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### **Beyond the Bankruptcy Code: A New Statutory Bankruptcy Regime for Tribal Debtors**

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## **BEYOND THE BANKRUPTCY CODE: A NEW STATUTORY BANKRUPTCY REGIME FOR TRIBAL DEBTORS**

*Laura N. Coordes\**

### ABSTRACT

*Native American tribes and tribal businesses play an important role in U.S. commerce, but many of these entities are effectively prohibited from filing for bankruptcy relief when financial distress occurs. This Article demonstrates how and why the Bankruptcy Code is a poor fit for these “tribal debtors” and suggests that Congress enact a new statutory regime to provide structured debt relief for these entities rather than modify the Bankruptcy Code.*

*Although this proposal is novel with respect to tribal debtors, Congress has looked beyond the Bankruptcy Code to provide debt relief when use of the Code would be inapt on two other recent occasions: the passage of the Dodd-Frank Act and PROMESA. Using tribal debtors as an example, this Article investigates whether and how this practice might continue and what it might mean for the bankruptcy system writ large.*

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\* Associate Professor, Arizona State University Sandra Day O'Connor College of Law. I thank Matthew Bruckner, Vincent Buccola, Anthony Casey, Patricia Ferguson, Melissa Jacoby, Rhett Larson, Kaiponanea Matsumura, Robert Miller, Erin Scharff, Joshua Sellers, Bijal Shah, and David Skeel for their advice and comments. I also benefited from discussions of this Article at the University of North Carolina's junior faculty exchange presentation and ASU's junior scholars' workshop.

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## INTRODUCTION

In a crisis, uncertainty is dangerous and terrifying. Financial crises are no different. The events leading to the 2008 recession caused banks—and regulators—to panic,<sup>1</sup> and U.S. economic policy became unsteady as the Federal Reserve and lawmakers struggled to respond.<sup>2</sup> In particular, the “shocking” collapse of Lehman Brothers set off a “financial tsunami,” which in turn nearly “triggered a global financial meltdown.”<sup>3</sup>

Similarly, after the Supreme Court in 2016 rejected Puerto Rico’s attempt to enact its own form of bankruptcy legislation,<sup>4</sup> Puerto Rico teetered on the brink of financial collapse. Congress rushed to devise a solution<sup>5</sup> in the face of the commonwealth’s declaration that it intended to default on significant payment obligations, which threatened to trigger “a cycle of hospital closures, electric-grid instability, infrastructural collapse, and emergency-service breakdowns.”<sup>6</sup> When the next crisis strikes, which entities will be left to face the devastating consequences of uncertainty?

Native American tribes and tribal-affiliated businesses<sup>7</sup> (collectively referred to as “tribal entities” or “tribal debtors”)<sup>8</sup> are playing an increasingly

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<sup>1</sup> Kimberly Amadeo, *The 2008 Financial Crisis*, THE BALANCE (July 1, 2017), <https://www.thebalance.com/2008-financial-crisis-3305679> (“The mistrust within the banking community was the primary cause of the 2008 financial crisis.”).

<sup>2</sup> See John H. Makin, *Financial Crises and the Dangers of Economic Policy Uncertainty*, AMERICAN ENTERPRISE INST. (2012), <https://www.aei.org/publication/financial-crises-and-the-dangers-of-economic-policy-uncertainty/>.

<sup>3</sup> Adam Shell, *Lehman Bros. Collapse Triggered Economic Turmoil*, ABC NEWS, <https://abcnews.go.com/Business/lehman-bros-collapse-triggered-economic-turmoil/story?id=8543352>.

<sup>4</sup> *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1942 (2016).

<sup>5</sup> Stephen A. Nuno, *Congress Passes PROMESA Act for Puerto Rico Debt Crisis*, NBC NEWS (June 29, 2016), <https://www.nbcnews.com/news/latino/congress-passes-promesa-act-puerto-rico-debt-crisis-n601291> (noting that the vote to pass the bill came two days before Puerto Rico faced a \$2 billion debt payment).

<sup>6</sup> Ed Morales, *Who is Responsible for Puerto Rico’s Debt?*, THE NATION (June 7, 2016), <https://www.thenation.com/article/who-is-responsible-for-puerto-ricos-debt/>.

