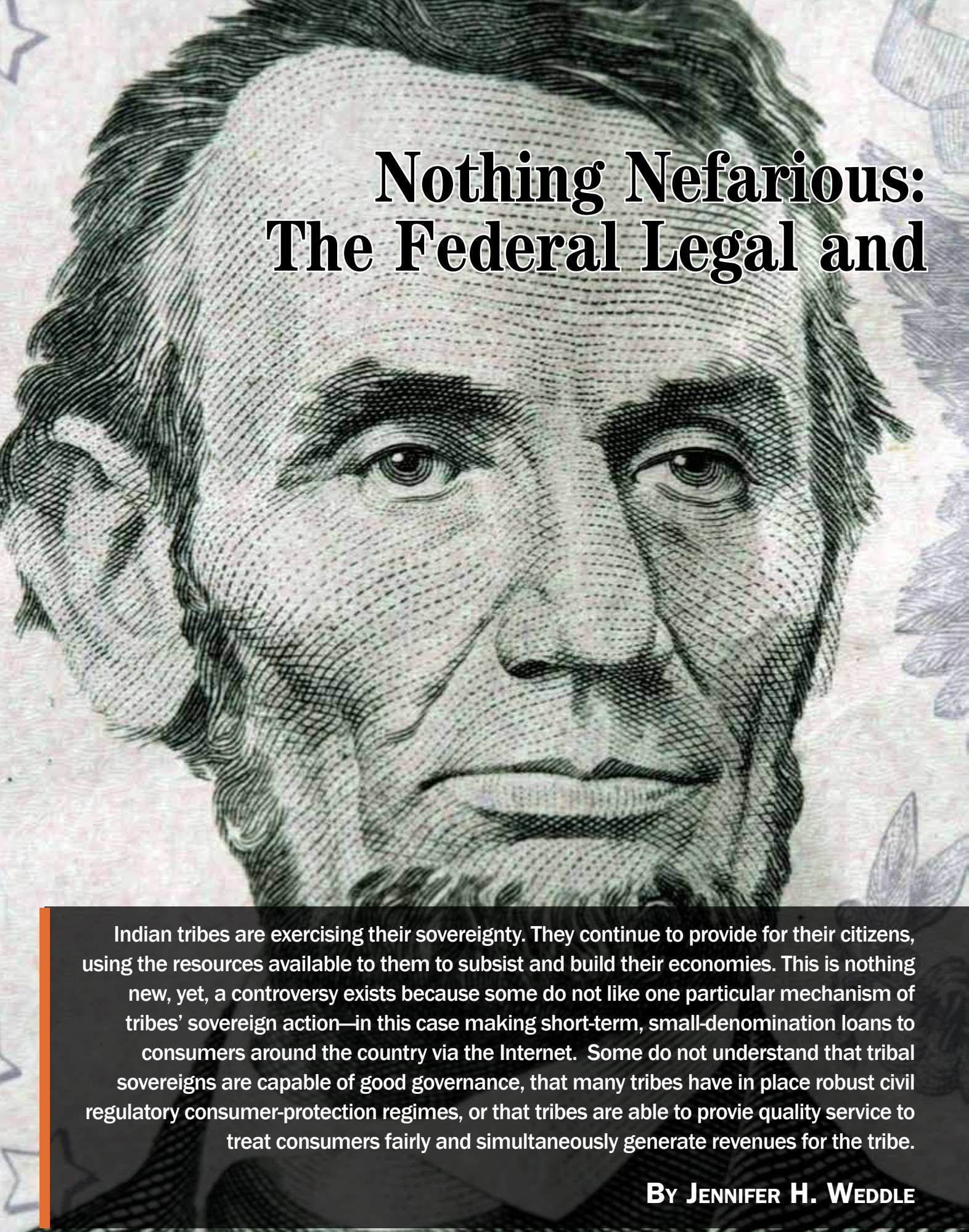

Nothing Nefarious: The Federal Legal and

Indian tribes are exercising their sovereignty. They continue to provide for their citizens, using the resources available to them to subsist and build their economies. This is nothing new, yet, a controversy exists because some do not like one particular mechanism of tribes' sovereign action—in this case making short-term, small-denomination loans to consumers around the country via the Internet. Some do not understand that tribal sovereigns are capable of good governance, that many tribes have in place robust civil regulatory consumer-protection regimes, or that tribes are able to provie quality service to treat consumers fairly and simultaneously generate revenues for the tribe.

