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LEGAL ISSUES IN TRIBAL E-COMMERCE

ADAM CREPELLE*

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. *See infra* Part III.

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

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

12. *See infra* Part III.

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

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

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

II. TRIBAL SOVEREIGNTY AND ECONOMIC DEVELOPMENT

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

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

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

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

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

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

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

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

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

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

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

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

23. McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020) ("And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves."); Andrew Jackson, President of the United States, First Annual Message to Congress (Dec. 8, 1829), https://millercenter.org/the-presidency/presidential-speeches/december-8-1829-first-annual-message-congress ("As a means of effecting this end[,] I suggest for your consideration the propriety of setting apart an ample district west of the Mississippi, and without the limits of any state or territory now formed, to be guaranteed to the Indian tribes as long as they shall occupy it, each tribe having a distinct control over the portion designated for its use. There they may be secured in the enjoyment of governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes.").

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

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

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

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

28. 8 U.S.C. § 1401(b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. TRIBES, E-COMMERCE, AND THE LAW

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

A. Online Reservation Sales and State Taxes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

66. 26 U.S.C. § 7871.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Online Gaming

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

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

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

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

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

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

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

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

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

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

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

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

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

96. *Id.* at 902–03.

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

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

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

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

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

102. 31 U.S.C. § 5362(10)(A).

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

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

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

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

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

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

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

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

108. *Id.* at *3.

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

110. *Id.* at 965.

111. *Id.* at 966–69.

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

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

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

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

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114. *Id.* at 7–8.

115. *Id.* at 19.

116. *Id.* at 15.

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

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

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

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

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

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

C. Fintech

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

i. Cryptocurrency

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

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

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

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

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

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

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

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

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

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2021).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. Tribal Lending

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

164. 12 U.S.C § 5481(27).

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

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

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

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

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

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

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

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

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

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

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

a. Tribal Sovereign Immunity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Jurisdiction and Forum Selection Clauses

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

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

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

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

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

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

202. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

216. 18 U.S.C. § 1153.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. RECOMMENDATIONS

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

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

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

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

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

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

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

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

Congress needs to revamp the rules governing Indian commerce. While

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

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

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

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

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

250. 25 U.S.C. § 264.

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

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

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

A. Tribal Jurisdiction

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

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

253. U.S. CONST. art. I, § 8, cl. 3.

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

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

256. *Id.* § 4301(a)(9), (b)(5).

257. Clarkson et. al., *supra* note 15, at 7 ("The dawn of the Internet Age, however, ushered in a variety of new opportunities for tribes located in rural areas to become hotbeds for business innovation.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

270. *Id.* at 729.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

281. Keyes, *supra* note 278.

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

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

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

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

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

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

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

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

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

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

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

290. 25 U.S.C. § 1304.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Arbitration Agreements

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

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

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

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

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

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

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

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

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

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

C. Sovereign Immunity

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

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

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

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

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

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

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

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

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

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

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318. 25 U.S.C. § 5124.

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

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

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

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

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

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

325. *Id.* § 124.109(c)(4).

326. 25 U.S.C. § 2711.

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

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

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

D. Tribal Interest Rate Exportation

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

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327. 13 C.F.R. § 124.109(c)(4)(i)(B).

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

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

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

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

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

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

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

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

334. *Id.*

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

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

337. Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 OHIO ST. L.J. 653, 705 (2005); Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1121–22 (2008); LAUREN K. SAUNDERS, NAT'L CONSUMER L. CTR., WHY 36%? THE HISTORY, USE, AND PURPOSE OF THE 36% INTEREST RATE CAP 2 (2013), https://www.nclc.org/images/pdf/pr-reports/why36pct.pdf ("The decision led some states to repeal their interest rates in exchange for banks' relocating their headquarters. Other states were forced to follow suit or lose their banking industry.").

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

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

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

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

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

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

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

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

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

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

344. *See* Clarkson et. al., *supra* note 15, at 28 ("Now, many state regulators are arguing that tribal governments should not be able to offer lending products over the Internet even though larger non-Indian enterprises can legally export interest rates on credit cards and loans with impunity."); Weddle, *supra* note 126, at 63 n.37 ("The annualized interest rate charged by tribes is often between 200 to 900 percent, which is equivalent to, and in many cases lower than, what many banks charge for short-term loan products they often euphemistically label as 'overdraft protection' of 'checking account advances.'").

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

E. Cryptocurrency

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

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

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

347. U.S. CONST. art. I, § 8, cl. 5.

348. *Id.* art. I, § 10, cl. 1.

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

350. U.S. CONST. art. I, § 8, cl. 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Taxation

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

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

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

362. 25 U.S.C. § 4301(b)(5).

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

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

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

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

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

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

victory-with-supreme-cour.asp.

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

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

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

370. *Id.* at 1022–23.

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

372. 26 U.S.C. § 7871.

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

V. CONCLUSION

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

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373. 31 U.S.C. § 5362(10)(C)(i)(II).

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

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

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NON-DEBT AND NON-BANK FINANCING FOR HOME PURCHASE: PROMISES AND RISKS

SHELBY GREEN*

"[H]ousing is the dominant source of wealth for most families, just as its twin — mortgage debt — is the chief liability."[1]

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1. Carlos Garriga & Aaron Hedlund, *Crises in the Housing Market: Causes, Consequences, and Policy Lessons* 1–2 (Econ. Rsch. Fed. Rsrv. Bank of St. Louis, Working Paper No. 2019-033A, 2019), https://doi.org/10.20955/wp.2019.033.

I. INTRODUCTION

The 2008 housing and financial industry crisis brought the world to the brink of economic collapse. While, in some of my earlier articles,[2] I told the story of this woeful time, here, by way of introduction, I will recount briefly some of the lapses in individual judgment and regulatory oversight by the main protagonists in the story, only as a backdrop to show how the conditions were ripe for the advent of novel forms of home purchase finance, the main focus of this article. I refer to these new forms as non-debt and non-bank financial companies, or NDNBs.[3] Novel financial instruments are not new. Indeed, the adjustable-rate mortgages ("ARM") and interest-only mortgages,[4] that factored so prominently in the events leading to the crisis,

2. *See* Shelby D. Green, *Testing Fannie Mae's and Freddie Mac's Post-Crisis Self-Preservation Policies under the Fair Housing Act*, 66 CLEV. ST. L. REV. 477, 479 (2018) [hereinafter Green, *Testing*]; Shelby D. Green, *Disquiet on the Homefront: Disturbing Crises in the Nation's Markets and Institutions*, 30 PACE L. REV. 7 (2009) [hereinafter Green, *Disquiet*].

3. *Infra* text accompanying notes 36–37 for a further description.

4. These concepts are defined more particularly *infra* text accompanying notes 88–

were novel at the time. Superficially, they were beneficial as they made home ownership manageable because the initial loan repayment amounts were low and within the borrower's means. What was troublesome and perhaps sinister was that they were foisted upon those who could not see that they would not stay manageable and the debt would increase by those who knew them well.[5] All the while, the regulators were not watching the changes in the market, *per se*, but only the sharp trajectory in the volume of transactions, housing prices and rates of homeownership.[6] In the aftermath of the crisis, many were skeptical of the public apology by the story's protagonists, that is, that their activities were based on an honest taken up desire to support the cause of advancing homeownership for all — a long-standing national policy. Nothing in the national policy called for the wholesale abandonment of underwriting principles, which were designed to protect both lenders and consumers of mortgage credit. Lenders chose to ignore the concern of the creditworthiness of mortgage applicants, instead blindly taking the applicant at her word, as to her income, assets, and credit history[7] and made one hundred percent loans on contrived appraisals of value. The low or no-documentation loans, some with a one hundred percent loan-to-value ratio, at one point accounted for more than two-thirds of certain loans made by two of the largest banks — Countywide Financial and Washington Mutual — that collapsed under the weight of their improvidence in the crisis.[8] That default was more likely by a borrower whose dreams of homeownership were larger than his financial ability, was not unforeseeable.

The homeownership goals thrown up by the improvident lenders began around the Great Depression when the Roosevelt administration declared the national goal of the greatest level of home ownership.[9] That goal would be

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5. I discuss the cohort of those holding ARMs *infra* text accompanying notes 236–42.

6. *See* Robert J. Samuelson, *Rethinking the Great Recession*, WILSON Q., Winter 2011, at 16, 19.

7. *See* FINANCIAL CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 160 (2011) [hereinafter FCIC FINAL REPORT], https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf; *see also id.* at 3, 12. We can see this as lenders recognized the increased risk of loss by precarious borrowers and accounted for it through higher interest rates and adjustable rate mortgages. Even more sinister was that lenders knew that when defaults happened, those losses would fall on those who purchased the mortgages on the secondary market. For a description of the secondary market, see *infra* note 16.

8. *See* FCIC FINAL REPORT, *supra* note 7, at xxiii, 107–09. *See generally* Green, *Disquiet*, *supra*, note 1 at 9 n.9, 10 n.14 (describing how risky loans and government encouragement of mortgage loans contributed to the crisis).

9. *See FDR and Housing Legislation*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM, https://www.fdrlibrary.org/housing (last visited Nov. 19, 2021). I

achieved by a host of federal policies and programs.[10] The first came in the form of mortgage insurance offered by the Federal Housing Administration ("FHA") — under which the federal government insured the repayments of mortgage loans made to borrowers of modest means.[11] The significant advantage to the borrower was that the maturity of loans was extended from the traditional five years with a balloon payment at the end, to a twenty-five-year, fully amortized loan.[12] And, with a low down-payment,[13] homeownership came within the reach of many. Other federal policies since adopted to make home purchase affordable, are found in the tax laws — for example, the deductibility of mortgage interest[14] and the exclusion of gain of up to $500,000 for a couple filling jointly, in the sale of a personal residence.[15]

At first, the loan originators' ability to make loans was limited by the rate of savings deposits they had on hand. But the creation of the secondary mortgage market[16] changed these dynamics. In 1949, Congress established the Federal National Mortgage Association ("Fannie Mae") and in 1970, the Federal National Mortgage Corporation ("Freddie Mac"). Both are federally-chartered, but privately-owned entities ("Government Sponsored Entities" or "GSEs") whose mission was to buy up mortgage loans from loan originators, thereby creating liquidity for more loans to would-be

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discuss the rates of home ownership *infra* text accompanying notes 39–45.

10. *See generally* Shelby D. Green, *The Search for a National Housing Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69 (1998) (examining federal policies and development of homeownership).

11. 12 U.S.C. § 1709(b). The idea was that by providing mortgage insurance, lenders would increase their levels of lending. In addition, the federal insurance program imposed interest rate ceilings, established uniform lending criteria, required lower down-payments, and introduced longer mortgage terms. The analogous program created for Veterans, under the then Veterans' Administration, not the Department of Veteran's Affairs, ("VA"), guaranteed loans on behalf of Veterans.

12. *Id.*

13. The required down-payment for an FHA loan is now 3.5% as opposed to non-FHA loans which typically require 20%. VA loans can be 100% loans. *See* 12 U.S.C. § 1709(b)(9)(A) (requiring a down-payment of not less than 3.5%).

14. *See* I.R.C. § 163(h). Until the Tax Cuts and Jobs Act of 2017, interest paid on mortgage loans of $1 million was deductible, but after, the maximum loan was reduced to $750,000.

15. *Id.* § 121.

16. In contrast to the primary mortgage market, consisting of loan originators, the secondary mortgage market is made up of participants who buy mortgages from loan originators and sell investments in those mortgages to private and public investors. *See* Daniel J. McDonald & Daniel L. Thornton, *A Primer on the Mortgage and Mortgage Finance Market*, 90 FED. RSRV. BANK OF ST. LOUIS REV., Jan–Feb 2008, at 31, 34–36, https://files.stlouisfed.org/files/htdocs/publications/review/08/01/McDonald.pdf.

homeowners.[17] Soon, private actors entered the secondary mortgage market.[18] While these were all truly laudable programs, something went wrong as perverse incentives took hold. Loan originators profited from packaging loans and because the risks of default traveled with the mortgage now owned by FNMA or FHLMC, or the private purchaser, the originators made loans to almost anyone — if he could sign the mortgage papers.[19]

A host of factors can be discerned as the major culprits in practices leading up to the crisis. First, the seeming wholesale abandonment of safe underwriting practices in favor of short-term profits by loan originators. Second, there was the indiscriminate purchase by the GSEs and private actors of poor-quality loans, many based on inflated appraisals of the property. Third, there was the inevitable default by a borrower, whose ARM interest rate had increased by several percentage points, but whose financial circumstances had not. The Financial Crisis Inquiry Commission, authorized by the U.S. Senate in May 2009, was the result of one of two things — either the borrowers never could fulfill their obligations under the loan or never intended to.[20] The effects on the markets were yet the same either way.

It was a toxic mix of excess and cupidity, whose impact fell heavily not just on the actors (the financiers and borrowers), but on the nation and the world. There were millions of foreclosures with no end in sight.[21] Homeownership rates took a nose-dive,[22] businesses shuttered and factories

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17. *See id.* Later, the Government National Mortgage Association ("Ginnie Mae"), 12 U.S.C. § 1716-23(h), was created to purchase loans made to veterans. Ginnie Mae "guarantees" principal and interest. These GSEs issued debt securities to raise funds for their purchases.

18. Decades later, private investment companies achieved a large presence in the secondary market. *See* OFF. OF FED. HOUS. ENTER. OVERSIGHT, A PRIMER ON THE SECONDARY MARKET, MORTGAGE MARKET NOTE NO. 08-3 2–3, 7–8 (2008), https://www.fhfa.gov/PolicyProgramsResearch/Research/PaperDocuments/20080721_MMNote_08-3_N508.pdf. At the time that the famed Lehman Brothers collapsed in September 2008, it was the largest private holder of mortgage-backed securities with $619 billion in debts. *See Lehman Brother-Fall From Grace*, CFI, https://corporatefinanceinstitute.com/resources/knowledge/finance/lehman-brothers (last visited Nov. 19, 2021).

19. While the purchase agreements often provided recourse against the originator in case of defective loans, those cases are still shaking out in the courts. *See, e.g.*, *In re* Part 60 Put-Back Litig., 165 N.E.3d 180 (N.Y. 2020) (enforcing the sole remedy clause in securitization contract).

20. *Id.*

21. *See* FED. DEPOSIT INS. CORP., CRISIS & RESPONSE: AN FDIC HISTORY 2008–2013 xii (2018) [hereinafter CRISIS & RESPONSE] (reporting 2.8 million mortgage loans in foreclosure in the first quarter of 2008, more than four times the number in 2005).

22. *See infra* text accompanying note 39.

closed,[23] retail sales plummeted,[24] and hundreds of commercial banks failed.[25]

Alas, it was only after the horses got out that the regulators acted to close the barn door. The immediate rescue reaction came from the federal government under the Troubled Asset Relief Fund — a nearly $3 trillion cash infusion to failing investment banks.[26] Fannie Mae and Freddie Mac were also put under conservatorship under the Housing and Economic Recovery Act of 2008 ("HERA"),[27] their role as the primary protagonist in the secondary mortgage markets, curtailed. And lenders had little sympathy for the beleaguered borrower as filings for foreclosures were almost automatic. Indeed, a practice of "robo-signing" of default papers arose, where the same individual from the loan servicer would attest to hundreds of defaults within the context of a single day, in many cases, without any verification of the status of the loan, leaving the borrower to sort things out later in court.[28] When this practice became known, several of the larger banks — Chase, Bank of America, Wells Fargo — entered into consent decrees with the United States Department of Justice, which among other things, required them to verify defaults and have staff available to speak to beleaguered borrowers.[29] On the state level, as courts became overwhelmed by foreclosure complaints, some adopted moratoria on foreclosures and mandatory meditation programs.[30]

When the waters began to calm, Congress and state governments set out to learn what happened and to examine the conditions that created the nightmare. Among the prominent findings of the Financial Crisis Inquiry

23. *See* CRISIS & RESPONSE, *supra* note 21, at xii–xiii (stating that 8.8 million jobs were lost, having a $10 to $14 trillion economic effect).

24. Robert J. Samuelson, *Revisiting the Great Depression*, WILSON Q., Winter 2012, at 36, 38, 41.

25. *See* CRISIS & RESPONSE, *supra* note 21, at xiii, xix–xxiii (reporting that the FDIC closed 500 banks, 12% of all insured banks, at a cost of $73 billion).

26. *See infra* text accompanying notes 63 and 84.

27. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified at scattered sections of 12, 15, 26, 37, 38 and 42 U.S.C.).

28. Anna Louie Sussman, *Ex-mortgage Document Exec Pleads Guilty in 'Robo-signing' Case*, REUTERS (Nov. 20, 2012, 7:56 PM), https://www.reuters.com/article/robosigning-plea/ex-mortgage-document-exec-pleads-guilty-in-robo-signing-case-idUSL1E8ML0C120121121.

29. Press Release, U.S. Dep't of Just., $25 Billion Mortgage Servicing Agreement Filed in Federal Court (Mar. 12, 2012), https://www.justice.gov/opa/pr/25-billion-mortgage-servicing-agreement-filed-federal-court.

30. *See, e.g.*, *Foreclosure Mediation Programs by State*, NAT'L CONSUMER L. CTR., https://www.nclc.org/issues/foreclosure-mediation-programs-by-state.html (last visited Nov. 19, 2021) (directing the reader's attention specifically to the Nevada foreclosure mediation rules).

Commission, was that there was an utter lack of ethical principles guiding either face-to-face transactions or corporate decision making.[31] As such, the first regulatory response was to reign in some of the more pernicious deeds through the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[32] ("Dodd-Frank"). This comprehensive legislation purported to deal with systemic risk. There were also amendments to the Truth in Lending Act of 1968[33] for greater disclosures about the costs of borrowing and new standards for mortgage loan origination. Moreover, many states followed with legislation that aimed to protect borrowers from lending abuses.[34] Regrettably, Dodd-Frank only offered prospective relief and did not operate to undo the millions of foreclosures that had already occurred or were in the pipeline.[35] Some foreclosed homeowners were relegated to entering into installment land contracts to buy back their homes.[36] While I discuss below, in more detail, the need for and promises of the regulatory constraints imposed by Dodd-Frank upon lenders, for the moment, as the lead into the main point of this Article, I will note that perversely, rather than making fair loans more readily available, the legislative and regulatory responses made it more difficult for the average borrower to obtain a mortgage loan. As new stringent underwriting standards became mandatory and as lenders were required to retain some of the risks, many withdrew from mortgage lending altogether. Enter the non-banks and non-debt financial companies ("NDNBs"), these entities, while not entirely new on the homebuying scene, are gaining ground. They cover the entire homebuying experience — from selling an existing home to providing down payment assistance to long-term financing. The great benefit of some of these models is that they offer a way past the seemingly insurmountable barrier — the twenty percent down payment — that often puts homeownership out of reach for many. The

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31. For a discussion of the FCIC's findings, see *infra* text accompanying notes 68–72.

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

33. 15 U.S.C. § 1601.

34. *E.g.*, N.Y. BANKING LAW § 590 (McKinney 2021); NEV. REV. STAT. § 645B (2020); MASS. GEN. LAWS ch. 255F (2021).

35. Many states, though, enacted foreclosure relief measures, and there were more than a few suits filed against lenders under the original version of TILA and other consumer protection laws. *See* Tami Luhby, *Predatory-Lending Lawsuits on the Rise*, CNN MONEY (Oct. 9, 2009, 7:19 AM), https://money.cnn.com/2009/10/08/news/economy/Predatory_lending_lawsuits_increase/index.htm; *see also* U.S. GEN. ACCT. OFF., FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING (2004), https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-04-280/html/GAOREPORTS-GAO-04-280.htm.

36. *See* Green, *Testing*, *supra* note 2, at 526.

national median home price in 2020 is nearly $350,000[37] and a twenty percent down payment, $70,000, would take a lifetime to save for a household having the median national income of $62,000. For some, NDNBs are the only path toward realizing the American dream. For many — the sophisticated millennials, at ease with technology in everyday affairs, NDNBs are perfectly fine. But for the cohort that figured so prominently among the losers in the housing crisis — the less well-educated, less sophisticated, the more risk averse — the rise in NDNBs is concerning. Because some of the NDNBs do not implicate traditional mortgages, they are not subject to the lending regulations aimed to help homebuyers make informed choices and to protect against abuses, although they could run afoul of regulations against fraudulent and deceptive practices. But this is a very broad standard. Even as all the contours of the programs are laid bare, they may yet pose undue risks to vulnerable consumers that are not mitigated by any regulation — they portend novel forms of ownership rights that threaten to disturb the existing taxonomy of property interests that may not be justified by any discernable societal interests in efficiency and low information costs. Whether these inventions and new forms of homeownership assistance serve to facilitate a promise of security and autonomy or a nightmare in another guise remains to be seen.

This Article explores the phenomenon of the NDNBs in home purchase and finance that has gained a growing presence in the mortgage marketplace since the 2008 crisis. Part II offers a deeper discussion of the risk-prone practices leading to the 2008 housing crisis and the regulatory and industry responses for recovery. Parts III and IV describe the emerging new models of home purchase. Part IV explores some of the apparent and hidden risks in these transactions. Part VI concludes with suggestions for assessing and managing risks and for reforms.

II. RISK-PRONE HOME PURCHASE AND LENDING PRACTICES LEADING TO 2008 HOUSING CRISIS

In this Part, I will highlight some of the more striking aspects of the 2008 housing crisis, about which so much has been written.[38] There seems little

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37. *Median Sales Price of Houses Sold for the United States*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/MSPUS (last visited Nov. 19, 2021).

38. *E.g.*, *Financial Crises and Recovery: Financial Crises Timeline*, PACE UNIV., https://libraryguides.law.pace.edu/financialcrisis (last visited Nov. 19, 2021); U.S. DEP'T OF HOUS. & URB. DEV., REPORT TO CONGRESS ON THE ROOT CAUSES OF THE FORECLOSURE CRISIS (2010), https://www.huduser.gov/portal/publications/Foreclosure_09.pdf; Patricia A. McCoy, *The Housing Mortgage Financial Crisis: Lessons Learned* (Joint Ctr. for Hous. Stud., Working Paper No. HBTL-01, 2013), https://www.jchs.harvard.edu/sites/default/files/hbtl-01_0.pdf; William R. Emmons et al., *The*

disagreement among the commentators on its consequences — that it left the nation shaken to its economic core, fearful, and distrustful of the traditional markets and market makers. Despite rising nearly twenty-five percentage points from thirty four percent in 1934 to just under seventy percent in 2003, during the crisis, the rate of homeownership plummeted to 67.5% in just five years.[39] Reports revealed a slow climb back up to 67.9% in the second quarter of 2020.[40] The effects of the crisis were felt more sharply by certain populations within our society. For African-Americans, whose homeownership rates have always lagged behind whites, in the fourth quarter of 2008, it stood at only 46.8% only to rise to 47% in 2020.[41] There are similar disparities for Latino households (historically at 48.5%, but rising to 51.4% in 2020).[42] For Asian-Americans and Native Hawaiian and Pacific Islanders, the homeownership rate was (61.4% in 2020).[43] These numbers

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Foreclosure Crisis 2008: Predatory Lending or Household Overreaching?, REG'L ECONOMIST, July 2011, at 12, 12, https://core.ac.uk/download/pdf/6575498.pdf; Julie L. Stackhouse, *Lessons Learned from the Financial Crises*, FED. RSRV. BANK OF ST. LOUIS (Sept. 11, 2011), https://www.stlouisfed.org/dialogue-with-the-fed/lessons-learned-from-the-financial-crisis.

39. *See* Dean Baker, *Subprime Borrowers Deserve an Own to Rent Transition*, 5 ECONOMISTS' VOICE 1, 2 (2008), http://www.bepress.com/ev/vol5/iss1/art5; *see also* OFF. OF FED. HOUS. ENTER. OVERSIGHT, REPORT TO CONGRESS (2008), https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/OFHEO_Report_Congress-2008.pdf.

40. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY/HOUSING VACANCY SURVEY, 6 tbl. 14 (2021) [hereinafter CENSUS POPULATION SURVEY], https://www.census.gov/housing/hvs/data/histtabs.html.

41. The St. Louis Federal Reserve Bank Research Series is the source for comprehensive rates of ownership by demographics and over time. *Homeownership Rates by Race and Ethnicity: Black Alone in the United States*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/BOAAAHORUSQ156N (last visited Jan. 18, 2022). A post-crisis analysis confirmed what many suspected while it was happening. *Helping Families Save Their Homes in Bankruptcy Act of 2009, and the Emergency Homeownership and Equity Protection Act: Hearing on H.R. 200 and H.R. 225 Before the H. Comm. on the Judiciary*, 111th Cong. (2009). That is, the rate of foreclosure for African-American and Latinx homeowners over age 50 was nearly double that for white homeowners in all age groups and roughly double the rate of minority homeownership. *See id.* at 71–72 (statement of David M. Certner, Legal Counsel and Legislative Policy Director, AARP, Washington, D.C.). The precise numbers are stark: Older African-American homeowners held only 6.8% of all first mortgages, but suffered 14.4% of all foreclosures; for Latinx homeowners, those numbers were 7.5% and 15.9% respectively. *Id.* For homeowners over the age of 50, there was nearly a 17 times greater likelihood that there loans were subprime. *Id.*

42. *Homeownership Rates by Race and Ethnicity: Hispanic (of Any Race) in the United States*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/HOLHORUSQ156N (last visited Nov. 19, 2021).

43. *Homeownership Rates by Race and Ethnicity: All Other Races: Asian, Native Hawaiian and Pacific Islander*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/ANHPIHORUSQ156N (last visited Nov. 19, 2021).

stand in contrast to the rates for whites: 74.8% in 2008, rising to 76% in 2020.[44] The causes of disparate rates of homeownership are in no small measure due to discriminatory mortgage lending practices as well as exclusionary land use practices.[45]

As the crisis set in, the estimated number of foreclosures was predicted to continue to rise to four to five million in the next two years — absent drastic intervention[46] — and later studies by the Congressional Research Office revealed that many mortgage holders were not inclined to engage in foreclosure avoidance courses, instead immediately invoking their contract rights to recourse in the property.[47]

A. The Housing Markets Before and After the Crisis

Although the real estate market is peculiarly subject to booms and busts,[48]

44. *Homeownership Rates by Race and Ethnicity: Non-Hispanic White Alone in the United States*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/NHWAHORUSQ156N (last visited Nov. 19, 2021).

45. Discrimination in mortgage lending, from disparate lending terms to outright redlining, continues to burden borrowers of color. *See* Press Release, U.S. Dep't of Just., Justice Department Reaches Settlement with Wells Fargo Resulting in More Than $175 Million in Relief for Homeowners to Resolve Fair Lending Claims (July 12, 2012), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief. Discriminatory zoning only makes the problem more onerous as rates and terms of lending reflect the demographics of the loan area. *See* AMY DENINNO, THE ROLE OF ZONING REGULATIONS IN THE PERPETUATION OF RACIAL INEQUALITY AND POVERTY: A CASE STUDY OF OAKLAND, CALIFORNIA (2019), https://www.lincolninst.edu/sites/default/files/amy_narrative_final.pdf.

46. OFF. OF THRIFT SUPERVISION, MONTHLY MARKET MONITOR 8 (Jan. 22, 2009); *Meeting on Priorities for the Next Administration: Use of TARP Funds under EESA, Before the H. Comm. on Fin. Servs.*, 111th Cong. 18 (2009) [hereinafter *Use of TARP Funds under EESA*] (statement of John F. Bovenzi, Deputy to the Chairman and Chief Operating Officer, FDIC). In the midst of the crisis, it was feared that the number of foreclosures would rise to more than 10 million. *See also* Emmons et al., *supra* note 38, at 12; *Federal Deposit Insurance Corporation on Oversight of Implementation of the Emergency Economic Stabilization Act of 2008 and Efforts to Mitigate Foreclosures*, 110th Cong. (2008) (statement of Michael Krimminger, Special Advisor for Policy for Fed. Deposit Ins. Corp.), https://archive.fdic.gov/view/fdic/1581; *Use of TARP Funds under EESA*, *supra* note 46, at 17 (statement of John F. Bovenzi, Deputy to the Chairman and Chief Operating Officer, Fed. Deposit Ins. Corp.). The rate of foreclosures rose in 2008 to 1.84% and continued upward to 2.23% in 2010; not leveling off until 2019, when the rate dipped to .36%. *Foreclosure Rate in the United States from 2005 to 2020*, STATISTA, https://www.statista.com/statistics/798766/foreclosure-rate-usa/ (last visited Nov. 19, 2021).

47. EDWARD VINCENT MURPHY, CONG. RSCH. SERV., RL34653, ECONOMIC ANALYSIS OF A FORECLOSURE MORATORIUM 9–10 (2008).

48. *See* Jeffrey P. Cohen et al., *The Boom and Bust of U.S. Housing Prices from Various Geographic Perspectives*, 94 FED. RSRV. BANK OF ST. LOUIS REV. 341, 360 (2012), https://research.stlouisfed.org/publications/review/2012/09/04/the-boom-and-bust-of-u-s-housing-prices-from-various-geographic-perspectives.

for most of history, the price of homes kept pace with the rate of inflation. However, from 1995–2006, house prices diverged from other economic trends and increased dramatically, by eighty percent.[49] But, this rise was unsustainable — the leverage by borrowers with questionable credit holding subprime loans could not form the pillars for long-term stability.[50] Because many of the loans were 100% loans, as most of the early payments are allocated to interest, it would take many years into the loan before the homeowner would see any equity. When faced with the disruptions in the market, absent equity, there would be no safe exit by these borrowers.[51]

The prevailing lending practices also drove housing supply, with record or near-record levels of homes on the market.[52] High supplies, exacerbated by high foreclosure rates, would necessarily force down housing prices,

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49. In 2001, home prices were at their highest ever and in 2006, home prices were double what they were ten years earlier. *See* Becky Sullivan & Ari Shapiro, *10 Years After Housing Crises: A Realtor, A Renter, Starting Over, Staying Put*, NPR (Apr. 28, 2018, 7:03 AM), https://www.npr.org/2018/04/28/603678259/10-years-after-housing-crisis-a-realtor-a-renter-starting-over-staying-put; *see also All-Transactions House Price Index for United States*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/USSTHPI (last visited Nov. 19, 2021).

50. The "subprime market" is so defined because the median FICO is substantially below that for prime loans (620 as compared to 723) and the loans carry high loan-to-value ratios. To control for the high risk of default given these characteristics, subprime loans typically have adjustable interest rates, often with a balloon payment of principal and negative amortization, under which the principal of the loan is not reduced on a schedule, but rather increases over the term. Under the 2/28 loans, the initial rate is typically very low and fixed for two years; thereafter, the rate adjusts periodically, in accordance with some index agreed to in the mortgage for the rest of the term. Depending on what is happening in the economy, the first adjustment could be a shocker if the borrower's financial means did not experience the same increases. *Cf.* Berghaus v. U.S. Bank, 360 S.W.3d 779, 784 (Ky. Ct. App. 2012) (rejecting claim of predatory lending and violations of federal disclosure requirements on account of lender's failure to disclose "potential for an enormous rate increase"). The related "Alt-A" market was also suffering. The Alt-A market consists of borrowers who are typically self-employed and consequently have unpredictable income streams. Even so, as their credit scores are a bit stronger, lenders made loans with little documentation and often with a high debt-to-income ratio. *See* SUMIT AGARWAL & CALVIN T. HO, COMPARING THE PRIME AND SUBPRIME MORTGAGE MARKETS 1–2 (2007), https://fraser.stlouisfed.org/files/docs/historical/frbchi/fedletter/frbchi_fedletter_2007_241.pdf. If lenders hoped for different results in the case of the Alt-A borrower, they were sorely mistaken.

