the first half of 2007.<sup>61</sup>

There is no ethnic or racial demographic more economically crippled and, therefore, none more financially susceptible to the payday loan companies' offers,<sup>62</sup> yet there is almost no regulation of payday loan terms or interest rates on American Indian reservations.<sup>63</sup> This lack of regulation is because reservations fall almost exclusively under federal jurisdiction,<sup>64</sup> the individual states cannot regulate most non-criminal issues on the reservations that rest within their borders.<sup>65</sup> Therefore, any state restrictions or prohibitions placed on payday loan companies, even as simple as interest rate caps, have no power within the borders of lands that are designated "Indian country."<sup>66</sup>

Possessing a sovereignty that, in most respects, is on par with or greater than that of the state<sup>67</sup> is both a blessing and a curse for American Indian tribes.<sup>68</sup> The benefits are abundant: the ability for tribes to control their society and culture, especially in the face of centuries of systematic attacks on that very same culture and even contemporary factors which pressure people to leave the reservation;<sup>69</sup> avoidance of state laws that could potentially discriminate against American Indians; and a chance to experiment with economic schemes which better fit the population on the reservation, a population which is often different from the general United States population in terms of location,

61. Algernon Austin, *High Unemployment Means Native Americans are Still Waiting for an Economic Recovery*, ECON. POL'Y INST. (Dec. 17, 2013), <http://www.epi.org/publication/high-unemployment-means-native-americans/>.

62. Martin & Schwartz, *supra* note 25, at 754–55.

63. While federal banking laws touch reservations, most interest rate restriction on loans are state legislation. Hilary B. Miller, *The Future of Tribal Lending Under the Consumer Financial Protection Bureau*, ABA (Mar. 4, 2013), [http://www.americanbar.org/publications/blt/2013/03/04\\_miller.html](http://www.americanbar.org/publications/blt/2013/03/04_miller.html).

64. See generally *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751 (1998) (reasserting that tribal sovereignty status allows the individual tribes to experience sovereign immunity similar to state and federal governments, and such immunity cannot be diminished by the states); COHEN'S HANDBOOK OF FED. INDIAN LAW § 7.03[1.A.i-ii] (Nell Jessup Newton et al. eds., 2005 ed.) [hereinafter COHEN'S].

65. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 169–70 (1973) (quoting U.S. DEPT. OF THE INTERIOR, FED. INDIAN LAW 845 (1958)) (asserting that "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation . . ." It seems that interest rate regulation fell under the same category as taxes). COHEN'S, *supra* note 64 § 6.01[1].

66. 18 U.S.C. § 1151 (2015) (defining "Indian country" as: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same").

67. *Native Am. Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959) (declaring the tribes "have a status higher than that of states"); see also COHEN'S, *supra* note 64, § 6.01[2] (outlining the areas and manner in which states can act over tribal governments).

68. It is a blessing because tribal sovereignty is one of the most powerful tools American Indian tribes can use, but it is a curse because such power is resented by the states that have limited ability to regulate reservations within state borders.

69. Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J. 187, 189–90 (1998), reprinted in JOINT OCCASIONAL PAPERS ON NATIVE AFFAIRS, [https://nnidatabase.org/db/attachments/text/JOPNAs/2003\\_CORNELL\\_kalt\\_JOPNA\\_sovereigntyandnationbuilding.pdf](https://nnidatabase.org/db/attachments/text/JOPNAs/2003_CORNELL_kalt_JOPNA_sovereigntyandnationbuilding.pdf) (stating that tribal sovereignty has allowed some tribes to create economic policies and plans and that, in one case, the Cochiti Pueblo tribe has created jobs on the reservation for any tribal member who wants one).

population density, household income, and lifestyle.<sup>70</sup>

One economic scheme that is becoming popular for tribes is incorporating a tribal payday loan company or partnering with a previously-existing company.<sup>71</sup> There are several reasons why tribes may choose to do this, but at the crux of every reason is money. Bringing a payday loan company to the reservation creates a new—and often desperately needed—cash flow into the community.<sup>72</sup>

For one, the presence of a payday loan company on the reservation means more jobs.<sup>73</sup> There are several stories from around the country of tribes facing harsh poverty conditions that were able to strike a deal with an outside payday loan company and maintain a way of life on the reservation.<sup>74</sup>

For example, in 2010 the Chippewa Cree reservation in northern Montana faced an unemployment rate of over 70%.<sup>75</sup> The tribe had previously incorporated its own payday loan company, but it failed to generate much profit.<sup>76</sup> However, increased federal lending regulations<sup>77</sup> pushed national payday loan powerhouse Think Finance to consider entering into a partnership with a tribal company, and in 2011 Think Finance and the Chippewa Cree entered into an agreement to create Plain Green.<sup>78</sup> The agreement stipulations include Think Finance's promise to build a call center on the reservation, providing dozens of sorely needed jobs to the community.<sup>79</sup>

There are benefits to the states as well. A great deal of reservation lands are held in trust by the United States government and because of their trust status they are exempt from property taxes.<sup>80</sup> For states, especially those with a high American Indian population residing on large swaths of reservation land, there is little incentive to assume

70. See generally Stephen Cornell, *Sovereignty, Policy, and Prosperity in Indian Country Today*, CMTY. REINVESTMENT, FED. RES. BK. KS. CITY (Winter 1997), reprinted in ROBERT T. ANDERSON ET AL., *AM. INDIAN LAW: CASES AND COMMENTARY* 364–65 (3d. ed. 2015) (discussing the difficult economic environment some tribes face).