By Jennifer H. Weddle

Historical Predicate for Tribal Sovereign Lending

Over the past decade, approximately two dozen tribes have established online consumer lending enterprises. These efforts have been met with overwhelming response from consumers, who enjoy tribal lending products and services and frequently become loyal repeat customers. But despite strong customer satisfaction ratings, tribal lending has been met with skepticism and criticism by state and federal authorities.[1] Stated third-party concerns about tribal lending generally relate to (1) specific lending activities inconsistent with state law (which does not apply to tribes) and (2) spurious allegations that the financing of such loans from outside sources and/or reliance upon technology or consulting services from non-Indian industry experts to support tribal lending enterprises gives rise to a "rent-a-tribe" scenario.[2]

Many state and federal authorities also appear unable keep up with the constantly evolving online lending industry in general, either in terms of technology advances or the development of new and more consumer-friendly loan products. They often ascribe the misnomer "payday loans" to tribal lending products. "Payday loan" is a term of art, meant to refer to an advance against a consumer's next paycheck, due upon the consumer's receipt of that paycheck. Historically, borrowers did not typically repay these loans in full upon receipt of their next paycheck. The loans had automatic renewal provisions and associated fees, which—although they allowed consumers to pay smaller amounts at a time—ultimately extended the repayment period and cost consumers more in the long run. In response to federal concerns, the online lending industry broadly shifted away from that structure and now favors an installment loan structure disallowing automatic rollovers, requiring early principal pay-down and shortening the repayment periods and costs to consumers. Tribal lenders routinely offer the installment product, which tribes view as more consumer friendly.

The disconnect between state and federal regulators and sovereign lenders also stems from a lack of awareness of federal Indian law, the treatment of tribal sovereigns in our constitutional structure, or tribes' inherent sovereign authority to engage in exactly the sort of basic economic engineering in which states and municipalities have long engaged—creating favorable forums for particular types of industries.

To provide context for this intense law and policy debate, this article (1) describes what the tribal activities are and what they are not; (2) explains the firm legal foundations of tribal sovereignty that support all tribal economic activities; (3) discusses how tribal sovereignty serves to preempt the application of other laws; and (4) relates tribal lending to its historical antecedent in the National Banking Act, which, among other things, sought to protect consumer choice and the accessibility of banking services by protecting national systems from state intrusion and restriction.

Background on Tribes and Tribal Lending Enterprises

Many Indian tribes engaged in online lending are located in geographically remote areas with historically few economic development opportunities. Typically, when tribes undertake online consumer lending, they form enterprises under the tribe's business enterprise laws, nearly always wholly owned and controlled by the tribe, for the benefit of the tribal community. Tribes also typically subject their lending enterprises to robust

tribal regulation and management, including mandatory best practices established by the tribe.

Tribal loans typically originate from Indian reservations by tribal member employees and are borrowed by consumers from around the country. Tribes engaged in lending operations employ workforces ranging from a few dozen members to several hundred members. Online lending enterprises often provide tribes with significant annual income, which is critical to tribal citizens whose median household annual income is often well below the poverty line.

This annual income is all the more important when one considers that many tribal governments are wholly without access to the stable revenue base needed to provide essential public services for their citizens. More traditional methods of governmental revenue-raising are unavailable to numerous tribes. Specifically, tribes often cannot raise funds via property, income, or sales taxes. Tribes lack a property tax base because significant reservation lands are held in trust by the United States and thus not subject to property taxation. And tribes often lack any practical sales tax or income tax base because typical historic unemployment on many reservations exceeds 50 percent.[3]

Additionally, tribes often lack access to those familiar revenue streams to which state governments have become accustomed, such as developable natural resources.[4] Many tribes are also not near a major population center that would support a significant gaming or tourism enterprise. Overall, many reservations are remote, making economic development very difficult. E-commerce, such as online consumer lending, represents a new ray of economic hope for these tribes and their members. In an era where federal funding to Native American governments is either static or declining, tribes have turned to online lending as an important revenue source to fund their governments and capitalize basic infrastructure and public works.