51. *See* LEXISNEXIS, SUBPRIME LENDING: AN UPDATE OF THE ISSUES AND APPROACHES 23 (2007); *see also* Steven L. Schwarcz, Systemic Risk and the Financial Crisis: Protecting the Financial System as a 'System' 16 (Feb. 12, 2014) (unpublished manuscript) (on file with the University of California Berkeley School of Law), https://www.law.berkeley.edu/files/bclbe/Schwarcz_Paper.pdf.

52. *See Monthly Supply of Houses in the United States ("MSACSR")*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/MSACSR (last visited Nov. 19, 2021) (tracking housing supply by month).

which continued to drop through 2010 only to stabilize beginning in 2011.[53] These declining prices and stalled markets created the phenomenon of underwater mortgages; at one point, more than a third of all mortgages in the country had this characteristic.[54] As home values plunged and foreclosures skyrocketed, local governments were taxed to provide emergency shelter and social services to the displaced former homeowners and to shore up communities against blight and instability.[55]

Market participants appeared to deliberately target the vulnerable to lure them into burdensome mortgage transactions, without warning of their eventual costs.[56] Subprime loans were the financing forms de jour for

53. *See All-Transactions House Price Index for the United States*, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/USSTHPI (last visited Nov. 19, 2021) (depicting housing prices from 1975–2021).

54. The state of being "underwater" exists when the amount owed on the mortgage loan is greater than the market value of the home. FANNIEMAE, KEYS TO RECOVERY (2008), https://www.fanniemae.com/media/28871/display; *see also* ASHLYN AIKO NELSON, BAILING OUT UNDERWATER MORTGAGES (2010), https://oneill.indiana.edu/doc/research/mortgages_nelson.pdf (reporting that the percent of underwater mortgages in the country reached nearly 40% by 2009).

55. *See, e.g.*, Bank of America Corp. v. Miami, 137 S. Ct. 1296, 1300–02 (2017) (seeking recovery for increased costs of municipal services after many foreclosures of subprime mortgages); Oakland v. Wells Fargo, 972 F.3d 1112, 1117 (9th Cir. 2020) (seeking damages under the Fair Housing Act for reduced tax revenues because of a high rate of foreclosure of predatory loans).

56. *See* Christopher Kent, Assistant Governor (Financial Markets) of the Reserve Bank of Australia, Address to the Housing Industry Association Breakfast: The Limits of Interest-Only Lending (April 24, 2018), https://www.bis.org/review/r180426f.htm (discussing the risks of interest-only and negative-amortization loans). It was no surprise that these loans accounted for the large percentage of delinquencies in the crisis. *See* James Bullard et al., *Systemic Risk and the Financial Crisis: A Primer*, 91 FED. RSRV. BANK OF ST. LOUIS REV. 403 (2009), https://research.stlouisfed.org/publications/review/2009/09/01/systemic-risk-and-the-financial-crisis-a-primer/ (examining how subprime loans affected the larger housing market); Christopher Palmer, Why Did So Many Subprime Borrowers Default During the Crisis: Loose Credit or Plummeting Prices? 1 (Apr. 14, 2015) (unpublished manuscript), https://files.consumerfinance.gov/f/documents/P5_-_CPalmer-Subprime.pdf ("The subprime default rate — the number of new subprime foreclosure starts as a fraction of outstanding subprime mortgages — tripled from under 6% in 2005 to 17% in 2009. By 2013, more than one in five subprime loans originated since 1995 had defaulted."); Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Rsrv. Sys., Remarks at the Federal Reserve Board of Chicago's 43rd Annual Conference on Bank Structure and Competition: The Subprime Mortgage Market (May 17, 2017), https://www.bis.org/review/r070522a.pdf (stating that for subprime "mortgages, the rate of serious delinquencies . . . rose sharply during 2006 . . . about 11 percent, about double the recent low seen in mid-2005 . . . . In the fourth quarter of 2006, . . . subprime mortgages accounted for more than half of the foreclosures."); MORTG. BANKERS ASS'N, NATIONAL DELINQUENCY SURVEY 3 (2007), https://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2008-03-00%20MBA%20National%20Delinquency%20Survey.pdf (reporting that in "the fourth quarter of 2007, the foreclosure inventory rate increased 17 basis points for prime loans (from 0.79

borrowers of color, in diverse neighborhoods, irrespective of credit standing.[57] This was all the more heinous because "yield spread premiums" were rewards from creditors to mortgage brokers who locked borrowers into higher-cost loans.[58]

B. The Regulators Were Watching God[59]

In the years leading up to the crisis, the regulators did not see that the rise in mortgage loan originations — up to $2 trillion in 2007 — would eventually come crashing down.[60] Indeed, after the collapse, they shrank to less than a fraction of that level, to $1.4 trillion, and did not recover until 2012.[61] The regulators also did not see the tsunami of defaults at the market's edge.[62]

When the storm was full upon the nation, the regulators reacted with a variety of measures — including cash infusions into the market (the Troubled Assets Relief Program or "TARP"),[63] interest rate cuts, and eventually regulatory reforms, most significantly Dodd-Frank.[64] Before

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percent to 0.96 percent), and increased 176 basis points for subprime loans (from 6.89 percent to 8.65 percent)"); SHARON L. STARK & ZHONG YI TONG, QUARTERLY MARKET MONITOR QMM 5-09 (OFF. OF THRIFT SUPERVISION) 5 (May 7, 2009).

57. *See* Emily Badger, *The Dramatic Racial Bias of Subprime Lending During the Housing Boom*, BLOOMBERG CITYLAB (Aug. 16, 2013, 6:54 AM), https://www.bloomberg.com/news/articles/2013-08-16/the-dramatic-racial-bias-of-subprime-lending-during-the-housing-boom.

58. *See* FCIC FINAL REPORT, *supra* note 7, at xxii; Shelby D. Green, *Shadowing Lenders and Consumers: The Rise, Regulation, and Risks of Non-Banks*, 37 BANKING & FIN. SERVS. POL'Y REP., Sept. 2018, at 12, 13; *see also* Green, *Disquiet, supra* note 1, at 9 n.9, 10 n.14.

59. ZORA NEALE HURSTON, THEIR EYES WERE WATCHING GOD 235 (1937). In the midst of a fierce hurricane, the people seemed to stare into the dark, perhaps resigning themselves to idea that only the almighty could save them.

60. *See* Samuelson, *supra* note 6, at 19; Greg Buchak et al., *Fintech, Regulatory Arbitrage, and the Rise of Shadow Banks* 11 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23288, 2018), http://www.nber.org/papers/w23288.

61. Buchak et al., *supra* note 60, at 11.

62. Both lenders and borrowers, at best miscalculated, or at worst simply ignored, their risks. *See* CRISIS & RESPONSE, *supra* note 21, at xxiv–xxv, xxxvi.

63. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765.

64. *See* Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Rsrv. Sys., Speech at the Women in Housing and Finance and Exchequer Club Joint Luncheon: Financial Markets, the Economic Outlook, and Monetary Policy (Jan. 10, 2008), https://www.federalreserve.gov/newsevents/speech/bernanke20080110a.htm (describing the effects of the housing market on the U.S. economy and response); *see also* Glenn Hubbard, *Financial Regulatory Reform: A Progress Report*, 95 FED. RSRV. BANK OF ST. LOUIS 181, https://files.stlouisfed.org/files/htdocs/publications/review/13/03/181-198Hubbard.pdf (noting how regulators failed to act to avoid the

discussing Dodd-Frank in some detail, I will take a moment to comment on the efficacy of the regulators' immediate responses. Some say that their most regrettable error was letting Lehman Brothers fail in September 2008.[65] Because rather than staunch the hemorrhaging in the market, that bankruptcy sent out dramatic waves of more panic, which led to the total absence of trust. No one would lend, which in turn meant no one was spending or hiring, which ultimately led to the need for the rescue of many other companies.[66] Moreover, the regulators failed to employ the available regulatory tools to curb the rising housing market and the credit surge — increased interest rates, caps on loan-to-value ratios, and greater capital retention by banks.[67] Instead, by allowing the market to operate unconstrained, the regulators left market participants susceptible to the slimmest changes in market dynamics.

When the waters calmed and Congress was able to discern the lapses, the Dodd-Frank legislation that followed the emergency responses was largely prophylactic in nature. Dodd-Frank resulted from the findings of the Financial Crisis Inquiry Commission, as part of the Fraud Enforcement and Recovery Act.[68] The Financial Crisis Inquiry Report was issued in January 2011, and in scathing terms made plain that had the regulators been watching things on the ground — the explosive growth in subprime lending, securitization, and the unsustainable rise in housing prices — the crisis might not have happened.[69] In addition, the report noted, as the Federal Reserve failed to set prudent mortgage-lending standards, banks, both investment and depositary, bought and sold mortgage securities without scrutinizing them

crisis).

65. At the same time as Lehman Brothers was allowed to fall down, following measures adopted during the Great Depression, several states enacted moratoria on foreclosures. *See* PEW CHARITABLE TR., DEFAULTING ON THE DREAM: STATES RESPOND TO AMERICA'S FORECLOSURE CRISIS 3 (2008), https://www.pewtrusts.org/en/research-and-analysis/reports/2008/04/16/defaulting-on-the-dream-states-respond-to-americas-foreclosure-crisis; *see* Frank S. Alexander et al., *Legislative Responses To The Foreclosure Crisis In Nonjudicial Foreclosure States*, 31 REV. BANKING & FIN. L. 341, 365 (2012). Now and during that earlier frightful period, states passed legislation that gave borrowers rights to redeem the foreclosed property after sale and limited or precluded deficiency judgments. *See* David Wheelock, *Changing the Rules: State Mortgage Foreclosure Moratoria During the Great Depression*, 90 FED. RSRV. BANK OF ST. LOUIS REV. 569, 569, 570, 574 (2008).

66. *See The Origins of the Financial Crisis: Crash Course*, THE ECONOMIST (Sept. 7, 2013), https://www.economist.com/schools-brief/2013/09/07/crash-course.

67. *See id.*

68. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617.

69. *See* FCIC FINAL REPORT, *supra* note 7, xi, xv–xxviii (summarizing the findings and conclusions of the Commission).

for their quality; some even knew they were rubbish.[70] Not seeing the trends, the federal policy makers — the Treasury, the Federal Reserve Board, and the Federal Reserve Bank of New York — were ill-prepared to respond in a meaningful way to arrest or at least to minimize the crisis, instead, they were resigned to let it burn itself out.

It was not just the regulators who defaulted in their oversight responsibilities, but corporate boards, who at the first line, abandoned sound decision-making principles and risk evaluation, prudence and ethics, ignored the long-view and instead were driven only by prospective gain from the deal on the table in the moment. This fixation left them ill-prepared even for the most minor shocks in the market.[71] Lax loan origination policies, inflated appraisals, and dishonest ratings of mortgage-backed securities by the ratings agencies, Moody's, Standard & Poor's, and Fitch, (who were paid to give high ratings) were some of the more pernicious practices that created a powerful recipe for implosion and collapse.[72]

Dodd-Frank outlawed these practices. The legislation aimed to establish new morals of the marketplace and to protect consumers and lenders in their loan transactions.[73] Recognizing that the work of the then five regulatory agencies might sometimes overlap or reveal gaps, Dodd-Frank created the Financial Stability Oversight Council ("FSOC") to identify "systemically important financial institutions" ("SIFI") and to monitor them for practices as would threaten the financial stability of the industry.[74] Those institutions would then be subject to heightened regulatory constraints and disclosure-based obligations.[75]

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70. *Id.* at xvii–xx.

71. *Id.* at xxii–xxiii. The report found that investment banks operated on only veneers of capital. For example, at the end of 2007, Bear Stearns was frantically borrowing up to $70 billion in the overnight market, when it had only $11.8 billion in equity and faced $383.6 billion in debt. This "was the equivalent of a small business with $50,000 in equity borrowing $1.6 million, with $296,750 of that due each and every day." *Id.* at xx. In the six years from 2001 to 2007, "national mortgage debt nearly doubled, and the amount of mortgage debt per household rose more than 63% from $91,000 to $149,500, even while wages were essentially stagnant." *Id.*

72. *Id.* at xxv, 125–26.

73. Before the 2008 financial crisis, consumer financial protection was largely performed by the U.S. Department of Housing and Urban Development and the Federal Trade Commission. The Dodd-Frank Act invested much of this authority into a new Consumer Financial Protection Bureau ("CFPB"), but bank regulators still supervise many consumer activities of their chartered firms. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617.

74. *See* Hilary J. Allen, *Putting the "Financial Stability" in Financial Stability Oversight Council*, 76 OHIO ST. L.J. 1087, 1113–20 (2015) (describing the structure and mandate of FSOC).

75. The process of labeling a company as "systemically important" has been a fraught one. When the FSOC designated the insurer MetLife as "systemically important"

Under Dodd-Frank, "too big to fail" would become but a song. Instead, firms would be monitored for unsafe practices and be required to disinvest of certain assets — those that posed "grave threat[s] to the financial stability of the United States."[76] Portfolios would be required to be diverse[77] and institutions would be required to maintain minimum capital levels.[78] These requirements would be evaluated by regular "stress tests" to ensure that firms could survive a variety of economic shocks in the market.[79] There would be prophylactic limits on consolidations and mergers of companies reaching certain liability thresholds.[80] Otherwise, SIFIs would be allowed to fail and need "living wills" for an orderly liquidation in case of improvident demise.[81] No longer would the Federal Reserve make emergency loans to specific firms, but "only to participants in a program or facility with broad-based eligibility designed for the purpose of providing liquidity to the financial system";[82] no longer would the Federal Deposit Insurance

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in 2014, MetLife challenged the designation in court, and the district court subsequently struck down the designation, finding the FSOC failed to conduct a cost-benefit analysis. *See* Ryan Tracy, *MetLife Asks Appeals Court to Uphold Removal of "SIFI" Label*, WALL ST. J. (Aug. 16, 2016, 10:38 AM), https://www.wsj.com/articles/metlife-asks-appeals-court-to-uphold-removal-of-sifi-label-1471355267. While the case was on appeal to the D.C. Circuit Court of Appeals, the parties agreed to a dismissal.

76. Dodd-Frank Act, 12 U.S.C. § 5331(a).

77. *See* FDIC, RMS MANUAL OF EXAMINATION POLICIES § 3.2 (2020), https://www.fdic.gov/regulations/safety/manual/section3-2.pdf.

78. Josh Morris-Levenson et al., Does Tighter Bank Regulation Affect Mortgage Originations? 6–7 (Jan. 20, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941177, explains that minimum levels of capital serve to enable firms to absorb market shocks and otherwise to control economic losses. The new regulations require certain banks to hold enough liquid assets to survive periods where refinancing is not possible. *Id.* at 7.

79. *See* Prasad Krishnamurthy, *Regulating Capital*, 4 HARV. BUS. L. REV. 1, 3 (2014) (noting that these enhanced capital requirements for SIFIs accord with international standards). For an in-depth discussion of how stress tests work in practice, see Robert Weber, *A Theory for Deliberation-Oriented Stress Testing Regulation*, 98 MINN. L. REV. 2236, 2290–301 (2014).

80. 12 U.S.C. § 1852(b) (providing that "a financial company may not merge or consolidate with . . . another company, if the total consolidated liabilities of the acquiring financial company upon consummation of the transaction would exceed 10 percent of the aggregate consolidated liabilities of all financial companies"); *see also* DAVIS POLK & WARDWELL LLP, PROPOSED DODD-FRANK LIMIT ON FINANCIAL INSTITUTION M&A TRANSACTIONS (2014), https://www.davispolk.com/sites/default/files/05.27.14.DoddFrank.Concentration.Limit_.on_.Financial.Institution.MA_.pdf (discussing the concentration limit proposal).

81. *See* Nizan Geslevich Packin, *The Case Against the Dodd-Frank Act's Living Wills: Contingency Planning Following the Financial Crisis*, 9 BERKELEY BUS. L.J. 29, 39 (2012) (explaining the liquidation planning required by Dodd-Frank).

82. Extensions of Credit by Federal Reserve Banks, Loans, 80 Fed. Reg. 78,959 (Dec. 18, 2015) (to be codified 12 C.F. R. pt. 201). *See generally* MARC LABONTE, CONG.

Corporation ("FDIC") offer emergency loan guarantees.[83] The TARP would be the first and last bailout.[84] Instead, the FDIC would move to liquidate failing financial firms.[85] By these measures, Dodd-Frank aimed to remove the incentive to act recklessly with the bravado of impunity.

i. Protections for the Hapless Borrower

Dodd-Frank created the Consumer Financial Protection Bureau ("CFPB") to adopt rules for the entire lending process — from loan origination to loan servicing.[86] The rules would apply to depository institutions and non-banks

RSCH. SERV., R44185, FEDERAL RESERVE: EMERGENCY LENDING (2020), https://fas.org/sgp/crs/misc/R44185.pdf (examining the use of Section 13(3) of the Federal Reserve Act).

83. For a discussion of the problematic incentives of emergency loan authority, see Anthony J. Casey & Eric A. Posner, *A Framework for Bailout Regulation*, 91 NOTRE DAME L. REV. 479 (2015).

84. See Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL'Y 55, 57–58 (2010) for a lively critique of TARP.

85. *See* CRISIS & RESPONSE, *supra* note 21, at 190–93 (explaining the process of bank receiverships); 12 U.S.C. § 5390(n).

86. In the aftermath of the crisis, many states adopted a myriad of protections for borrowers at the initial contracting stage and when facing foreclosure. These protections include limits on the terms of high-cost loans and required counseling in advance of taking the loan. The failure to comply with these requirements could be onerous for lenders. *See, e.g.*, LaSalle Bank, N.A. v. Shearon, 850 N.Y.S. 871 (Sup. Ct. 2008) (canceling the entire debt upon violations of banking law on a high-cost loan). In some states, settlement conferences are required before a foreclosure complaint may proceed, with the aim of allowing time to cure a default or averting foreclosure altogether. *See* Abigail Lawlis Kuzma, *Foreclosure in the Heartland: What Did We Learn?*, 49 VAL. U. L. REV. 39 (2015); *see also 2008 Enacted Foreclosure Legislation*, NAT'L CONF. STATE LEGIS., https://www.ncsl.org/research/financial-services-and-commerce/foreclosures-2008-enacted-legislation.aspx (last updated Jan. 21, 2009) (summarizing recently enacted foreclosure laws across the fifty states); NEGOTIATED ALTERNATIVE TO FORECLOSURE ACT (UNIF. L. COMM'N 2017) *see also, e.g.*, N.Y. BANKING LAW § 6-1 (McKinney 2021). *See generally* Geoffrey Walsh, *State and Local Foreclosure Mediation Programs: Can They Save Homes?*, NAT'L CONSUMER L. CTR. (Sept. 2009), https://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs.pdf (considering the efficacy of mitigation programs in to prevent homes from being foreclosed); NEV. REV. STAT. § 107.086(3) (2021) (discussing mediation); ALON COHEN, CTR. FOR AM. PROGRESS, WALK THE TALK: BEST PRACTICES ON THE ROAD TO AUTOMATIC FORECLOSURE MEDIATION 2 (2010), https://www.americanprogress.org/wp-content/uploads/issues/2010/11/pdf/walk_the_talk.pdf (highlighting the benefits of foreclosure mediation); Aleatra P. Williams, *Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage and Housing Crisis*, 7 NW. J. L. & SOC. POL'Y 454 (2012) (arguing for regulations to encourage homeownership and safeguard homeowners); Frank S. Alexander et al., *Legislative Responses To The Foreclosure Crisis In Nonjudicial Foreclosure States*, 31 REV. BANKING & FIN. L. 341 (2011) (examining states' legislative response to increased foreclosures during the 2008 crisis).

alike, to ensure fair lending laws market-wide.[87] In my view, the most significant invention of the CFPB is the ability to repay ("ATR") rule.[88] Under this rule, lenders must make an affirmative determination of a borrower's ability to repay the loan, and not just at the initial rate, but over the loan's full term in the case of an adjustable-rate mortgage.[89] This means that borrowers must be given a good faith estimate of the monthly payment amount *after* it adjusts or resets,[90] and must be given six months' notice that the mortgage changed from fixed to adjustable.[91] To make the ATR determination, lenders must review hard evidence of creditworthiness, such as pay stubs and bank accounts.[92] Accordingly, "no- or low-doc" loans cannot be extended.[93] The CFPB also adopted the "Qualified Mortgage," a safe harbor for lenders whose loan meets the ATR requirements[94] and satisfy specific conditions meant to reduce risk. The loan:

- may not contain the onerous features (negative amortization, adjustable rates);[95]
- cannot have a term longer than 30 years;[96]
- cannot charge points and fees that exceed a specific threshold;[97] and
- cannot be made to borrowers with a debt-to-income ratio greater than forty-three percent.[98]

For loans that are not qualified, lenders may not assess prepayment penalties for adjustable-rate and higher cost mortgages nor may they push

87. *See* Truth in Lending, 73 Fed. Reg. 44,522 (July 30, 2008) (to be codified at 12 C.F.R. pt. 226).

88. 12 C.F.R. § 1026.43(c) (2021); *see* Patricia A. McCoy & Susan M. Wachter, *Why The Ability-To-Repay Rule Is Vital To Financial Stability*, 108 GEO. L.J. 649, 649 (2020) (asserting that the "ability-to-repay rule acts as a circuit breaker that will help prevent poorly underwritten loans from fueling a future bubble in housing prices that creates the risk of financial collapse").

89. Dodd-Frank, 15 U.S.C. § 1639c(a); 12 C.F.R. § 1026.43(c)(4).

90. 12 C.F.R. 1026.20(d).

91. *See id.*

92. *Id.* §1026.43(c)(3)–(4).

93. *See id.* § 1026.43(c)(3)(i), (c)(4) (noting the verification requirements).

94. *Id.* § 1026.43(e)(2), (e)(4).

95. *Id.* § 1026.43(e)(2)(i).

96. *Id.* § 1026.43(e)(2)(ii).

97. *Id.* § 1026.43(e)(3).

98. *Id.* § 1026.43(e)(2)(v); Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): General QM Loan Definition, 85 Fed. Reg. 86,308, 86, 308 (Dec. 29, 2020) (to be codified at 12 C.F.R. pt. 1026) ("For General QM's, the ratio of the consumer's total monthly debt to total monthly income . . . must not exceed 43 percent.").

loans with prepayment penalties even if fixed rate, over ones without.[99] In no case may lenders finance worthless credit or other insurance.[100] New rules also require homeownership counseling.[101] And, this is telling of the practices pre-crisis, for loan soundness, the CFPB rules require that the property is appraised before any deal is closed for higher priced loans,[102] and that the appraiser adhere to industry standards in preparing a report, including inspecting the interior of the property.[103]

To make the loan process less opaque, the CFPB substituted the long-used, but sometimes inscrutable federal mortgage forms, the HUD-1 Settlement ("HUD-1") and Truth-in-Lending Disclosure ("TIL") statements, with two plain-speaking more accessible forms — the Loan Estimate and Loan Closing Disclosure Statement.[104] The amendments also prohibited deceptive advertising, banned lenders and brokers from influencing appraisers, and barred servicers from engaging in unfair servicing practices related to fees and billing.[105]

C. Control of Government-Sponsored Enterprises by the Federal Housing Finance Agency

The crisis could not have caught on without the support from GSEs.[106] Fannie Mae and Freddie Mac, although government-chartered, acted as any other profit-seeking entity. At their peak, they amassed investment

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99. 12 C.F.R. §§ 1026.43(g)(1)(ii)(A); 1026.43(g)(3).

100. *Id.* § 1026.36(i). Before Dodd-Frank, it was common to charge steep premiums for unnecessary credit life insurance and to finance these premiums as part of the mortgage loan.

101. *Id.* § 1026.34(5); *see id.* § 1026.36(a)(5). There are also prohibitions on: 1) compensation to loan originators by persons other than the borrower, *id.* § 1026.36(d)(2); 2) the payment of a "yield spread premium" to brokers for selling high-cost loans to borrowers, *id.* § 1026.36(d)(1); 3) the steering of borrowers into certain loans, *id.* §1026.36(e); 4) the mandatory arbitration and waivers of consumer rights, *id.* §1026.36(h); and 5) the making of negative amortization loans to first-time borrowers without counseling, *id.* § 1026.36(k).

102. *See id.* § 1026.35(a)(1) (defining "higher-priced mortgage loan").

103. *Id.* § 1026.35(c)(3).

104. *See TILA-RESPA Integrated Disclosures*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/tila-respa-integrated-disclosures (last visited Nov. 20, 2021) (linking the Loan Estimate Form and the Closing Disclosure Form).

105. *See* Green, *Testing*, *supra* note 2, at 492; Linda Singer et al., *Breaking Down Financial Reform: A Summary of the Major Consumer Protection Portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 14 J. CONSUMER & COM. L. 2, 4–6 (2010).

106. *See* INT'L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT 111, 131 (2011); *see also* Theresa R. DiVenti, *Fannie Mae and Freddie Mac: Past, Present, and Future*, 11 CITYSCAPE: J. POL'Y DEV. & RES. 231, 231–33 (2009).

portfolios of more than $1.5 trillion. Because the portfolios were undiversified, consisting almost entirely of home mortgages and securities backed by them, the GSEs were particularly vulnerable in the crisis, as more than twenty percent of these mortgages were in default.[107] HERA was enacted to avert their impending collapse. HERA created the Federal Housing and Finance Agency ("FHFA"), to oversee and essentially control GSE's business activities and determine what other activities they would be allowed to engage in, what assets to hold, and what capital to reserve.[108] No sooner than it was created, the FHFA placed Fannie Mae and Freddie Mac in "voluntary" conservatorship to shield them from claims and to monitor their activities.[109]

III. RISE OF NON-BANKS IN HOME PURCHASE FINANCE

The post-crisis regulatory constraints on banks, seem to have provided the opening for "shadow banking,"[110] that is, financial transactions by "non-banks."[111] The precarious fiscal state of commercial banks, along with Dodd-Frank's heightened capital requirements crippled many banks' ability to lend.[112] Many retreated from the loan origination market altogether, thinking that the industry was too costly,[113] especially because of new regulations requiring lenders to have some skin in the game by holding onto some of their loans on their balance sheets and the new liquidity requirements.[114] These constraints seemed to make loan origination

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107. GLOBAL FINANCIAL STABILITY REPORT, *supra* note 106, at 12; *see also* Green, *Testing*, *supra* note 2, at 480.

108. Green, *Testing*, *supra* note 2, at 483 (describing the expansive role of the FHFA to prevent the GSEs from accumulating debt).

109. In *Testing*, I recount how after the conservatorship was imposed, the missions and policies of Fannie Mae and Freddie Mac changed — from that of making housing available to the greatest number, to a matter of self-preservation, with sometimes heart-rendering impacts on the hapless borrowers, whose mortgages were bought and foreclosed by the GSEs. *See id.* at 495.

110. "*Shadow banking*" has alternative meanings. In some contexts, it refers "to the funding of loans through securities markets instead of banks — or to the funding of banks through securities markets instead of deposits." EDWARD V. MURPHY, CONG., RSCH. SERV., R43087, WHO REGULATES WHOM AND HOW? AN OVERVIEW OF U.S. FINANCIAL REGULATORY POLICY FOR BANKING AND SECURITIES MARKETS 9 (2013). In other contexts, it "refer[s] to financial activity that is ineligible for a government backstop," i.e., deposit insurance and access to the Federal Reserve's discount window. *Id.*

111. *Id.* at 21.

112. AMIN RAJAN, THE RISE OF PRIVATE DEBT AS AN INSTITUTIONAL ASSET CLASS 3 (2015).

113. *Id.* at 4; *see also* Morris-Levenson et al., *supra* note 78, at 2, 7 (making the connection between the decline of banks in the loan origination markets and Dodd-Frank capital and liquidity requirements).

114. *See* Morris-Levenson et al., *supra* note 78, at 7 (detailing the effects of the

economically unprofitable, since the higher capital requirements meant lost business opportunities as less funds were available for lending.[115] With lower loan-to-value ratios, tightened underwriting standards, and the absence of government agency guarantees,[116] it seemed safer to stay out of the business altogether rather than risk liability for regulatory lapses.[117] The retreat occurred more often by larger banks[118] creating a perfect entry point for non-banks.[119] Non-banks took advantage of historically high yields and acquired "legacy residential mortgage exposure at very high levels."[120]

As the term suggests, non-banks are not depositary institutions, thus their operations are not at the core of bank regulation. Yet, they have a presence in all aspects of the credit markets, from mortgage loan origination to payday lenders.[121] Their sui generis character makes them ineligible for government guarantees, such as deposit insurance, and the Federal Reserve's emergency discount window. As I discuss below, the very fact that they are untethered from the traditional banking system, should prompt us to look for meaningful reins.

A. Novel Business Models: A Janus Effect

NDNBs are "two-faced," but not something altogether ugly, as that term suggests. Instead, the increased market liquidity and diversity of funding sources aligns well with current financing philosophy and promises to allocate risks to investors more efficiently. The technology-driven business models that obviate the need for brick-and-mortar establishments, and

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liquidity coverage ratio).

115. *See id.*at 7–8.

116. Joshua Anderson & Tom Collier, *Earning an Illiquidity Premium in Private Credit*, PIMCO (July 7, 2015), https://www.pimco.com/en-us/insights/investment-strategies/featured-solutions/earning-an-illiquidity-premium-in-private-credit/.

117. *See* Buchak et al., *supra* note 60, at 2 (suggesting the path for the entry of fintech was made by the retreat of banks from the market); *see also* Julapa Jagtiani & Catharine Lemieux, *Fintech Lending: Financial Inclusion, Risk Pricing, & Alternative Pricing* 2, 22–23, 26, 38 (Fed. Rsrv. Bank of Chi., Working Paper No. 17-17, 2017) (noting that the use of novel algorithms and data sources risks diverging regulations); Kathleen Pender, *Why Big Banks are Losing Out to Nonbank Lenders in Mortgages*, S.F. CHRON., https://www.sfchronicle.com/business/networth/article/Why-big-banks-are-losing-out-to-nonbank-lenders-6106027.php (last updated Feb. 28, 2015).