71. See Joanna Zuckerman Bernstein & Julia Harte, *The Sovereign Matchmaker*, AL JAZEERA AM. (June 19, 2014), <http://projects.aljazeera.com/2014/payday-nation/matchmaker-payday.html> (describing the process in which payday loan companies and Indian tribes arrange deals).

72. This means jobs and a percentage of the revenue. Walsh, *supra* note 32; see generally Harte & Bernstein, *supra* note 27, Interactive: Tribal Payday Lending 101, no. 4.

73. Walsh, *supra* note 32.

74. Or in the case of the Habemotolel Pomo, maintain a way of life on the rancherias, which are the small plots of land established for Indian groups without land of their own. Harte & Bernstein, *supra* note 27. In the wake of payday loan companies affiliating with tribes, rancherias in California have become what Delaware has become for corporations—a single office playing host to dozens of businesses. But some of the money that does trickle down to the tribes goes to good use—funding youth cultural and educational instruction.

75. Walsh, *supra* note 32.

76. *Id.*

77. Although this Note places a greater focus on state regulations because a) they are more common (after all, there are 50 states with potentially 50 different sets of usury laws, but only one federal government), and b) the legal relation between state and tribal jurisdictions is less legally explored and thus a richer lode to explore and analyze, this is not to say that federal regulations do not offer a compelling factor in payday loan companies decisions to adapt their business plans. See *supra* Section II.A.4 (discussing that it was federal regulations which caused the payday loan companies that participated in hire-a-bank practices to do so).

78. Walsh, *supra* note 32.

79. *Id.*

80. This assertion is not new. See generally *Worcester v. Ga.*, 31 U.S. 515 (1832) (ruling that state laws do not apply on tribal lands, including tax laws. Later on, lands held in trust were included in this understanding).

full jurisdiction over the tribes.<sup>81</sup> Regulation of the increased population and land area to regulate would be expensive to the already-stretched budgets of regulatory agencies, administrative departments, and law enforcement, while the new lands would not generate any additional revenue from property taxes.<sup>82</sup> By refraining from imposing jurisdiction over some or all adjudicatory issues, the states are able to save money.<sup>83</sup>

There are costs to sovereignty as well. Reservations, which are typically poorer than the rest of the state they lay in, might be more willing to look past the harmful effects of incorporating a payday company on their land.<sup>84</sup> When the Chippewa Cree tribe was approached with an offer from Think Finance, they could hardly refuse.<sup>85</sup> While the terms of the partnership were not completely lopsided,<sup>86</sup> there were troubling aspects of the incorporation deal.<sup>87</sup> The ease of accessibility tribal members now have to payday loans on the reservation outweighs the minimal revenue the company creates for the tribe.<sup>88</sup>

Another worry is the sustainability of the partnership. In August 2015, a North Carolina Superior Court ruled that a payday loan company operating from a reservation outside the state was still subject to all North Carolina rules and regulations when dealing with North Carolina residents.<sup>89</sup> Several other state courts have issued rulings with similar effects: all companies, regardless of where they are incorporated, are subject to the banking laws of the state of the customer with whom they are conducting business.<sup>90</sup> This Note will further investigate this trend and assess the future of the “hire-a-tribe” method and the relationship between payday loan companies and American Indian tribes.

The intersection of payday loans, American Indian tribes and reservations, overlapping and competing sovereignty, incorporation, physicality, socio-economic factors, market influences, and lending regulations creates an intellectual tangle.<sup>91</sup> The

81. 18 U.S.C. § 1151 (2015); *see also* Austin, *supra* note 61 and accompanying text (describing the unemployment on reservations).

82. *See* 28 U.S.C. § 1360(b) (1984) (“Public Law 280”) (re-emphasizing the fact that tribal land held in trust by the government, which includes almost all reservation land, cannot be taxed by the state. “Nothing in this section shall authorize the . . . taxation of any real or personal property . . . belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States . . .”).

83. *See* Cornell, *supra* note 70, at 418 (arguing that *Bryan v. Itasca Cty.* prevents states from taxing reservations or tribes in order to raise money to fund the state’s choice to enact Public Law 280 and expand jurisdiction over the tribes within its borders).

84. Walsh, *supra* note 32.

85. *Id.* After all, Think Finance made it clear that if the tribe tried to negotiate the terms, Think Finance could simply move on to hundreds of other tribes willing to strike a deal. *Id.*

86. *Id.* (reporting that Think Finance held 49% ownership of the newly-created Plain Green, while the tribe, through their own lending company, held 51%).