<sup>7</sup> Although this Article primarily discusses tribes and tribal-affiliated businesses together, there are distinctions between the two. Tribes or Indian nations are “self-governing sovereigns” that “generally exercise powers of self-government.” Karen J. Atkinson & Kathleen M. Nilles, *Tribal Business Structure Handbook*, OFFICE OF INDIAN ENERGY & ECONOMIC DEVELOPMENT, II-1 (2008), [https://www.irs.gov/pub/irs-tege/tribal\\_business\\_structure\\_handbook.pdf](https://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf). By contrast, a tribally chartered corporation is “a corporation that is organized under a tribal statute or code or pursuant to a resolution of an authorized tribal legislative body.” *Id.* at III-1, III-3. This Article does not address individual Native Americans, who are eligible to file for debt relief under chapters 7 or 13 of the Bankruptcy Code. This Article similarly does not address businesses created under state law that may have connections to tribes or tribal members, as these businesses are likely able to use chapter 11 of the Code.

<sup>8</sup> Although tribes and tribal businesses are distinct, many of the same problems apply to both in the bankruptcy context, in part because tribal businesses are often conflated with tribes themselves, as discussed in

significant role in U.S. commerce,<sup>9</sup> yet the U.S. Bankruptcy Code makes it difficult, if not outright impossible, for these entities to use the bankruptcy system as debtors. Lack of guidance from the Bankruptcy Code in this area creates uncertainty for tribal entities and those that engage in business with them. Because tribal entities are increasingly important players in U.S. commerce and business, uncertainty as to these entities' treatment in bankruptcy may make them the next victims of an unexpected financial crisis, with consequences that could destabilize a significant portion of the American economy.

Although various observers have expressed concern over a tribal debtor's lack of eligibility for bankruptcy,<sup>10</sup> eligibility is only the first hurdle a tribal debtor will encounter if it seeks to restructure its debts using the U.S. Bankruptcy Code. Even if a tribal entity were deemed eligible to file for bankruptcy, the Bankruptcy Code conflicts with other federal statutes and policies governing Indian nations and their businesses, such as the Indian Gaming Regulatory Act ("IGRA"). The federal government's trust relationship with tribes, tribal sovereignty, the federal regulatory environment, and other tribal laws and customs pose further challenges for prospective tribal debtors.

These under-explored challenges raise the question of whether tribal entities should be eligible for bankruptcy or some sort of structured debt relief in the first place. While acknowledging that exclusion of tribal entities from the Bankruptcy Code may have been intentional, this Article nevertheless illustrates that tribal entities can experience debt overhang and holdout creditors in the

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Part I.A. Therefore, this Article refers to both entity types collectively as "tribal entities" or "tribal debtors" except when the distinctions between these entities become important.

<sup>9</sup> Atkinson & Nilles, *supra* note 7, at I-1 (noting that "[t]ribal governments and tribal businesses engage in a wide range of business and financial transactions," including "tourism, gaming, energy, agriculture, forestry, manufacturing, federal contracting, and telecommunications").

<sup>10</sup> See, e.g., R. Spencer Clift, III, *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177, 181 (2002) (arguing for clarification of a tribe's status under the Bankruptcy Code); Amanda L. Cartwright, *Can Native American-Owned Casinos File for Chapter 11?*, AM. BANKR. INST. J., Oct. 2012, at 50, 50 (noting the lack of a "clear insolvency regime" for tribes); Ji Hun Kim & Christopher S. Koenig, *Rolling the Dice on Debtor Eligibility*, AM. BANKR. INST. J., June 2015, at 18, 19 (noting that "[I]t is not clear whether Congress would be able to easily amend the Code to provide Native American tribes with a source of relief under federal bankruptcy laws"); Stephan A. Hoover, Comment, *Forcing the Tribe to Bet on the House the Limited Options and Risks to the Tribe when Indian Gaming Operations Seek Bankruptcy Relief*, 49 CAL. W.L. REV. 269 (2013) (arguing that Indian gaming operations should be able to file for bankruptcy); Alexander Hogan, Note, *Protecting Native American Communities by Preserving Sovereign Immunity and Determining the Place of Tribal Businesses in the Federal Bankruptcy Code*, 43 COLUM. HUM. RTS. L. REV. 569 (2012) (discussing the "uncertainty concerning the place of Indian tribes in the federal bankruptcy system"); Blake F. Quackenbush, *Cross-Border Insolvency & The Eligibility of Indian Tribes to Use Chapter 15 of the Bankruptcy Code*, 29 T.M. COOLEY L. REV. 61 (2012) (proposing that tribes use chapter 15 of the Code to file for bankruptcy).