118. Morris-Levenson et al., *supra* note 78, at 2.

119. Anderson & Collier, *supra* note 116, at 3.

120. *Id.*

121. *See* Stanley Fischer, Vice Chairman, Bd. of Governors of the Fed. Rsrv. Sys., Speech at the Central Banking in the Shadows: Monetary Policy and Financial Stability Postcrisis, 20th Annual Financial Markets Conference: Nonbank Financial Intermediation, Financial Stability, and the Road Forward (Mar. 30, 2015), https://www.federalreserve.gov/newsevents/speech/fischer20150330a.htm.

humans for that matter, are very twenty-first century. They have been dubbed "fintech"[122] as they employ digital tools that operate autonomously and are thought to produce greater efficiencies for the entity and ease of use for customers.[123] While there will be some losses from the lack of human judgment in transactions, fintech's use of alternative metrics for assessing risk has made home financing more available to a different cohort of borrowers — those who appear under traditional criteria to be financially marginal, but under eccentric gauges, not.[124]

These same characteristics might describe the other, perhaps dark side of NDNBs — in particular their growing market and their heavy reliance on the FHA to insure their loans.[125] In 2020, of the top five lenders, three were non-banks, Quicken Loans, United Wholesale Mortgage, and Penny Mac.[126] The market share of non-banks rose nearly three-fold from fourteen percent in 2008 to over fifty percent in 2017.[127] The share continued to rise thereafter, from 58.9% in 2019 to 68.1% in 2020.[128] Non-banks sell most of their

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122. *See infra* Part III.B.

123. *See* Buchak et al., *supra* note 60, at 2–3 (stating that advances in technology allow fintech firms to save labor costs, utilize advanced screening processes for loan applicants, and provide better products and convenience to customers).

124. I discuss these new metrics *infra* text accompanying notes 133–39.

125. *See* You S. Kim et al., *Liquidity Crises in the Mortgage Market*, BROOKINGS PAPERS ON ECON. ACTIVITY, 348, 348 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/KimEtAl_Text.pdf (linking the number of lenders engaged with the FHA and VA to government vulnerabilities to nonbank lenders); Martin N. Baily et al., *The Origins of the Financial Crisis*, INITIATIVE ON BUS. & PUB. POL'Y AT BROOKINGS 14–15 (2008), https://www.brookings.edu/wp-content/uploads/2016/06/11_origins_crisis_baily_litan.pdf (identifying that "[i]n 2001 there were $2.2 trillion worth of mortgage originations with 65 percent of these in the form of conventional conforming loans and Federal Housing Administration (FHA) and Department of Veteran Affairs (VA) loans").

126. *See* Alicia Phaneuf, *The Growing Market Share of Nonbanks and Alternative Financing in the Online Mortgage Lending Industry*, BUS. INSIDER (Jan. 19, 2021, 10:40 AM), https://www.businessinsider.com/alternative-nonbank-mortgage-lending; John Bancroft, *The Battle for Origination Supremacy: Nonbanks at 63% Market Share*, INSIDE MORTG. FIN. (Jun. 25, 2020), https://www.insidemortgagefinance.com/articles/218443-the-battle-for-origination-supremacy-nonbanks-at-63-market-share. *See generally* Kayla Shoemaker, *Trends in Mortgage Origination and Servicing: Nonbanks in the Post-Crisis Period,* 13 FDIC Q. 51 (2019), https://www.fdic.gov/bank/analytical/quarterly/2019-vol13-4/fdic-v13n4-3q2019-article3.pdf (discussing mortgage trends since the 1970s).

127. *See* Kathryn Fritzdixon, *Bank and Non-bank Lending Over the Last 70 years*, 13 FDIC Q. 31, 34 (2019), https://www.fdic.gov/bank/analytical/quarterly/2019-vol13-4/fdic-v13n4-3q2019-article1.pdf; *see also* Pedro Gete & Michael Rehr, Mortgage Securitization and Shadow Bank Lending 1, 4 (June 2020) (unpublished manuscript), https://ssrn.com/abstract=2921691 (discussing the market share of nonbanks in mortgage origination).

128. Orla McCaffrey, *Nonbank Lenders Are Dominating the Mortgage Market*, WALL

mortgages to the GSEs, since nearly eighty percent carry FHA insurance, which makes them eligible for purchase.[129] As market shares have increased, the requirements on the borrower's side of financing have changed — the average down-payment has dropped to 11.4% from 20%[130] and FICO scores have dropped to a median of 710 out of 850,[131] very close to the subprime cutoff.[132]

B. How the Fin-Tech Non-Banks Operate

As the term suggests, fintech is computer-driven technology with standards and protocols for manipulating and transmitting data.[133] These firms use complex algorithms that purport to assess credit risk, based on an analysis of a variety of data — from citizenship or residence status, social security accounts, and bank account records.[134] While FICO scores factor prominently in this assessment, instead of a credit score,[135] non-banks assign the would-be borrower a credit grade,[136] which is calculated based on the

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ST. J. (June 22, 2021, 9:11 AM), https://www.wsj.com/articles/nonbank-lenders-are-dominating-the-mortgage-market-11624367460.

129. As an example, by the end of 2017, the non-bank share of Ginnie Mae's purchases was nearly 60%. Kim et al., *supra* note 125, at 352.

130. Sara Ventiera, *Where Buyers Are Making the Lowest — and the Highest — Down Payments*, RELATOR.COM (Mar. 18, 2020), https://www.realtor.com/news/trends/lowest-down-payment-cities/. This is explained in part by the FHA loan insurance that allows down-payments as low as 3.5%. *See* 12 U.S.C. § 1709(b)(9)(A).

131. *What's the Average Credit Score in America?*, CAPITALONE (June 10, 2021), https://www.capitalone.com/learn-grow/money-management/average-credit-score-in-america/ (reporting an average FICO score of 710 for 2020). FICO scores are plotted on a scale of 300 to 850 points. Kevin Outlaw, *What is a Good FICO Score?*, BANKRATE (Jan. 11, 2017), https://www.bankrate.com/finance/credit/what-is-good-fico-score.aspx.

132. Eight years after the crisis, the Federal Reserve Bank of Cleveland reported that the subprime loan was back; in 2014 26% of FHA loans originated from FICO scores under 660, with 40% between 661–700, which is "near-pime." Marshall Lux & Robert Greene, *What's Behind the Non-Bank Mortgage, Boom?* 22 (Harv. Kennedy School, Mossavar-Rahmani Ctr. for Bus. & Gov., Working Paper No. 42, 2015), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/42_Nonbank_Boom_Lux_Greene.pdf.

133. *See* J. Christina Wang, *Technology, the Nature of Information, and FinTech Marketplace Lending* 2 (Fed. Rsrv. Bank of Bos., Working Paper No. 18–3, 2018), https://www.bostonfed.org/publications/current-policy-perspectives/2018/technology-nature-of-information-fintech-marketplace-lending.aspx (explaining how Fintech platforms operate).

134. *Id.*

135. Credit scores are compiled by the three credit bureaus and are used by the GSEs in mortgage lending.

136. Wang reports that fintech company, Lending Club, assesses credit risk using up to 35 subgrades. Wang, *supra* note 133, at 10. She goes on to comment on studies that show that these subgrades are seen as an accurate measure "of the relative credit risk, as evidenced by its rising and now high correlation with the average ex-post default loss

same factors used by banks, but also on atypical things, such as information collected from social media accounts, which are used to confirm basic information on a loan application, such as employment.[137] Perhaps most concerning about the use of social media data is the idea that it helps these non-banks to discern the would-be borrower's "character."[138] If this is meant to refer to the borrower's willingness to pay her debts as inferred from payment records, it is of no significance. But, if this is meant to discern political leanings or cultural affinities, then that is a different matter. For the lay person, the correlation between social media and credit responsibility is not obvious, but fintech quants who think in terms of game theory or regression analysis find this information compelling. The idea is that the cold, dispassionate algorithms operate to assess a borrower's likely propensity for honesty and responsibility, without the influence of human bias.[139] To be sure, human assessment can tilt either way — to deny access to credit, either intentionally or subliminally.[140] However, while an automated lending system may not be influenced by implicit biases, it may overlook a case for sympathy, exception, or context.

C. The Regulation of Non-Banks

Should we worry about rise of non-banks in the mortgage loan origination market? The same impetus — regulatory myopia, cupidity for lenders and investors, and naiveté by both borrowers and lenders — that led to increased regulation of banks following the crisis should animate responses to non-banks. This concern was raised by the previous Vice Chairman of the Federal Reserve, Stanley Fischer, when he pointed to the non-banking sector as a potential weak link in the chain of sound market transactions.[141] In

rate." *Id.* at 11; Julapa Jagtiani et. al, *Fintech Lending and Mortgage Credit Access* 24–25 (Fed. Rsrv. Bank of Phila., Working Paper No. 19-47, 2019), https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2019/wp19-47.pdf.

137. Wang, *supra* note 133, at 13.

138. *Id.* at 13 n.26. In fact, Wang reports that in 2011 through 2012, Lending Club relied so heavily on its algorithms for deriving credit grades that it essentially ignored credit data, such as income, employment status, and length of employment provided by the loan applicants. *Id.* at 12.

139. *Id.* at 14.

140. *See* Jagtiani et. al, *supra* note 136, at 4, 11 ("In fact, . . . fintech lenders discriminate less than traditional, face-to-face lenders.").

141. Fischer, *supra* note 121, at 1–2. Fischer highlighted the case of New Century, the second-largest non-bank originator, which collapsed and set in motion waves of disruptions throughout the financial industry. Even before the crisis, non-banks were subject to the existing Truth in Lending Act standards and the Fair Debt Collection Practices Act; however, these laws proved ineffective in avoiding unfair and unsafe lending. *See* Eric S. Belsky & Nela Richardson, Understanding the Boom and Bust in Nonprime Mortgage Lending 107 (Sept. 2010) (unpublished manuscript),

enacting Dodd-Frank, Congress had some awareness of this vulnerability and the need for shoring up, but not subjecting non-banks to specific capital requirements.[142] Instead, it named non-banks as "covered persons,"[143] which by focusing on the particular activities in which they engage, their enterprise comes under federal scrutiny for market risk,[144] bringing both banks and non-banks into alignment for purposes of consumer protection regulations.[145]

Yet, even knowing the CFPB is watching, some non-banks still cross the line. Recently, two mortgage companies were caught defrauding potential

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https://www.jchs.harvard.edu/sites/default/files/ubb10-1.pdf; Michael Flaherty & Howard Schneider, *U.S. Regulators Struggle in Effort to Tackle Shadow Banking*, REUTERS (Apr. 1, 2015, 1:31 PM), https://www.reuters.com/article/us-usa-fed-shadow banks/u-s-regulators-struggle-in-effort-to-tackle-shadow-banking-idUSKBN0MS51X 20150401; Ryan Tracy, *SEC Official: 'Not Clear' Bank Regulation Has Made Economy Safer*, WALL ST. J. (Apr. 1, 2015), http://blogs.wsj.com/moneybeat/2015/04/01/sec-official-not-clear-bank-regulation-has-made-economy-safer (reporting that "Fed Vice Chairman Stanley Fischer floated several ideas for regulating shadow banks, some of which might take SEC action to implement"); *see also* U.S. TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITY: ASSET MANAGEMENT AND INSURANCE 63 (2017); IRIS H.Y. CHIU ET AL., RESEARCH HANDBOOK ON SHADOW BANKING: LEGAL AND REGULATORY ASPECTS 7 (Iris H.Y. Chiu & Iain MacNeil eds., 2018) (mentioning generally what shadow banking is and the regulatory challenges that come with it); Yesha Yadav, *Too Big to Fail Shareholders*, 103 MINN. L. REV. 587, 589–91 (2018) (discussing the overall "scant" regulatory attention given to banks).

142. *See* KARAN KAUL & LAURIE GOODMAN, NONBANK SERVICER REGULATION 3 (2016), https://www.urban.org/sites/default/files/publication/78131/2000633-Nonbank-Servicer-Regulation-New-Capital-and-Liquidity-Requirements-Don%27t-Offer-Enough-Loss-Protection.pdf (noting how nonbanks "have not been subject to the same level of supervisory financial regulation and capital requirements" as larger banks).

143. Under 12 U.S.C. § 5514(a)(1)(C), the CFPB has the authority to supervise any covered person it "has reasonable cause to determine, . . . is engaging, or has engaged, in conduct that poses risks to consumers concerning offering or provision of consumer financial products or services." This authority extends to

> (1) nonbank covered persons of any size that offer or provide: (a) origination, brokerage, or servicing of loans secured by real estate for use by consumers primarily for personal, family or household purposes, or loan modification or foreclosure relief services in connection with such loans, (b) private education loans, and (c) payday loans; and (2) 'larger participant[s] of a market for other consumer financial products or services, as [the Bureau defines] by rule . . . .'

Procedural Rule To Establish Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determinations, 78 Fed. Reg. 40,352 (July 3, 2013) (to be codified at 12. C.F.R. pt. 1091).

144. *See* CONSUMER FIN. PROT. BUREAU, 2014 CFPB DODD-FRANK MORTGAGE RULES READINESS GUIDE 3–7 (3d ed., 2014), https://files.consumerfinance.gov/f/201409_cfpb_readiness-guide_mortgage-implementation.pdf (providing a list and interpretation of newly enacted mortgage loan origination and servicing rules).

145. *See* U.S. TREASURY, REFORMING WALL STREET PROTECTING MAIN STREET 9 (2012), https://www.treasury.gov/connect/blog/Documents/20120717_DFA_FINAL.pdf (displaying a graphic showing both nonbanks and traditional banks under enhanced federal supervision).

customers, service members and veterans with intentionally distorted advertising regarding the company's VA guaranteed loans.[146] One company advertised credit terms it had no intention of offering, while failing to clearly disclose the terms of the loans it did provide.[147] In refinancing loans, the company misrepresented how much cash it was willing to give.[148] The other company falsely characterized adjustable rate loans as fixed rate to get borrowers to apply and falsely represented that impossibly low FICO scores would qualify for the best interest rates.[149] The company's advertisements also falsely implied that it was a government affiliate.[150]

IV. EMERGING NEW MODELS FOR HOME PURCHASE FINANCE

A. Installment Land Contracts

Leaving non-banks' practices for the moment, let us go on to discuss the alternative models — some old and venerable and some novel — being employed by these entities to assist in achieving home ownership. The use of installment loan contracts for a home purchase is not new, but what is new is using them to repurchase homes lost in foreclosure during the housing crisis. Despite a long history in property law, these devices became very popular after the 2008 crisis, when speculators were buying up properties at foreclosures as an investment strategy.[151] An "installment land contract," also known as a "contract for deed," had long-been viewed as an attractive financing device for those with poor credit or who are unable to save the

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146. *CFPB Settles with Two Mortgage Companies Over Misleading VA Loan Advertisements*, BUCKLEY (Aug. 25, 2020), https://buckleyfirm.com/blog/2020-08-25/cfpb-settles-two-mortgage-companies-over-misleading-va-loan-advertisements#page=1.

147. *Id.*

148. *Id.* The ads violated CFPA, Mortgage Acts and Practices — Advertising Rule (MAP Rule), and Regulation Z. Both cases were settled. "In addition to a $260,000 civil money penalty, the consent order require[d] the company to enhance its compliance functions, [including] to designate a compliance official to review mortgage advertisements for compliance with consumer protection laws, and comply with certain enhanced disclosures requirements." *Id.* In the second case, in addition to a $150,000 civil money penalty, the consent order required the appointment of a compliance official to ensure mortgage advertisements comply with consumer protection laws. *Id.*

149. *Id.*

150. *Id.*

151. *See* Ryan Dezember, *After the 2008 Housing Crisis, a Lot of People Made Big Money Buying Up Foreclosed Homes and Renting Them Out — and It Shows One Response to a Financial Crisis*, BUS. INSIDER (Aug. 4, 2020, 9:20 AM), https://www.businessinsider.com/after-2008-housing-crisis-people-bought-and-rented-foreclosed-homes-2020-8.

traditional 20% down payment for a mortgage loan.[152] Crisis investors have taken advantage of the confluence of tightening credit and housing shortages to sell these newly foreclosed homes through the contract for deed at substantial markups over the foreclosure purchase price[153] and sometimes selling them back to the foreclosed owner. As with mortgage loan origination, some parties on the other side of these deals were targets for unscrupulous practices. African-American and Latino homebuyers,[154] those unsophisticated and inexperienced, have been the prime market for these deals.[155] Ostensibly innocuous devices, the contract for deed and the related rent-to-own scheme,[156] come with significant risks, all the while lacking the required disclosures (e.g., physical defects or the presence of lead paint) and limits on terms that come with mortgage financing (e.g., maximum interest rates, balloon payments, prepayment penalties, or protections in case of default).[157]

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152. *See* Cystal Myslajek, *Risks and Realities of the Contract for Deed*, FED. RSRV. BANK MINNEAPOLIS (Jan. 1, 2009), https://www.minneapolisfed.org/article/2009/risks-and-realities-of-the-contract-for-deed.

153. Fannie Mae has asserted that "the bulk sale program for hard-to-sell homes accounted for a small fraction of the 900,000 homes it has sold since the financial crisis," many of them run-down and sold at bargain prices. Matthew Goldstein & Alexandra Stevenson, *Market for Fixer-Uppers Traps Low-Income Buyers*, N.Y. TIMES (Feb. 20, 2016), https://www.nytimes.com/2016/02/21/business/dealbook/market-for-fixer-uppers-traps-low-income-buyers.html.

154. In *'Contract for Deed' Lending Gets Federal Scrutiny*, N.Y. TIMES (May 10, 2016), https://www.nytimes.com/2016/05/11/business/dealbook/contract-for-deed-lending-gets-federal-scrutiny.html, reporters Matthew Goldstein and Alexandra Stevenson, recount the case of Harbour Portfolio, which bought more than 6,700 single-family homes for an average of $8,000 each in Ohio, Michigan, Illinois, Florida, Georgia, Pennsylvania, and a handful of other states since 2010, for the purpose of reselling them by contract for deed. Most of the homes were burdened by mortgages held by Fannie Mae but sold in bulk after the crisis. *See also* JEREMIAH BATTLE ET AL., TOXIC TRANSACTIONS: HOW LAND INSTALLMENT CONTRACTS ONCE AGAIN THREATEN COMMUNITIES OF COLOR (2016); JAMES H. CARR ET AL., STATE OF HOUSING IN BLACK AMERICA (2016).

155. *See, e.g.*, Matthew Goldstein & Alexandra Stevenson, *How a Home Bargain Became a 'Pain in the Butt,' and Worse*, N.Y. TIMES (July 7, 2017), https://www.nytimes.com/2017/07/07/business/dealbook/how-a-home-bargain-became-a-pain-in-the-butt-and-worse.html (reporting on a 2017 suit filed by the Atlanta Legal Aid Society, against Harbour Porfolio, claiming that the firm "targeted African-American communities to sell contracts for deed on at inflated prices").

156. Discussed *supra* text accompanying notes 122–55 and *infra* text accompanying notes 157–89.

157. *See* Alexandra Stevenson & Matthew Goldstein, *Seller-Financed Deals Are Putting Poor People in Lead-Tainted Homes*, N.Y. TIMES (Dec. 26, 2016), https://www.nytimes.com/2016/12/26/business/dealbook/seller-financed-home-sales-poor-people-lead-paint.html (reporting that many of the homes sold by Harbour Portfolio were in severe states of disrepair). For an interesting discussion of the plight of homeowners in Detroit, among other cities, facing tax foreclosures, see Bernadette

For some foreclosed homeowners, buying back their property through an installment land contract is the only way of regaining homeownership, since the right to redeem the property at foreclosure, has been frustrated by rules adopted by the GSEs that prohibit not-for-profit entities from purchasing property in foreclosure on behalf of the foreclosed owner.[158] Legal challenges to these rules have all failed.[159] In other cases, would-be home buyers are unable to obtain a bank loan or come up with a down payment so they enter into a long-term contract for purchase.[160]

Despite their important role in facilitating home ownership for would-be buyers living paycheck to paycheck, installment land contracts are difficult to embrace warmly because they are fraught with risk on both sides of the transaction. However, these risks are primarily present on the buyer's side. While the buyer has the immediate right to possess, during the long executory period, so much could go wrong. The buyer having only equitable title, bears the risk of loss from casualties — acts of God and woman.[161] The seller, holding legal title could encumber it exposing the buyer to loss by a prior claimant.[162] Moreover, because the buyer is usually charged with maintaining the property, in case of a default, as traditionally conceived, she stands to lose everything — all the payments, all the improvements and all the appreciation in value. Additionally, the usual forfeiture clauses mean no restitution.[163] In the case of purchasers of foreclosed properties, there were

Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosure*, 9 U.C. IRVINE L. REV. 847 (2019) (reporting on a study of tax assessments in Detroit, during the period after the housing crisis of 2008, showing that from 2011 to 2015, Wayne County, Michigan foreclosed on approximately 100,000 Detroit properties for unpaid property taxes, which was more than a quarter of all properties in the city); *see also* Bernadette Atuahene, *Predatory Cities*, 108 CAL. L. REV. 107 (2020) (describing how through practices such as improper tax assessments, many cities are systematically and illegally, taking property from residents only to vest in public coffers).

158. *See* Green, *Testing*, *supra* note 2, at 500.

159. *See* Green, *Testing*, *supra* note 2, at 530–31.

160. *See* Amy Fontinelle & Rachel Witkowski, *Land Contract: What It Is & How It Works*, FORBES (May 25, 2021), https://www.forbes.com/advisor/mortgages/what-is-a-land-contract/ (explaining how these contracts work and how a would-be home buyer can still move towards home ownership without the same challenges of traditional home purchasing).

161. SARAH MANCINI & MARGOT SAUNDERS, LAND INSTALLMENT CONTRACTS: THE NEWEST WAVE OF PREDATORY HOME LENDING THREATENING COMMUNITIES OF COLOR 10 (2017), https://www.bostonfed.org/home/publications/communities-and-banking/2017/spring/land-installment-contracts-newest-wave-of-predatory-home-lending-threatening-communities-of-color.aspx.

162. *Id.*

163. *Id.* (explaining that without a clause providing protections otherwise, a buyer's default leads to "punitive forfeiture of all amounts paid").

additional worries about the properties' physical condition. These sales are typically "as is," and with no right to inspect other than from the sidewalk, putting the risks of defects and the restoration burden on the buyers. Finally, as buyers under contracts for deed often fail to record their contracts, they are at risk of losing all of their investments to a subsequent purchaser without notice of the contract.

But the general evolution in the law as it pertains to deals in real property, such as the implied warranty of habitability in landlord-tenant relations and the abandonment of caveat emptor in favor of disclosures by sellers of defects, has not entirely bypassed parties to installment land contracts. Indeed, in the last several decades, there has been a steady movement to reconceptualize the contract for deed away from that of an executory contract toward one that comports more with its essence, a conveyance of an interest in land.[164] After all, the buyer in possession with the contractual obligation and self-interest to maintain it and pay taxes, looks very much like an owner.[165]

Looking to the essence of that deal, then employing a legal fiction based on the maxim that *equity regards substance and not form*, courts and legislatures are treating the former vendor/vendee relationship as a mortgagor/mortgagee relationship, with the seller retaining the legal title, merely for purposes of security — just like a mortgage. As a mortgagee, the vendee becomes required to extinguish the vendee's interest, not simply by declaring a default and forfeiture, but by foreclosure.[166] Just as in the traditional mortgage context, a foreclosure by sale is hoped to generate a sum to compensate the vendor for what remains on the debt and possibly to create a surplus, which would go to the vendee. Even as some courts do not reconceptualize the nature of the parties' transaction, they apply contract tools and equitable powers to reach a fair and equitable result.[167] Rather than

164. Fontinelle & Witkowski, *supra* note 160 (highlighting the importance of negotiating for protection clauses and other provisions to safeguard the buyer's property interest).

165. Sometimes contract for deed programs are successful. Two programs, one in Minnesota, Bridge to Success, and one operating in sixteen states, Battery Point Financial, buy properties in foreclosure to resell by contracts for deed. Both Bridge to Success, which utilizes pre-purchase counselling, and Battery Point Financial, which rehabilitates homes and sells them under 20-year contracts, comply with CFPB regulations for high-cost mortgages.

166. *See, e.g.*, Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973) (finding it inequitable, that, if forfeiture were to be enforced, the defaulting defendants would lose over half of their purchase price and the right to possess the home); Bean v. Walker, 464 N.Y.S.2d 895 (App. Div. 1983) (reversing the lower court's holding that the defaulting vendee lacked rights); Eric T. Freyfogle, *Vagueness and the Rule of Law: Reconsidering Installment Land Contract Forfeitures*, 1988 DUKE L.J. 609 (1988).

167. Associated Bank-Milwaukee v. Wednt, No. 00-0483, 2001 Wisc. App. LEXIS

allow forfeiture, courts permit a beleaguered vendee to cure a default; some vendees may be awarded restitution of amounts paid in excess of the land value.[168] Some borrowers may be entitled to reinstatement of the contract after default by paying what was owed at the time.[169] These inventions were long-coming and reveal a much needed reform in the law. Yet, because they only operate after the deal has been consummated and performance is well underway, they do little to help the naïve borrower before undertaking the obligation in the first place.[170]

B. Rent to Own and Seller Financing

In a rent to own model of home purchase finance, tenants/buyers have the option to purchase the home they are renting from the landlord/seller, usually within a specified amount of time. This arrangement gives the tenant/buyer an opportunity to see the value of the home and neighborhood up close and operates as a hedge increases in home prices. It is one of the few home purchase options for renters with less than stellar credit. Typically, the rent payments will be applied as a down payment on the home and the renter will seek a traditional mortgage for the balance.[171] Sometimes, the seller offers to finance the purchase with the renter signing a promissory note, along with a purchase money mortgage, in favor of the seller.[172]

On the surface, rent-to-own plans seem to be a good thing, but more often than not, they serve to pass off a property otherwise unsellable because of its physical condition. That was the case in *Rainbow Realty Group, Inc. v. Carter.*[173] There, Cress Trust offered four alternatives to consumers interested in its housing stock: "straight sale, straight rental, land contract,

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192, at *3 (Wis. Ct. App. Feb. 7, 2001) (stating that "foreclosure actions are subject to equitable considerations").

168. *See, e.g.*, Peterson v. Hartell, 707 P.2d 232 (Cal. 1985); Rosewood Corp. v. Fisher, 263 N.E.2d 833 (Ill. 1970).

169. *Peterson*, 707 P.2d at 234 (holding that even after a willful default, a vendee can redeem her right to the property by making all payments due); *Rosewood*, 263 N.E.2d at 837–40 (holding that the Forcible Entry and Detainer statute does not apply to purchasers under land sale contract).

170. The FHFA is conducting a review of some of the terms of deals between investors and purchasers of GSE property, and the CFPB has begun to look into consumer protection violations by these companies. This could result in Fair Housing Act violations if the investors are targeting a particular cohort based on race or ethnicity and if the forfeiture provisions operate to make housing unavailable. *See Fannie Targets 'Abusive Seller Financing' Sales*, DAILY REAL EST. NEWS (May 25, 2017), https://www.iprore.com/news/fannie-targets-abusive-seller-financing-sales.

171. Jean Folger, *Rent-to-Own Homes: How the Process Works*, INVESTOPEDIA, https://www.investopedia.com/updates/rent-to-own-homes/ (last updated Oct. 12, 2021).

172. *Id.*

173. 131 N.E.3d 168 (Ind. 2019).

and rent-to-buy contract."[174] A married couple with a good monthly income but a poor credit history entered into the "rent-to-buy contract," signing a "Purchase Agreement Rent to Buy Agreement," for a single-family house.[175] The agreed price was $37,546, payable at $549 per month to be paid over the course of thirty years with 16.3% interest.[176] Under the agreement, the couple took the property as is, acknowledging that it was not in "livable condition," that it was their responsibility to "make it habitable" prior to moving in, and that their renovations and improvements would thereafter be considered attached to the real property.[177] The agreement stated that the parties intended to execute the sale and clarified that the payments for the first twenty-four months would be considered "rental payments."[178] After these payments, a "Conditional Sales Contract (Land Sale)" would be entered into for twenty-eight years.[179] The house was in miserable condition — toilets were missing, plumbing and electric wiring were defective; there were no door locks; windows were broken; the basement stairs were unusable; and carpets were destroyed beyond repair.[180] There was virtually no flooring; trash was everywhere and animals had taken up nests inside.[181] When the couple failed to make payments as agreed, Cress Trust sued to evict in small-claims court.[182] The couple counterclaimed, alleging injury from Cress Trust's failure to make the premises habitable as required by the landlord-tenant statute.[183] The trial court ruled for defendants on the counterclaim, but the court of appeals reversed.[184] The Indiana Supreme Court agreed with the trial court. It explained that even though the agreement was designated "a contract" and contained attributes of a contract of sale — stating the home was purchased "as is," with no warranty of condition, and labeling the transaction a "sale" — the form and labels did not determine the legal status of the deal.[185] The court observed that if the agreement were a contract of sale, the couple were homeowners and thus, not subject to eviction in small-claims court, where the landlord brought its action.[186] Most

174. *Id.* at 171.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* 171–72
181. *Id.*
182. *Id.* at 172.
183. *Id.*
184. *Id.*
185. *Id.* at 173.
186. *Id.*

telling was that the agreement referred to "rental payments" for the first 24 months, which the landlord was entitled to keep on eviction.[187] Because a landlord-tenant relationship had arisen, the landlord had a duty to make the premises habitable.[188] The result in this case was an enlightened one, but there may be many other courts who are less sympathetic, leaving the renter/owner at the mercy of the deal they made.

C. Alliances and Joint Ventures Between the Borrowers And Financers

As the above discussion shows, the primary attractive feature of installment land contracts and the rent-to-own arrangements is that they facilitate initial entry into homeownership. Nevertheless, there are discernable limits on that ownership. For the installment land contract, the buyer holds only an equitable title until the full purchase is paid. In the case of rent-to-own agreements, the renter holds only an option to buy if she is somehow later able to find traditional financing. The new models discussed below purport to help the buyer acquire full and immediate title. However, the investments made by NDNBs may result in novel claims and rights that may not fit within the existing taxonomy of ownership rights. Below, I discuss specific NDNBs in turn and offer an analysis of their shape and content later.

i. Fleq

The Fleq™ website states: "You get one life. Own it. At Fleq, we believe home ownership is attainable without a large down payment. Without difficult credit standards. Without taking on massive amounts of debt. And without long-term commitments."[189] Fleq is just one of a growing number of NDNBs that have emerged since the 2008 housing crisis.[190] On their face, these firms seem to achieve the twin goals of homeownership with little risk. The name, Fleq, suggests its model: "flexible" and "equity."[191] It "partners" with homebuyers into an "alliance" to purchase a home,[192] making the homebuyer both owner and tenant. The process of acquiring a home and

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187. *See id.* at 172.

188. *Id.* at 177.

189. FLEQ, https://fleq.com/ (last visited Nov. 20, 2021).

190. *See* Kelsey Ramirez, *Startup Explains Its New, No-Mortgage Homeownership Model*, HOUSINGWIRE (Jan. 6, 2020), https://www.housingwire.com/articles/startup-explains-its-new-no-mortgage-homeownership-model/ ("Many firms are trying to improve the affordability of homes and the attainability of mortgages . . . .").

191. *See* FLEQ, *supra* note 189.

192. *Id.*

forming the alliance is described in these steps.