Without the means or mechanism to establish and operate public services, it is not surprising that reported crime rates within Indian Country (the term under federal statutory law used to refer to Indian reservations, allotments, and dependent Indian communities) are more than two-and-half-times the national average, according to a 2004 report by the U.S. Department of Justice.[5] Conversely, Indian tribes are served by fewer than one-half the number of law enforcement officers, on average, as similarly situated off-reservation communities, according to the most recent U.S. Department of the Interior study.

Such structural disparities, which are widespread in Indian Country and by no means limited to public safety, coincide with an era of flat or declining federal programmatic funding to tribes generally. There may be no greater contributor to the disproportionately high rates of violent crime in Indian Country than the systematic lack of an adequate and sustainable revenue base to sustain tribal governmental infrastructure and operations. Whenever surveyed, tribes consistently report that they would take additional steps to safeguard their citizens if more tribal governmental revenues and/or federal funds were available.[6]

Fortunately for an increasing number of tribal governments and the people they serve, e-commerce has become an important way to help fund essential governmental services in some of our country's poorest and most geographically isolated communities. This includes economic development efforts such as tribal Internet lending enterprises. Tribes are working diligently to provide a safe and secure community in an environment of increasing federal scarcity, whereby federal budgets for tribal programs have been reduced dramatically in recent years.[7] It is an uphill struggle at times, but fortunately federal law enables Indian tribes to engage in commerce and run their own

Tribal members work at an online lending call center.

affairs so long as they comply with relevant federal laws.

Due to the incredible governmental importance of the online lending businesses, tribes are generally extraordinarily cautious and conservative in establishing the businesses, requiring their close management and auditing and mandating robust consumer-protective practices. Tribes typically only make loans to consumers with verifiable employment and bank accounts who have the demonstrated ability to repay. Typical online lending customers are neither desperate nor lacking capacity to enter into arms-length contracts for services that contain choice-of-law provisions requiring the application of laws other than state law. Instead, tribes serve consumers who understand that online lending can be an expensive form of borrowing, but who also appreciate having convenient access to credit in their circumstances (e.g., customers who might have difficulty qualifying for more traditional forms of credit because of a messy divorce or a personal bankruptcy or who might have an unanticipated medical expense, car repair, or other issue that they do not want to impact their overall credit scores). In sum, tribes typically lend to customers they believe to be intelligent adults fully capable of managing their own financial affairs and contracts.

These things are generally true of many tribes. They have created various lending enterprises, typically tribal limited liability companies established under tribal business enterprise laws and wholly owned and controlled by the tribe for the benefit of the tribal community. These enterprises are all subject to robust tribal regulation and management, including tribal mandatory best practices (often modeled on Online Lenders Alliance best practices). Tribal loans made to consumers around the United States typically originate from reservation lands by tribal personnel each day. Tribal lending enterprises benefit the tribal community and support tribes' provision of governmental services to their citizens.

By establishing, regulating, and operating lending enterprises, tribes are exercising their sovereignty—sovereignty that predates the United States and holds deep roots in the nation's earliest jurisprudence.

Tribal Sovereignty: A Bedrock Legal Principle

Tribal sovereignty is a foundational principle of federal law and the cornerstone of the legal and political existence of American Indian tribes. From the earliest years of the republic, the U.S. Supreme Court and lower federal courts have recognized the political independence and self-governing status of Indian tribes.[8] An Indian tribe's sovereignty is not the result of reparations or a specific grant of authority by Congress, but rather the "inherent powers of a

limited sovereignty which has never been extinguished."[9]

Because a tribe retains all inherent attributes of sovereignty that have not been divested by Congress, the proper inquiry with respect to a tribe's exercise of its sovereignty is whether Congress—which exercises plenary power over Indian affairs—has limited that sovereignty in any way.[10] Further, "in the absence of federal authorization .... *tribal sovereignty*, is privileged from diminution by the States."[11]

In the consumer lending context—online or otherwise—Congress has not acted to constrain tribal authority in any way. In fact, in the Consumer Financial Protection Act of 2010, Congress defined "state" to include "any federally recognized Indian tribe,"[12] and in so stating included Indian tribes among the governmental units working with the Consumer Financial Protection Bureau for consumer protection purposes. Additionally, in recent sessions of Congress, both the House and Senate have proposed bills to amend the Truth in Lending Act to include state and tribal entities, but those bills have enjoyed virtually no traction outside of committee.[13]

Instead, in the online lending space, tribes are acting parallel to states, but they are not under the same sovereign umbrella.