same way other bankruptcy-eligible entities can. When tribal entities have a need for bankruptcy's unique debt restructuring tools,<sup>11</sup> this Article advocates for those entities to be deemed eligible to restructure their debt.

If getting into bankruptcy is the first step, the next step involves determining how bankruptcy relief can be fashioned for tribal debtors. Rather than use the Code's ill-fitting law and procedures, this Article proposes an alternative: Congress should enact a new statutory regime for tribal debt relief.

Although special debt relief legislation is a novel proposal with respect to tribal entities, it is not unprecedented. In 2010, Congress passed the Dodd-Frank Act, which provides for an orderly liquidation process for distressed financial firms.<sup>12</sup> These firms were ineligible to file for relief under the Bankruptcy Code.<sup>13</sup> And in 2016, Congress enacted special debt restructuring legislation for Puerto Rico, another entity that was deemed ineligible for traditional, Code-based bankruptcy relief.<sup>14</sup>

With respect to both banks and Puerto Rico, Congress looked beyond the Bankruptcy Code to create laws specifically tailored to these entities and their unique attributes.<sup>15</sup> Indeed, as this Article will discuss, specialized legislation may become a new norm in bankruptcy law, as entities previously not contemplated by the Bankruptcy Code pursue options for debt restructuring. This Article contends that, like financial firms and U.S. territories, tribal entities are differently situated from other debtors covered by the U.S. Bankruptcy Code. Therefore, if Congress were to consider structured debt relief for tribal entities, these entities deserve a distinct form of relief, one that allows these entities to concretely address the threat that creditors may destroy ongoing operations.

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<sup>11</sup> See Laura N. Coordes, *Gatekeepers Gone Wrong: Reforming the Chapter 9 Eligibility Rules*, 94 WASH. U. L. REV. 1191, 1206–07 (2017) (describing these tools); see also Matthew A. Bruckner, *Bankrupting Higher Education*, 91 AM. BANKR. L.J. 697 (2017) (describing bankruptcy tools and applying a framework to evaluate whether colleges should be bankruptcy-eligible).

<sup>12</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010).

<sup>13</sup> See generally Richard M. Hynes & Steven D. Walt, *Why Banks Are Not Allowed in Bankruptcy*, 67 WASH. & LEE L. REV. 985 (2010).

<sup>14</sup> Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 et seq. (2016).

<sup>15</sup> In addition to these examples, Congress also passed the Regional Rail Reorganization Act, which created a special court and distinct processes for certain U.S. railroads. Pub. L. No. 93-236, 87 Stat. 986 (1974). The Act functioned as a “supplement” to the Bankruptcy Act, which predated the U.S. Bankruptcy Code. *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 109 (1974). As a pre-Code law, a full discussion of the Act and its impact on bankruptcy at the time is beyond this Article's scope; for a fuller discussion, see Stephen J. Lubben, *PROMESA and the Bankruptcy Clause: A Reminder About Uniformity*, 12 BROOK. J. CORP. FIN. & COM. L. 53, 56–58 (2017).

The Article proceeds as follows. Part I examines the question of whether tribal entities should be eligible for structured debt relief. After probing the nature of the problem of excluding tribal debtors from Code-based bankruptcy relief, Part I discusses the merits and drawbacks of granting tribal entities access to relief before concluding that access to structured debt relief is warranted in distinct cases. Part II then explores possible avenues of relief for tribal debtors. After surveying existing proposals for granting tribal debtors eligibility for bankruptcy under the Bankruptcy Code, Part II introduces on an alternative path: the creation of specialized bankruptcy legislation.