- The would-be homebuyer finds a home, sometimes using a broker recommended by Fleq.
- Credit and background checks are made, then Fleq forms an "alliance" with the homebuyer. The costs — the monthly payment, which is comprised of rent, ownership costs, and fees, and the initial equity contribution to the alliance — are calculated, an appraisal is ordered, and an inspection of the property's physical condition is conducted.
- The respective percentages of ownership are determined as well as the amounts required for increasing those shares, but rent paid by the homebuyer cannot be used to acquire additional equity in the home.
- After payments of the initial equity contribution, a membership fee and part of the closing costs, the purchase closes. [193]

D. Equity Sharing: The Spoils of Appreciation

In the equity sharing arrangement, a financer is an investor in the transaction and purchases a portion of the homeowner's equity. In return, the homeowner accepts a contractual limit on her equity appreciation. When the value of the property changes, there is a risk and reward trade-off for both the borrower/homeowner and the lender/investor.

i. How the New Equity Sharing Models Work

a. Haus

The Haus program, offering a "co-investment partnership," is available to both current homeowners (for tapping into homeowner equity) and would-be homebuyers.[194] Like other "co-investors," Haus advertises that the funds are not a mortgage or debt but an investment in the home.[195] These are the components of the Haus model:

- After approval, Haus determines how much the buyer must initially put down and funds the balance of the purchase price.
- The buyer makes monthly payments to buy back the equity from Haus.
- The monthly payments include the "monthly equity purchase, a fee, homeowners' insurance, and property taxes." The

193. *Id.*; Ramirez, *supra* note 190. Fleq may further assist the homebuyer in managing title issues, arranging for homeowner's insurance, and setting up escrows.

194. HAUS, https://haus.com/faq (last visited Nov. 20, 2021).

195. *Id.*

homeowner is free to increase the amount of equity payments during the term but must maintain a minimum percentage of ownership. The homeowner is allowed to "cash out," by selling back equity to Haus for personal use, and the monthly payment is adjusted accordingly.

- Payments are fixed for ten years.[196]
- After ten years, if the homeowner has bought back all of Haus's equity, the home is owned outright. If the homeowner has not purchased all of the equity, they can choose to renew the partnership, buy-out the remaining Haus equity, or sell the home to a third party.[197]

b. Noah

The newest fintech firm engaged in home purchase finance is Noah, another form of equity-sharing arrangement.[198] Noah's technological platform develops "a full financial profile of [its] homeowner partners," even for those in marginal financial circumstances, proclaiming itself the "the financing source of last resort."[199] Noah's prequalification process is not unlike that for traditional mortgage refinance, where the terms depend on the market value of the property, available equity, and the homeowner's credit standing. It is all done online through Noah's customer portal. The process is fast and can be completed in as few as fifteen days. Despite the outward similarities, Noah's financing is not secured by a "mortgage" on a home loan, rather it is described as a "debt-free investment agreement."[200] Homeowners do not make monthly payments or interest, but a one-time lump sum to Noah at any time during the relationship.[201] Noah uses a holistic approach, considering more than just an applicant's credit score, to determine the value and terms of the arrangement.[202]

Suppose Noah co-invests $100,000 in the purchase of a home, this is how

196. *Id.* Haus claims that, compared to a traditional mortgage, these payments are 30% less. *Haus Raises $7.1M to Bring Flexibility and Affordability to Homeownership*, BUSINESSWIRE (July 18, 2019, 11:17 AM), https://www.businesswire.com/news/home/20190718005549/en/Haus-Raises-7.1M-to-Bring-Flexibility-and-Affordability-to-Home-Ownership.

197. HAUS, *supra* note 194.

198. Benjamin Horney, *Home Equity Financing Fintech Noah Nabs, $150M In Funding*, LAW360 (April 22, 2020), https://www.law360.com/articles/1266276/home-equity-financing-fintech-noah-nabs-150m-in-funding.

199. *Id.*

200. *Id.*

201. *How it Works*, NOAH, https://www.noah.co/how-it-works (last visited Nov. 20, 2021).

202. *Id.*

the plan operates:

- It first determines the Adjusted Home Value.
- It then offsets risk through a valuation adjustment, which typically ranges from 10% to 20%.
- This adjustment reduces Noah's exposure to downturns and amplifies its returns in a rising market.
- As Noah's co-investment of $100,000 was contingent on receiving a 30% equity share, if the home's value increases to $1,343,916 at the end of the ten-year term, Noah's payout is $233,175; it's a gain of $133,175, at an annualized return on investment of 8.83%.[203]

c. Unison

Perhaps seeing what was over the horizon, Unison entered the home finance business in 2004, just before the worries about a crisis began to take shape. Like the GSEs and other private participants on the secondary market, Unison is funded by institutional investors, such as pension plans and university endowments.[204] It offers to "partner" with homebuyers, not by making a loan, but instead by making a co-investment in the buyer's home — such as by providing part of the down payment and sharing in the homes appreciated value.[205] The Unison partnership makes homeownership possible as it eases the down payment burden — the buyer paying as little as five percent, while Unison pays the balance of the traditional twenty percent.[206] The loan to value ratio (eighty percent) under the Unison model is the same as under the traditional borrowing scenario and Unison sets specific qualifications to ensure that the home is a good long-term investment that is likely to appreciate.[207] Unlike a mortgage, no interest is charged on Unison's down payment contribution, and the homebuyer does not make monthly repayments. Instead, Unison recoups its investment on

203. This is a hypothetical based on the Noah concept. *See also* Colin Robertson, *Noah: A Home Equity Sharing Product*, TRUTH ABOUT MORTG. (Apr. 1, 2020), https://www.thetruthaboutmortgage.com/noah-review-a-home-equity-sharing-product/ (explaining how the Noah model works).

204. *Where Does Unison Get Its Funds?*, UNISON (Mar. 20, 2019), https://www.unison.com/article/about-unison-funding.

205. Robert Farrington, *Unison Review: Uniquely Use the Equity in Your House*, COLLEGE INV., https://thecollegeinvestor.com/24159/unison-review/ (last updated Nov. 18, 2021).

206. Liz Brumer, *Unison Review: Capturing Home Equity Through Shared Appreciation*, MILLIONACRES (Nov. 20, 2019), https://www.fool.com/millionacres/real-estate-financing/unison-review-capturing-home-equity-through-shared-appreciation/ (last updated May 19, 2021).

207. *See id.*

the eventual sale of the home. In this partnership, Unison stays in the background, assuring the homebuyer that she is sole owner of the home and that Unison is merely an investor with "no rights of occupancy" or control.[208]

Besides enabling the initial purchase, Unison also helps homeowners tap into the equity of their existing homes. Unison will give cash for a part of the equity, in exchange for a percentage share of the home's future appreciation.[209] For example, Unison will convert up to $500,000 or 17.5% of a home's value to cash in exchange for a portion of its value when the homeowner decides to sell.[210] Unlike a home equity loan from traditional lender, the Unison "co-investment" does not encumber the property with more debt, nor does it require contemporaneous repayment as the cash out is only repayable at the end of the partnership agreement, which is the earlier of the sale of the home or thirty-years from signing. Unison is not in these deals for charity; instead, it may earn a substantial profit if the value of the home increases during the life of Unison's "investment."[211]

There are certain restrictions and tangential costs attached to both the "HomeOwner" and "HomeBuyer" programs. For instance, as part of the agreement, Unison sets a "Maximum Authorized Debt Limit," meaning that any future refinancing will be subject to limitations.[212] Homeowners must pay all third-party closing costs as well as a 2.5% origination fee[213] and are subject to periodic credit checks.[214]

d. Point

Point is another business model that invests in the equity of existing homes. While there are surface similarities to Unison in the sense that Point does not lend money, as would require monthly repayments, Point is different in several structural respects: buyout, caps on points return, and rights to rentals. These are the features of Point:

- Homeowners are required to own at least thirty percent of the

208. *How It Works for a Homeowner*, UNISON, https://www.unison.com/how_it_works_homeowner (last visited Nov. 20, 2021) ("If I partner with Unison, who owns the home? You own the home!").

209. Brumer, *supra* note 206.

210. *Id.*; UNISON, *supra* note 208.

211. Brumer, *supra* note 206; UNISON, *supra* note 208.

212. UNISON HOMEOWNER PROGRAM GUIDE 48 (2017), https://seekingalpha.com/uploads/2017/11/11/5068968/Unison_HomeOwner_Program_Guide.pdf.

213. Brumer, *supra* note 206.

214. Unison requires a certain FICO score, which is the same as a credit check. *Your Homeowner Questions Answered*, UNISON, https://www.unison.com/faq_homeowner (last visited Nov. 20, 2021). As another example, Hometap is an equity sharing company that is very similar to Unison. *The Smart Way to Tap into Your Home's Equity,* HOMETAP, https://www.hometap.com/ (last visited Nov. 20, 2021).

equity in the home.

- The homeowner has the right to buy out Point or pay off the investment by sale of the home at any time during the thirty-year term with no pre-payment penalty.
- Point's return is capped at a set amount, usually twenty-five to forty percent of the appreciation value.
- The homeowner has the right to rent out the property, upon payment of a "small rental premium" to account for any decreases in value of the home from wear and term from use, such as the natural depreciation from a renter's presence.[215]

ii. Other Alternative Financing Models

a. P2P Mortgage Loans

Peer-to-peer ("P2P"), lending helps homebuyers by making available loans from groups of individual lenders, who desire to help those that otherwise lack the means for accessing capital. In this respect, P2P lenders tend to operate in underserved markets — making loans to borrowers with marginal credit standing; even so, P2P loans typically carry lower interest rates than those charged by traditional lenders.[216] They are open to hearing the borrower's "story," which purports to capture all aspects of the borrower's circumstances as would allow a fully, and perhaps sympathetic assessment of the borrower's application for capital. This wide-ranging application process does come with the cost of a much slower procedure. P2P loans offer the flexibility of a "mix-and-match option," under which borrowers can use a P2P loan for the down payment and seek a conventional loan for the balance of the purchase price.[217] While reports show that more than thirty percent of Americans have used P2P lending, many banks are reluctant to accept P2P funds as a down payment on a conventional loan.[218] The reasons for this hesitancy are not clear. It seems that what might be the main concern, priority of claim, could easily be addressed by an agreement

215. *Most Popular FAQs*, POINT, https://help.point.com/collection/1-homeowner-faq (last visited Nov. 20, 2021); *see also* Hal M. Bundrick, *Shared Appreciation: Tapping Home Equity Without Taking a Loan*, NERDWALLET (Aug. 9, 2019), https://www.nerdwallet.com/blog/mortgages/shared-appreciation-tapping-home-equity-without-taking-out-a-loan/.

216. Bob Schneider, *Peer-to-Peer Lending Breaks Down Financial Borders*, INVESTOPEDIA (Jul. 25, 2019), https://www.investopedia.com/articles/financial-theory/08/peer-to-peer-lending.asp.

217. *Id.*

218. *See End of the IOU: P2P Payments the New 'Social Norm'*, BANK OF AM. (May 11, 2017), https://newsroom.bankofamerica.com/press-releases/consumer-banking/end-iou-p2p-payments-new-social-norm.

under which the P2P loan would be subordinate to the bank loan.[219] This is typically how these arrangements are handled. Ostensibly, P2P lending looks like purchase-money mortgages.[220]

While this form of lending is not necessarily a "non-debt" means of financing a home, it is certainly a non-conventional option.[221] The process can be compared to "crowdfunding," a popular platform used to invite contributions for sympathetic causes or to launch some invention.

iii. Novel Home Purchase Assistance Programs

a. "Alternative" iBuyers

As the homebuying experience can seem inscrutable at worse and time-consuming at best, companies have emerged to make the whole process worry- and stress-free. For customers needing to sell an existing home while looking to purchase a new one, Homeward is the answer. Acting for the homebuyer, Homeward purchases the new home, usually all-cash, while the customer hires an agent to sell the existing home.[222] In the interim, the customer enters into a lease with Homeward for the new home until the old home is sold (typically for periods up to six months).[223] The customer will acquire a new mortgage to purchase the new home from Homeward at the original price plus a two to three percent convenience fee, but this may vary

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219. *See* Frank Addessi, *The Risks and Rewards of P2P Lending*, SMARTASSET (Mar. 14, 2018), https://smartasset.com/personal-loans/the-risks-and-rewards-of-p2p-lending.

220. *See id.*; Jim Probasco, *P2P Mortgage Loans — A Growing Trend*, INVESTOPEDIA (Apr. 9, 2021), https://www.investopedia.com/articles/personal-finance/071515/p2p-mortgage-loans-growing-trend.asp.

221. Jean Folger, *5 Problems With Buying a House With a Friend as an Investment*, INVESTOPEDIA, https://www.investopedia.com/articles/investing/073015/5-common-problems-buying-house-friend.asp (last updated June 29, 2021), offers some caution for friends purchasing a home together: the credit status of the friends will be tied together; exiting the relationship may be difficult without a prior agreement; and the friendship may be tested as disagreements over use or transfer arise. *See also* Rachel Stults, *What to Do When Buying a House With a Friend — And Why You Probably Shouldn't*, REALTOR.COM (Jan. 27, 2016), https://www.realtor.com/advice/buy/how-to-buy-a-home-with-friends-and-why-you-probably-shouldnt/. For an example of a "successful" friendship buying experience, see a case detailed by Julie Beck, *The Case for Buying a House with Friends,* THE ATLANTIC (Dec. 13, 2019), https://www.theatlantic.com/family/archive/2019/12/how-buy-house-friends-without-going-crazy/603538/.

222. Mary A. Azevedo, *Homeward Secures $371M to Help People Make All-Cash Offers on Houses*, TECHCRUNCH (May 27, 2021, 9:00 AM), https://techcrunch.com/2021/05/27/homeward-secures-371m-to-help-people-make-all-cash-offers-on-homes/.

223. *Id.*

depending on location.[224] The whole process purports to be risk-free, as Homeward guarantees to purchase the old home at the predetermined price if it has not sold on the market within the period agreed to.[225] This guarantee appears to remove much of the risk of a stagnant market and helps the homeowner avoid having to take out a second mortgage loan while the first home is awaiting sale.[226]

V. PROMISES AND RISKS FROM ALTERNATIVE BUYING AND FINANCING MODELS

A. The Lure into the Shadows: Muddy Rights and Remedies

We should worry about the novel practices and non-banks in the home purchase world,[227] for the promise of low down payments and no monthly payments are but surface appeals, with real risks lurking beneath. I lay out several kinds of risks that exist.

i. Costs

The non-debt models are not without monetary costs. They specify

224. *Id.*

225. *Id.*

226. *See* Mary A. Azevedo, *Austin-Based Real Estate Startip Homeward Secures $105M in Debt & Equity*, CRUNCHBASE NEWS (May 14, 2020), https://news.crunchbase.com/news/austin-based-real-estate-startup-homeward-secures-105m-in-debt-equity/. Several other companies, like Offerpad and Opendoor, offer similar services to make the homebuying experience seamless, with their "one stop shops" through their "iBuyers" programs. *See* Jeff Andrews, *The Real Estate Transaction is Broken. Tech Companies Want to Fix It*, CURBED (Mar. 21, 2019), https://www.curbed.com/2019/3/21/18252048/real-estate-house-flipping-zillow-ibuyer-opendoor; Jeff Andrews, *These Startups Make Selling Your House as Easy as Possible*, CURBED (Apr. 12, 2018), https://www.curbed.com/2018/4/12/17221178/opendoor-offerpad-sell-house-online-offers; Courtney Read, *What is an iBuyer?*, OFFERPAD (Dec. 21, 2017), https://blog.offerpad.com/what-is-an-ibuyer/; Joe Gomez, *What is an iBuyer —How It Works and Is It Worth It?*, OPENDOOR, https://www.opendoor.com/w/guides/what-is-an-ibuyer (last visited Nov. 20, 2021). Another company, Knock, while not an iBuyer, also uses "data science and local experts to set a list price on your home," which then becomes the "trade-in price" of the home. While the homeowner pays these costs, Knock will advance up to $25,000 for upgrades to improve the marketability of the home. KNOCK, https://www.knock.com/faq (last visited Nov. 20, 2021). When the transactions are completed, Knock earns a 6% commission from the homeowner and a 3% commission from the seller of the new home.

227. *See generally* FIN. STABILITY OVERSIGHT COUNCIL, 2019 ANNUAL REPORT (2019), https://home.treasury.gov/system/files/261/FSOC2019AnnualReport.pdf (examining risks to financial stability in the United States in various markets and sectors); Debra Kamin, *Is iBuying Here to Stay?*, N.Y. TIMES (Nov. 19, 2021), https://www.nytimes.com/2021/11/19/realestate/ibuying-ilending.html (describing risks and potential drawbacks of using ibuying and ilending).

maximum investment amounts ranging from $400,000 (Hometap) to $500,000 (Unison).[228] The minimum share of investment ranges from $25,000 (Point) or 17.5% (Unison), with maximums from 20% (Point) to 70% (Unison).[229] The stated investment terms are either ten years (Hometap and Noah) or thirty years (Point and Unison).[230] The fees assessed are 1) 3% of the financing amount, appraisal, and third-party fees (Hometap); 2) Servicing Fee of $2,000 or 3% of the financing amount, whichever is higher, underwriting, appraisal, and third-party fees (Noah); 3) 3%-5% of the financing amount, appraisal, and third-party fees (Point); and 4) 3% of the financing amount, which includes appraisal and third-party fees (Unison).[231]

When maturity arises after thirty years or if the homeowner sooner sells the property, Unison claims a share of the appreciation as valued from the date of the transaction. The share will vary depending on the deal but could be as high as "the original co-investment plus or minus their share of the home's change in value."[232] That payment to Unison may be greater than the homebuyer would have paid in interest to a traditional lender. This is how the numbers add up. For 10% of the down payment, Unison earns 33.3% of the change in value as determined by an independent appraisal when the homeowner chooses to end the relationship, either at sale of the property, buy out of Unison, or at the scheduled termination point, i.e., 30 years. For 15% of the down payment, Unison would earn 49.5% of the increase in value.[233]

If the homeowner decides to sell the home within three years, Unison may invoke a "Special Termination" payment, which is the original investment plus an investment option, starting around 3.3% of the property value.[234] If the homebuyer does not maintain the property, she may be subject to a "Deferred Maintenance Adjustment."[235]

228. *Frequently Asked Questions*, HOMETAP, https://www.hometap.com/faqs/ (last visited Nov. 20, 2021); UNISON, *supra* note 214.

229. UNISON, *supra* note 214; POINT, *supra* note 215.

230. UNISON, *supra* note 214; Point, *supra* note 215; *Still have questions? We've got answers*, NOAH, https://www.noah.co/faq (last visited Nov. 20, 2021); HOMETAP, *supra* note 228.

231. *See supra* note 230.

232. UNISON, *supra* note 214.

233. *See id.*; *What is an Option Contract*, UNISON (Apr. 11, 2019) (on file with author) (demonstrating how the option contract with Unison works).

234. UNISON, *supra* note 214.

235. *Id.* In its FAQ, Unison describes ordinary wear and tear as allowed, but that damage exceeding ordinary wear in tear is "assessed by one or more appraisals, inspections or repair estimates obtained from independent third-party providers who are used to determine the amount of the Deferred Maintenance Adjustment" and defines a Deferred Maintenance Adjustment as "allocating the loss in value due to improper

How does Unison compare in terms of cost to a traditional mortgage? It depends on whether the property appreciates in value, in which case, the Unison investment — the down payment and eventual share — will cost more. Conversely, a traditional mortgage loan does not involve sharing of equity with the lender. But, if the value of the property declines, Unison is the better deal. In summary, the Unison model makes sense for the budget-stressed homebuyer — as initial payments are low — who expects to be better off financially in the future. It also makes sense for homebuyers in markets experiencing modest gains in appreciation, in which case the down payment assistance and comparatively low monthly payments will mean most of the gain is kept by the homebuyer.

ii. Contracting and Consumer Protections

As explained above, mortgages given to an institutional lender are subject to a host of federal and state regulations designed to protect banks from excesses, the markets from systemic risks, and borrowers from their improvidence.[236] Adherence to the ATR regulations and loan disclosure is critical if we are to avoid another housing crisis.[237] But, as the structure of financing offered by the equity sharing partners and alliances does not involve a "mortgage" per se, none of these protections are available. There are no disclosures about the economics of the deal, nor even about the financer's business model.

The appeal of the benefits seems like the same lures that drew in buyers to ARMs leading to the crisis.[238] Then, as now, homebuyers may be inclined to overlook the downsides in favor of the immediate satisfaction of homeownership. Just as subprime loans were made to credit-risky borrowers or exposed borrowers to greater risks because of adjustable interest rates and interest only terms, equity-sharing arrangements use less stringent standards for evaluating an applicant's credit worthiness. Although FICO scores for first time borrowers have been dropping in recent years even for mortgages,[239] the metrics used by the non-banks are unconventional and

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maintenance to [the homeowner]." *Id.* There are otherwise no standards for determining where to draw the line.

236. *See supra* Part II.B.

237. *See* McCoy & Wachter, *supra* note 88, at 649.

238. *See generally* Eric S. Belsky & Nela Richardson, Understanding the Boom and Bust in Nonprime Mortgage Lending (Sep. 2010) (unpublished manuscript), https://www.jchs.harvard.edu/sites/default/files/ubb10-1.pdf (explaining the appeal secondary benefits had to buyers).

239. Aly J. Yale, *Lenders are Loosening the Reins; What FICO Credit Score Do You Need to Get a Mortgage?*, MORTG. REPS. (Dec. 25, 2017), https://themortgagereports.com/34667/mortgage-fico-scores-drop.

unproven. Indeed, the "co-investment" business model is unchartered territory and raises a host of issues that could trap even the economically savvy millennial.[240] Many of these businesses are not forthcoming with the specific terms of the agreements and borrowers do not appear to be encouraged to consult with an attorney. Instead, several of them suggest borrowers speak with an in-house consultant to make sure the borrower is "fully informed" prior to signing the agreement.[241] Additionally, while "co-investment" businesses advertise that they are sharing in "all" the risk, the fine print indicates that for platforms such as Point and Unison borrowers are required to pay back some or all of the initial investment, at the very least, even if the home depreciates in value. [242]

iii. Novel Forms of Rights

The Fleq Alliance and equity sharing arrangements suggests new forms of ownership, defying numerus clausus.[243] Under numerus clausus, only certain forms of property rights are recognized as such by the legal system. This limited recognition circumscribes the private parties' ability to craft novel rights and obligations.[244] The main reason asserted for this principle is the interest in "'optimal standardization,' that is, balancing economic and social demand for different types of property interests against the need to economize on information costs imposed on third parties that have to accommodate to such diversity, in view of the *in rem* nature of property rights."[245]

Professors Arruñada and Lehavi explain:

240. *See* Larry Kochard, *Commentary: Overcoming the 4 Most Common Co-Investment Obstacles*, PENSIONS & INVS. (Sept. 3, 2019), https://www.pionline.com/industry-voices/commentary-overcoming-4-most-common-co-investment-obstacles (discussing the difficulties of the "co-investment" strategy).

241. NOAH, *supra* note 230; POINT, *supra* note 215; HOMETAP, *supra* note 228; UNISON, *supra* note 214.

242. *See supra* note 241.

243. *See* FLEQ, *supra* note 189.

244. Benito Arrunada & Amnon Lehavi, *Prime Property Institutions for a Subprime Era: Toward Innovative Models of Homeownership*, 8 BERKELY BUS. L.J. 1, 19 (2010) (citing UGO MATTEL, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 39 (2000)).

245. *Id.*; *see* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 24–42 (2000). Some maintain that information and transaction costs from novel forms can be controlled through the requirement that parties seeking to use them give some sort of public notice, and through the adoption of rules to guide our understanding of the arrangements. *See* Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 395–409 (2002).

> This does not necessarily mean that recognized types of property rights included in the "closed list," such as ownership, should essentially adhere to a single blueprint, i.e., an indivisible fee simple interest in both the land and the home.[246] At the same time, for new models that "rearrange" ownership to become formally institutionalized, the new format needs not only to become *de facto* familiar to various stakeholders, but should also be supported by enabling legislation and regulation. This support and familiarity would allow actors such as lenders to fully understand the nature of the property configuration and the type of collaterals, and consequently to be willing to extend credit.[247]

While there may be good reasons for not rigidly adhering to this principle, such as where its rationale is not implicated,[248] that is not the case with these new inventions. The structure and nature of their claims to an interest in the property are not readily apparent from the ground. Because the relationships may not be evidenced by a recordable instrument, discovering the claims may not be possible, and the resulting claims against the property may not fit within the traditional regime, from which there are specific rights, remedies, and schemes for resolving conflicts.

a. Property or Contract Rights

Rights in property acquired under these new models may be limited in idiosyncratic ways. In the Noah model, the relationship is described as an "equity-sharing contract," that refers to "homeowner partners."[249] Fleq

246. Other writers have pointed out practical and normative differences in the concept of traditional property rights across different social contexts and different types of resources. *See* Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1558–70 (2003) (discussing "institutions of property" ranging from those regulating arms-length market transactions to marital property); Amnon Lehavi, *The Property Puzzle*, 96 GEO. L. J. 1987, 1997–2000 (2008) (noting that different values implicate the ordering of rights to various resources).

247. Arrunada & Lehavi, *supra* note 244, at 19.

248. In *Community in Property: Lessons From Tiny Homes Villages*, 104 MINN. L. REV. 385 (2019), Professor Lisa T. Alexander challenges the *numerus clausus* proposition by offering the phenomenon of the tiny homes village as a new kind of property interest. The contours of this new form of housing tenure or property relation is complex and nuanced. As she describes it, the interest in tiny homes villages lacks a "formal title," yet operates much like traditional rights, in the sense of some security of tenure and the obligation and self-interest to maintain. While there are limits on the right to alienate, some tiny villages allow participants some share in the appreciation in value when they decide to leave. In Professor Alexander's view, the absence in this stewardship model of all those attributes normally associated with ownership (unqualified rights to exclude and to alienate) does not disqualify it from the canon of property interests.

249. NOAH, *supra* note 230.

purports to create an "alliance," that refers to a "joint venture."[250] If we treat them as they are denominated, then the rules of business associations should apply. This means equal participation in management, sharing of liabilities, formalities for dissolution, and fiduciary duties. As contracts, then the rights and remedies are measured in some ways by default rules — implied covenant of good faith and fair dealing, anticipatory repudiation, impossibility — but subject to bargain. It is unlikely that there will be much bargaining between the would-be homebuyer and financer, as the arrangements suggests an etched in stone character. In any case, the usual remedies will mean actions against the parties, but not against the property as would be the case with property interests.

As property interests, the lines are equally blurred. If the deed, the written evidence of ownership, names parties other than or in addition to the homebuyer, then all the rights of ownership are diminished, as the homebuyer will lack the apparent ability freely and unilaterally to transfer title or to give lesser rights. A deed that names parties in addition to the homebuyer will give those parties rights of possession and perhaps rights to veto decisions by the homebuyer over the use and changes to the home. Under the Unison model, the homeowner is typically not permitted to rent out the property and must keep the home in good condition.[251] Who decides on the quality and extent of improvements and repairs? If they are co-owners of joint venture property, can the homeowner seek partition? The Fleq Alliance does not specify relative claims and rights in the context of a divorce proceedings between married homebuyers or where the homebuyers fall into a bankruptcy proceeding. How do the financers protect their interests in case of involuntary transfers? There is a risk on the other side as well — what if the investor is in bankruptcy? Is the house an asset of that debtor's estate? These seem to be the same kinds of risks facing a vendee under an installment land contract, but at least there, the vendee, if she is in possession, can give notice by that possession of her equitable claim to the property to later purchasers. In the title examination phase, the non-possessing co-investor may be willing to accept risks of title, thought unsuitable by a single homebuyer? The non-possessing co-investor may be content with title insurance proceeds if defects manifest themselves later, but a possessing owner, may not want the risk of losing ownership.

b. A Mortgage by Another Name

The equity sharing company, Unison, states that it does not offer loans but

250. FLEQ, *supra* note 189.
251. UNISON, *supra* note 214.

options for investment.[252] Because it is not a loan, the homeowner is not required to make monthly payments to retire it, nor is she obligated to pay interest. Because Unison enables the homebuyer to make a larger down payment, private mortgage insurance may be avoided, and the monthly mortgage payments are smaller.[253] But, where does Unison's investment stand in terms of priority of claims? What are Unison's rights in case the homebuyer doesn't fulfill his side of the bargain? The claim clearly does not fit the traditional notion of a mortgage.[254] All the usual recourses and protections, notice of default, right to cure, and to redeem in case of a default, leaves homebuyers quite exposed. At the same time, the NDNB lacks those recourses available to a traditional mortgagee in case the co-venturer fails to fulfill his part of the deal.

i. Shared Appreciation Mortgage Comparison

One ready comparator to the shared equity investor model is the shared appreciation mortgage ("SAM"), which emerged in 1980.[255] SAMs enable reduced monthly payments, which in turn means less annual income

252. *See* Brumer, *supra* note 206.

253. *See* UNISON, *supra* note 214 (explaining Unison's services and comparing Unison to alternatives such as a second mortgage, an FHA loan, or a gift fund).

254. *See generally* David Waddilove, *The "Mendacious" Common-Law Mortgage*, 107 KY. L.J. 425 (2019) (examining the critiques of the "common-law mortgage" and interpreting the common-law mortgage in the context of the seventeenth century and judicial interventions to the doctrine since then). The first mortgages took the form of a fee simple subject to a condition subsequent, under which the borrower transferred legal title to a lender, which title would terminate on *law day* when the debt was repaid. The conveyance was structured with this language: "To lender, but if borrower pays by September 1530, borrower has the right to reenter and retake the land." However, this arrangement put the borrower at great risk. If on *law day*, the borrower was unable to repay the loan — he fell off his horse — the failure to repay, meant forfeiture of all payments made to that point as well as of the land. Borrowers appealed to equity for relief and the courts obliged by offering the "equitable right of redemption" — borrowers could thus pay late. But, because the courts of equity did not specify a date by which late payments must be made, this left lenders in a very precarious position. They in turn appealed to equity and this appeal gave rise to "strict foreclosure," that is, that the borrower was required to pay by a date certain or forever lose the property. Eventually, courts came to see that strict foreclosure was too very harsh, such that they required foreclosure by sale on the theory that a public auction might generate funds to repay the lender as well as some surplus to the borrower. Alas, that was only the theory, as studies over the centuries reveal that rarely do public sales generate any surplus to the borrower, but only minimize her ultimate liability to the lender. However, in several states, lenders are denied any deficiency judgment against the borrower. *See* GRANT NELSON ET AL., REAL ESTATE FINANCE LAW 199–210 (6th ed. 2015); RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES §4.1 cmt. a (AM. L. INST. 1997); Bennett v. Bank of E. Or., 167 Idaho 481 (2020).