Indian tribes are governments whose status as distinct, self-governing political entities predates the U.S. Constitution. Indian tribes do not derive their existence, and in most respects their authority to govern or do business, from the United States. Of course, commerce among Indian tribes predated European contact. After European contact, commerce by and with Indian tribes expanded in many different modes according to needs and opportunities of the time. Article I, Section 8 of the Constitution delegates to Congress exclusive authority to regulate commerce with Indian tribes, and laws enacted by Congress in the 1790s regulating sales, leases, and other conveyances of tribal land and trade with Indian tribes remain substantially in effect.[14] Many treaties between the United States and Indian tribes, which, like laws enacted by Congress, are the law of the land under the Supremacy Clause of the Constitution, both secure and regulate trade by and with Indian tribes. Federal laws, regulations, executive orders, and policies too numerous to list promote and regulate commerce by and with Indian tribes. This remains true in the modern context as well.

An example of modern federal regulation of tribal commerce came, in 2000, when Congress presented definite and unambiguous support for the unencumbered development of tribal economies. In the Native American Business Development Act, Congress made specific findings regarding tribal economic development and the role of the federal government in that nation-building pursuit. Specifically, the act found that:

> (1) Clause 3 of Article I, Section 8 of the U.S. Constitution recognizes the special relationship between the United States and Indian tribes;
> (2) Beginning in 1970, with the Nixon Administration's inauguration of the Indian self-determination era, each President has reaffirmed the special government-to-government relationship between Indian tribes and the United States;
> (3) In 1994, President Bill Clinton issued an executive memorandum to the heads of departments and agencies that obligated all federal departments and agencies, particularly those that have an impact on economic development, *to evaluate the potential impacts of their actions on Indian tribes*;
> (4) Consistent with the principles of inherent tribal sovereignty and the special relationship between Indian tribes and the United States, *Indian tribes retain the right to enter into contracts and agreements to trade freely and seek enforcement of treaty and trade rights*;
> (5) Congress has carried out the responsibility of the United States for the protection and preservation of Indian tribes and the resources of Indian tribes through the endorsement of treaties and the enactment of other laws, including those that provide for the exercise of administrative authorities;
> (6) The United States has an obligation to guard and preserve the sovereignty of Indian tribes to foster strong tribal governments, self-determination, and economic self-sufficiency;
> (7) The capacity of Indian tribes to build strong tribal governments and vigorous economies is hindered by their inability to engage surrounding communities and outside investors in economic activities on Indian lands;
> (8) Despite the availability of abundant natural resources on Indian lands and a rich cultural legacy that accords great value to self-determination, self-reliance, and independence, Native Americans suffer higher rates of unemployment, poverty, poor health, substandard housing, and associated social ills than those of any other group in the United States;
> (9) The United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands to:—(A) Encourage investment from outside sources that do not originate with the tribes; and (B) *Facilitate economic ventures with outside entities that are not tribal entities*;
> (10) The economic success and material well-being of Native American communities depends on the combined efforts of the federal government, tribal governments, the private sector, and individuals;
> (11) The lack of employment and entrepreneurial opportunities in the communities referred to in paragraph 7 has resulted in a multigenerational dependence on federal assistance that is:—(A) Insufficient to address the magnitude of needs; and (B) Unreliable in availability; and
> (12) The twin goals of economic self-sufficiency and political self-determination for Native Americans can best be served by making available:—(A) The resources of the private market; (B) Adequate capital; and (C) Technical expertise.[15]

This is clear evidence of congressional intent to encourage exactly the sort of economic development in which tribes with lending enterprises are now engaged.