87. *Id.*; *see also* Harte & Bernstein, *supra* note 27, Interactive: Tribal Payday Lending 101, no. 4 (showing that tribes only earn a 1–2% cut of the revenue their partner lending company makes, while the “matchmaker” who connected the payday loan company with the tribe takes 10–15% of the tribe’s monthly share).

88. *See* Walsh, *supra* note 32 (explaining that the tribe is receiving only about five percent of Plain Green’s revenues).

89. *State v. W. Sky Fin.*, 2015 NCBC LEXIS 87, 87–88 (N.C. Super. Ct. Aug. 27, 2015).

90. *Id.*; Stoecker, *supra* note 34.

91. *See generally* Otoe-Missouria Tribe of Indians v. N.Y. State Dep’t of Fin. Servs., 769 F.3d 105, 113 (2d. Cir. 2014) (mentioning that in a case involving Indian lands the courts must be careful as they “weigh the interests of each sovereign—the tribes, the federal government, and the state” when deciding which law governs).

next Part will assemble all these moving pieces in the context of current judicial and legislative approaches to payday loan companies operating within tribal reservations and sometimes loan companies piloted by the tribes themselves.

### III. ANALYSIS

It seems that an industry, the entire model of which is based on issuing predatory loans to individuals with little financial capital and who often have difficulty securing loans through an established bank, should not operate anywhere near an American Indian reservation.<sup>92</sup> Courts are beginning to address the issue of payday loan companies operating out of American Indian reservations, and in doing so, they are entering what has been called a “tangled web”:<sup>93</sup> the contention between state, federal, and tribal sovereignty. Historically, tribes that are formally recognized by the federal government operate under the legal understanding that they have always retained certain rights crucial for a sovereign state to function.<sup>94</sup>

#### A. *Sovereign Immunity of Tribes*

Paramount among the inherent rights of the American Indian tribes is the right of sovereign immunity—the power a sovereign government has to protect itself from suits by its people or people of other sovereigns.<sup>95</sup> This sovereign immunity protects the tribe and any of its entities—including payday loan companies—from civil lawsuits filed by individuals and from class actions suits.<sup>96</sup>

It was this immunity that attracted payday loan companies to American Indian reservations in the first decade of the 21st century.<sup>97</sup> Under the protection of sovereign immunity, lenders could act in the manner that would best benefit the company without regard to the state regulations that drove them out of the state in the first place.<sup>98</sup> Payday loan companies, assured that sovereign immunity keeps them safe from litigation by unhappy customers of states’ agencies,<sup>99</sup> continue practices such as charging exorbitant interest rates<sup>100</sup> or depositing unsolicited loans into individuals’ bank accounts.<sup>101</sup> The legal truth of tribes’ claims of protection through sovereign immunity is at the crux of

92. See Harte & Bernstein, *supra* note 27 (describing the relationship between payday lenders and Native American Tribes).

93. See, e.g., Daniel B. Wood, *Caught in a Tangled Web of US-Indian History*, CHRISTIAN SCI. MONITOR (Jan. 26, 1999), <http://www.csmonitor.com/1999/0126/p12s1.html> (describing how the United Nations needed to intervene to save Navajo land); see generally MacKenzie T. Batzer, Note, *Trapped in a Tangled Web* United States v. Lara: *The Trouble with Tribes and the Sovereignty Debacle*, 8 CHAP. L. REV. 283 (2005) (showing that the phrase “tangled web” is often used when referring to the intricacies of Indian law).

94. COHEN’S, *supra* note 64, at n.1285.

95. *Id.* § 21.02[2].

96. *Id.* § 7.03(1)(a)(i).

97. Truman Lewis, *Indian Tribes Expand Into Payday Loans*, CONSUMER AFF. (Feb. 10, 2011), <http://www.consumeraffairs.com/payday-loans-and-lenders?page=2>.

98. Adam Mayle, *Usury on the Reservation: Regulation of Tribal-Affiliated Payday Lenders*, 31 REV. BANKING & FIN. L. 1053, 1077 (2012).

99. Walsh, *supra* note 32; Stoecker *supra* note 34.

100. See Silver-Greenberg, *infra* note 114 (reporting that payday loan companies the New York Department of Financial Services was attempting to regulate charged as much as 300% annually).

101. Harte et al., *supra* note 4.

this Note and is an issue just now being explored by the state and federal court systems.<sup>102</sup> Until recently, it seemed that such claims were correct.<sup>103</sup> State agencies such as the Department of Justice or Department of Banking that attempt to bring suits against payday loan companies operating out of reservations have been seemingly thwarted by tribal sovereign immunity.<sup>104</sup>

One such example is the Connecticut Department of Banking, which brought a suit on behalf of thousands of Connecticutians against two of the largest payday loan companies.<sup>105</sup> The companies were accused of charging high interest rates, unconscionable dealings, and predatory lending.<sup>106</sup> In 2014, the Department was able to get a large settlement from the companies.<sup>107</sup> Connecticut, which has an interest rate cap law,<sup>108</sup> succeeded because the defendant companies were operating online in order to circumvent the state's interest rate cap.<sup>109</sup>