Part III then explains the process for developing specialized legislation for tribes and provides guidance on key features of this proposed bankruptcy relief. Significant features include an automatic stay; a voluntary, orderly process for debt adjustment and liquidation; exclusivity for tribal debtors to propose a plan; use of collective action clauses and other sovereign debt restructuring tools, when appropriate; a property distribution scheme that allows for some equity retention; strict scrutiny of debtor-in-possession (“DIP”) lending; limited interference into the debtor’s internal affairs; and an adjudicator to run the process and settle disputes. This Part also analyzes some of the benefits and drawbacks of the proposed legislation. Part IV concludes by briefly explaining how specialized law may represent a broader shift for the bankruptcy system as a whole.

## I. ELIGIBILITY FOR STRUCTURED DEBT RELIEF

Tribal entities are playing an increasingly significant role in U.S. commerce, yet these entities face uncertainty when it comes to addressing financial difficulties. It is at best unclear, and at worst outright prohibited, for tribal entities to use the U.S. Bankruptcy Code as debtors. This Part describes the current treatment of tribal entities under relevant U.S. laws and highlights some of the arguments for and against their eligibility for bankruptcy relief. Ultimately, this Part concludes that tribal entities should be eligible for structured debt relief in appropriate circumstances.

### A. *The Status Quo: Confusion and Uncertainty*

Tribes and tribal businesses are increasingly involved in commerce—with the blessing and encouragement of the U.S. government.<sup>16</sup> But what happens if

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<sup>16</sup> See Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OREGON L. REV. 757, 760–63 (2001) (contrasting federal control over economic activity and jobs

a tribal entity experiences financial distress? The answer is unclear for several reasons. The status of a tribal entity itself is often ambiguous. Is the entity sovereign? Can it be sued? How much does it resemble a non-tribal business entity? It does not seem possible for tribes themselves to file for bankruptcy, and there is no clear answer as to whether a tribal business could use the Bankruptcy Code. In particular, the Bankruptcy Code conflicts with other laws and policies pertaining to tribes and tribal businesses. These uncertainties cloud business relations with Indian nations and may have the effect of closing off access to lenders and other opportunities.

### 1. *Tribal Entities in Commerce*

To date, a handful of tribal-affiliated corporations have sought access to the U.S. bankruptcy system as debtors.<sup>17</sup> Nevertheless, many more tribal entities experienced financial difficulties during the 2008 financial crisis<sup>18</sup> and may have explored bankruptcy or other debt restructuring options without actually filing.<sup>19</sup> In addition, the threat of fiscal distress for tribal entities is significant due to these entities' engagement in nearly all areas of commerce.

The 2008 recession was difficult on nearly all businesses, and many tribal casinos become overleveraged during this time.<sup>20</sup> At least six casinos sought to restructure their debt out of court between 2010 and 2013.<sup>21</sup> These restructurings were largely consensual, as both sides had incentives to negotiate: creditors wanted the gaming operation to remain in business, produce revenue, and allow the tribal entity to service its debt, while tribes wanted their gaming assets to operate because these operations often funded basic public services for tribal

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in Indian country with the relatively hands-off policy the federal government takes with respect to non-Indian businesses).

<sup>17</sup> Ji Hun Kim & Christopher S. Koenig, *Rolling the Dice on Debtor Eligibility: Native American Tribes and the Bankruptcy Code*, AM. BANKR. INST. J., June 2015, at 18, 18–19.

<sup>18</sup> For example, the La Posta Casino near San Diego shut down due to “lack of business and mounting debt” in 2012. J. Harry Jones, *Santa Ysabel Casino Goes Out of Business*, THE SAN DIEGO UNION-TRIBUNE (Feb. 3, 2014), <http://www.sandiegouniontribune.com/business/sdut-santa-ysabel-casino-debt-2014feb03-htmlstory.html>; see Jonathan Martin, *Elizabeth Warren, Addressing Claims of Native Ancestry, Vows to Press for Tribes*, N.Y. TIMES: POLITICS, (Feb. 14, 2018), <https://www.nytimes.com/2018/02/14/us/politics/elizabeth-warren-trump.html> (noting that some tribes “account for the most impoverished communities in the country”).