The broad-ranging potential implications of tribal sovereignty have been routinely addressed by the U.S. Supreme Court, which has consistently left imposition of any restraints on sovereignty solely before Congress.[16] In fact, where a petitioner has specifically asked the court to "abandon or at least narrow" the doctrine of tribal sovereignty because "tribal businesses had become far removed from tribal self-governance and internal affairs," the Court flatly declined to do so. It stated, "We retained the doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency" and while "the rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities … In our interdependent and mobile society, however, tribal [sovereignty] … extends beyond what is needed to safeguard tribal self-governance."[17] The Court declined to place limitations on

tribal sovereignty so as to "defer to the role Congress may wish to exercise in this important judgment."[18]

Tribal Sovereignty and Federal Pre-emption

In light of this strong legal backdrop of tribal sovereignty, there is nothing unusual or untoward about a tribe's determination to make its territory a favorable forum for credit practices that might be disfavored by other sovereigns. This sort of economic engineering is commonplace for corporate-friendly forums such as the states of Delaware and South Dakota, which routinely export their corporate-favorable state laws upon customers who live in states or territories with more restrictive laws. This practice is common and does not subject Delaware or South Dakota to collateral attacks by sister sovereigns.[19]

It is not an uncommon or novel proposition that federal law would preempt state usury law. U.S. law permits national banks,[20] Federal Deposit Insurance Corporation–insured state-chartered banks,[21] and certain other classes of lenders, *e.g.,* first-lien residential lenders under 12 U.S.C.A. §1735f-7a, to make loans to state residents without regard to state usury law. This concept of federal preemption of state interest rates is rooted in the power of Congress and "has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates."[22]

Similarly, loans by sovereign Indian tribes represent another category of loans under U.S. law that may be made to residents of states without regard to state usury law. The Indian Commerce Clause[23] broadly pre-empts state laws that interfere with tribal activities and business enterprises. In fact, "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause" because although the "States still exercise some authority over interstate trade," they "have been divested of virtually all authority over Indian commerce and Indian tribes."[24] "The question of whether federal law, which reflects related federal and tribal interests, pre-empts state activity is not controlled by the standards of preemption developed in other areas."[25] Instead, "no specific congressional intention to pre-empt state activity is required."[26] The Consumer Financial Protection Act of 2010 clearly made provision for the tribes, as sovereign governments, to act as regulators of consumer lending, and the Native American Business Development Act,[27] found that it was a policy of the United States to assist and encourage Indian tribes as they enter into economic arrangements with outside parties. "If the state law interferes with the purpose or operation of a federal policy regarding tribal interests, it is pre-empted."[28] Therefore, it follows that state laws that run counter to tribal economic development efforts—so strongly supported in federal law—are pre-empted.

This holds true whether the state carries out a direct enforcement action or avoids litigation altogether and uses its position to publicly and forcefully declare its disapproval of all online lending so as to intimidate and discourage banks and third-party payment processors from providing services to online lenders. Where a sovereign state disagrees with the regulations of another, the disputing sovereign cannot attack its payment systems to usurp regulatory authority. To the contrary, the federal electronic transfer system is an integral part of the federal banking and payment system and commerce. Its functioning cannot be subject to unilateral actions of the states. Such action, without court order, would impermissibly interfere with tribal lenders' rights as participants in the electronic funds transfer system and the smooth functioning of the payment system.[29]

Historic Context

In the early years after the founding of the United States, national banks—much like Indian tribes—often faced regulatory interference by overzealous states acting to preserve their own interests. Thus, in analyzing tribal online lending, it is useful to consider the parallel challenge waged by hostile state regulators against national banks who made loans to out-of-state borrowers under terms that state regulators alleged were usurious.

Nearly two centuries ago, in *McCulloch v. Maryland*, the Supreme Court held that federal law is "supreme over state law with respect to national banking."[30] Congress ended state interference in national banking by passing the National Bank Act (NBA) in 1864 "to facilitate … a national banking system."[31] The NBA "establishes nationally chartered banks and grants these banks certain powers, including 'all such incidental powers as shall be necessary to carry on the business of banking.'"[32]

Since the passage of the NBA, the Supreme Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation."[33] In fact, "'the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is an abuse because it is the usurpation of power which a single State cannot give.'"[34] At base, the NBA regime protects national financial products from state intrusion.[35] In

Tribal leaders and counsel climb the steps of the Department of Treasury in September 2013.