Despite its successful litigation, however, the Department of Banking itself claimed that it was unable to protect its citizens from other lenders—One Click Cash, United Cash Loan, and Mobiloans—because those lenders, while operating online as some of their names indicate, were also the business wings of American Indian tribes.<sup>110</sup> This is not a situation of a state agency simply hitting a roadblock and throwing up its hands. In the wake of the 2014 settlement with the two major lenders, the Department of Banking organized an 11-person team to call every plaintiff in the class action suit to inform them of their entitlement to compensation from the settlement fund; this effort ensured that more money would actually make it back to the people from whom it was illegally taken and that less unclaimed money would go back to the payday loan companies.<sup>111</sup> Yet, in response to complaints filed by Connecticutians against One Click Cash, United Cash Loan, and Mobiloans, as well as other companies, the state Department of Banking was nonetheless unable to pursue tribal companies.<sup>112</sup>

But there are some states who have challenged the notion of tribal sovereign immunity, arguing that while it serves a necessary purpose to protect tribal governments both from suits brought by its citizens—a valid concern that lies at the heart of state and federal sovereign immunity—and from non-Indians alike, the reach of tribes' alleged sovereign immunity goes too far and shelters unconscionable actions like those committed by payday loan companies. A few states have challenged what they see as tribal sovereignty infringing on state sovereignty, and the federal courts are beginning to agree with the states.<sup>113</sup>

102. *E.g.*, *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 109 (2d Cir. 2014) (presenting the idea that involving tribal immunity as a way to avoid state law on high interest loans).

103. *See generally* *Mich. v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024 (2014) (ruling that a tribe running a casino outside of the reservation was still protected by sovereign immunity).

104. Stoecker, *supra* note 34.

105. *Id.*

106. *Id.*

107. *Id.*

108. CONN. AGENCIES REGS. § 36a-585-1 (1995).

109. Stoecker, *supra* note 34.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 113 (2014). *But see* *Mayle*, *supra* note 98, at 1062 (calling the victories state governments have experienced as “exception[s] to the

Tribes with reservations in Oklahoma and Michigan sued the New York Department of Financial Services superintendent, Benjamin Lawsky, after Lawsky attempted to regulate the loans and operations of the lending companies affiliated with the tribes.<sup>114</sup> In an October 2014 decision, the Second Circuit Court of Appeals ruled that Lawsky and his department did, in fact, have the right to regulate the actions of financial corporations operating within New York state borders.<sup>115</sup>

This decision holds three-fold significance for the future of payday loan companies. First, on its face, the decision means that payday loan companies have potentially lost access to the entire Second Circuit<sup>116</sup>—Connecticut,<sup>117</sup> Vermont,<sup>118</sup> and New York<sup>119</sup>—all of which have interest rate regulations in place. The ruling by the Second Circuit means that state agencies in Connecticut, Vermont, and New York all have power to control any operation a tribal lender conducts within the state, which includes regulating the interest rates of loans awarded. Connecticut has already made its intentions clear when it comes to the payday loan industry.<sup>120</sup> It can be assumed that Vermont too will take full advantage of the ruling.<sup>121</sup> As for New York, one can imagine that the loss of territory in the nation's second-most populous state is a hard pill for the payday loan industry to swallow.

The Second Circuit's decision was, at the time, the highest court ruling to favor state sovereignty claims over tribal sovereignty, when it came to financial regulations, and could be indicative of the way other circuits may rule.<sup>122</sup> As a federal court of appeals, the Second Circuit Court has the potential to serve as an indicator as to the direction a particular legal issue may be going. This is a small, yet potentially substantial, crack in the legal armor that tribes have been touting as a means to attract payday loan companies to do business on their reservations.<sup>123</sup> If payday loan companies begin to perceive that tribal sovereignty (including and especially sovereign immunity) will no longer allow them to operate in states with payday loan regulation or protect them from class-action lawsuits or actions from the state, or both, then they might simply move on.<sup>124</sup> The

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rule”).

114. Jessica Silver-Greenberg, *Appeals Court Rejects Claims by American Indian Payday Lenders*, N.Y. TIMES:DEALBOOK (Oct. 1, 2014, 7:28 PM), [http://dealbook.nytimes.com/2014/10/01/appeals-court-rejects-claims-by-american-indian-payday-lenders/?\\_r=0](http://dealbook.nytimes.com/2014/10/01/appeals-court-rejects-claims-by-american-indian-payday-lenders/?_r=0).

115. *Otoe-Missouria Tribe*, 769 F.3d at 117 (“New York’s usury laws apply to all lenders, not just tribal lenders . . .”).

116. *About the Court*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, [http://www.ca2.uscourts.gov/about\\_the\\_court.html](http://www.ca2.uscourts.gov/about_the_court.html) (last visited Oct. 26, 2016).

117. *Connecticut State Information*, CONSUMER FED’N AM., <http://www.paydayloaninfo.org/state-information/14> (last visited Oct. 26, 2016).