255. Shared Appreciation Mortgage, 45 Fed. Reg. 66801 (proposed Oct. 8, 1980) (to be codified at 12 C.F.R. 545.6-4(b)).

necessary to buy a home. It does this through a two-tiered system of interest: a) a fixed, below-market interest, payable for the term and b) "contingent interest," payable as a percentage of the appreciation in the value of the property, either at loan maturity or on sale or transfer of the property.[256] The percentage of value is determined at the inception of the loan and may not exceed forty percent of the net appreciation.[257] That appreciated value is the difference between the sales price as market value and the costs — original costs (purchase price, closing costs, including real estate commissions, title insurance, appraisals, inspections); capital improvements; and outlays for the appraisals to calculating appreciated value.[258] While the SAM is amortized as a forty year loan, the actual term is much less, only ten years.[259]

While there are superficial comparisons between the SAM and the equity sharing home financing models, there are significant differences on several points:

- **Required disclosures:** At bottom, a SAM is a mortgage that is memorialized in an instrument that contains language to give notice of its claim to part of the value of the property, and in closing the loan, lenders must make disclosures to the borrower on the economics of this financing device.[260] With a SAM, the lender must show the borrower how the mortgage aligns with a fixed-rate mortgage in terms of cost, based on the fixed interest as well as the contingent interest. To do this, the lender must make an honest representation of the anticipated rate of appreciation of the property.[261] None of these requirements exist for the equity sharing models; only the percentage of appreciation is specified in the closing documents.
- **Economic Benefits:** The SAM benefits the lender if the rate of appreciation is as great as the contingent interest rate is fixed at the inception. But the borrower remains obligated to pay the principal of the loan, no matter if the value declines. Conversely, under the Unison model, the risk of the home not appreciating in value, falls entirely upon Unison and Unison's expectation of gain

256. Stanley L. Iezman, *The Shared Appreciation Mortgage and the Shared Equity Program: A Comprehensive Examination of Equity Participation*, 16 REAL PROP. PROB. & TR. J. 510, 515 (1981); *see also* ANDREW CAPLIN ET AL., FACILITATING SHARED APPRECIATION MORTGAGES TO PREVENT HOUSING CRASHES AND AFFORDABILITY CRISES (2008).

257. CAPLIN ET AL., *supra* note 256, at 8–9.

258. Iezman, *supra* note 256.

259. *Id.*

260. *Id.* at 516.

261. *Id.*

can be short-circuited if the homeowner sells the property or buys it out after five years,[262] in which case, any future gain goes exclusively to the homeowner.

- **Consequences at the end of the term:** Under both models, if the borrower is unable to sell the property profitably, she may have to refinance the loan at then prevailing interest rates and if she is unable to find a loan that is affordable, she might find herself in a forced sale, where all parties stand to lose. On this point, the two models, equity sharing and the SAM, are alike in terms of the dire consequences confronting the homebuyer at the end of the loan or investment period. They both may require a substantial payment of unrealized appreciation, even as the homebuyer or borrower may lack the liquid funds to make this payment.[263] In both cases, the choices of the obligor are limited — take out a new conventional loan, and incur substantial transactions costs (fees, time, lost opportunities), or sell the property. The potential loss of home looms large in both scenarios.[264]
- **Liability upon death of the homeowner:** The obligation to repay a SAM continues to burden a borrower's estate after his death. While the Unison model requires the heirs or the estate of the homebuyer to settle the Unison agreement after a 180-day grace period, it is not clear how Unison enforces this right.[265]

c. Landlord-Tenant

As described above, Fleq forms an alliance with the homebuyer who becomes both an owner and a renter, with the option to buy equity in the

262. *What is an Option Contract*, UNISON, *supra* note 233. As stated earlier, the buyout amount is the sum of Unison's original investment plus a share of the change in value of the home, which is determined by an independent appraisal. While the homeowner is entitled to a "Remodeling Adjustment" for improvements that add value to the home, improvements cannot be made during the first five years of the agreement.

263. *See* Arrunada & Lehavi, *supra* note 244, at 34 (suggesting that at the end of a loan period under the shared-appreciation mortgage, a borrower may lack liquidity and force her to take a conventional loan or sell the house).

264. *See id.*

265. *Your Questions, Answered: Advanced Topics*, UNISON (last visited Nov. 21, 2021), https://www.unison.com/ (lacking a clear answer to this issue); *see also Creative Financing for Home Purchases: What's Available Now?* MCKISSOCK (Feb. 17, 2017), https://www.mckissock.com/blog/appraisal/18584/; *Is Unison Home Co-investing Legit?*, CLARK (June 6, 2019), https://clark.com/homes-real-estate/unison-home-co-investing/; James Rufus Koren, *This Company Will Help With a Down Payment, But It Wants a Stake in Your New Home*, L.A. TIMES (Jan. 6, 2017, 3:00 AM), https://www.latimes.com/business/la-fi-home-equity-investments-20170106-story.html.

property.[266] While the outward appearance may be the classic landlord-tenant relationship, with the "tenant" having exclusive possession, Fleq does not assume the role of landlord, with the significant obligation of making sure the premises remain habitable under the implied warranty of habitability, instead placing that burden on the tenant. Most courts do not allow a waiver of the warranty.[267] The court in *Rainbow* saw through the contract label and evaluated the relationship for what it was, a landlord-tenant relationship.[268] Is "the alliance" a landlord-tenant relationship in disguise? If it is, what form of tenancy is it — tenancy for years or tenancy at will? What happens when the tenant fails to make the rental payments? Does Fleq have the right to terminate the tenancy and seek possession in a summary proceeding?

B. Remembrance of Looming Systemic Risks

The growing power and means to control the housing finance market by non-banks is cause for concern. Studies show that the growth of non-banks poses risks to borrowers, communities, and the U.S. government alike.[269] And because of the identified weaknesses in their business models, they remain just as vulnerable to a significant and sustained macroeconomic shock.[270] The same lax underwriting standards indicted as large contributors to the 2008 crisis, since circumscribed by bank regulations, now define the holdings of non-banks.[271] In general, mortgage loans from non-banks are of poorer quality than those originated by banks, and are being made to homebuyers with less income and wealth, and less business sophistication, [272] than those originated by banks.[273] And this seems to be the consciously

266. *Frequently Asked Questions*, FLEQ (last visited Nov. 21, 2021), https://fleq.com/faqs/.

267. *See, e.g.*, Rainbow Realty Grp., Inc. v. Carter, 131 N.E.3d 168, 174 (Ind. 2019) (holding that the agreement met the statutory requirements to subject the parties to a landlord tenant relationship, including warranty of habituality).

268. *Id.*

269. *See, e.g.*, Kim et al., *supra* note 125, at 349 (outlining the vulnerabilities of non-banks).

270. *See id.* at 387.

271. Lux & Greene, *supra* note 132, at 7.

272. Kim et al., *supra* note 125, at 390; *see also* Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RSRV. (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm (describing various trends in homeownership by race, ethnicity, and socio-economic status).

273. Kim et al., *supra* note 125, at 390.

adopted business model.[274] Recent reports show that non-banks originated a significantly higher share of mortgage homes loans to minority borrowers and in low- to moderate-income neighborhoods,[275] than the number made by large banks.[276] By the objective measure of FICO scores, the loans made by non-banks carry lower expectations of performance — more than half were to borrowers whose FICO scores were below the 660 benchmark for demarcating prime from subprime loans.[277] While this presence in underrepresented communities might otherwise be applauded, we should worry if these efforts are the same kind of setup that led to so much economic and psychological grief in these communities during the crisis.[278]

Just as before, the GSEs and banks are playing a large role in this new drama — the GSEs purchasing most non-bank loans and banks making them warehouse loans[279] in the background. Despite the apparent constraints imposed by the conservatorship under HERA, the GSEs are heavily invested in loans originated by non-banks.[280] These loans are not much different from those that were the culprits in the financial crisis and are still more costly

274. The Quicken Loan ads for its "rocket mortgage" and the Lending Tree pajama-clad puppet aim to put viewers at ease about borrowing.

275. Kim et al., *supra* note 125, at 390.

276. As stated, the good part about this new world of lending is that loans are accessible to Black and Hispanic borrowers and as they live in low-or moderate-income tracts, *see id.* at 351, yet, there are some troubling underwriting dynamics still operating. This cohort of borrowers is less likely to have college degrees and have less income and wealth. *Id.* at 390. They have a higher debt-to-income ratio, at the same time, having a FICO credit score lower by five points for GSE pools and twenty-five points for Ginnie Mae, making the chances of default significantly higher. *Id.* at 392.

277. Lux & Greene, *supra* note 132, at 22.

278. Buchak et al., *supra* note 60, at 19–20 (finding that fintech and shadow bank loans are more than .02% likely to go into default than traditional bank loans).

279. *Id.* at 11. Warehouse lenders typically fund 95% of the mortgage balances, lending $40 billion at the end of 2016. *Id.* at 12–13. *See generally* Peter Rudegeair et al., *Big Banks Find a Back Door to Finance Subprime Loans, Lending to Nonbank Financial Firms Surges to Record as Banks Avoid Direct Exposure*, WALL ST. J. (Apr. 10, 2018, 7:18 PM), https://www.wsj.com/articles/big-banks-find-a-back-door-to-finance-subprime-loans-1523352601 (stating that while banks describe this new lending approach as "safer than dealing directly with consumers with bad credit . . . [it] mean[s] that banks are still deeply intertwined with the riskier loans that they say they swore off after the financial crisis"). Heavy reliance upon warehouse lending by non-banks puts them in a precarious existence if their loans are called in on margin or are subject to market-to-market reevaluations.

280. FHFA, RECENT TRENDS IN THE ENTERPRISES' PURCHASES OF MORTGAGES FROM SMALLER LENDERS AND NONBANK MORTGAGE COMPANIES 16 (2014) ("[N]on-banks accounted for 26.3 percent of agency purchase mortgage loans originated in December 2012, by December 2014, that number had grown to 48.37 percent."); *see also AEI Housing Center*, AEI, www.housingrisk.org (last visited Nov. 21, 2021).

than those from banks, despite the support of the GSEs and Ginnie Mae.[281] Because they are dependent on short-term credit to finance their operations, they may experience losses from contraction if these sources become more expensive or non-existent in a tight financial market.[282] Moreover, because their business model is novel and decentralized, they are challenging to monitor and constrain,[283] and due to their small size, they may regard the effects of excessively risky activities as merely abstract.

As with all technology-dependent operations, hacking — in recent times, carrying huge ransom demands — is an ever-present threat.[284] The new technology employed by NDNBs to assess credit risk may not lead to better assessments but would instead mask risk factors.[285] This point should not be rejected out of hand as the ravings of a luddite. The algorithms developed to evaluate applications that use unorthodox sources and types of data, such as insurance claims, utility bills, social networks, data from Amazon purchases, and eBay transactions may only reveal frequencies of occurrence, but not necessarily meaningful correlations.[286] After all, how does buying a classic Burberry raincoat on eBay predict whether one is likely to make timely mortgage payments? It may show that the would-be borrower is frugal, buying used and not new, or it might just as well show him to be profligate — a store brand coat would keep the rain away just as a classic one. This is not to say that a human assessment of creditworthiness is better, but only that we should not take technology as infallible. While these algorithms have not yet been tested in times of market turmoil, at least in

281. In fact, despite the strong market support offered by the GSEs and Ginnie Mae, non-bank loans carry interest rates that are 3.7 basis points higher than loans made by banks. Buchak et al., *supra* note 60, at 21–22; *see also* Neil Buchak & Aurel Hizmo, *Do Minorities Pay More for Mortgages, Finance and Economic Discussion Series* (Fed. Rsrv, Finance and Economics Series No. 2020-07, 2020), https://www.federalreserve.gov/econres/feds/do-minorities-pay-more-for-mortgages.htm (concluding that minority borrowers pay more for mortgages).

282. *See* Kim et al., *supra* note 125.

283. William Magnuson, *Regulating Fintech*, 71 VAND. L. REV. 1167, 1172 (2018); *see also* Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 235 (2018) (describing the risk implications of fintech in consumer finance).

284. Magnuson, *supra* note 283, at 1201–02; *see* Nicol Turner Lee et al., *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, BROOKINGS (May 22, 2019), https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/.

285. Jagtiani et al., *supra* note 136, at 5. Those who borrow from the Lending Club have a higher risk of becoming delinquent. Jagtiani & Lemieux, *supra* note 117, at 31.

286. Jagtiani & Lemieux, *supra* note 117, at 2, 26–28.

other areas of trading, it is widely believed that algorithmic high-speed trading has contributed to instability in markets.[287]

C. Untethered and Operating in the Shadows

As I suggested at the beginning of this paper, non-banking is sometimes referred to as "shadow banking," and this is for good reason. In many ways, they operate outside of the larger regulatory regime which places a premium on disclosures — to consumers[288] — and on public scrutiny. This is so because of non-banks' decentralized structure, consisting of a series of dispersed networks with discrete functions.[289] The asymmetric systems of information access make it difficult to monitor them and anticipate industry harm.[290] In such a scenario, there is little incentive to look out for or avoid relationships whose risks are apparent or could be discovered with a little investigation.[291]

Unlike depository institutions, non-banks do not have Community Reinvestment Act ("CRA")[292] obligations; nor an affirmative legal obligation to lend in any specific geographic area, but they are enjoined from engaging in practices that discriminate. Recently, the CFPB brought the first-ever redlining complaint against a non-bank, in *Bureau of Consumer*

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287. The Long-Term Capital Market Program, at its debut, was widely celebrated because of its leveraged trading strategies premised on computer models. However, the models lacked the judgment required to abandon the strategies before it was too late, leading to the eventual collapse of the hedge fund, threatening billions in losses, but it was bailed out by the government. *See* Adam Hayes, *Long-Term Capital Management (LTCM)*, INVESTOPEDIA (May 3, 2021), https://www.investopedia.com/terms/l/longtermcapital.asp.

288. *See* Mary Jo White, Chair, SEC, Opening Remarks at the Fintech Forum (Nov. 14, 2016), https://www.sec.gov/news/statement/white-opening-remarks-fintech-forum.html.

289. Magnuson, *supra* note 283, at 1169.

290. *See From the People, for the People*, THE ECONOMIST (May 7, 2015), https://www.economist.com/news/special-report/21650289-will-financial-democracy-work-downturn-people-people (describing peer-to-peer lending companies, such as Lending Club).

291. Magnuson, *supra* note 283, at 1213 (discussing the balance of long-term and short-term interests). Magnuson posits that fintech may have long-term incentives to maintain a reputation for providing high-quality, reliable loans and investment opportunities; but, where the long-term interests of the company and the short-term interests of the managers of the company diverge, it is far from clear that the long-term interests will win out. *See id.*

292. 12 U.S.C. § 2901. The Act requires depository institutions to designate an assessment area or assessment areas. Then, the depository institutions must act to serve the credit needs of the entire area — including low- and moderate-income areas, which typically will overlap with predominantly minority areas. *See* 12 C.F.R. § 25.41 (2022); *see also* Jagtiani et al., *supra* note 136, at 2 (stating that in CRA assessment areas with fewer than ten banks, fintech loans are more prevalent than loans from other nonbanks).

Financial Protection v. Townstone Financial Inc.[293] The CFPB alleged that Townstone engaged in redlining by acts calculated to discourage applications based on race, including staff making disparaging comments about Black residents and certain minority populated areas, failing to market in those areas, and failing to employ non-whites as loan officers.[294] The CFPB has tried to overcome the hurdle posed by the absence of CRA obligations by "leveraging the concept of a Reasonably Expected Market Area ("REMA")"[295] or a "Proper Assessment Area," as a basis for evaluating claims of redlining.[296]

VI. CONCLUSIONS: NECESSARY REFORMS AND CONTROLS

It is fair to ask whether the regulations coming out Dodd-Frank went too far, particularly as we see that tighter lending standards made loans largely unavailable to many in marginal economic circumstances. The new regulations sensibly called for greater scrutiny in extending credit to protect both the borrower and the lender, but they should not disqualify them wholesale.

While the NDNBs present many differences from the financing tools that were prevalent prior to the 2008 housing crisis, ARMs were not at all novel when they were used. It was the indiscriminate deployment that led to the crisis. Then, as now, there is the need for controls on both sides of the transactions. NDNBs should be regulated by rules precisely calibrated to their particular features,[297] be subject to registration procedures that are simple,[298] and be subject to centralized regulation.[299] What this might look like must come from both imagination to design different kinds of legal relations, and fear of relieving a dark period in our financial history. At a

293. Complaint, Bureau of Consumer Fin. Prot. v. Townstone Fin., Inc., No. 1:20-cv-04176 (N.D. Ill. July 15, 2020). The CFPB alleged violations of the Equal Credit Opportunity Act, Regulation B. 15 U.S.C. 1691(a). *Id.*

294. *Id.* at 4–13.

295. The FDIC has offered guidance to banks on how to determine the appropriate geographic area to avoid charges of redlining. *See Are You at Risk for Redlining? Understanding Your Reasonably Expected Market Area (REMA) and CRA Assessment Area*, FDIC DIV. OF DEPOSITOR & CONSUMER PROT. (Mar. 14, 2018), https://www.fdic.gov/news/events/sf-region/2018-03-14-rema-cra-presentation.pdf.

296. *Id.*

297. *See* Dale A. Oesterle, *Intermediaries in Internet Offerings: The Future Is Here*, 50 WAKE FOREST L. REV. 533, 547–49 (2015).

298. *See* Gregory Scopino, *Preparing Financial Regulation for the Second Machine Age: The Need for Oversight of Digital Intermediaries in the Futures Markets*, 2015 COLUM. BUS. L. REV. 439, 505–06.

299. *See* Kevin V. Tu & Michael W. Meredith, *Rethinking Virtual Currency Regulation in the Bitcoin Age*, 90 WASH. L. REV. 271, 300–13 (2014).

minimum, the capital requirements applicable to banks should apply to non-banks as well. As former Vice Chairman Fischer has suggested, they should be required to "maintain buffers of highly liquid assets that are sized according to the risk that their liabilities will run off quickly in a stress[ful] situation."[300]

On the substantive side of the transactions, the use of untested and unconventional criteria for assessing creditworthiness should be allowed only as a comparative measure. The surface appeal of non-debt financing seems well-calculated to mask the genuine risks not just to the homebuyer, but to the partner in the alliance or co-venturer. Homebuyers in these arrangements — particularly, equity sharing arrangements — need the same kind of cost of finance disclosures as borrowers from banks. To head off systemic and ripple market effects when the market turns bad, these finance companies should be required to make the same ATR determination as lenders. As I suggested in my earlier work, financial ability is not a static, fixed thing, but ebbs and flows with the economic tides. This means that the assessment of risk should anticipate that life happens. The best responses to life changes that make it impossible to meet financial obligations cannot handily be addressed by moratoria on foreclosures and stimulus checks.[301] Instead, we need to build in mechanisms for systemic or market adjustments — ones that perhaps index payments to the events in the economy, indeed to personal circumstances.

The merits of NDNBs, novel creatures in many respects, must be evaluated for their hidden and obvious threats before they take root that is too deep to pull up. As their place in the taxonomy of common law property is not clearly established, the contours of rights and obligations may need legislative definition. The result may be something sui generis in terms of category, but with bright lines fixed that delineate contours. NDNBs must not be allowed to operate on the edges, but must be brought squarely within the established, tested regime and held up against safety and soundness measures calibrated to the risk inherent in financing home purchases in the shadows.

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300. Fischer, *supra* note 121, at 7.

301. The HUD Single-Family Housing Policy Handbook includes "residual income" as a compensating factor in calculating the allowable DTI ratio. U.S. DEP'T OF HOUSING & URB. DEV., HANDBOOK 4000.1, FHA SINGLE FAMILY HOUSING POLICY HANDBOOK 339–43 (2021).

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COMMON LAW RULES: APPLYING COMMON LAW PRINCIPLES TO REASSIGNED PHONE NUMBER DISPUTES UNDER THE TCPA

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I. INTRODUCTION

Senator Ernest Hollings once described automated calls as "[t]he scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall."[1] With advances in technology and the increased popularity of cellphones and smartphones, the frequency of these disturbances has only increased.[2] Automated callers, or "autodialers," can now call and text cellphone users anywhere at any time, reaching them outside of the home, at work, on their morning commute, on a date, or even in a quiet theater. The growing popularity of cellphones has coincided with an increasing rate of phone number reassignments. Good faith autodialers now find themselves calling a phone number's previous, consenting owner only to reach the phone number's new, unconsenting owner.[3] In response, courts have struggled to determine when the law prohibits autodialers from making such calls to a phone number's new owner.[4]

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1. 137 CONG. REC. 30,821 (1991) (statement of Sen. Ernest Hollings).

2. *See* ERNEST HOLLINGS, AUTOMATED TELEPHONE CONSUMER PROTECTION ACT, S. Rep. No. 102-178, at 2 (1991) (finding that calls were made to "more than 7 million Americans every day" in 1991); *TNS Report: Americans Now Receive 300 Million Unwanted Robocalls Per Day*, BUSINESSWIRE (Mar. 4, 2020, 9:03 AM), https://www.businesswire.com/news/home/20200304005116/en/TNS-Report-Americans-Now-Receive-300-Million-Unwanted-Robocalls-Per-Day (citing 2020 TNS ROBOCALL INVESTIGATION REPORT) (stating that in 2019, Americans received almost 300 million unconsented calls per day).

3. *See* William Dolan et al., *FCC Establishes Reassigned Phone Number Database*, JONES DAY (Jan. 2019), https://www.jonesday.com/en/insights/2019/01/fcc-establishes-reassigned-phone-number-database (explaining that 35 million phone numbers are reassigned yearly in the United States); Tim Bauer, *JPMorgan Chase to Pay $3.75 Million to Settle TCPA Suit on Calls to Reassigned Phone Numbers*, INSIDEARM (June 27, 2016, 7:35 AM), https://www.insidearm.com/news/00041956-jp-morgan-chase-to-pay-375-million-to-set/ (reporting that JPMorgan Chase called 675,000 reassigned phone numbers and had to pay an almost $4 million settlement).

4. *See, e.g.*, Medley v. Dish Network, LLC, 958 F.3d 1063, 1069–70 (11th Cir.

The Telephone Consumer Protection Act ("TCPA")'s autodialing ban generally restricts a business or other commercial entity from using an automatic telephone dialing system ("ATDS"), to make unconsented calls or texts.[5] Section 227(b)(1)(A)(iii) of the TCPA, codified at 47 U.S.C. § 227, requires that any call from an ATDS must have the prior express consent of the phone number's owner.[6] While the TCPA expressly provides that phone number owners must consent to receive calls from autodialers, it does not explicitly address whether phone number owners can revoke their consent.[7] However, as the TCPA's implementing agency, the Federal Communications Commission ("FCC") interprets the TCPA to allow for revocation "at any time and through any reasonable means."[8] Courts have upheld this FCC interpretation as permissible.[9] Furthermore, some courts take this interpretation a step further, holding that consent given as part of a bargained-for exchange cannot be unilaterally revoked.[10]

When a phone number owner who previously gave consent as part of a bargained-for exchange discontinues ownership over the phone number, the wireless carrier may subsequently reassign the phone number.[11] The caller may be unaware of the change in ownership. However, the TCPA still allocates the burden of ensuring proper consent to the caller.[12]

2020) (holding that consent cannot be unilaterally revoked in a bargained-for exchange); Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1255 (11th Cir. 2014) (holding that consent is revocable under the TCPA). *See generally* Zachary D. Miller et al., *Effective Revocation of Consent Under the Telephone Consumer Protection Act Following* Reyes v. Lincoln Automotive Financial Services, 72 CONSUMER FIN. L.Q. REP. 453 (2018) (stating that there should be a special interpretation of consent in TCPA context because of the statute's remedial purpose for consumers who receive unwanted calls).

5. Telephone Consumer Protection Act, 47 U.S.C. § 227(a)–(b).

6. *Id.* § 227(b)(1)(A)(iii); *see also id.* § 227(b)(1)(B) (listing a few enumerated exceptions to the consent requirement, including in the case of an emergency).

7. *See id.* § 227 (failing to create revocation of consent provisions).

8. *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7990 (2015) (establishing that regardless of how consent was given, the caller carries the burden of proving that it has the required prior express consent).

9. *See, e.g.*, Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1048 (9th Cir. 2017) (concluding that revocation "must be clearly made and express a desire not to be called or texted").

10. *See generally* Medley v. Dish Network, LLC, 958 F.3d. 1063 (11th Cir. 2020) (holding that when consent is given as part of a bargained-for exchange, common law contract principles prevent one party from unilaterally revoking consent); Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51 (2d Cir. 2017) (holding that where consent is not freely given, but is part of a contract's consideration, that consent cannot be unilaterally revoked).

11. *See* Dolan et al., *supra* note 3.

12. *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. at 7990, 7994.

When a caller previously obtained proper consent from a wireless phone number's previous owner, and the phone number is later reassigned to a new owner, courts should apply the common law of consent to determine whether the reassignment effectively revokes the previous owner's consent. The TCPA requires the caller obtain the current phone number owner's prior express consent before making automated calls, however new owners of reassigned numbers were not privy to the previous owner's bargained-for consent with the caller.[13] Thus, autodialers cannot secure the requisite prior-express consent.[14] Accordingly, callers should face TCPA liability when calling reassigned phone numbers because of the burden of proof and Congress's intent to protect private phone number holders from automated calls when it passed the TCPA.[15]

This Comment will first explore the purpose of the TCPA and the role of the FCC in implementing the law, the TCPA's consent requirement and the inferred revocation of consent procedure, and the permissibility and applicability of common law doctrines to federal law. It will then analyze whether courts should apply contractual consent law and the TCPA's text to establish a standard for consent revocation in the case of reassigned phone numbers. Finally, this Comment will argue that courts must apply common law consent principles to disputes over calls made to reassigned phone numbers when the previous owner gave consent to be contacted and suggest that the FCC continue its efforts to implement the Reassigned Number Database to ease the burden on callers of confirming consent.

II. THE TCPA'S CONSENT REQUIREMENT TO PROTECT CITIZENS FROM AUTOMATED CALLS AND THE SPECIAL DIFFICULTIES OF REASSIGNED PHONE NUMBERS

Congress passed the TCPA to curb the increasing prevalence of unsolicited, automated telephone calls to residential phone users to protect

13. *See* 47 U.S.C. § 227(b)(1)(A)(iii) (requiring prior express consent). *See generally* Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51 (2d Cir. 2017) (finding that because Reyes entered into an agreement the consent cannot be unilaterally revoked); RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. L. INST. 1981) (defining "bargained-for exchange").

14. *See* 47 U.S.C. § 227(b)(1)(A)(iii).

15. *See id.*; *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd at 7790. *See generally* Kimberly J. Winbush, Annotation, *Unsolicited Calling and Messaging Under Communications Act of 1934, as Amended by Telephone Consumer Protection Act of 1991, as Amended, (TCPA) (47 U.S.C.A. § 227) and Regulations Thereunder (47 C.F.R. § 64.1200) — Federal Cases*, 52 A.L.R. Fed. 3d Art. 1 (2021) (stating that Congress's purpose in enacting the TCPA was to restrict "proliferation of unsolicited phone calls" to residential phone numbers to protect phone number owners' privacy).

those users' privacy interests.[16] While the TCPA requires consumers to give consent to receive automated calls, it fails to address revocation of consent.[17] Nevertheless, by applying common law consent principles, the FCC and courts interpret the TCPA to allow revocation when consent is freely given.[18] However, questions arise when applying this standard to reassigned phone numbers.

A. The TCPA's Purpose and the Role of the FCC

When Congress enacted the TCPA in 1991, the country was experiencing a massive increase in the use of telemarketing, with "over 300,000 telemarketing solicitors call[ing] more than 18 million Americans every day."[19] At the time of enactment, caller ID was not common, so recipients could not identify the caller, whether it be a telemarketer, a family member, or a friend, before answering.[20] Companies utilized autodialers to telemarket because they were more efficient than having a human make the same calls.[21] Referring to the unrestricted telemarketing phenomenon as "an intrusive invasion of privacy," Congress noted that consumers were "outraged" over the increase in these "nuisance calls" when it enacted the TCPA.[22]

One of the TCPA's primary purposes is to prohibit the use of autodialers to call phone numbers without the phone number owner's prior express consent.[23] To achieve this goal, Congress tasked the FCC with issuing

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16. *See* 47 U.S.C. § 227; *see also* Winbush, *supra* note 15.

17. *See* 47 U.S.C. § 227.

18. *See* Medley v. Dish Network, LLC, 958 F.3d 1063, 1069–70 (11th Cir. 2020) (holding that Congress intended common law consent to apply to TCPA; therefore, consent is only freely revocable when it is not given as part of a bargained-for exchange); *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7993–94 (2015) (failing to find any proof Congress intended special consent principles to apply to TCPA).

19. Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1043 (9th Cir. 2018) (quoting 137 CONG. REC. S16,971 (daily ed. June 27, 1991) (statement of Rep. Larry Pressler)).

20. Justin Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules*, 84 BROOK. L. REV. 1, 2 (2018).

21. *See Marks*, 904 F.3d at 1043 (citing H.R. REP. NO. 102-317 at 6, 10 (1991)) (finding that an autodialer could call and deliver the exact same message to 1,000 telephone numbers without the cost and time of having a human do the same).

22. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227).

23. Hurwitz, *supra* note 20, at 2. *See generally* 47 U.S.C. § 227(a)(1) ("The term 'automatic telephone dialing system' means equipment which has the capacity — (A) to store to produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.").

regulations interpreting and applying the statute.[24] However, the FCC's regulations are subject to judicial review, and a court may set aside or suspend orders or regulations that the FCC issues.[25] Since the TCPA's enactment, the FCC has issued several major regulations to aid in enforcement.[26] Most notably, the FCC further broadened the TCPA in 2015 to address new trends that did not exist when Congress implemented the Act, such as increased cellphone usage and the reassignment of phone numbers.[27]

i. Section 227(b)(1)(A)(iii)'s Consent Requirement and Evolution

The TCPA's consent requirement laid out in § 227(b)(1) makes it unlawful to make a call within the United States using "any automatic telephone dialing system . . . to any telephone number assigned to a . . . cellular telephone service . . . ."[28] However, the FCC allows autodialed calls when the phone number's owner has given his prior express consent to be called.[29] While the TCPA does not expressly define "prior express consent," the FCC interprets it to mean that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."[30]

Courts further interpret both the TCPA's consent subsection and the FCC's orders.[31] In examining when a phone number owner gives prior express consent, the Ninth Circuit held that knowingly releasing a phone

24. 47 U.S.C. § 227(b)(2) (giving the FCC power to "prescribe regulations to implement the requirements of this subsection" and guidance on what these regulations may entail, make exceptions for, and ban).

25. 28 U.S.C. § 2342(1).

26. *See generally* Marissa A. Potts, Note, *"Hello, it's me [Please don't sue me!]": Examining the FCC's Overbroad Calling Regulations Under the TCPA*, 82 BROOK. L. REV. 281 (2016) (summarizing the FCC's orders interpreting and administering the TCPA).

27. *Id.* at 291 (citing *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7989–8000 (2015)).

28. 47 U.S.C. § 227(b)(1) (excepting calls made to collect debt owed to the United States and for emergencies). *Contra* Barr v. Am. Ass'n Pol. Consultants, 140 S. Ct. 2335, 2346–48 (2020) (holding the government-debt exception unconstitutional and severing it from the rest of the statute).

29. 47 U.S.C. § 227(b)(1)(A); *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752, 8768–69 (1992).

30. *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. at 8769.