Tribal advocacy team in front of New York Department of Financial Services in August 2013.

addition, a national bank may "'export' a favorable interest rate from its home state in transactions with borrowers from other states."[36]

In the same way that national banks are protected from state law allegations of usury, so too are Indian tribes entitled to "export" their interest rates.[37] In both instances, Congress ultimately controls the ability of national banks and Indian tribes to engage in lending free from state interference.

Congress's most recent actions confirm that it wants to avoid placing Indian tribes under the umbrella of state regulation in this context. Indeed, in 2010 Congress recognized tribal sovereignty in the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Congress passed Dodd-Frank to "protect consumers from abusive financial services practices."[38] The Act established the Consumer Financial Protection Bureau (CFPB) to carry out federal consumer financial laws.[39] If Congress had wanted to prohibit or limit tribal online lending—which some state and federal officials now label as predatory, lumping it in with an entire industry viewed as homogenously bad for consumers—Dodd-Frank would have been the time to do it, through its comprehensive and broad-ranging set of financial reforms. But Dodd-Frank is silent about any limitation on online lending.

In passing Dodd-Frank, Congress also declined to delegate any regulatory authority over Indian tribes to the states. Instead, it chose to include "any federally recognized Indian tribe" in the act's definition of a state.[40] This puts states and Indian tribes on parallel footing, as both are defined as sovereigns working to regulate consumer protection violations alongside the CFPB. In other words, Congress chose to recognize Indian tribes as co-equal sovereign *regulators* rather than as merely the *regulated*.

Just as a state may not attack the payment systems of another state or disrupt its regulatory authority, neither can a state attack the payment systems or disrupt the regulatory authority of a tribal sovereign. In fact, such state interference would run counter to express federal policy on the issue, as the electronic transfer system is an integral part of the federal banking and payment system and commerce. "Payment and settlement systems are critical components of the nation's financial system, [and] [t]he smooth functioning of these systems is vital to the financial stability of the U.S. economy."[41] And tribal lending enterprises rely upon those vital systems to carry out the business that their governments have established and now closely regulate.

The Path Forward

Fundamentally, providing consumer loans is a customer service business. This reality creates an alignment of interests between tribes and state and federal regulators. Tribal lenders need to make their businesses work, not only for the tribes, but also for their customers, to earn their repeat business. Tribes are regulating, licensing, and providing dispute resolution—all of which are available in any state lending regulatory regime. Tribes are willing to work with states on a government-to-government basis to address matters of mutual concern. Numerous tribes are involved in intensive outreach and education efforts to explain to state and federal officials what their businesses are and what they are not. In the next months and years, tribal lenders will seek to explain the sovereignty basis for their businesses and also spread the word about important tribal consumer protection efforts in hopes that state and federal officials will respectfully engage tribal leaders in government-to-government dialogue. Working together, our three sovereigns—the federal, state, and tribal governments—can achieve much for consumer protection and our economies. ⊙

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Endnotes

[1]State and federal suspicion and disapproval of tribal lending has taken many forms in recent years, including investigative efforts by state consumer protection agencies and attorneys general and failed litigation attempts to enforce civil investigative subpoenas (*see e.g.*, *Cash Advance v. State,* 242 P.3d 1099, 1107 (Colo. 2010)), and publicity and letter-writing campaigns aimed to indiscriminately "choke off" all online lenders from banking and payment processing services needed to sustain their businesses, regardless of the legal predicate for such businesses or their actual lending practices (*see e.g.,* Aug. 5, 2013, Letter from New York Department of Financial Services Superintendent Benjamin Lawsky to 117 banks, available at www.dfs.ny.gov/about/press2013/pr130806-link1.pdf). In numerous instances, tribes have challenged these efforts, both in administrative proceedings and as plaintiffs in litigation. *See Otoe-Missouria Tribe of Indians v. New York Department of Financial Services*, No. 13 Civ. 5930 (RJS) (S.D.N.Y., pending on emergency appeal of interlocutory order to the Second Circuit, Case No. 13-3769).