118. *Vermont State Information*, CONSUMER FED’N AM., <http://www.paydayloaninfo.org/state-information/53> (last visited Oct. 26, 2016).

119. *New York State Information*, CONSUMER FED’N AM., <http://www.paydayloaninfo.org/state-information/40> (last visited Oct. 26, 2016).

120. Stoecker, *supra* note 34 (noting that interest rates above 12% are illegal in Connecticut).

121. Vermont limits single-payment interest rate loans to 18% per annum, VT. STAT. ANN. tit. 9, § 41a(b)(1) (1979), far below the interest rates at the center of the *Otoe-Missouria* case.

122. Since the Supreme Court has not yet ruled on any cases involving the question of state jurisdiction over tribal-run payday loan companies operating within state borders, any federal circuit court decision will have equal weight until that time.

123. PYMNTS.COM, *supra* note 47.

124. *Infra* Part IV.

payday loan industry is quite profitable—earning \$4.3 billion in revenue in 2012<sup>125</sup>—and equally resourceful.<sup>126</sup> After all, the industry faced the same issues of being regulated or altogether forced out by state laws in the 1990s, and it was able to respond and adapt, moving its services and operation to the burgeoning internet.<sup>127</sup>

Third, the ruling could be viewed as a blow to tribal immunity and thus, by extension, a blow to tribal sovereignty.<sup>128</sup> In some contexts, American Indian tribes have been treated as equals to the U.S. government.<sup>129</sup> In most situations though, the tribes walk a precarious line with the federal and state governments.<sup>130</sup> While the Supreme Court recognizes that the tribes had full inherent sovereignty and rights before the European colonization of the present-day United States, the Court has also ruled that Congress now possesses plenary power.<sup>131</sup> As both the tribes' and Congress's rights are currently defined and understood, there seems to be an incompatibility between the two. On one side there are the indigenous peoples of North America, whom even the Supreme Court has recognized to have inherently possessed full sovereignty.<sup>132</sup> On the other side there is Congress, which has power over the Indian tribes through the United States Constitution.<sup>133</sup> From the tribal governments' perspectives, any loss of perceived rights could signal the genesis of the dreaded "slippery slope" that plagues any decision on law and policy.

#### B. *The Payday Loan Industry's Relationship with Sovereign Immunity*

If the trend in payday loan litigation is heading toward favoring state rule over tribal sovereignty, then it leaves both the payday loan industry and all American Indian tribes with a number of dilemmas. For the payday lenders, the biggest issue is the manner in which they are going to continue to operate.<sup>134</sup> As mentioned, the industry has faced adversity in the form of regulatory schemes before, and one cannot help but think that perhaps this time the payday loan industry has run out of tricks. State laws capping interest rates and limiting loan business practices have become more restrictive, closing

125. Harte & Bernstein, *supra* note 27.

126. See generally Aaron F.W. Meek, Comment, *The Conflict Between State Tests of Tribal Entity Immunity and the Congressional Policy of Self-Determination*, 35 AM. INDIAN L. REV. 141 (2011) (arguing that state tests have diminished tribal sovereignty and immunity).

127. Walsh, *supra* note 32.

128. *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 105 (2d Cir. 2014) (asserting that the plaintiff tribes could not sufficiently prove that the online loan transaction had taken place on tribal land).

129. COHEN'S, *supra* note 64, § 4.01, at 205–06 (citing how tribal sovereignty can be equal to federal sovereignty at times).

130. *Id.*

131. *Id.* § 5.01; see generally *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (exploring congressional authority to abrogate a treaty); *Morton v. Mancari*, 417 U.S. 535 (1974) (exploring congressional intent for a given statute relating to tribal sovereignty); *United States v. Wheeler*, 435 U.S. 313 (1978) (developing the idea of Congress's plenary power over the tribes).

132. See COHEN'S, *supra* note 64, § 4.01(1)(a) (tribes had inherent sovereignty before the European explorers came to America, and tribes still retain this sovereignty unless it has been explicitly removed).

133. See *id.* § 5.01(1)(a) (stating that "[t]he Indian commerce clause also recognizes tribes as distinct political entities by authorizing Congress 'to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes'").

134. *Supra* Section II.A.3 (describing the payday lender industry's systems and standards of operations).

up loopholes and garnering key wins in federal court.<sup>135</sup> If history can be used as any prediction for the future, then it appears that payday lenders may be running out of room to maneuver in an increasingly hostile political climate.<sup>136</sup>

If this is the case, the only alternatives left would be for payday loan companies to either reduce their annual interest rates to levels within the legal limit of the states they want to operate in or to embark on a widespread lobbying campaign to repeal such interest rate cap laws. Profits for payday loan companies would most likely drop on account of severely lower interest rates, but with a \$4.3 billion profit across the entire industry, the payday loan companies might have to take a cut—especially when faced with the alternative of being unable to operate in half the country or more.