31. *See* Zachary D. Miller & Rachel R. Friedman, *TCPA Litigation Update: Courts Take the Reins in Defining the Statute's Limits*, 73 BUS. LAW. 431, 434 (2018) (stating that courts take a "common sense approach" to the scope of "prior express consent" in finding that the consent only applies to matters "relate[d] to the context in which consent" was originally given).

number for a transaction-related communication meets the prior express consent requirement established by the FCC.[32] For the automated call to be lawful, the prior express consent must relate to the same subject matter as the call or text.[33] The phone number owner is essentially giving consent to be contacted only for "use in normal business communications."[34]

B. Revocation of Consent Under the TCPA

The TCPA does not address the revocation of consent; however, in its 2015 Order, the FCC interpreted the TCPA to allow revocation through "any reasonable means."[35] The FCC noted that any other interpretation of the TCPA could subject consumers to an unlimited number of unwanted calls, contradicting the TCPA's purpose and consent as defined by common law.[36] To further support this interpretation, the FCC argued that Congress's failure to craft a limited form of consent revocation into the TCPA indicates that it intended for common law consent concepts to apply.[37] The FCC concluded that revocation does not place an unreasonable burden on callers to record and respect the consent revocation, and included examples of reasonable revocation methods.[38] In the same order acknowledging the permissibility of consent revocation, the FCC affirmed that the caller has the burden of proving it had the required prior express consent in the face of a dispute.[39]

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32. *See* Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1044–45 (9th Cir. 2017).

33. *See id.* (interpreting the FCC's 1992 Order alongside Congress's intent and the TCPA's legislative history to mean that giving the phone number does not give express consent to be contacted for any purpose, but rather the contact must relate to the transaction that gave rise to consent).

34. *See id.* at 1045 (using an example from the FCC's 2008 Order in which the FCC ruled that giving a cellphone number to the debtor only reasonably gives prior express consent to be contacted about the debt).

35. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7993–95 (2015) (finding that this interpretation is most reasonable considering the TCPA's purpose and stating that the statutory silence on the right to revoke should be interpreted to favor consumers).

36. *See id.* at 7993–94.

37. *Id.* at 7994 (noting that "nothing in the language of the TCPA or its legislative history support the notion that Congress intended to override a consumer's common law right to revoke consent").

38. *See id.* at 7996 (listing examples of revocation methods: "a consumer-initiated call, directly in response to a call initiated or made by the caller, or at an in-store bill payment location, among other possibilities" and stating that callers cannot hinder "a consumer's right to revoke consent using any reasonable method").

39. *Id.* at 7994 (emphasizing that under "longstanding Commission precedent," the caller bears the burden of proving consent, regardless of how the consent was originally given).

In 2018, the D.C. Circuit Court of Appeals upheld the permissibility of the FCC's interpretation that consent is revocable through "any reasonable means."[40] The court refused to agree with concerns that this standard is too broad, stating that strictly and narrowly defined revocation standards would harm both the caller and the phone number owner.[41] The D.C. Circuit also noted that the 2015 Order did not affect contracting parties' ability to contractually determine revocation procedures for themselves.[42]

Courts also hold that phone number owners may revoke consent under the TCPA, reasoning that Congress did not create a specific understanding of consent within the TCPA, and as a result, common law principles allow the revocation of consent.[43] The Supreme Court held that when Congress uses a term that has a "settled meaning . . . under the common law," unless it expressly provides otherwise, it intended to apply the term's settled meaning.[44] Under this rule of statutory interpretation, the Ninth Circuit considered the TCPA's purpose and the FCC's interpretations of the law to find that Congress intended to allow consumer revocation of consent.[45] In further clarifying and establishing the process for revoking consent, the court held that a caller must clearly and expressly convey their revocation.[46]

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40. ACA Int'l v. FCC, 885 F.3d 687, 695 (D.C. Cir. 2018) (upholding the FCC's interpretation of the TCPA, which allows a person to "revoke consent through any reasonable means clearly expressing a desire to receive no further calls or texts").

41. *See id.* at 709–10 (finding that phone number owners should be able to easily revoke consent to remain consistent with the TCPA's purpose of protecting citizens from unwanted automated calls and callers should want easily applied opt-out procedures to avoid possible TCPA liability).

42. *See id.* at 710 (stating that the 2015 Order only prevents callers from unilaterally determining revocation procedures and imposing those on the called party).

43. *See, e.g.*, Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1047 (9th Cir. 2017) (supporting this interpretation by finding that under common law consent is revocable); *see also* Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 270–71 (3d Cir. 2013) (quoting Neder v. United States, 527 U.S. 1, 21 (1999)) (stating that Congress did not establish another meaning of consent so the common law understanding should be applied, under which consent that is freely given is revocable)

44. *See id.*; *see also* Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1255 (11th Cir. 2014) (finding that Congress intended for the TCPA to incorporate common law consent principles, including revocation, under which consent may usually be revoked orally).

45. *Van Patten*, 847 F.3d at 1047 (referring to the TCPA as a "remedial statute intended to protect consumers from unwanted telephone calls" and noting that the FCC's "endorse[ment]" of this interpretation supports the court's conclusion that consent is revocable under the TCPA); *see also Gager*, 727 F.3d at 271 (stating that as a consumer "remedial statute," any silence or ambiguity in the TCPA should be permissibly interpreted in favor of the consumer).

46. *Van Patten*, 847 F.3d at 1048.

Additionally, other courts have found that no time limit applies to when the phone number owner must revoke consent.[47]

i. Revocation of Consent in a Bargained-for Exchange

While courts have generally reached a unanimous consensus that freely given consent may be revoked under the TCPA, they vary when consumers give consent as part of a bargained-for exchange.[48] A bargained-for exchange, is "[a contractual] agreement to exchange promises or to exchange a promise for performance or to exchange performances."[49] Under black letter contract law, a party cannot unilaterally modify an agreement once it is completed without the other party's consent.[50]

In *Medley v. Dish Network, LLC*,[51] the phone number owner expressly consented to be called as part of her agreement with her television provider and later attempted to unilaterally revoke this consent, but the television provider still contacted her.[52] The Eleventh Circuit held that an agreement manifests the parties' mutual assent, and under contract common law, one party cannot change the agreement without the other party's consent to the change.[53] To square this holding with its previous holding in *Osorio v. State*

47. *See, e.g.*, *Gager*, 727 F.3d at 272 (concluding that the TCPA's silence on temporal limits to give or revoke consent does not limit the consumer's right to give or revoke consent).

48. *See generally* Medley v. Dish Network, LLC, 958 F.3d 1063 (11th Cir. 2020) (holding that consent may not be revoked under the TCPA when it is given as part of a contract); Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51 (2d Cir. 2017) (holding that the TCPA does not allow unilateral revocation of consent when the consent is given as part of a bargained-for contract). *But see* Miller et al., *supra* note 4, at 462–66 (acknowledging some courts that refuse to follow the *Reyes* analysis, but who instead apply the broader Gager and Osorio analyses and focus on the broad intent of the TCPA to hold that there should be a special consent standard for the revocation of consent in a bargained-for exchange under the TCPA).

49. RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. L. INST. 1981).

50. *See* 13 CORBIN ON CONTRACTS § 67.8 (2020) (stating that when there is a contractual obligation, the release of that obligation must be shown by "mutual agreement" or some other contract right of release); *see also* Kasia Solon Cristobal, *From Law in Blackletter to "Blackletter Law"*, 108 L. LIBR. J. 181, 182 (2016) (quoting THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 1547 (desk ed. 2012)) (defining black letter law as "basic principles of a subject in the law").

51. 958 F.3d 1063 (11th Cir. 2020).

52. *Id.* at 1064–66, 1069.

53. *See id.* at 1069–70 (citing Kuhne v. Fla. Dep't of Corrs., 745 F.3d 1091, 1096 (11th Cir. 2014)) (stating that an agreement is the "manifestation of mutual assent" between the parties to the agreement; accordingly, black letter contract law prohibits one party to an agreement from unilaterally changing the terms of the agreement once the agreement has been agreed to).

Farm Bank F.S.B.,[54] where it held that consent may be revoked, the court differentiated between consent given freely under the TCPA and consent given as part of a bargained-for exchange under the TCPA.[55] Further, the court refused to create a special exception for contractual consent given under the TCPA even though it characterized the statute as a remedial consumer protection statute.[56] The court relied on its interpretation that Congress intended common law consent principles to apply to the TCPA, and therefore, it could not permissibly alter the understanding of consent.[57]

Similarly, in *Reyes v. Lincoln Automotive Financial Services*,[58] the phone number owner agreed as part of his lease to receive phone calls from the car dealer about the lease.[59] He later attempted to revoke this consent after he defaulted on his loan.[60] The Second Circuit determined that Congress intended for the term "consent" to have the same meaning under the TCPA as it does under common law.[61] Thus, analyzing the consent under common law, the court concluded that consent could not be unilaterally revoked under the TCPA when given as part of a bargained-for exchange.[62] The court concluded that any other result would be inconsistent with the common law understanding of consent because the other party to this agreement, the car dealer, did not assent to changing the terms of the contract.[63]

The Third Circuit weighed in with its support for applying common law consent principles to TCPA disputes in *Gager v. Dell Financial Services*.[64]

54. 746 F.3d 1242 (11th Cir. 2014).

55. *Compare id.* at 1255 (holding that consent may be orally revoked under the TCPA), *with Medley*, 958 F.3d at 1070–71 (holding that consent may not be unilaterally revoked when it is given as part of a contract).

56. *See Medley*, 958 F.3d at 1070–71.

57. *See id.* (stating that when Congress enacted the TCPA, consent was not unilaterally revocable when part of a contract and there is no proof in the TCPA's legislative history that Congress intended consent to have a meaning different from that of the common law).

58. 861 F.3d 51 (2d Cir. 2017).

59. *Id.* at 53–54.

60. *Id.*

61. *Id.* at 56–57 (citing Neder v. United States, 527 U.S. 1, 21 (1999)) (stating that unless Congress establishes otherwise, when it uses a term with a "settled meaning under the common law," Congress intends for the term to have the meaning it has at common law).

62. *Id.* at 57 (establishing that consent is only revocable under common law when it is freely given; however, when consent is given as a provision of a contract, any modification must be made with the "mutual assent" of every party to the contract).

63. *See id.* at 58 (stating that without express legislative intent by Congress to change the meaning of consent within the TCPA, courts cannot infer that Congress intended a different meaning).

64. 727 F.3d 265 (3d Cir. 2013).

In this case, the court rebuffed the caller's argument that because Congress explicitly established specific consent standards in other consumer protection statutes, consent is likewise limited in the TCPA.[65] The court held that Congress's choice to make specific consent rules in those statutes, but not in the TCPA, supported the finding that common law consent principles apply to TCPA consent.[66]

ii. Revocation of Consent and Reassigned Phone Numbers

There are millions of wireless number reassignments every year.[67] A caller may place a call to a phone number presuming that the phone number's owner is unchanged and intending to reach the prior owner who consented to the call.[68] Because automated callers typically do not receive notice of when an ownership change has occurred, it is difficult for them to ensure that they still have the proper consent.[69] Currently, no established database or procedures exist for callers to affirm an owner's prior express consent or that the owner still holds domain over that phone number.[70] However, if automated callers fail to obtain the requisite consent consumers can recover up to $1,500 per violation, meaning per call or text.[71] These violations can quickly add up if autodialers are calling reassigned numbers under the good faith impression that they have consent.[72]

In a blow to callers, the FCC's 2015 Order elucidated "that the TCPA requires the consent not of the intended recipient of the call, but of the current

65. *Id.* at 270 (pointing to the Fair Debt Collection Practices Act 1977 amendments, the CAN-SPAM 2003 amendments, and the Junk Fax Prevention Act of 2005 where Congress created explicit procedures whereby the consent could be revoked).

66. *Id.* (concluding that Congress's choice to craft specific consent rules in other statutes, but not the TCPA, means that "Congress did not intend to depart from the common law understanding of consent").

67. *See* Dolan et al., *supra* note 3.

68. *See* ACA Int'l v. FCC, 885 F.3d 687, 705 (D.C. Cir. 2018) (questioning whether, under these circumstances, the caller becomes liable under the TCPA for making an automated call without the requisite prior express consent).

69. *See* Alysa Z. Hutnik et. al., *TCPA Litigation: Key Issues and Considerations*, PRACTICAL LAW LITIGATION, Westlaw (database updated April 2021) (suggesting this creates compliance issues for callers and challenges for customer class action certification).

70. *See id.* (acknowledging the FCC's encouragement to businesses that they implement procedures to stem calls to reassigned phone numbers).

71. *See* Tanya L. Forsheit & Daniel M. Goldberg, *New FCC Rules Affect Companies that Use Automated Dialing Systems*, L.A. LAW., Dec. 2015 at 15, 15 (using the example that sending 100,000 messages without consent could result in $50 million worth of liability, regardless of whether the caller intended to make unconsented calls).

72. *See id.*

subscriber."[73] The FCC defined a "called party" as "the subscriber, *i.e.*, the consumer assigned the telephone number dialed and billed for the call."[74] Courts have upheld the FCC's interpretation, reasoning that a natural reading of the TCPA justifies this interpretation.[75]

The FCC attempted to mitigate the high burden that ensuring consent placed on callers by creating a "one-call safe harbor."[76] Under this safe harbor, autodialers who call without notice of the phone number's reassignment and have reason to believe they still have the necessary consent may make one call after the phone number's reassignment without facing TCPA liability to attempt to clear any ownership ambiguity.[77] However, while the D.C. Circuit agreed with the FCC's interpretation of "called party," it set the agency's one-call safe harbor rule aside, finding it "arbitrary and capricious."[78]

Continuing its analysis in *ACA International v. FCC*,[79] the D.C. Circuit analyzed the FCC's interpretation of "reasonable reliance" on the prior express consent given by a party.[80] The court struggled to understand how the FCC concluded that one call was enough to end reasonable reliance on the prior phone number owner's consent.[81] The court reasoned that one call or text may not be enough to determine whether the phone number has been reassigned and the consent revoked.[82] The court further found that the one-call safe harbor was inconsistent with the TCPA's statutory scheme,

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73. *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7999–8000 (2015).

74. *Id.* at 8000–01 (finding that the term "called party" within the statute means the phone number's current owner, not any prior owner that the caller might be intending to reach).

75. *See, e.g.*, N.L. *ex rel.* Lemos v. Credit One Bank, N.A., 960 F.3d 1164, 1167 (9th Cir. 2020) (concluding that the caller's intent to reach a consenting customer does not preclude TCPA liability when the caller reaches someone else by reading the statute according to its "ordinary and natural meaning").

76. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. at 8007–10.

77. *See id.* (noting that the one call will provide the caller with an additional opportunity to gain knowledge of the reassignment, but, if the one call does not clear the ambiguity, the caller will be said to have had constructive knowledge of the reassignment). *Contra* ACA Int'l v. FCC, 885 F.3d 687, 705 (D.C. Cir. 2018) (setting aside the one-call exception).

78. *See ACA Int'l*, 885 F.3d at 705–06.

79. 885 F.3d 687 (D.C. Cir. 2018).

80. *See id.* at 707.

81. *See id.* (noting that if the call does not give the caller reason to suspect reassignment, the caller may be justified in making a second call while still under reasonable reliance of consent).

82. *See id.*

questioning how it aligned with the TCPA if the caller became aware of the reassignment before the one call or if the one call occurred months after reassignment.[83] The court ruled that the FCC failed to reasonably explain its rationale for deeming that the one-call exception was not arbitrary.[84]

The *ACA International* court concluded that setting aside the FCC's entire interpretation of reassigned numbers would avoid imposing the strict liability standard that the FCC intended to avoid.[85] Looking to the future, the court noted that the FCC is working to implement a comprehensive database that would make it easier for callers to identify reassigned phone numbers.[86]

C. Permissibility of Applying Common Law to Federal Statutes

Words or phrases used in a federal statute should be interpreted under the definition that Congress provided in the statute or in the U.S. Code or by their "accepted meaning in the area of law addressed by the statute."[87] Justice Jackson justified this approach:

> [W]here Congress borrows terms of art which [have] accumulated the legal tradition and meaning of centuries of practice it presumably knows and adopts the cluster of ideas . . . . [A]bsence of contrary direction may be taken as satisfaction with widely accepted definitions, not as [a] departure . . . .[88]

This approach aligns with the "Clear Statement Rule," which requires Congress to make its intent to give a particular statutory provision an interpretation different than the traditional legal interpretation with "unmistakable clarity."[89] As a result, when Congress enacts a law, the meaning of a term under related common law presumptively applies to the

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83. *See id.* at 707–08 (stating that "reasonable reliance" may become unreasonable if the call is made months after reassignment or if the caller learns of the reassignment before calling, and, noting that the traditional understanding of the caller's burden of proof is inconsistent with subjecting consumers to unconsented calls).

84. *Id.* at 708.

85. *See id.* at 708–09 (noting that if only the one-call exception was set aside, then callers would be strictly liable for all calls made to a reassigned number without renewed consent, even if the caller is unaware of the reassignment, which is likely a harsher penalty than the FCC intended when trying to craft an approach to reassigned numbers).

86. *See id.* at 709 (indicating the court would find that these further, more developed, and tailored methods would create a permissible reasonable reliance standard).

87. LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 7 (2014).

88. *Id.* at 7–8.

89. *See id.* at 20 n.119 (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Term*, 68 Iowa L. Rev. 198, 208 (1983)) (referring to Judge Wald's statement that Congress should "signal [ ] its intention in neon lights" when it wants to depart from an accepted legal meaning of a term).

statute's terms unless Congress clearly states otherwise.[90] The Supreme Court acknowledged and supported interpreting a statutory term under its "accumulated settled meaning under . . . the common law."[91] Thus, both courts and the FCC must follow these principles when interpreting the TCPA.

III. APPLYING CONTRACT COMMON LAW TO CONSENT DISPUTES WITH REASSIGNED PHONE NUMBERS

Where Congress does not explicitly establish a specialized definition of a statutory term that already has a recognized legal meaning, such as consent, courts will interpret the term by inferring that Congress intended that term's pre-established meaning to apply to the statute.[92] In the case of "consent" as used in the TCPA, Congress did not create a specialized legal meaning, thus signaling its intent for established common law consent principles to apply.[93] As a result, in the case of reassigned phone numbers, common law consent requires that any prior express consent be terminated upon reassignment unless a phone number's new owner gives his prior express consent.

A. Permissibility of Applying Common Law Contracts to Consent Under the TCPA

When deciding a dispute about consent under the TCPA, courts should apply the common law definition of consent, defined as a "voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose . . . ."[94] When interpreting the meaning of Congress's choice of the word consent in the TCPA, courts must follow recognized canons of statutory interpretation to ensure that they are applying TCPA provisions as Congress intended.[95] In choosing to use the term

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90. *Id.* at 20 (requiring Congress to make its intent to change such common law principles specific).

91. Neder v. United States, 527 U.S. 1, 21 (1999) (holding that when Congress chooses a term that has "an accumulated settled meaning at common law," unless Congress explicitly states otherwise, it means to adopt the common law meaning of the term and courts should interpret the term in this way).

92. *See id.*; *see also* EIG, *supra* note 87, at 2, 7–8 (stating that courts must interpret terms of a statute according to their established legal meaning unless Congress makes clear its intent for another legal meaning to apply).

93. *See Neder*, 527 U.S. at 21; EIG, *supra* note 87, at 2, 7–8. *See generally* 47 U.S.C. § 227 (failing to further define consent beyond "prior express consent").

94. *Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

95. *See* EIG, *supra* note 87, at 1 (stating that the canons of statutory interpretation allow Congress to draft legislation knowing how its language and word choice may be interpreted by the courts in the future).

"consent," which has a recognized meaning under common law, without providing an alternative definition, Congress signaled to the courts that they must rely on consent's "accumulated settled meaning."[96]

Further, in applying the "Plain Meaning Rule" to consent in the context of the TCPA, courts must interpret consent by its definition in the statute or by its accepted meaning at common law unless Congress explicitly makes clear otherwise.[97] If Congress intended for the TCPA's statutory term of consent to take on a different or unique meaning from its established legal meaning, Congress would have done so with "unmistakable clarity."[98] Congress did not take this action with the term consent in drafting the TCPA; therefore, courts must interpret the term according to common law principles.[99]

Within the TCPA, aside from requiring callers to obtain a phone number owner's prior express consent, the law does not define how consent may be given or revoked.[100] This further indicates that Congress did not intend to deviate from the common law understanding of the term.[101] As the TCPA's implementing agency, the FCC in its 2015 Order, affirmed that Congress's failure to establish a specialized consent standard for the TCPA indicated its approval of courts applying the common law of consent to TCPA disputes.[102] Statutory interpretation requires that courts give deference to an implementing agency's reasonable interpretations of the statute.[103] To reach this conclusion, the FCC considered the TCPA in its entirety, as well as its

96. *See Neder*, 527 U.S. at 21 (establishing that when Congress is silent regarding a term with an established legal meaning this choice indicates its intent not to deviate from that term's established legal meaning).

97. *See* EIG, *supra* note 87, at 2, 7–8 (noting that if the language is plain and unambiguous this interpretation must be applied and noting that looking to other areas of the statute is important in discerning this).

98. *See id.* at 19–20 (presuming Congress has knowledge of related common law when it enacts a statute and intends for those principles to be applied unless a specific meaning is otherwise established).

99. *See* 47 U.S.C. § 227 (choosing not to define consent beyond requiring "prior express consent;" therefore, not clearly signaling Congressional intent to establish a specialized consent definition).

100. *See id.*

101. *See generally* Medley v. Dish Network, LLC, 958 F.3d 1063 (11th Cir. 2020) (finding no congressional intent to establish a specialized meaning of consent within the TCPA); Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51 (2d Cir. 2017) (agreeing with the FCC and other courts who have found it appropriate to apply common law consent to the TCPA).

102. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7994 (2015).

103. *See* EIG, *supra* note 87, at 27; *see also* 47 U.S.C. § 227(b)(2) (giving the FCC the power to "prescribe regulations implementing the requirements of this subsection").

legislative history, and found no indication that Congress intended to craft a specialized understanding of consent.[104]

The Third Circuit supports this conclusion by comparing Congress's choice not to further expand or limit the concept of consent within the TCPA with other consumer protection statutes in which Congress did establish a unique consent standard.[105] In *Gager*, the caller pointed to Congressional action that established explicit statutory procedures barring unwanted communications and argued that the TCPA likewise limits consent revocation.[106] The court, however, disagreed and concluded that Congress's choice to make specific consent standards in the pointed-to acts, but its choice not to do the same in the TCPA, meant that "Congress did not intend to depart from the common law understanding of consent" in crafting the TCPA.[107]

For example in its 1977 amendments to the Fair Debt Collection Practices Act, Congress created a specific procedure a consumer must follow to revoke consent.[108] Congress crafted similar consent revocation rules in the CAN-SPAM Act of 2003 and the Junk Fax Prevention Act of 2005.[109] However, in the TCPA's regulation of automated calls to wireless numbers, Congress only requires "the prior express consent of the called party."[110] While the TCPA does not further define prior express consent, the FCC is satisfied when a person knowingly gives their phone number without further instructions not to be contacted on it, reflecting the understanding under

104. *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. at 7994.

105. *See* Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 270 (3d Cir. 2013).

106. *See id.* (arguing that the limited consent principles in the amendments to the Fair Debt Collection Practices Act in 1977, Congressional amendments to the CAN-SPAM Act of 2003, and the Junk Fax Prevention Act of 2005 mean consent is also limited under the TCPA).

107. *Id.*

108. *See id.*; *see also* Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 805(c), 91 Stat. 877 (1977) (codified as amended at 15 U.S.C. § 1692c) (requiring the consumer to "notif[y] the debt collector in writing" of her desire that the debtor no longer contact her).

109. *See Gager*, 727 F.3d at 270; *see also* CAN-SPAM Act, Pub. L. No. 108-187, § 5(3)(A)(i), 117 Stat. 2707 (2003) (codified as amended at 15 U.S.C. § 7704(a)(3)(A)(i)) (establishing that the email message must include a return email that the recipient can use to send a response email requesting not to be contacted again); Junk Fax Prevention Act, Pub. L. No. 109-21, § 2(d), 119 Stat. 360 (2005) (codified as amended at 47 U.S.C. § 227(b)(2)(E)) (listing the requirements that "a request not to send future unsolicited advertisements to a telephone facsimile machine" must include to be effective).

110. 47 U.S.C. § 227(b)(1)(A)(iii).

common law of when a party has given consent.[111] Because Congress did not create a specialized meaning of the term "consent" in the TCPA, courts must apply the term's common law principles in their interpretations.[112]

i. Interpreting Revocation of Consent into the TCPA

While the TCPA does not address the revocation of consent, the common law consent rules indicate that revocation must be allowed.[113] According to black letter law, consent is revocable when it is freely given and is only revocable when given as part of a bargained-for exchange when all parties to the agreement mutually agree to the revocation.[114] The FCC interprets revocation as permissible under the TCPA, and courts generally agree with this conclusion.[115] The FCC supports its interpretation by returning to Congress's choice not to create a specific consent standard for the TCPA and concluding that it intended for the application of common law consent rules.[116] This interpretation is consistent with the Third Circuit's holding in *Gager*.[117] Further, the D.C. Circuit specifically upheld the permissibility of the FCC's interpretation that consent can be revoked through any

111. *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752, 8769 (1992); s*ee also Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining consent as a "voluntary yielding" or "permission regarding some act or purpose").

112. *See* Neder v. United States, 527 U.S. 1, 21 (1999); 47 U.S.C. § 227(a) (failing to establish a specialized definition of consent under the TCPA).

113. *See* RESTATEMENT (SECOND) OF TORTS § 892A (AM. L. INST. 1981) (stating that at common law, consent is generally revocable).

114. *See id.* (finding consent revocable when it is freely given); 13 CORBIN ON CONTRACTS § 67.8 (2020) (stating that release of an obligation as part of a bargained-for agreement requires "mutual agreement").

115. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7993, 7994–95 (2015) (finding revocation of consent permissible by "any reasonable means" and concluding that this interpretation is most consistent with the TCPA's overall purpose as any other conclusion could result in consumers receiving unlimited calls after they no longer wish to); *see, e.g.*, Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1047 (9th Cir. 2017) (stating that under common law and relevant case law, consent is revocable, sometimes freely and sometimes subject to the parties meeting certain standards); Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 270–71 (3d Cir. 2013) (noting that TCPA silence on revocation does not automatically exclude the right, and relying on the TCPA's status as a consumer remedial statute); Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1255 (11th Cir. 2014) (finding that Congress intended to incorporate revocation into the TCPA as part of the common law understanding of consent).

116. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. at 7994.

117. *Gager*, 727 F.3d at 270 (acknowledging other consumer protection statutes where Congress explicitly created specialized consent terms and concluding that if Congress had the same intent for the TCPA, it would have acted similarly but did not).

"reasonable means," finding that a broad standard is best for both callers and consumers.[118]

Courts' acceptance of revocation of consent rests primarily on two reasons: (1) understanding common law consent principles to apply to the TCPA and (2) following the FCC's interpretation that revocation is permissible. First, when Congress enacts a statute and includes a term with an established legal meaning at common law, that meaning will apply unless Congress clarifies that it should not.[119] Because Congress did not establish a special meaning of consent in the TCPA, even though other statutes make clear that Congress knew it could do so, courts must apply the common law meaning of consent to the statute, which allows revocation.[120] Second, as the agency tasked with interpreting and promulgating further regulations consistent with the TCPA, courts must give deference to the FCC's reasonable interpretation of the law.[121] Thus, courts must acknowledge the FCC's approval of consent revocation under the TCPA.[122] Because of Congress's choice not to create a specialized definition of consent for the TCPA, common law consent principles rule, which allow for revocation of consent in varying methods depending on the context in which the consent was obtained.[123]

B. Affirming the Differing Revocation of Consent Standards Under the TCPA Depending on the Consent's Context

To consistently apply the common law meaning of revocation of consent to the TCPA, courts must acknowledge the differing standards for revoking consent at common law. While the common law of consent allows revocation, depending on the circumstances surrounding the consent, a person may not be able to revoke that consent unilaterally, and the same rules apply to the TCPA.[124] Black letter contract law prevents a party from

118. *See* ACA Int'l v. FCC, 885 F.3d 687, 695, 709 (D.C. Cir. 2018) (stating that "reasonable means" is any clear expression of the desire to no longer be called or texted).

119. *See* EIG, *supra* note 87, at 20.

120. *See Gager*, 727 F.3d at 270–71 (citing Neder v. United States, 527 U.S. 1, 21 (1999)) (concluding that because Congress did not create a specific meaning of consent for the TCPA, the common law meaning must be applied and acknowledging other statutes where Congress established a specialized consent revocation procedure).

121. *See* EIG, *supra* note 87, at 27.

122. *See, e.g.*, Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1047 (9th Cir. 2017) (supporting its holding by pointing out that the FCC "endorses" TCPA consent revocation).

123. *See Gager*, 727 F.3d at 270–71 (citing Neder v. United States, 527 U.S. 1, 21 (1999)); *Van Patten*, 847 F.3d at 1047.

124. *See* RESTATEMENT (SECOND) OF TORTS § 892A (AM. L. INST. 1981) (stating that when consent is freely given it may be revoked at any time; however, when consent is

unilaterally modifying the terms of an agreement once the agreement is finalized.[125] For instance, in *Reyes*, the plaintiff leased a car from the defendant and assented to a lease term that allowed the lessor to call him regarding his auto lease.[126] The court held that under the common law understanding of contractual consent, Reyes could not unilaterally revoke consent because the lessor obtained it as part of a bargained-for agreement, the lease.[127]

Conversely, consider if Reyes was only thinking about leasing a car and signed up for texts from the dealership to hear about specialized lease deals. In this scenario, because Reyes freely gave his consent, not as part of any agreement with the dealership, his consent would be freely and unilaterally revocable under common law consent standards, and therefore, the TCPA.[128] The outcomes of these slightly different factual scenarios regarding automated messages under the TCPA remain consistent with established common law consent principles.

Understanding that Congress did not intend a different standard or understanding of consent from the common law, courts should conclude that when a phone number owner gives consent as part of a bargained-for exchange, that consent is not unilaterally revocable.[129] Some plaintiffs argue that this interpretation is inconsistent with decisions that find consent revocable under the TCPA; however, as demonstrated in the *Reyes* hypothetical above, there is a distinct difference between the revocation of consent standards for freely given and bargained-for consents.[130] Therefore, such decisions are not contradictory and are consistent with common law consent principles because without further explicit guidance from Congress, courts must fully apply common law consent principles.

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given as a term of an agreement, revocation is subject to the laws of contract or the terms of the agreement).

125. RESTATEMENT (SECOND) OF CONTRACTS § 287 cmt. a (AM. L. INST. 1981) (requiring an alteration of the agreement to be manifested by the party wishing a change and the other party to demonstrate its acceptance of the wished-for alteration).

126. *See* Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51, 53–54 (2d Cir. 2017).

127. *See id.* at 57.

128. *See id.* (stating that consent is only unilaterally revocable when it is freely given).

129. *See* Medley v. Dish Network, LLC, 958 F.3d 1063, 1070 (11th Cir. 2020) (holding that consent cannot be unilaterally revoked under the TCPA when given as part of a contract).

130. *Compare id.* at 1070 (differentiating this case from its prior case, *Osorio*, by applying common law consent principles to consent given as part of a bargained-for exchange), *with* Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1255 (holding consent to be called freely revocable under the TCPA when the number was given only as an emergency contact).