<sup>19</sup> John Froomjian, *Indian Casinos Not Immune to Troubles During Recession*, THE PRESS OF ATLANTIC CITY (Nov. 1, 2009), [http://www.pressofatlanticcity.com/web\\_specials/indian-casinos-not-immune-to-troubles-during-recession/article\\_ea6131b2-9a82-11de-8f64-001cc4c03286.html](http://www.pressofatlanticcity.com/web_specials/indian-casinos-not-immune-to-troubles-during-recession/article_ea6131b2-9a82-11de-8f64-001cc4c03286.html).

<sup>20</sup> Adam Moses, *Drowning in Debt? A Look at Recent Debt Restructurings in the Tribal Gaming Industry*, GLOBAL GAMING BUSINESS, (2013), <https://www.milbank.com/images/content/1/2/12269/Drowning-in-Debt-By-Adam-Moses-March-2013.pdf>.

<sup>21</sup> *Id.* (listing ongoing and recently completed restructurings).



members.<sup>22</sup> Despite these incentives, when disagreements occurred, the lack of a neutral third party, such as a judge or arbitrator, to resolve these disagreements sometimes dragged out the process.<sup>23</sup> Indeed, tribal restructurings from this period have been characterized as “rather protracted affairs, with some taking years to complete.”<sup>24</sup>

Casinos are popular businesses for tribes, in part because Congress has supported the development of tribal gaming operations. In 1988, Congress passed the Indian Gaming Regulatory Act (“IGRA”),<sup>25</sup> which establishes a jurisdictional framework governing Indian gaming.<sup>26</sup> The Act was designed to encouraging tribal entities to engage in commerce.<sup>27</sup> By 2001, so-called “gaming tribes” had made a significant impact on the U.S. economy, contributing \$32 billion in revenue, \$12.4 billion in wages, and creating 490,000 jobs.<sup>28</sup> “The benefits from Indian gaming also spill over to non-Indian communities and to federal and state tax revenues.”<sup>29</sup>

Importantly, casinos represent just one component of tribal business. Significant incentives exist for enterprises that do business with Native American-owned companies, including access to cash rebates, discounted leasing rates, and tax-exempt financing.<sup>30</sup> For their part, tribal businesses, and particularly tribally chartered corporations, also enjoy advantages, including avoidance of state regulation and taxation, as well as ease of formation.<sup>31</sup> Tribes and tribal corporations regularly engage in real estate development,<sup>32</sup> banking

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<sup>22</sup> Moses, *supra* note 20.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (citing the restructuring of the Foxwoods Resort Casino).

<sup>25</sup> Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. § 2701 et seq.).

<sup>26</sup> 25 U.S.C. § 2702.

<sup>27</sup> *Id.* (“The purpose of this chapter is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”).

<sup>28</sup> Gabriel S. Galanda, *Getting Commercial in Indian Country*, 12 ABA BUS. L. SECT. NO. 6 (July/August 2003).

<sup>29</sup> ROBERT J. MILLER, RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 71 (Univ. Neb. Press 2013) (2012).

<sup>30</sup> See generally *Advantages of Doing Business With Native Americans*, ABA SECTION OF STATE AND LOCAL GOVERNMENT, Spring 2016 Meeting, available at [https://www.americanbar.org/content/dam/aba/administrative/state\\_local\\_government/NavigatingTribalWatersRobSaunooke41116.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/state_local_government/NavigatingTribalWatersRobSaunooke41116.authcheckdam.pdf) (discussing these and other advantages conferred by federal and state law).

<sup>31</sup> *Choosing a Tribal Business Structure*, U.S. DEPT. INTERIOR, Dec. 10, 2015, <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/bia/pdf/idc1-032915.pdf>.