While there are downsides to American Indian tribes hosting payday loan companies on the tribe's reservation,<sup>137</sup> the situation is so bad on most Indian reservations that any new presence of business and money is welcomed.<sup>138</sup> Tribes that do not directly own and operate their own payday loan companies, but instead participate in the “rent-a-tribe” model, receive a very small percentage of the net profits—sometimes as little as .85%.<sup>139</sup> However, even that small percentage of money can be \$35,000 a year,<sup>140</sup> which can be a significant payout to a tribe of 3500 with an unemployment rate higher than 80% in the winter months.<sup>141</sup> Even if the payday lenders do not hire local Indians and outsource the call center work,<sup>142</sup> the residual annual earnings are still better than nothing.<sup>143</sup> And some companies do hire call center workers from outside the reservation,<sup>144</sup> which equates to an even more devastating economic impact if tribal sovereignty can no longer serve as a shield to the companies and they left.

It may be difficult to predict exactly how other federal courts are going to rule. The payday loan industry is modeled to attract people who have reached their worst financial situation and have nowhere else to turn, so it is appropriate that all parties involved—payday loan companies, American Indian tribes, customers, and state governments—

135. See generally Goldsmith & Martin, *supra* note 30 (describing the increasing amount of interest rate cap legislation).

136. See Walsh, *supra* note 32 (stating that the jobs the tribe hoped Plain Green would bring never materialized because the call center was built elsewhere); see also Harte & Bernstein, *supra* note 27 (noting that an increase of contact between payday loan companies and tribes could make already impoverished members more likely to become customers—and thus victims—of the lenders).

137. *Supra* Part II.

138. See Nicholas Nehamas, *Payday Nation: The Tribe That Said No*, AL JAZEERA AM. (June 18, 2014), <http://projects.aljazeera.com/2014/payday-nation/sioux-tribe-payday.html> (summing up perfectly the lack of real choice many tribes have when approached with partnership deals from payday loan companies: “[w]hen you deal with people who are impoverished, they will go for any idea that promises cash . . .”).

139. Harte & Bernstein, *supra* note 27, Interactive: Tribal Lending 101, no. 4.

140. See Bernstein & Harte, *supra* note 71 (quoting Allen Parker, a middleman, who claims to “make[] sure his tribes get at least \$3000 to \$5000 per month”).

141. Nehamas, *supra* note 138.

142. See Harte & Bernstein, *supra* note 27 (explaining that often the payday loan company will not actually set up any infrastructure on the reservation upon which it claims to operate).

143. See *id.* (demonstrating that the dividends that are paid to the Habematolel Pomo tribe go towards badly needed improvements to education resources and infrastructure). For a tribe with a more pragmatic outlook from the same article series, see Nehamas, *supra* note 138 (quoting Geneve Lone Hill, president of the Wakpamni Lake Community Corporation—a company that holds the title to an outside payday lender's website—who agrees that what little money the impoverished community receives from their deal with the payday lender, “isn't much . . . but it's better than nothing”).

144. Walsh, *supra* note 32.



should prepare and make changes as if the worst were going to happen to them. Part IV of this Note will address the situation of the four above-mentioned parties and make suggestions for how each should proceed in the future.

#### IV. RECOMMENDATION

The future of the payday loan industry on tribal reservations is murky, despite the recent trend in case law pointing to payday loan companies facing further restrictions from regulations.<sup>145</sup> The development or disappearance of payday loan companies on tribal reservations will affect three different groups who play distinct roles in the payday loan industry: the companies, the tribes, and the customers. I will make recommendations for all three groups in anticipation of further growth of payday loan companies for the next several years, but with the prediction of an ultimate decline of the industry.

##### A. *The Payday Loan Companies*

There are two different futures for payday loan companies: one in which the recent cases are an anomaly and tribal sovereignty will be reaffirmed by federal courts in the next few years or one in which the states that are less tolerant to payday loan companies will have greater power to keep such operations outside their borders and away from their citizens.<sup>146</sup> Such lack of tolerance—with case law<sup>147</sup> to back up the states—could reduce the potential number of states, and thus reduce the size of the customer base, available to payday loan companies. It is difficult to imagine a \$4.3 billion industry disappearing overnight, but if more federal courts begin ruling in favor of states over payday loan companies and their tribal partners, then the future of the payday loan companies could be bleak. Assuming that the legal developments over the next several years are not favorable to the payday loan industry and assuming that life for the lenders will not be “business as usual,” then companies have one of two options: either change their business model to comply with state usury laws or lobby to change state laws to allow for staples of the payday loan industry, such as uncapped interest rates.

##### 1. *Restructure the Payday Loan Business Model*

The first option is for companies to restructure their business model so that the interest rates of the loans they offer comply with state regulations. Simply put, payday loans would offer their loans with calculated annual interest rates that do not exceed the interest rate cap of the state in which they operate.<sup>148</sup> However, there are several problems with this approach.

First, states vary on their interest rate caps (and some do not regulate interest rates at

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145. Huffman, *supra* note 35.

146. See COHEN’S, *supra* note 64, § 6.01[5] (discussing the states’ authority over un-exempted tribal activity off the reservation. The question for future courts to decide is whether a tribally-owned payday loan company falls into an exemption or not).