Related conclusions by courts support the application of the different common law consent revocation standards to TCPA disputes. For example, the Eleventh Circuit refused to create a special exception for consent given as part of a bargained-for exchange.[131] The court noted that even though the TCPA is a remedial consumer protection statute, Congress chose not to amend the common law understanding of consent to make an exception for the TCPA.[132] Further, the D.C. Circuit noted that the FCC's 2015 Order allowing consent to be revoked by "any reasonable means" does not affect the ability of contracting parties to determine specific revocation procedures for themselves through mutual assent.[133]

This standard becomes more difficult to apply in the case of a consumer who gives consent as part of a bargained-for exchange, then later disconnects that phone number, and the wireless carrier subsequently reassigns the phone number to a new user where the caller is not aware of this change in ownership. In the black and white case where a consumer has given consent to be called as part of a bargained-for exchange, the common law of contracts does not allow the consumer to revoke this consent unilaterally.[134] This is true even in the context of the TCPA and its purpose as a consumer protection statute because Congress did not establish a specialized meaning of consent for TCPA disputes.[135]

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131. *See Medley*, 958 F.3d at 1070–71 (stating that while the terms of the TCPA should be read in a light favorable to consumers, courts cannot craft understandings of these terms that are different from their settled meaning without explicit permission from Congress).

132. *See id. Contra* Miller et al., *supra* note 4, at 462, 465 (pointing out that some courts refuse to follow the *Reyes* and *Medley* standard, which prevents unilateral revocation of consent when it is given as part of a bargained-for exchange, and instead choose to allow a special interpretation of consent under the TCPA because of its purpose as a consumer protection statute, even though this result is contrary to common law consent rules).

133. *See* ACA Int'l v. FCC, 885 F.3d 687, 710 (D.C. Cir. 2018) (interpreting the 2015 Order to only prevent callers from unilaterally establishing revocation procedures). *Cf.* Scott J. Hyman et al., *Unconscionability and Contractual Consent-to-Call Clauses Under the Telephone Consumer Protection Act*, 73 CONSUMER FIN. L.Q. REP. 25, 28 (2019) (explaining that in instances where the caller has imposed consent terms in a consumer contract of adhesion, it may be appropriate for courts to apply contractual unconscionability principles to allow consumers to revoke consent).

134. RESTATEMENT (SECOND) OF CONTRACTS § 287 cmt. a (AM. L. INST. 1981).

135. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7994 (2015) (inferring Congress's failure to establish a specialized meaning of consent in the TCPA as implicit approval for resolving TCPA disputes under the common law); EIG, *supra* note 87, at 19–20 (explaining the "Clear Statement Rule" in the case of Congress establishing a specialized meaning for a term that already has an established legal meaning).

Returning to the facts in *Reyes*, however, what if Reyes had given consent to be called regarding his auto-lease as part of the terms of his agreement with the lessor but then disconnected his phone number, and the lessor subsequently placed an automated call or text to Reyes's old phone number, instead reaching the phone number's new owner?[136] The TCPA fails to provide a clear answer to whether this triggers TCPA liability. The caller technically violated the TCPA because it did not have the prior express consent of the new phone number owner, and the new phone number owner was not privy to the bargained-for agreement between Reyes and the lessor.[137] This eliminates the stricter revocation of consent standard required in a bargained-for agreement under common law.[138] Although there was no mutual assent between Reyes and the lessor to release him from the contractual agreement, the TCPA's main purpose of protecting consumers from unconsented automated calls would protect the phone number's new owner from being subjected to calls from the lessor.[139] Still, it is likely that the lessor/caller is unaware of the phone number's reassignment and did not intend to make an unsolicited automated call.[140] Neither the TCPA, FCC orders, nor court decisions offer a clear answer as to the outcome of this scenario.

C. Applying Common Law Consent to Callers of Reassigned Phone Numbers

To remain consistent with the common law consent principles that Congress intended the TCPA to embody, callers must still be held liable when making a call to a reassigned phone number. The reassigned phone number owner has not given prior express consent to be called and was not privy to any contractual consent that may have arisen as part of an agreement between the caller and the previous phone number's owner.[141] Furthermore,

136. *See generally* Reyes v. Lincoln Auto. Fin. Servs., 861 F.3d 51 (2d Cir. 2017) (summarizing that the consumer gave consent to be contacted regarding his lease as part of the lease agreement).

137. *See* 47 U.S.C. § 227(b)(1)(A)(iii) (requiring prior express consent for automated calls placed to wireless numbers).

138. *See* RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. L. INST. 1981) (defining agreement as "a manifestation of mutual assent" between parties); 13 CORBIN ON CONTRACTS § 67.8 (2020) (stating that release from a contractual obligation can only occur upon "mutual agreement" of the parties).

139. *See* Winbush, *supra* note 15 (noting the Congressional purpose of the TCPA: to protect consumers from "unsolicited phone calls").

140. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. at 7994 (stating that even if the caller is unaware of a change in phone number ownership, it still has the burden of ensuring consent).

141. *See* 47 U.S.C. § 227(b) (requiring callers to have the prior express consent of the

the TCPA has long placed the burden of ensuring prior express consent on the caller.[142]

However, this standard creates a high burden on callers.[143] Callers facing TCPA liability have attempted to avoid responsibility for placing calls to a reassigned number by arguing that a "called party" under the TCPA refers to a call's intended recipient, not the person they reach.[144] However, both the FCC and courts rejected this argument and upheld the strict liability standard and caller's burden of ensuring proper consent.[145] To mitigate the potentially high cost of the strict liability standard, the FCC created a "reasonable reliance" exception via the one-call safe harbor for callers who place a call while reasonably relying on the consent given by the previous phone number owner.[146]

While a reasonable reliance standard may be acceptable, the FCC's attempted mitigation is inconsistent with the TCPA's primary purpose of protecting consumers from unconsented automated calls.[147] The one-call safe harbor was too broad because a caller may learn of reassignment before placing the call and still avoid liability.[148] Further, the rule had no temporal

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called party for an autodialed call to escape TCPA liability); EIG, *supra* note 87, at 19–20 (stating that unless Congress explicitly states or establishes otherwise, it intends for terms in its statutes to be interpreted in accordance with their traditional legal meaning).

142. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. at 7994 (emphasizing that this standard is consistent with "longstanding Commission precedent").

143. *See* Hutnik et al., *supra* note 69 (stating that applying liability for lack of consent is a difficult issue because the caller may not be aware that it no longer has consent and there is currently no clear set of procedures or database that would allow a caller to easily carry its burden of ensuring it still has consent); Forsheit & Goldberg, *supra* note 71, at 15 (employing an example to demonstrate how quickly damages liability can add up for the entity making calls without consent).

144. *See* N.L. *ex rel.* Lemos v. Credit One Bank, N.A., 960 F.3d 1164, 1166 (9th Cir. 2020) (summarizing the defendant's argument that if the caller did not intend to place an unconsented call it should not be subject to TCPA liability).

145. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. at 8000–01 (defining "called party" as "the subscriber, *i.e.*, the consumer assigned the telephone number dialed and billed for the call"); *see, e.g.*, *N.L. ex rel. Lemos*, 960 F.3d at 1168–70 (examining other times that the term "called party" is used in the TCPA and concluding it is meant to refer to the person who receives the call).

146. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. at 8000 (establishing a "one-call safe harbor" for callers who place a call to a reassigned phone number under "reasonable reliance" that they still have consent and do not have "actual or constructive knowledge of the reassignment" and allowing the caller to make one call to the phone number without facing TCPA liability).

147. *See* ACA Int'l v. FCC, 885 F.3d 687, 707–08 (D.C. Cir. 2018) (finding that the one-call safe harbor method is inconsistent with protecting people from unconsented calls).

148. *See id.* (reasoning it is inconsistent with the TCPA's purpose of prohibiting

limit, meaning a caller could place a call years after the reassignment of a phone number when it would no longer be reasonable to rely on the former owner's prior express consent.[149] In focusing on the one-call safe harbor's efficacy, the D.C. Circuit questioned how one call could be enough to end reasonable reliance, arguing that if the one call did not allow the caller to become aware of the phone number's change in ownership, the caller may be just as justified in placing another call.[150]

In making the one-call safe harbor rule, the FCC rightfully acknowledged the heavy burden placed on callers as phone number reassignments continue to increase in frequency.[151] There is currently no established method for a caller to learn of a number reassignment short of placing the call and reaching a different party.[152] Congress implemented the TCPA to regulate unconsented automated calls, not prohibit all automated calls.[153] Thus, the FCC's choice not to enforce a strict liability standard is consistent with the TCPA; however, the FCC must determine a way to ensure that both the caller's and the consumer's rights under the TCPA are protected in its approach to crafting guidance for calls placed to reassigned numbers.

Generally, courts signaled their willingness to support the FCC's reasonable reliance standard for TCPA liability because as the implementing agency, the FCC has the power to interpret the TCPA.[154] The courts only disagreed that the one-call safe harbor was an adequate method of establishing the reasonable reliance standard.[155] The D.C. Circuit concluded that it had to set aside the FCC's entire interpretation of reassigned numbers to avoid imposing a harsher penalty than the FCC intended.[156] The D.C. Circuit stated that it would be willing to support a reasonable reliance standard, so long as the FCC worked to further develop and tailor the

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unconsented calls if the caller finds out about the reassignment but may still make one call to the phone number's new owner).

149. *See id.* (wondering if it is truly "reasonable" to rely on consent that was given many years ago and not since acted upon).

150. *See id.*

151. *See, e.g.*, Bauer, *supra* note 3 (emphasizing the high settlements that callers may have to pay for violating the TCPA).

152. *See In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7994 (2015).

153. *See* 47 U.S.C. § 227.

154. *See ACA Int'l*, 885 F.3d 687 at 708–09.

155. *See id.*

156. *See id.* (concluding that if only the one-call safe harbor were set aside, the strict liability standard would effectively be reimposed, which the FCC signaled it did not support in attempting to create a "reasonable reliance" standard).

methods by which callers ensured reasonable reliance while still protecting consumers.[157]

In 2018, the FCC announced its plans to establish a Reassigned Number Database to address the increasing phenomena and disputes arising when reassigned phone numbers receive automated calls.[158] As this approach is consistent with common law consent principles and the TCPA, and the courts indicated approval of a detailed, reasonable reliance standard and procedure, the FCC should continue its efforts to establish this database.

IV. SOLVING REASSIGNED NUMBER TCPA CONSENT DISPUTES WITH THE PROPOSED REASSIGNED NUMBER DATABASE

The Reassigned Number Database would give callers a straightforward way to ensure they have the proper consent before placing a call and allow callers to avoid TCPA liability if they place a call to a reassigned number after reasonably relying on the information from the Database.[159] Currently, there is no established database or set of easily applicable procedures that callers can use to determine whether a phone number has been reassigned, thus terminating the prior express consent required by the TCPA.[160]

Returning to the *Reyes* hypothetical, if Reyes gave the car lessor consent to call him as part of the contractual agreement for his car lease and later disconnected the phone number, and the wireless carrier reassigns that phone number to John, for example, there is no clear mechanism for the car lessor to learn of the reassignment. Thus, the car lessor may place a call to the phone number on the record under the reasonable reliance that the call will reach Reyes, but instead reach John, who did not consent to the call and was not a party to Reyes's bargained-for agreement.

Under the TCPA, the caller has the burden of ensuring it has consent to call.[161] Thus, making the call and reaching John would expose the lessor/caller to TCPA liability, which could total as much as $1,500 per call.[162] The FCC's orders do not prohibit parties to such an agreement from establishing their own consent terms in the agreement, such as requiring

157. *See id.* at 709.

158. *In re* Advanced Methods to Target & Eliminate Unlawful Robocalls, 33 FCC Rcd. 12024, 12025 (2018).

159. *See id.* at 12025, 12043.

160. *See* Hutnik et al., *supra* note 69 (demonstrating that there is currently no easily applicable methodology for callers to carry their burden of establishing prior express consent when a phone number has been reassigned).

161. *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7994 (2015).

162. Forsheit & Goldberg, *supra* note 71, at 15.

Reyes to inform the car lessor if he changes his phone number.[163] However, as a consumer remedial statute, the provisions should be read as favorably as possible for Reyes, and courts may interpret such terms as the car lessor unlawfully attempting to place the burden of knowing consent on the consumer.[164] However, the FCC does not support a strict liability standard for callers who place a call to a reassigned phone number when they reasonably rely on prior express consent.[165]

To square the TCPA's requirement that callers ensure that they have the necessary prior express consent with the difficulties that arise in determining prior express consent for a reassigned phone number, the FCC should continue to establish the Reassigned Number Database and clarify its "reasonable reliance" standard.[166] The database would create a set of easily applicable procedures for callers to follow to ensure that they are not contacting reassigned phone numbers, and hence no longer have the consent of the phone number's owner: (1) check the database, and (2) do not contact the phone numbers that appear in the database as now having a new unconsenting owner.[167]

The FCC began to establish this database by requiring telephone and wireless companies to keep records of phone number disconnection dates, so it will be functional for callers upon implementation.[168] Thus, in the *Reyes*

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163. *See* ACA Int'l v. FCC, 885 F.3d 691, 710 (D.C. Cir. 2018).

164. *See id.* (stating that the 2015 Order does not prevent parties from establishing consent terms contractually so long as the caller does not unilaterally make the terms); Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 271 (3d Cir. 2013) (stating that as a consumer remedial statute, any silence or ambiguity in the statute should be permissibly interpreted in favor of the consumer); *see also* Hyman et al., *supra* note 133, at 28 (finding that in the case of contractual consent, unconscionability principles may be able to be applied to allow the consumer to unilaterally revoke consent).

165. *See ACA Int'l*, 885 F.3d at 708–09 (stating that imposing a strict liability standard is likely a harsher penalty than the FCC intended when trying to solve consent issues with reassigned numbers and supporting this conclusion by pointing to the FCC's attempted one-call safe harbor).

166. *See generally In re* Advanced Methods to Target & Eliminate Unlawful Robocalls, 33 FCC Rcd. 12024 (2018) (proposing a database in which wireless carriers would be required to keep track of and report numbers that have been reassigned, these numbers would be uploaded to the database, and callers would have to check the database to ensure numbers on their call lists do not appear on the reassigned numbers list).

167. *See id.*

168. *FCC Creates Reassigned Phone Number Database with Safe-Harbor Against TCPA Liability for Users*, DAVIS WRIGHT TREMAINE LLP: PRIVACY & SECURITY LAW BLOG (July 9, 2020), https://www.dwt.com/blogs/privacy--security-law-blog/2020/07/fcc-tcpa-safe-harbor-reassigned-number-database (stating that when the database goes live, disconnections will be reported every month and carriers must wait forty-five days or more before reassigning the number to allow callers time to check the database and remove the number from the call campaign before it is reassigned).

hypothetical, when Reyes disconnects his number, the carrier would report this discontinuation to the FCC's database and be required to wait at least forty-five days before reassigning the phone number to John.[169] This procedure allows the car lessor time to check the database and remove the number from its call campaigns. This accomplishes Congress's goal of preventing John from being subjected to unconsented automated calls and the FCC's attempt to lessen the heavy strict liability burden on callers. The proposal would also create a new safe harbor for callers under which the caller would avoid TCPA liability if it consults the database and does not find the number.[170] This exception remains consistent with the FCC's reasonable reliance standard, the TCPA's overall purpose, Congress's intention for common law consent principles to apply to the TCPA, and the FCC's interpretation of the TCPA.[171]

V. CONCLUSION

Applying common law consent principles as Congress intended, when a consumer who gave consent as part of a bargained-for exchange later disconnects that phone number, and the wireless carrier reassigns that phone number to an unconsenting, non-party to the bargained-for agreement, the caller lacks the required prior express consent to make the call. The caller remains liable for any calls placed to the reassigned phone number even if it is unaware of the reassignment. To resolve this issue, the FCC should implement its Reassigned Number Database and clarify the "reasonable reliance" standard.

169. *See id.*

170. *See id.* (stating that the caller must be able to prove that it looked at the database as well as that it could still reasonably rely on the prior express consent of the prior phone number owner).

171. *See* 47 U.S.C. § 227; ACA Int'l v. FCC, 885 F.3d 687, 708–09 (D.C. Cir. 2018) (noting that the FCC does not seem to support a strict liability standard); *In re* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7994 (2015).

JACK DANIEL'S HIGHLIGHTS THE SECOND AND NINTH CIRCUIT'S DIVIDE ON THE APPLICATION OF THE ROGERS TEST

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I. INTRODUCTION

On March 31, 2020, in *VIP Products LLC v. Jack Daniel's Properties, Inc.*,[1] the Ninth Circuit held that a dog toy was an "expressive work" and not a commercial product, thus entitling it to a heightened level of protection under the First Amendment and extending the use of the *Rogers* test. This decision diverged from the Second Circuit's application of the Lanham Act, causing a difference in the application of the *Rogers* test.[2] Accordingly, Lanham Act plaintiffs in the Second Circuit are subjected to the *Rogers* test when the product is expressive but not when the product is commercial.[3]

The Second Circuit considers humor as one factor to determine whether a work is expressive rather than commercial.[4] Conversely, the Ninth Circuit, deems humor as per se expressive, and therefore applies the *Rogers* test broadly.[5] This bifurcated analysis of the Lanham Act will eventually require Supreme Court intervention.

In *VIP Products*, the Ninth Circuit ruled that VIP Products' dog toy was an "expressive work" entitled to a heightened level of protection under the First Amendment and thus the Lanham Act.[6] The determination was rooted in VIP Products' humorous use of the mark.[7] Accordingly, the court found the likelihood-of-confusion test was not the standard the district court should have relied on when interpreting the Lanham Act.[8]

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1. 953 F.3d 1170 (9th Cir. 2020).

2. *See* Quinn Emanuel Urquhart & Sullivan, LLP, *December 2019: Trademark & Copyright Litigation Update*, JD SUPRA (Jan. 3, 2020) [hereinafter *December 2019 Update*], https://www.jdsupra.com/legalnews/december-2019-trademark-copyright-28229/ (describing how Ninth and Second Circuits deviate in their application of the *Rogers* test).

3. *See, e.g.*, Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 812–13 (2d Cir. 1999) (finding that when a product uses humor alone, it remains commercial and does not require the *Rogers* test as it is not an expressive work).

4. *Id.* at 812 (considering the "parody defense," which allows for "considerable leeway to parodists whose expressive works aim their parodic commentary at a trademark or a trademarked product").

5. *Compare id.* (finding that humor cannot be the only factor in determining whether a work is expressive), *with VIP Prods. LLC*, 953 F.3d at 1174–76 (finding that humor alone can constitute an expressive work).

6. *VIP Prods. LLC*, 953 F.3d at 1175–76.

7. *See id.* at 1174–75 (finding the toy an expressive work because it "communicates a 'humorous message' . . . using word play to alter the serious phrase that appears on a Jack Daniel's bottle").

8. *See id.* at 1174 (stating that the likelihood-of-confusion test fails to consider First Amendment freedom of expression in "artistic expression," thus the *Rogers* test is required); *see also* David Muradyan, *Likelihood of Confusion Analysis Under the Lanham Act*, IP LAW BLOG (Aug. 15, 2012), https://www.theiplawblog.com/2012/08/articles/trademark-law/likelihood-of-confusion-analysis-under-the-lanham-act/ (listing the likelihood-of-confusion factors: "(1) strength of the mark, (2) proximity [of]

The Ninth Circuit's decision to define a dog toy as an expressive work because of its humorous mark places the issue of whether a product should be looked at as commercial or expressive at the forefront. If humor is sufficient to define a work as expressive, plaintiffs are unduly burdened in trademark issues[9] This use of "expressive work" also enables courts to over-apply the *Rogers* test, a very high threshold to pass.[10] The Ninth Circuit's decision to bypass any consideration of the likelihood-of-confusion test creates very stringent criteria for any plaintiff claiming unfair use or trademark ifnfringement.[11]

The Second Circuit created the *Rogers* test under the Lanham Act and has been consistent in its interpretation,[12] being careful not to expand its use to commercial products.[13] The Second Circuit also maintains the purpose of the Lanham Act by utilizing the likelihood-of-confusion analysis before applying the *Rogers* test.[14] This limited use of the *Rogers* test allows the Second Circuit to adhere to the purpose of the Lanham Act, which is to balance First Amendment rights and trademark protection as it applies "only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."[15]

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the goods or services, (3) similarity of the marks, (4) evidence of actual confusion, (5) the marketing channels used, (6) the type of goods or services and the degree of care likely to be exercised by the purchasers of the defendant's product, (7) defendant's intent in selecting the mark, and (8) the likelihood of expansion of the product lines").

9. *See* Jonathan Montcalm, *Has Fox's "Empire" Ended the Battle? Ninth Circuit Expands Scope of Permissible Promotion of Expressive Works*, DORSEY (Dec. 8, 2017), https://thetmca.com/has-foxs-empire-ended-the-battle-ninth-circuit-expands-scope-of-permissible-promotion-of-expressive-works/ (stating the Ninth Circuit has granted significant leeway to expressive works, thus creating protections for uses that were previously unlawful).

10. *See* Joshua Simmons, *Trademarks and the First Amendment: Litigation Trends*, N.Y. L.J. (Nov. 6, 2020, 3:04 PM), https://www.law.com/newyorklawjournal/2020/11/06/trademarks-and-the-first-amendment-litigation-trends/ (quoting ESS Ent. 2000 v. Rock Star Videos, 547 F.3d 1095, 1099 (9th Cir. 2008)) (noting that the artistic use of a trademark will not be found to infringe upon the holder's rights unless "the use of the mark has no artistic relevance to the underlying work whatsoever, or if it has some artistic relevance, unless it explicitly misleads as to the source of content of the work"). *See generally id.* (using Ninth Circuit cases as examples to show the expansion of expressive work).

11. *See December 2019 Update*, *supra* note 2 (stating Second Circuit plaintiffs do not need to meet this same high bar, but rather must only prove likelihood-of-confusion).

12. *See* Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989) (creating the *Rogers* test: (a) the title of the work has some artistic relevance to the underlying work; and (b) that the title is not explicitly misleading as to the source or content of the work).

13. Petition for Writ of Certiorari, VIP Prods. LLC v. Jack Daniel's Props., 953 F.3d 1170 (9th Cir. 2020) (No. 20-365).

14. *See December 2019 Update*, *supra* note 2.

15. *Rogers*, 875 F.2d at 999; Lanham Act, 15 U.S.C. § 1051.

The Ninth Circuit has adopted the *Rogers* test in a way that expands the plain language of the Lanham Act and, therefore, has broadened the test beyond its original purpose.[16] This is compared to the Second Circuit, which created the *Rogers* test and continues to stay within the framework of the Lanham Act.[17] The Second Circuit consistently separates commercial products from expressive works, and when it determines a work is commercial, it only requires the likelihood-of-confusion test for a Lanham Act plaintiff.[18] However, if the work is deemed expressive, the Second Circuit uses the *Rogers* test but in a way that is consistent with the plain language of the Lanham Act.

This Note distinguishes the Ninth Circuit's interpretation of expressive work and use of the *Rogers* test from the Second Circuit's. Section II will outline the Lanham Act and follow the development of the *Rogers* test in the Second and Ninth Circuits. More specifically, it will highlight the expansion of the Ninth Circuit's use of "expressive work" and the *Rogers* test. Section III will analyze the differences in the use of the Lanham Act and the *Rogers* tests applied by the Second Circuit and the Ninth Circuit.

II. BACKGROUND

The Lanham Act serves to protect federally registered marks from similar marks that would confuse consumers.[19] The *Rogers* test was developed as a tool to help aid the legislature enforce trademark infringement issues.[20]

A. Origins of the Lanham Act

In 1946, Congress enacted the Lanham Act at 15 U.S.C. §§ 1051-1127.[21] The Lanham Act provides federal guidelines and procedures to regulate the enforcement of trademark rights.[22] To prevail, the Lanham Act requires a

16. *See* Jared Kagan, *Bad Spaniels Make Bad Law: Ninth Circuit Says Dog Toy is an Expressive Work Entitled to First Amendment Protection*, IPWATCHDOG (Apr. 3, 2020), https://www.ipwatchdog.com/2020/04/03/bad-spaniels-make-bad-law/id=120353/.

17. *Rogers*, 875 F.2d at 999; Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc., 886 F.2d 490, 493–94 (2d Cir. 1989); Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 812–13 (2d Cir. 1999).

18. *Harley-Davidson, Inc.*, 164 F.3d at 813.

19. *Lanham Act*, LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/lanham_act (last visited Feb.. 4, 2022).

20. Ivan Blomqvist, *The Rogers Test: Free Speech v. Trademark Protection*, MOELLER IP (Feb. 12, 2021), https://moellerip.com/the-rogers-test-free-speech-v-trademark-protection/.

21. Lanham Act, 15 U.S.C. § 1051.

22. *Id.*

plaintiff to demonstrate that "(1) the plaintiff has a valid and legally protectable mark; (2) the plaintiff owns the mark; and (3) the defendant's use of the mark to identify goods or services causes a likelihood of confusion."[23] In the Second Circuit, if a work is not expressive under the Lanham Act, the likelihood-of-confusion factors are used.[24] However, when the work is expressive under the Lanham Act, the Second Circuit uses the *Rogers* test .[25]

The *Rogers* test applies to expressive works "only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."[26] The *Rogers* test intended to strike a balance between trademark rights and First Amendment rights.[27] Therefore, when an expressive work is at issue, a Lanham Act claimant must show the work is either "not artistically relevant to the underlying work" or "explicitly misleads consumers as to the source or content of the work" to prevail.[28]

B. Creation and Progression of the Rogers Test

The *Rogers* test originated in the Second Circuit in 1989 from the landmark case *Rogers v. Grimaldi*.[29] There, the court analyzed a false advertising claim from a famous duo suing Grimaldi over a movie title under the Lanham Act.[30] The duo, Ginger Rogers and Fred Astaire, believed that the film "Ginger and Fred," which depicted a famous cabaret duo in a satirical way, portrayed them and would lead the audience to believe Rogers and Astaire were involved with the film.[31]

Grimaldi claimed that the title was free speech protected under the First Amendment.[32] The District Court for the Southern District of New York granted summary judgment for Grimaldi as the film was an artistic expression and not a commercial product.[33] Rogers subsequently appealed

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23. *Id.*; *Lanham Act*, *supra* note 19.

24. *See* Muradyan, *supra* note 8 (listing the likelihood-of-confusion factors).

25. David Grossman & Mariah Volk, *Gordon v. Drape Creative, Inc.*, LOEB & LOEB LLP (Nov. 30, 2018), https://www.loeb.com/en/insights/publications/2018/11/gordon-v-drape-creative-inc.

26. Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989).

27. *See id.*

28. VIP Prods. LLC v. Jack Daniel's Props., 953 F.3d 1170, 1174 (9th Cir. 2020); Muradyan, *supra* note 8.

29. 875 F.2d 994 (2d Cir. 1989).

30. *Id.* at 996.

31. *Id.* at 996–97.

32. *Id.* at 997.

33. Rogers v. Grimaldi, 695 F. Supp. 112, 124 (S.D.N.Y. 1988), *aff'd*, 875 F.2d 994 (2d Cir. 1989).

the district court's decision.[34] The appellate court affirmed the district court's decision but found that the Lanham Act could apply to titles of artistic works.[35] Subsequently, the Second Circuit developed a standard for artistic works, which stated that the Lanham Act "should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."[36]

Under this standard, artistic relevance is analyzed first.[37] A title is artistically relevant if it has some artistic relevance to the underlying work.[38] If it does have artistic relevance, then the Second Circuit analyzes whether the "title explicitly misleads as to the source or the content of the work."[39] Through this new standard, the Second Circuit determined that the title had artistic relevance to the underlying work and did not explicitly mislead consumers.[40] Therefore, it affirmed the district court's decision and, as a result, created the *Rogers* test.[41] After this decision, when there is an "expressive work," the *Rogers* test interprets the Lanham Act to apply when deciding if consumer confusion exceeds the right to free expression.[42] "[T]hat balance will normally not support applying the Act," unless the two aforementioned prongs are fulfilled[43] with regard to the title's creative connection and the impression that perceived connection might cause.[44]

i. Second Circuit's Rogers Test Prongs

As noted above, the *Rogers* test consists of two prongs: 1) "at least some artistic relevance" and 2) "not explicitly misleading as to the content of the work."[45] The first prong of the *Rogers* test is a factual issue that the courts

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34. *Rogers*, 875 F.2d at 996.

35. *See id.* at 998 (finding that titles counted as an expressive work and thus are entitled to protection).

36. *Id.* at 999.

37. *See id.* at 998 (analyzing artistic relevance before analyzing if a work is explicitly misleading as to its content).

38. *Id.* at 999.

39. *Id.*

40. *Id.* at 1001–02 (concluding that although the title may be misleading to some, "the title is entirely truthful as to its content" and "has an ironic meaning that is relevant to the film's content;" therefore, the Lanham Act claim must fail).

41. Lynn M. Jordan & David M. Kelly, *Another Decade of* Rogers v. Grimaldi*: Continuing to Balance the Lanham Act with the First Amendment Rights of Creators of Artistic Works*, 109 TRADEMARK REP. 833, 837 (2019).

42. *See* Grossman & Volk, *supra* note 25 (defining the main purpose of the *Rogers* test as ensuring that customers are not confused on the source of the work).

43. *See id.*

44. *Rogers*, 875 F.2d at 1000.

45. *Id.*

consider on a case-by-case basis.[46] The bar establishing "artistic relevance" is low; defendants simply have to prove that the work rises just above what the court considers "artistic relevance."[47]

Conversely, the second prong of the *Rogers* test requires a more in-depth analysis.[48] Accordingly, the Second Circuit employs a variety of factors to evaluate the challenged work's likelihood-of-confusion.[49] If there is confusion, then the Second Circuit analyzes whether that confusion is "particularly compelling."[50] Where the confusion is "particularly compelling," then the Second Circuit considers the work "explicitly misleading,"[51] meaning it fails the *Rogers* test, thus violating the Lanham Act.

ii. Second Circuit's Rogers Test Development

In 1993, the Second Circuit, in *Twin Peaks Productions, Inc. v. Publications International*,[52] illustrated its use of the *Rogers* test.[53] Publications International, Ltd. ("PIL") published a book titled "Welcome to Twin Peaks: A Complete Guide to Who's Who and What's What," based on the first season of the show "Twin Peaks."[54] On the book's cover, PIL placed a disclaimer that the show was not affiliated with the book.[55] Twin Peaks Production sued in the Southern District of New York alleging copyright infringement, trademark infringement, unfair competition, and trademark dilution.[56] PIL asserted fair use and First Amendment defenses.[57]

The district court found for Twin Peaks Productions on all matters besides trademark dilution and rejected PIL's defenses.[58] Subsequently, PIL

46. 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:144.50 (5th ed. 2021).

47. Jordan & Kelly, *supra* note 41, at 837 (stating that the court is simply responsible for determining that artistic relevance exists and not how much of it exists).

48. *See* 3 ANNE GILSON LALONDE & JEROME GILSON, GILSON ON TRADEMARKS § 13.24 (2021).

49. *See* Jordan & Kelly, *supra* note 41, at 850–51.

50. *See id.* at 851 ("If there is no likelihood-of-confusion, the analysis is complete.").

51. *Id.*; *see December 2019 Update*, *supra* note 2.

52. 996 F.2d 1366 (2d Cir. 1993).

53. *Id.*

54. *Id.* at 1370.

55. *Id.* at 1370–71, 1739 (noting that PIL published the book based on the show without authorization from the network or show creators).