<sup>32</sup> Terry Pristin, *Commercial Real Estate; Arizona Indians Turn to Real Estate Development*, N.Y. TIMES: BUSINESS DAY (Dec. 24, 2003), <http://www.nytimes.com/2003/12/24/business/commercial-real-estate-arizona-indians-turn-to-real-estate-development.html> (describing “a \$600 million commercial development on 209 acres owned by . . . Salt River Pima-Maricopa families”).

and finance,<sup>33</sup> telecommunications,<sup>34</sup> wholesale and retail trade,<sup>35</sup> and tourism,<sup>36</sup> to name a few examples. Indian nations are even getting involved in recreational marijuana sales: in October of 2017, the Las Vegas Paiute Tribe opened a 10,000-square foot retail store in downtown Las Vegas.<sup>37</sup>

Notably, tribes are also involved in payday lending and until recently, were the subject of much attention and focus by the Consumer Financial Protection Bureau (“CFPB”).<sup>38</sup> In January of 2018, the CFPB dropped a lawsuit against a group of lenders associated with a tribe. The suit alleged that the lenders had deceived consumers and failed to “disclose the true cost of the loans.”<sup>39</sup> In addition, tribal businesses, particularly in the Southwestern United States, are heavily involved in the provision of energy and water to surrounding regions, in addition to employing hundreds of individuals.<sup>40</sup> Financial distress for a tribal

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<sup>33</sup> Jennifer H. Weddle, *Nothing Nefarious: The Federal Legal and Historical Predicate for Tribal Sovereign Lending*, 61 FED. LAW. 58, 59 (2014) (“Over the past decade, approximately two dozen tribes have established online consumer lending enterprises.”).

<sup>34</sup> See National Tribal Telecom Ass’n, <http://www.nationaltribaltelecom.org/> (describing the Association’s purpose as “to provide a forum for tribally owned companies and those who work in the telecommunications industry”).

<sup>35</sup> Galanda, *supra* note 28.

<sup>36</sup> *Id.*

<sup>37</sup> Jay Jones, *Native American Tribe Opens Huge Pot Store Near Fremont Street in Las Vegas*, LOS ANGELES TIMES: TRAVEL (Oct. 31, 2017, 6:00 AM), <http://www.latimes.com/travel/deals/la-tr-las-vegas-paiute-tribe-pot-store-20171030-story.html> (last visited Jan. 31, 2018) (noting that the store, an “economic driver,” employs roughly 35% of the tribe). Several tribes have recently opened marijuana-related businesses. See J. Harry Jones, *Gaming Gone Bust, Tribe Turns to Marijuana Farming*, SAN DIEGO UNION-TRIBUNE (May 2, 2017, 6:50 PM), <http://www.sandiegouniontribune.com/communities/north-county/sd-no-ysabel-marijuana-20170502-story.html> (discussing how the Iipay Nation of Santa Ysabel has turned to marijuana cultivation). Struggling marijuana-related businesses have also had difficulty using the Bankruptcy Code. See Steven J. Boyajian, *Just Say No to Drugs? Creditors Not Getting a Fair Shake When Marijuana-Related Cases are Dismissed*, 36 AM. BANKR. INST. J. 9 (2017) (discussing cases where marijuana-related businesses debtors cannot get relief).

<sup>38</sup> Zeke Faux, *CFPB Signals Shift by Dropping Payday Lender Lawsuit*, BLOOMBERG (Jan. 18, 2018), <https://www.bloomberg.com/news/articles/2018-01-18/trump-led-cfpb-signals-shift-by-dropping-payday-lender-lawsuit> (explaining that online payday lenders associated with tribes are “surprisingly big” businesses that arose because tribes can argue that regulations pertaining to payday loans do not apply to them since these regulations are promulgated by state law).

<sup>39</sup> *Id.* (suggesting that the decision to drop the suit came due to the new direction the Trump administration took with respect to the CFPB).

<sup>40</sup> James Rainey, *Biggest Coal-Burning Power Plant in the West is Most Likely Shutting Down*, NBC NEWS, (Apr. 11, 2018, 11:23 AM), <https://www.nbcnews.com/news/us-news/biggest-coal-burning-power-plant-west-most-likely-shutting-down-n864981> (describing the Navajo Generating Station in Arizona as “a centerpiece of the [reservation’s] economy,” which provides “hundreds of jobs” and “helps light the Southwest and powers the pumps that send Colorado River water to Tucson and Phoenix”); Noah Silber-Coats & Susanna Eden, *Arizona Water Banking, Recharge, and Recovery*, THE ARROYO (2017), <https://wrrc.arizona.edu/sites/wrrc.arizona.edu/files/attachment/Arroyo-2017.pdf> (describing “Gila River Water Storage [ . . . ], a company that markets stored water credits primarily to developers”).

business could therefore have devastating consequences, possibly affecting the supply of critical resources to entire regions of the country.