[2]"Rent-a-tribe" is an intensely pejorative term borrowed from previous financial services litigation that coined the term "rent-a-bank" to find fault with a mid-1990s practice whereby lenders would open accounts with banks in states with less restrictive consumer lending practices and then wire monies to consumers in various states from that account to suggest that the less restrictive state law applied to the consumer loan, even though the consumer resided in a state with more restrictive consumer lending laws.

[3]This very high rate of unemployment is regrettably typical in Indian Country. *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian County: Hearing Before the S. Comm. on Indian Affairs*, 11th Cong. (2010), *available at* www.indian.senate.gov/public/_files/January2820102.pdf.

[4]The reasons for this lack of access vary, including tribes simply not owning mineral resources as well as tribes being unable to develop those resources because of a host of challenges, ranging from lack of investment capital from the private market to uncertainty and difficulty arising from burdensome and sometimes inconsistent land and mineral resource development and regulatory regimes. For background, *see* Elizabeth Ann Kronk, *Tribal Energy Resource Agreements: The Unintended "Great Mischief for Indian Energy Development" and the Resulting Need for Reform*, 29 Pace Envtl. L. Rev. 811 (2012).

[5]While very significant, lack of financial resources is by no means the only factor contributing to the stark criminal justice disparities endured by Indian Country. *See* Robert A. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. Law Rev. 503-583 (1976); Kevin K. Washburn, *American Indians, Crime and The Law: Five Years of Scholarship on*

Criminal Justice in Indian Country, 40 Ariz. St. L.J. 1003 (2008).

[6]By way of illustration, the U.S. Government Accountability Office recently surveyed 171 Indian tribes to inquire whether tribal courts planned to take advantage of new changes in federal law that allow them to incarcerate violent criminals for up to three years (instead of the previous federal statutory limit, which had been imposed by Congress on tribal court sentences since 1968, of not more than one year's imprisonment). While 64 percent of the responding tribes said they hoped to take advantage of this new authority to protect their communities, fully 96 percent added they had no plans to do so because of a lack of available funding. *See Report on the Tribal Law and Order Act of 2010, U.S. Governmental Accountability Office* (May 30, 2012) www.gao.gov/products/GAO-12-658R.

[7]Sequestration has caused disproportionate suffering in Indian Country and has been the subject of widespread media coverage. *See e.g.*, Annie Lowrey, *Pain on the Reservation,* N.Y. Times (July 12, 2013) www.nytimes.com/2013/07/13/business/economy/us-budget-cuts-fall-heavily-on-american-indians.html?pagewanted=all&_r=0; *Abandoned in Indian Country,* N.Y. Times (July 23, 2013) www.nytimes.com/2013/07/24/opinion/abandoned-in-indian-country.html; Byron Dorgan, *Broken Promises*, N.Y. Times (July 10, 2013) www.nytimes.com/2013/07/11/opinion/broken-promises.html; *The Sequester Hits the Reservation,* N.Y. Times (March 20, 2013) www.nytimes.com/2013/03/21/opinion/the-sequester-hits-the-indian-health-service.html?_r=0; National Congress of American Indians, *Analysis of the Sequester: Betraying the Trust Responsibility and Slowing Tribal Progress* (Feb. 27. 2013) www.ncai.org/attachments/PolicyPaper_NHgercNsKsuisvDgsQGeUdtPomuOziIBTlNMTZvCzsPnvCiaLZZ_NCAI%20Sequester%20Impact%20Paper%20Final.pdf; Dan Merica, *Forced cuts threaten to 'rip apart' Native American Schools* CNN (May 31, 2013) www.cnn.com/2013/05/31/politics/native-american-schools-cuts; Darla Cameron, et. al, *Tracking the Predicted Sequester Impact* (June 30, 2013) www.washingtonpost.com/wp-srv/special/politics/sequestration-federal-agency-update/; National Public Radio, *Indian Nations Squeezed By Sequester* (March 26, 2013) www.npr.org/2013/03/26/175361656/indian-nations-squeezed-by-sequester; Friends Committee on National Legislation, *Sequestering Native American Programs* (March 2013) fcnl.org/issues/nativeam/sequestering_nativeam_programs/. The burdens of sequestration have only intensified the economic burdens on tribes.