147. See generally *State v. W. Sky Fin.*, 2015 NCBC LEXIS 87 (N.C. Super. Ct. Aug. 27, 2015) (citing cases that have been victories for states); *Otoe-Missouria Tribe of Indians v. N.Y. State Dept. of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014).

148. State interest rate caps vary across the nation and are not found in every state. Some states cap their loans at 36% APR, while Connecticut law limits a loan to 12% annual. *Legal Status of Payday Loans By State*, CONSUMER FED’N AM., <http://www.paydayloaninfo.org/state-information> (last visited Oct. 26, 2016).

all).<sup>149</sup> Although tailoring to state regulations while remaining efficient and profitable is a challenge every national company has to address, the implications for the payday loan industry are much greater because most of the state regulations are specifically intended to keep the companies from operating.<sup>150</sup> High-interest loans are the payoff for the risk the lender assumes when it loans money to individuals who do not have credit and cannot, or believe that they cannot, obtain a loan from a bank.<sup>151</sup>

Another possible criticism to business model restructuring is the effort it would take for a company to essentially change its business methods. The models that payday loan companies use today are multi-faceted and profitable<sup>152</sup> and may be difficult to change.

## 2. *Lobbying for Changes in States' Legislation*

If payday loan companies are unable or unwilling to change their business plan, there is a second option: payday loan companies can lobby to change state laws. This approach substitutes the internal changes that companies would make to their own structure with changes made to the legislation through lobbying. Payday lobbying efforts in state legislatures may result in the passing of laws prohibiting interest rate caps, repealing current interest rate regulations on payday loans, or preventing interest rate cap bills from getting passed. An advantage to this approach is that American Indian tribes could residually benefit from the lobbying efforts of payday lenders under the old adage of “what is good for the goose is good for the gander.” But the lobbying approach too, has downsides. The main issue is the ability for payday loan companies to put on a unified front. While many payday loan companies are on reservations, some are not, and there are distinctions and varying interests that could splinter an industry-wide effort to stop or repeal interest rate regulation.

Additionally, payday loan companies are also struggling with an image problem among the general public.<sup>153</sup> In popular culture, this image is furthered tarnished.<sup>154</sup> With such bad publicity and with the commonplace of social media allowing average citizens to be corporate watchdogs, lobbying may be a poor option as it may only further damage

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149. *Id.*

150. *See supra* note 38 and accompanying text (noting Connecticut brought a lawsuit against a payday loan company).

151. High interest rates are not the only way a payday loan company can justify the risk of lending. Another method, often used simultaneously with the high interest rates, is ensuring that each customer pays the money back in the first place. Automatic withdrawals serve this purpose, preventing the customer from withholding money. Threats of lawsuit are also an effective tool to ensure the payday loan companies earn back their principal loan. Johnson, *supra* note 24, at 87–88.

152. *See* Martin & Schwartz, *supra* note 25, at 762–63 (identifying the business model as 1) creating a memorable storefront at a convenient location, 2) maintaining a friendly staff to appeal to customers, 3) maximizing loan spending and emphasize multiple loans, and 4) encouraging late payments in order to accrue more fees).

153. *See generally* Goldsmith & Martin, *supra* note 30 (finding as a trend that people were in favor of regulating payday loan interest rates in their states); *see also* John Oliver, *Predatory Lending, Last Week Tonight* (HBO television broadcast Sept. 12, 2016), <https://www.youtube.com/watch?v=PDyIgzYbWAw> (being equally funny and informative, activist comedian John Oliver’s piece on the social and financial harms of payday loan companies is demonstrative of a rising awareness of and reaction to the industry’s socially-questionable business model).

154. Oliver, *supra* note 153.

the payday loan industry's already tarnished reputation.<sup>155</sup> It appears that there is no easy answer for the payday loan companies to adapt to the legal changes in their industry.

### B. *The American Indian Tribes*

Unfortunately, there is no easy remedy to address the poverty that plagues many American Indian reservations.<sup>156</sup> Some tribes have found success in running gambling businesses, like casinos.<sup>157</sup> However, many reservations are unable to follow this business model.<sup>158</sup> Remote location, small populations, and lack of infrastructure make a casino an unviable option for many tribal communities.<sup>159</sup> Many reservations are on unfarmable land with few natural resources, rendering the tribe unable to create other jobs.<sup>160</sup> Sometimes the offer from a payday loan company is too good to turn down—and if they are turned down, companies can always find another tribe to host them.<sup>161</sup> Because money is such an issue for so many tribes, the loss of payday loan companies due to court rulings would be economically devastating for some tribes, even for those members whom the company did not hire. Even the 1–2% of net profits that the payday loan companies pay the tribes can make a huge difference for struggling tribes.<sup>162</sup>

However, it is best for all American Indian tribes if they do not associate with the payday loan companies at all. Increased state action<sup>163</sup> means parties more powerful than cash-needy citizens are challenging payday lender operations. As mentioned previously, the trend of court rulings seems to be prepared to swing in favor of the states.<sup>164</sup>