56. *Id.* at 1371.

57. *Id.* (asserting that their product was just using freedom of speech and not infringing on a trademark).

58. *Id.*; *see also* Twin Peaks Prods., Inc., v. Publ'ns Int'l, 778 F. Supp. 1247 (S.D.N.Y. 1991).

appealed to the Second Circuit Court of Appeals.[59] On appeal, the Second Circuit was "concerned that the District Court failed to recognize the special concerns implicated by the Lanham Act claims against titles of works of artistic expression."[60] Therefore, the Second Circuit applied the *Rogers* test.[61]

The Second Circuit recognized that the first prong of *Rogers* was satisfied by the artistic relevance to the underlying work.[62] When analyzing whether a work is "explicitly misleading," the Second Circuit applies the likelihood-of-confusion test.[63] Therefore, the Second Circuit remanded the issue of "explicitly misleading" to the district court to apply the likelihood-of-confusion test and thus, complete the full and correct analysis of the issues.[64] *Twin Peaks Productions* demonstrates that when the Second Circuit deems a work "expressive," it analyzes the second prong of *Rogers* differently than the Ninth Circuit.[65] The Second Circuit's analysis of the second prong contrasts with the Ninth Circuit's because it analyzes whether an "expressive work" is misleading based on the likelihood-of-confusion factors.[66]

The Second Circuit does not consider a product an "expressive work" when only humor is used and, therefore, does not apply the *Rogers* test in such cases.[67] The Second Circuit demonstrated this with its holding in *Harley-Davidson, Inc. v. Grottanelli*[68] where the plaintiff filed a trademark-infringement lawsuit against a motorcycle repair business operating under the name The Hog Farm. Harley-Davidson alleged that "Hog" was a trademark for its motorcycles and this use of the term would prompt consumers to incorrectly associate the two. Though the defendant relied on a parody defense,[69] the court noted that for a product to be considered an "expressive work," it must provide commentary on the original trademark.[70] However, humor alone is insufficient commentary on an original trademark when it fails to offer a comment with "critical bearing on the substance or

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59. *Twin Peaks Prods., Inc*, 996 F.2d at 1371.

60. *Id.* at 1378.

61. *Id.* at 1378–79.

62. *See id.* at 1379 (finding the work artistically relevant to the underlying work as it was a title of a book and was related to the book).

63. *See id.* The Second Circuit relies on the eight factors developed in *Polaroid Corp. v. Polaroid Electronics. Corp.* to guide its likelihood-of-confusion analysis.

64. *Id.* at 1379–80.

65. *December 2019 Update*, *supra* note 2.

66. *Id.*

67. Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 813 (2d Cir. 1999).

68. *Id.* at 806.

69. *See supra* note 4 (describing the parody defense).

70. *See Harley-Davidson, Inc.*, 164 F.3d at 813.

style of the original composition."[71] The Second Circuit held that "a trademark parody that endeavors to promote primarily non-expressive products" is not entitled to First Amendment protection.[72] Therefore, the Second Circuit uses the likelihood-of-confusion test to determine if a trademark has infringed the plaintiff's protected trademark.[73]

Thus, in the Second Circuit, Lanham Act plaintiffs are not required to pass the *Rogers* test requirements, rather, they must only satisfy the likelihood-of-confusion test when a defendant uses a trademark to humorously promote a product.[74] This case demonstrates that the Second Circuit only applies the likelihood-of-confusion factors and not the *Rogers* test when a work is not expressive.[75]

C. Ninth Circuit's Rogers Test Progression

After the landmark case of *Rogers v. Grimaldi*, the *Rogers* test has not only been used by the Second Circuit, but has also been adopted by the Ninth Circuit.[76] Originally, the *Rogers* test was used to analyze whether titles of expressive works were infringing on other works.[77] However, when the Ninth Circuit adopted the *Rogers* test, it expanded the test's application.[78]

In 2017, *Twentieth Century Fox TV v. Empire Distribution, Inc.*,[79] the Ninth Circuit held that Fox's use of the mark "Empire" in the show's name and its promotional activities were protected by the First Amendment.[80] This holding applied to all of Fox's uses of "Empire," including those auxiliary to protected expressive works.[81] This expansion meant that Fox could use

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71. *See id.* (requiring that the humor provide additional commentary to constitute an expressive work).

72. *Id.*

73. *Id.* at 813–14.

74. *See id.*

75. *Id.*

76. *See December 2019 Update*, *supra* note 2 (explaining that the Ninth Circuit adopted the *Rogers* test to evaluate expressive works pursuant to the Lanham Act).

77. Meredith M. Wilkes & Jacqueline K.S. Lee, *Litigating the First Amendment Defense in the Video Game Context*, INTA BULLETIN (Sept. 15, 2013), https://www.jonesday.com/files/Publication/46dc838c-ffa4-4cf6-b788-75a28c6642eb/Presentation/PublicationAttachment/29d1bd39-b132-4f42-a6d6-ecfd9dbfb03c/LitigatingtheFirstAmendm.pdf.

78. Kagan, *supra* note 16.

79. 875 F.3d 1192 (9th Cir. 2017).

80. *See id.* at 1197 (finding that underlying works using marks deserve protection as they are an extension of an expressive work).

81. *See id.* (citing Rogers v. Grimaldi, 875 F.2d 994, 999 n.5 (2d Cir. 1989)) (using a footnote from *Rogers* to classify auxiliary products as an extension of expressive works).

the trademark "Empire" in promoting shows, "live musical performances, radio play, and consumer goods such as shirts and champagne glasses."[82] Categorizing supplementary products as "expressive works" broadens the scope of permissible trademarks to include "promotional" products that create revenue and commercial goods.[83]

Unlike the Second Circuit, the Ninth Circuit has held that likelihood-of-confusion test is irrelevant to determine whether trademark use in an expressive work is explicitly misleading.[84] This is because the Ninth Circuit finds that the "likelihood-of-confusion test provides insufficient protection against a trademark owner's ability to control public discourse."[85] Instead, the Ninth Circuit requires an "explicit indication, overt claim, or explicit misstatement" to determine if a product is "explicitly misleading."[86] Notably, the Ninth Circuit is the only circuit to use these factors to determine whether a trademark used in an expressive work is explicitly misleading.[87]

In 2018, the Ninth Circuit further expanded the reach of expressive works in *Gordon v. Drape Creative*[88] by using humor to classify a commercial product as an expressive work.[89] Christopher Gordon created a YouTube video using the catchphrase "Honey Badger Don't Care."[90] After the phrase became widely popular, Gordon trademarked the phrase and used it to sell products.[91] Drape Creative later used this catchphrase in greeting and birthday cards[92] prompting Gordon to sue the company in the United States District Court for the Central District of California. The court granted summary judgment for the defendant using the *Rogers* test[93] and Gordon appealed.[94]

82. *Id.* at 1195.

83. *See* Montcalm, *supra* note 9.

84. *Twentieth Century Fox TV*, 875 F.3d at 1198.

85. *Id.* at 1197.

86. *See id.* at 1199 (finding that these factors were more in line with the Lanham Act).

87. Petition for Writ of Certiorari at 5–6, VIP Prods. LLC v. Jack Daniel's Props., 953 F.3d 1170 (9th Cir. 2020) (No. 20-365) (stating the Ninth Circuit is the outlier while the Second, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits do not require as high of a threshold).

88. 909 F.3d 257 (9th Cir. 2018).

89. *See id.* (finding a greeting card an expressive work because it was humorous).

90. *Id.* at 260.

91. *Id.*

92. *Id.* at 260–63 (finding that Drape did not receive authorization to use the phrase, even though the two parties had communicated about the idea in the past).

93. *Id.* at 260–61.

94. *Id.* at 263.

In its analysis, the court first found that the greeting cards were expressive works protected under the First Amendment because they conveyed messages to consumers through their humorous words and images.[95] The standard of "conveying a message" expands "expressive works" to include any product if it adds any amount of humor or critique.[96] Then, the Court applied the *Rogers* test and remanded the issues back to the district court.[97]

i. Ninth Circuit's Rogers Test Prongs

Despite their deviations in application, the Ninth and Second Circuits use the same prongs for the *Rogers* test. Both Circuits require: 1) "at least some artistic relevance," and that products are 2) "not explicitly misleading as to the content of the work."[98] However, the breakdown of those prongs in the Ninth Circuit is different.[99] Relying on Second Circuit case precedent, the Ninth Circuit interpreted the first prong of the *Rogers* test as establishing a standard [100] that the degree of artistic relevance "merely must be above zero."[101] This standard is considered on a factual basis and does not require judges to "engage in artistic analysis."[102]

When analyzing the second prong the Ninth Circuit disregards the likelihood-of-confusion analysis.[103] Instead, the Ninth Circuit's analysis is rooted in a multi-part elemental test that considers: whether the work "'*explicitly* misled consumers' through an 'explicit indication,' 'overt claim,' or 'explicit misstatement' that caused consumer confusion."[104]

ii. The Ninth Circuit's Analysis of VIP Prods. LLC v. Jack Daniel's Props.

In 2020, the Ninth Circuit heard *VIP Products LLC*.[105] The court analyzed whether a dog toy was an "expressive work" and, therefore, entitled to First Amendment protection.[106] Jack Daniel's argued that the dog toy was a

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95. *Id.* at 268.

96. *See* Kagan, *supra* note 16 (stating that the Ninth Circuit has strayed from traditionally expressive work by expanding its definition to include humor).

97. *Gordon*, 909 F.3d at 271.

98. *December 2019 Update*, *supra* note 2.

99. *Id.*

100. *See* Jordan & Kelly, *supra* note 41, at 837 (stating that, in the Second Circuit, "works that ha[ve] 'no artistic relevance' [are] the only works that would be exempt").

101. *See id.*

102. *Id.* at 838.

103. *December 2019 Update*, *supra* note 2.

104. Jordan & Kelly, *supra* note 41, at 858.

105. 953 F.3d 1170 (9th Cir. 2020).

106. *Id.* at 1172.

commercial product that was ruining its long-established trademark.[107] In response, VIP Products argued that it should be afforded First Amendment protection as it was conveying a message and commenting humorously on Jack Daniel's products.[108] The Ninth Circuit disagreed with Jack Daniel's and held that the dog toy was an "expressive work" because it conveyed a humorous message.[109] Therefore, the court accepted VIP's First Amendment defense under the Lanham Act.[110]

The appellate court considered the likelihood-of-confusion test under the Lanham Act but determined that the test fails when "artistic expression is at issue."[111] The likelihood-of-confusion test fails as it does not "account for the full weight of the public's interest in free expression."[112] By analyzing the work as "communicating ideas or expressing points of view," the court decided the VIP dog toy was an "expressive work."[113] Rather than applying the likelihood-of-confusion factors, the lower court turned to the *Rogers* test which requires a plaintiff to show that the defendant's use of the mark is either "not artistically relevant to the underlying work" or "explicitly misleads consumers as to the source or content of the work."[114] The appellate court vacated the district court's finding of infringement and remanded to the district court to determine whether Jack Daniel's product fits one of the prongs of the *Rogers* test.[115]

On trademark dilution by tarnishment, the appellate court held that there can be no dilution by tarnishment when the work in question is noncommercial.[116] It determined that because VIP used Jack Daniel's trade dress and bottle design to "convey a humorous message," the message is subject to First Amendment protection.[117] Therefore, VIP was entitled to

107. *Id.* at 1174 (highlighting that Jack Daniels has established an image of seriousness surrounding its trademark).

108. *Id.* at 1175.

109. *Id.* (finding that while the dog toy did not rise to the artistic level of the "Mona Lisa" it still was expressive).

110. *Id.* at 1175–76.

111. *Id.* at 1174 (commenting on the likelihood-of-confusion test's failure in these types of cases).

112. *Id.*

113. *Id.*

114. *Id.* (finding that when an expressive work is at issue, the likelihood-of-confusion test is not a high enough threshold).

115. *Id.* at 1176.

116. *Id.* (concluding that when a work is expressive, it is noncommercial, so dilution by tarnishment claims cannot survive).

117. *Id.* (finding that humor is an important right protected under the First Amendment, so it deserves a high bar of analysis).

judgment in its favor on the dilution claim.[118] Jack Daniel's filed a petition with the Supreme Court requesting that it grant a writ of certiorari and reverse the Ninth Circuit's decision.[119]

III. HOW THE NINTH CIRCUIT DELINEATES IN JACK DANIELS

The Ninth Circuit continues to use the Lanham Act to analyze trademark infringement, but its expansion of "expressive work" and changes to the *Rogers* test have differed from the Second Circuit's original test.[120] Thus, while the Nith Circuit's use of the test is rooted in the same purpose as the Second Circuit, to strike a balance between First Amendment protection and trademark rights under the Lanham Act, its expanded definition calls this balance into question.[121]

A. How the Ninth Circuit's Expanded its Definition of "Expressive Works"

When the Ninth Circuit determined that humor can qualify a product as an "expressive work," it expanded the term by granting any competing product that uses humor heightened protection.[122] One of the Ninth Circuit's first steps in expanding the scope of the *Rogers* test was to apply the definition of expressive works to commercial products used for promotion, even when those products are considered auxiliary.[123] By defining primarily commercial products as expressive, defendants in the Ninth Circuit could use humor to qualify any product as expressive, a relatively low bar for junior marks to pass.[124]

Expanding the scope in this way allows for any commercial product using

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118. *Id.*

119. *See* Petition for Writ of Certiorari, VIP Prods LLC v. Jack Daniel's Props., Inc., 953 F.3d 1170 (9th Cir. 2020) (No. 20-365).

120. *See* Simmons, *supra* note 10 (observing a "foundational agreement" that First Amendment rights must be considered in trademark infringement litigations, but "conflicts arise in trying to draw the line").

121. *See* Wilkes & Lee, *supra* note 77 (stating that defendants are "quick" to assert First Amendment defenses and the *Rogers* test seeks to balance these defenses with Lanham Act claims).

122. *Compare* VIP Prods. LLC v. Jack Daniel's Props. Inc., 953 F.3d 1170, 1175 (9th Cir. 2020) (holding humor alone is enough to deem a work expressive), *with* Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 813 (2d Cir. 1999) (holding that when a competing product uses humor to separate itself from a senior mark, the competing product needs to convey a message).

123. *See* Twentieth Century Fox TV v. Empire Distrib., Inc., 875 F.3d 1192, 1196–97 (9th Cir. 2017) (holding auxiliary products used to promote an expressive work was a natural extension of *Rogers*).

124. *See* Kagan, *supra* note 16.

a trademark in a humorous way to be considered an "expressive work."[125] This diverges from the original purpose of the Lanham Act, to protect against customer confusion regarding trademarks.[126] Allowing humor alone to negate consumer confusion contravenes the original protections since the Second Circuit's likelihood-of-confusion standard is meant to protect against humor being considered alone in place of a list of factors.[127] Moreover, when determining whether something is expressive, the courts are best suited to analyze if the product provides commentary on the original work.[128] As established by *Harley-Davidson, Inc.*, humor can be a factor, but humor alone is not enough to deem a product an "expressive work."[129]

In the Second Circuit, humor alone is not enough to express an idea or offer commentary unless there is a substantial message behind it.[130] Thus, if a commercial product's primary purpose is for the sale of goods and not commenting on the original work, then it cannot be expressive.[131] Commercial products and expressive works often conflict because they are afforded different levels of protection under the First Amendment.[132] The Harley Davidson court held that a product using a humorous representation of another product, especially that of a competitor, for self-promotion cannot be both expressive and commercial.[133] Therefore, considering humor alone gives heightened First Amendment protection to products that base their

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125. Bill Donahue, *Jack Daniel's Takes Dog Toy TM Fight to Supreme Court,* LAW360 (Sept. 21, 2020, 4:16 PM) https://www.law360.com/articles/1312109/jack-daniel-s-takes-dog-toy-tm-fight-to-supreme-court (arguing that the Ninth Circuit expanded the scope by affording jokes too much First Amendment protection).

126. *See Twentieth Century Fox TV*, 875 F.3d at 1196 (explaining when the Court applies the *Rogers* test).

127. *See* Kagan, *supra* note 16 (explaining that the low threshold of considering humor still leaves great risk for consumer confusion); *see also December 2019 Update*, *supra* note 2 (stating that the Second Circuit uses eight factors in their likelihood-of-confusion test).

128. *See* Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 813 (2d Cir. 1999) (citing Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569 (1994)) (holding commentary is necessary when humor is involved).

129. *Id.* at 812 (highlighting that the use of humor does not automatically make the product not commercial).

130. *Id.* at 812–13 (relaying that humor can be a factor but the humor needs to relate to the "original composition").

131. *See id.* at 813 (conveying that the use of humor is not an automatic marker for expressive works and court must consider the purpose of the humor).

132. Simmons, *supra* note 10.

133. *See Harley-Davidson, Inc.*, 164 F.3d at 812 (noting examples where the court has offered "considerable leeway" to parody products so long as their expressive work is attempting to provide humorous commentary, not attempting to promote or sell the product).

designs on senior trademarks and leaves very little room for trademark owners to prevail on infringement claims.[134]

The Ninth Circuit built upon the *Rogers* test by expanding the definition of expressive works to include commercial products, thus, establishing a high threshold for Lanham Act claimants.[135] The heightened threshold burdens plaintiffs with proving that the product was "explicitly misleading" rather than just that its likelihood-of-confusion was "particularly compelling."[136] The Ninth Circuit expands the *Rogers* test because it defines traditionally non-expressive works as expressive works.[137]

Under the Lanham Act, the *Rogers* test should only be used when the product is deemed expressive.[138] Through the Ninth Circuit's expansion of the definition of "expressive work," the *Rogers* test can be applied more broadly than it can in the Second Circuit.[139] The Lanham Act seeks to protect trademark owners, and by using the *Rogers* test in a way that seeks to protect junior trademarks, it strays from protecting senior trademark owners.[140] In the Second Circuit, when a work is non-expressive, the Lanham Act only requires a likelihood-of-confusion analysis.[141] The Ninth Circuit has completely disregarded this analysis.[142] Compared to the Ninth Circuit, the Second Circuit's definition of "expressive work" is aligned with the Rogers' test initial purpose.[143] The Second Circuit has not strayed from the original intentions of the Lanham Act which seeks to protect against commercial

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134. *See* Kagan, *supra* note 16.

135. *See December 2019 Update*, *supra* note 2 (discussing how the Ninth Circuit requires a stricter explicitly misleading inquiry instead of the likelihood-of-confusion inquiry applied by other courts in *Rogers* analyses).

136. *Id.*

137. *See* Kagan, *supra* note 16 (noting there was no precedent behind the Ninth Circuit choosing to define non-expressive works as expressive).

138. Michael A. Rosenhouse, Annotation, *Protection of Artistic Expression from Lanham Act Claims Under Rogers v. Grimaldi, 857 F.2d 994 (2d Cir. 1989)*, 22 A.L.R. FED. 3d Art. 4 (2017).

139. *See* Kagan, *supra* note 16 (stating that the Ninth Circuit's definition of expressive work is far beyond what is traditionally accepted, which poses a large risk to trademark owners).

140. Lanham Act, 15 U.S.C. § 1051(b) ("A person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce may request registration of its trademark on the principal register . . . .").

141. *Trademarks and Expressive Works*, STITES & HARBISON PLLC (Apr. 28, 2015), https://www.stites.com/resources/trademarkology/trademarks-and-expressive-works.

142. *See December 2019 Update*, *supra* note 2.

143. *See* Kagan, *supra* note 16(stating the Second Circuit has defined expressive products to include traditionally expressive works such as movies, titles, songs, and the like, while the Ninth Circuit has gone beyond this to include consumer goods in its definition).

activities that may cause consumers to believe a "false designation of orientation."[144]

The Second Circuit has adhered to the plain language of the Lanham Act, even when humor is involved, by analyzing how consumers may confuse products before applying the *Rogers* test.[145] When commercial products are involved, the Second Circuit, unlike the Ninth, is cautious to consider a product an "expressive work."[146] By accounting for factors other than humor when determining whether a work should be classified as expressive or commercial, the Second Circuit does not stray from the purpose of the Lanham Act, which is to avoid customer confusion.[147] This cautiousness strikes a proper balance between trademark rights and First Amendment rights[148] and has led the Second Circuit to use the likelihood-of-confusion factors before applying the *Rogers* test when non-expressive works are at issue.[149] The Second Circuit correctly analyzes an "expressive work" because it has not classified consumer goods as such.[150] When a work is not expressive, it does not require the *Rogers* test to establish a claim under the Lanham Act.[151] Therefore, the analysis better adheres to the plain language of the Lanham Act with its use of *Rogers* test, unlike the Ninth Circuit.

B. How the Ninth Circuit's Rogers Test Deviates from the Second Circuit's Rogers Test

The Second Circuit's *Rogers* test considers the likelihood-of-confusion factors in its second prong analysis.[152] Ultimately, the second prong of the

144. *See Trademarks and Expressive Works*, *supra* note 141 (showing how the Lanham Act was used in the development of the *Rogers* test).

145. *See* BedRoc Ltd., LLC v. United States, 541 U.S. 176, 177 (2004) (finding that when a statute is being analyzed "the inquiry begins with the statutory text, and ends there as the text is unambiguous"); *see also* Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 812 (2d Cir. 1999) (exploring the court's hesitation to give consumer products with generic names trademark protections).

146. *Compare Harley-Davidson, Inc.*, 164 F.3d at 812 (looking at competing products and addition of commentary before establishing a product as expressive), *with* Gordon v. Drape Creative, Inc., 909 F.3d 257, 268–69 (9th Cir. 2018) (holding a product was expressive because it was a greeting card with humor).

147. *Trademarks and Expressive Works*, *supra* note 141.

148. *See id.* (noting a needed balance between First Amendment rights and Lanham Act protections).

149. *December 2019 Update*, *supra* note 2.

150. Kagan, *supra* note 16(stating plainly expressive works as "movies, songs, photographs, television shows, video games, and greeting cards").

151. *See December 2019 Update*, *supra* note 2 (showing that the Second Circuit does not apply the *Rogers* test if it analyzes the work and concludes that it is not-expressive).

152. *Id.*

Rogers test requires a claimant to show that the product "explicitly misleads consumers as to the source or content of the work."[153] The likelihood of confusion factors are rooted in the *Polaroid* factors .[154] Using the likelihood-of-confusion factors when analyzing the second prong follows the plain language of the Lanham Act.[155]

The Lanham Act uses the phrase "likely to cause confusion" as a determining factor in trademark infringement cases.[156] The Second Circuit incorporates that language into their analysis of the *Rogers* test, showing that even though the *Rogers* test is judicially created, it adheres to the original purpose of the Lanham Act.[157] The Second Circuit further strikes more of a balance between trademark rights and First Amendment rights as it provides consistent, efficacious resolution of trademark infringement suits.[158] This allows plaintiffs to argue more for trademark infringement as the likelihood-of-confusion factors the Second Circuit employs are a less rigid standard than the Ninth Circuit's second prong.[159] The likelihood-of-confusion factors also allow the courts to consider more factors for analysis, which enables courts to separate expressive works from commercial products more easily.[160] This is a better standard because analyzing more factors allows the court to better balance First Amendment and trademark rights, and allows both defendants and plaintiffs more opportunities to prove their arguments. This is legally significant because it creates a standard that does not give more protection to one trademark over another.

The Ninth Circuit deemed the likelihood-of-confusion factors irrelevant in its application of the second prong of the *Rogers* test.[161] Instead, the Ninth

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153. *Id.* (showing how the Second Circuit interprets the same language differently than the Ninth Circuit in their *Rogers* test).

154. *Id.*

155. *See Lanham Act*, *supra* note 19 (stating that the Lanham Act requires a trademark be "distinctive" so the trademark can aid in "identifying and distinguishing particular goods as emanating from one producer or source and not another").

156. Lanham Act, 15 U.S.C. § 1125(a)(1).

157. *See December 2019 Update*, *supra* note 2 (highlighting that the Second Circuit uses the same language as the Lanham Act while the Ninth Circuit has adopted a different standard).

158. *See* Kagan, *supra* note 16 (stating trademark owners subject to Ninth Circuit jurisdiction must be "vigilant" about protecting their marks as this circuit's high bar does not protect trademark owner's rights).

159. *See December 2019 Update*, *supra* note 2 (stating that the Ninth Circuit only looks at "explicit indication, overt claim, or explicit misstatement"); *see also* Thomas M. Byron, *Spelling Confusion: Implications of the Ninth Circuit's View of the "Explicitly Misleading" Prong of the Rogers Test*, 19 J. INTELL. PROP. L. 1 (2011).

160. *See* Byron, *supra* note 159, at 2–3, 12–14.

161. VIP Prods. LLC v. Jack Daniel's Props, Inc., 953 F.3d 1170, 1174–75 (9th Cir. 2020) (holding the likelihood-of-confusion factors are not enough); *see also December*

Circuit requires a claimant to show an "explicit indication, overt claim, or explicit misstatement" to meet the second prong.[162] The Ninth Circuit developed this with substantial judicial discretion[163] by pulling from different analyses in the Sixth and Second Circuits to broaden its consideration to include "overt misrepresentation."[164]

The Ninth Circuit then expanded its interpretation in *Twentieth Century Fox*, by developing the factors of "explicit indication, overt claim, or explicit misstatement."[165] It cited *Rogers* in *Twentieth Century Fox* to highlight where these factors stemmed from in the Second Circuit.[166] However, the Second Circuit does not use these factors, and they are not mentioned in *Rogers* nor the Lanham Act.[167]

Therefore, the Ninth Circuit's analysis strays from the original language of the Lanham Act and the original use of the *Rogers* test.[168] Thus, not only would the *Jack Daniels* case not require the *Rogers* test if the Ninth Circuit correctly interpreted expressive works, but if the dog toy was to be considered an "expressive work," the Ninth Circuit did not apply the *Rogers* test correctly.

C. Possible Implications After Jack Daniels

The *Rogers* test has evolved from being used for titles of movies to applying to video games and gift cards and now to auxiliary products and dog toys.[169] The bar for artistically relevant was made low so that the First

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2019 Update, *supra* note 2.

162. Twentieth Century Fox TV v. Empire Distrib. Inc., 875 F.3d 1192, 1199 (9th Cir. 2017) (using the language from the Ninth Circuit to highlight the differences in the application of the *Rogers* test between the Second and Ninth Circuits).

163. *See id.* (stating that the Ninth Circuit created this interpretation on its own; therefore, creating a divide in how the Ninth and Second Circuit use the *Rogers* test).

164. *See* Byron, *supra* note 159, at 4–5.

165. *Twentieth Century Fox TV*, 875 F.3d at 1199.

166. *Id.*; *see also* Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).

167. *See* Lanham Act, 15 U.S.C. § 1125(a); *see also* Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989); Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc., 886 F.2d 490 (2d Cir. 1989); Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806 (2d Cir. 1999).

168. *See* Joshua Besser, *False Endorsement or First Amendment?: An Analysis of Celebrity Trademark Rights and Artistic Expression*, 41 SAN DIEGO L. REV. 1787, 1795 (2004) (stating that the purpose of the Lanham Act is to prevent consumer confusion as to the source of the product); *see also* Kagan, *supra* note 16 (stating the Ninth Circuit's First Amendment protections are denying trademark owners the ability to differentiate their trademarks).

169. *See* VIP Prods. LLC v. Jack Daniel's Props., 953 F.3d 1170 (9th Cir. 2020) (finding a dog toy to be an expressive work); *see* William K. Ford, *Restoring Rogers: Video Games, False Association Claims, and the "Explicitly Misleading" Use of*

Amendment would have continued protection.[170] However, this shift in allowing commercial products to be considered as expressive works when they contain a humorous message creates a new balance between First Amendment rights and trademark protections.[171] This new balance could be concerning for trademark owners but favorable for creators.[172] As trademark owners are recognizing that commercial products such as dog toys pass the *Rogers* test when they involve humor, the question arises: what products will be excluded from passing the *Rogers* test?[173]

However, the shift in allowing humor in commercial products to be deemed as expressive is not happening in the Second Circuit.[174] The differences between Ninth Circuit's *Rogers* test and the Second Circuit's *Rogers* test remain intact and enable the circuits to decide similar matters differently.[175] This difference in how the circuits are using the test leads to a difference in protection for brand owners depending on where the case is tried.[176] This raises concerns for forum shopping, as trademark owners will want to try their cases in the Second Circuit as it is a more favorable forum for them.[177]

IV. CONCLUSION

The Ninth Circuit in *VIP Products*, expanded the definition of expressive work because it only considered humor when the court should have

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Trademarks, 16 J. MARSHALL REV. INTELL. PROP. L. 306, 308–09 (2017) (listing films, magazines, video games, and greeting cards as things currently considered as non-commercial expressive works).

170. *See* Ford, *supra* note 169, at 314–15.

171. Jared I. Kagan & Emily R. Hush, *Parody Chew Toys and the First Amendment,* 13 LANDSLIDE 22 (2021) (describing the Ninth Circuit's *VIP* decision as potentially "disrupting the fine balance between the Lanham Act and free speech").

172. *See Bad Spaniels Dog Toys — Expressive Art or Noisy Trademark Infringers?*, TAFT (Apr. 21, 2021), https://www.taftlaw.com/news-events/law-bulletins/bad-spaniels-dog-toys-expressive-art-or-noisy-trademark-infringers.

173. *See id.* (stating trademark holders may need to use "hyper-vigilance" when protecting their marks).

174. *See* Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 813 (2d Cir. 1999) (stating "a trademark parody that endeavors to promote primarily non-expressive products" is not entitled to First Amendment protection).

175. *See December 2019 Update*, *supra* note 2 (discussing the continuing differences in the Second and Ninth Circuits).

176. *See* Jared Kagan & Jeremy Feigelson, *Will SCOTUS Tell Bad Spaniels to Roll Over?*, IP WATCHDOG (Oct. 22, 2020), https://www.ipwatchdog.com/2020/10/22/will-scotus-tell-bad-spaniels-roll/id=126606/ (stating concerns over the Ninth Circuit's decision in ruling a dog toy as an expressive work).

177. *See id.* (pointing out that the Intellectual Property Law Association of Chicago is concerned over the forum shopping risk the Ninth Circuit is creating).

considered humor, commentary, and competing products.[178] Therefore, using the product in question, a dog toy, the Ninth Circuit expanded expressive works to cover commercial products.[179] This is a delineation from the Second Circuit, which uses commentary upon the original mark and humor as tools to determine if a work is expressive.[180] However, there are differences with the circuits' uses of the *Rogers* test. The Second Circuit applies the likelihood-of-confusion factors to its *Rogers* test analysis while the Ninth Circuit uses the factors: 'explicit indication,' 'overt claim,' or 'explicit misstatement.'[181] Overall, the Ninth Circuit and Second Circuit's differences in determining expressive works and use of the *Rogers* test are creating a lack of uniformity. *VIP Products* is one of many cases that highlights the differences in how the Ninth Circuit progressed the *Rogers* test and how the circuits' different applications will likely need to be resolved by the Supreme Court.

178. *See* Kagan, *supra* note 16.

179. *Id.*

180. *See, e.g.*, Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 813 (2d Cir. 1999).

181. Twentieth Century Fox TV v. Empire Distrib. Inc., 875 F.3d 1199, 1199 (9th Cir. 2017); *see* Kagan, *supra* note 16.

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