[8]*See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (classifying tribes as "domestic dependent nations"); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (explaining that the tribes are "distinct independent political communities, retaining their original natural rights" and not dependent on federal law for their powers of self-government).

[9]*United States v. Wheeler*, 435 U.S. 313, 322-323 (1978); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 60 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority … "); Powers of Indian Tribes, 55 Interior Dec. 14 (D.O.I.) (1934), 1934 WL 2186.

[10]*See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130,148-149 n.11 (1982); Cohen's Handbook of Federal Indian Law, § 6.02[1] (Nell Jessup Newton, et al. eds Lexis Nexis 2005).

[11]*Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986) (emphasis supplied).

[12]12 U.S.C. § 5481(27).

[13]*See* H.R. 6483, 112th Cong. (2012); S. 3426, 112th Cong. (2012).

[14]*See* 25 U.S.C. §§ 177 & 261-264.

[15]25 U.S.C. § 4301(a) (emphasis supplied).

[16]*See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

[17]*Id* at 758.

[18]*Id*.

[19]*See Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978) (concluding that that national banks can charge the highest interest rate allowed in the bank's home state, regardless of where the borrower lives).

[20]12 U.S.C. § 85.

[21]12 U.S.C.A. § 1831d.

[22]*Marquette Nat. Bank v. First of Omaha Service Corp.*, 439 U.S. 299, 318 (1978).

[23]U.S. Const., Art. I, § 8, cl. 3.

[24]*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62, (1996).

[25]*Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989).

[26]*Id*.

[27]25 U.S.C. § 4301(a).

[28]*Hoopa Valley Tribe*, 881 F.2d at 659.

[29]The Electronic Fund Transfer Act, 15 U.S.C.A. §1693 *et seq.* (Regulation E, 12 C.F.R. Part 1005), establishes the basic rights, liabilities, and responsibilities of consumers who use fund transfer services and of financial institutions that offer those services. The Expedited Funds Availability Act, 41 U.S.C.A. § 4001 *et seq.* (Regulation CC, 12 C.F.R. 229) governs the availability of funds deposited to transaction accounts through credit transfers. And the U.S. Treasury Department rules govern all federal government transactions through these systems (31 C.F.R. Part 210). Under well-established Supremacy Clause principles, state restrictions that prevent or significantly interfere with the exercise of banking powers are pre-empted by federal law. *Barnett Bank. v. Nelson*, 517 U.S. 25 (1996).

[30]*Watters v. Wachovia Bank N.A.*, 550 U.S. 1, 10-11 (2007) (citing *McCulloch v. Maryland*, 316, 4 L. Ed. 579 (1819).

[31]*Marquette Nat'l Bank v. First of Omaha Serv. Corp.,* 439 U.S. 299, 315 (1978).

[32]*Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 311-12 (2d Cir. 2005) (quoting 12 U.S.C. § 24).

[33]*Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007).

[34]*Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 311-12 (quoting *Farmers' and Mechanics' Nat. Bank v. Dearing*, 91 U.S. 29, 34 (1875)).

[35]*See Hill v. Chem. Bank*, 799 F. Supp. 948, 951 (D. Minn. 1992).

[36]*Id.* (citing *Marquette National Bank v. First Omaha Service Corp.,* 439 U.S. 299 (1978)).

[37]Recent news headlines have alleged that sovereign loans include usurious or exorbitant interest rates, but that is incorrect. Tribal loans are typically priced at or below market rates. The annualized interest rate charged by tribes is often between 200 to 900 percent, which is equivalent to, and in many cases lower than, what many banks charge for short-term loan products they often euphemistically label as "overdraft protection" of "checking account advances."

[38]Pub. L. No. 111-203, Stat. 1376 (2010).

[39]12 U.S.C.A. § 5491 (creating CFPB).

[40]12 U.S.C.A. § 5481(27).

[41]*Federal Reserve Policy on Payment System Risk* (as amended effective March 24, 2011), *available at* www.federalreserve.gov/paymentsystems/psr_policy.htm.