This change can only come at the expense of the tribes, whose immunity from suit is the first line of defense for the payday loan companies. The more tribes that are brought into federal court, the more likely an unfavorable ruling will affect not only the immunity and sovereignty of tribes listed as parties, but all federally-recognized tribes across the nation. I cannot recommend that the federal courts do anything differently than how they have been proceeding, because a) I believe they are following the spirit of the law, and b) it is in the best interest of more Americans for payday lenders to be more closely-regulated (and have a disincentive to continue cooperating with American Indian tribes) than for tribal sovereignty to be perfectly maintained. I agree with this last point as well,

155. See Goldsmith & Martin, *supra* note 30, at 120–22 (surveying various state referendums and polls that show the majority of the public want to see interest rate caps; the survey concludes that “no study has found a public desire not to cap interest rates”).

156. Nehamas, *supra* note 138 (referring back to the quote by Lone Hill).

157. See *Dispelling the Myths About Indian Gaming*, NATIVE AM. RIGHTS FUND, <http://www.narf.org/indian-gaming/> (last visited Oct. 26, 2016) (identifying the Mashantucket Pequot Tribe in Connecticut and the Shakopee Mdewakanton Sioux Community in Minnesota as two of the most successful tribal-run casinos in the nation).

158. Harte & Bernstein, *supra* note 27 (reporting on the Habematolel Pomo tribe, which spent \$30 million on a casino that “has failed to live up to its promise,” to the detriment of the whole tribe).

159. *Id.* (explaining that some tribes are too remote to be viable, while others may get marred by legal battles with the state).

160. *Id.*

161. Nehamas, *supra* note 138.

162. Harte & Bernstein, *supra* note 27.

163. See Mayle, *supra* note 98, at 1066 (discussing how different states have attempted to hold payday lenders accountable).

164. See Part III.A (exploring the potential erosion of tribal sovereign immunity in the wake of recent judicial trends).

but I do not like what it spells for tribal sovereignty.

With this conclusion in mind, for the sake of the other 500+ American Indian tribes—and in light of the centuries of legal battles fought to preserve their sovereignty to the extent that it is today—tribes cooperating with payday loan companies need to refrain from doing so. The price of tribal sovereignty and sovereign immunity is greater than 2% skimmed off the top of a company's revenues.

### *C. The Payday Loan Customers*

Much like the tribes, the people who rely on payday loans are marred with problems like poverty and lack of financial infrastructure.<sup>165</sup> If payday loan companies are no longer able to operate under the protection of tribal sovereignty and are unable to operate as they did, then conceivably they will leave the market. As mentioned previously, traditional banks do not typically give out loans a) in small amounts, and b) to individuals with poor or no credit.<sup>166</sup> When payday lenders loan money, the interest rates are so high that many customers need to take out another loan just to pay off that first loan, which again garners high interest payments and requires another loan.<sup>167</sup>

Regardless of why the customer needs the money, being trapped in a cycle of debt and poverty are costs that outweigh the benefit of quick cash on hand. There is a gap between the institutions that loan money and the people who need loans, and that gap needs to be addressed;<sup>168</sup> but predatory payday industries are not the solution. Aside from continuing to pass legislation to cap the interest rates allowed for payday loans and other short-term loans, I suggest that the states follow Connecticut's model,<sup>169</sup> and be proactive to help people who have been affected by payday lenders' unsavory practices. This proactive method will not only help raise awareness of the potentially destructive power of the loans, but also restore some of the previously lost money to victims when the next settlement or outright court victory comes around.

## V. CONCLUSION

The recent trend of payday loan companies incorporating on American Indian reservations is both indicative of past events (a sign of changes in the payday loan system) and an indicator of future clashes, not only between the interest of the state and private interest, but between state and tribal jurisdiction. There have been previous schemes to regulate payday loan companies, from physical storefronts to online websites, and still the payday loan industry is as robust as ever. While the affiliation of payday lenders with American Indian tribes has potentially given curious legal scholars answers to how situations of Indian and financial law are played out in the courtroom and at the negotiation table, the risk to all vulnerable parties—the tribes themselves and the payday loan customers—is too great to continue. Based on the industry's history of prevalence, I

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165. Harte & Bernstein, *supra* note 27.

166. *Supra* Part II.

167. Stoecker, *supra* note 34.

168. Some of this gap is knowledge-based. Many people believe that they are protected by state-legislated interest rate caps when in fact they are not. See Goldsmith & Martin, *supra* note 30, at 128 (finding that the majority of people they interviewed had no idea that payday loan interest rates ran over 200%).

169. See Stoecker, *supra* note 34 (discussing Connecticut's idea to actively call citizens of the settlement in order for them to get back some of their money).

have no doubt that payday loan companies will continue to operate; there will always be a state or two that embraces financial deregulation.<sup>170</sup> The question that remains is whether they diminish the extent of tribal sovereignty through laborious legal battles before moving on to greener pastures.

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170. Florida, in particular, comes to mind. Riddell, *supra* note 11.