Participating in all of these activities brings risks as well as rewards. Tribes and their affiliate entities might face litigation connected to their activities,<sup>41</sup> such as the CFPB lawsuit, or they may incur unsustainable amounts of debt.<sup>42</sup> As tribal entities continue to engage in U.S. commerce and to interact with non-tribal individuals and organizations, it will become increasingly important for bankruptcy law to provide guidance on how these entities should be treated when they are subject to financial distress. Although, as noted, some casinos have been able to restructure their debts out of court, an out-of-court workout may not be feasible if a tribal entity is faced with a significant legal judgment,<sup>43</sup> persistent holdout creditors,<sup>44</sup> or several creditors clamoring for the same assets.

Cohen's Handbook of Federal Indian Law, commonly called the "bible" of federal Indian law,<sup>45</sup> has very little on the subject of tribal bankruptcy. As tribal businesses become increasingly entrenched in the broader commercial sphere, it is critical that these businesses—and those who interact with them—know what to expect in the event of a financial setback. Scholars have long recognized the importance of establishing functioning economies in Indian communities by developing tribal- and Indian-owned economic activities.<sup>46</sup> A necessary, but understudied, component of this process is ensuring that a system is in place to restructure or dissolve these economies if and when they fail.

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<sup>41</sup> *Federal Indian Law—Tribal Sovereign Immunity—Michigan v. Bay Mills Indian Community*, 128 HARV. L. REV. 301 (2014) ("Subsequent economic development by some Indian tribes has resulted in an increasing number of legal disputes that have run up against tribal immunity."); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014) (holding that a tribe is immune from suit for commercial activities on nontribal land as long as federal law has not expressly waived immunity, but noting in dicta that a state may use its own enforcement measures against individuals affiliated with the commercial activity).

<sup>42</sup> Alan N. Resnick & Henry J. Sommer, COLLIER GUIDE TO CHAPTER 11 ¶ 25.01 (LexisNexis 2012) (noting that "many casino operators incurred unsustainable debt levels" in the 1990s and 2000s and discussing tribal ownership of casinos). Professor David Skeel lists "whether unsustainable debt is a potential problem" as a factor to consider for determining when bankruptcy relief should be available. David A. Skeel, Jr., *When Should Bankruptcy Be An Option (For People, Places, or Things)?*, 55 WM. & MARY L. REV. 2217 (2014).

<sup>43</sup> See, e.g., the 'Sa' Nyu Wa bankruptcy, discussed *infra* (Part I.A.3), which was filed due to a large arbitration award.

<sup>44</sup> See, e.g., Omnibus Statement of Facts and Omnibus Declaration of David Chelette in Support Thereof, *In re Santa Ysabel Resort and Casino*, Case No. 12-09415-PB11 at 4 (July 3, 2012) (describing debtor's failed attempt to pursue an out-of-court restructuring and creditors' persistence in pursuing debtor's assets).

<sup>45</sup> "Cohen's Handbook of Federal Indian Law," LEXISNEXIS STORE, <https://store.lexisnexis.com/products/cohens-handbook-of-federal-indian-law-sku57318>.

<sup>46</sup> ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 3 (Univ. Neb. Press 2013) (2012).

## 2. Tribes' Uncertain Status

The U.S. legal system is not always clear with respect to its treatment of tribal entities. If a tribe or tribal corporation is conducting business solely with other tribal entities or individuals, “Indian law,” a “body of tribal, state and federal law,” governs.<sup>47</sup> Indian nations have the authority to govern themselves under the Indian Reorganization Act (“IRA”),<sup>48</sup> and many tribes organized under the IRA have chosen to adopt commercial laws modeled after U.S. laws like the Uniform Commercial Code.<sup>49</sup> Tribes also have the authority to regulate and adjudicate insolvency matters arising *within* the tribe.<sup>50</sup>

Complications arise, however, when entities outside of the tribe enter the picture. Although Indian nations are commonly referred to as “sovereign,” tribal sovereignty is not absolute.<sup>51</sup> Native American tribes are said to have sovereign immunity from all federal laws of general application—unless Congress makes an “unequivocal expression” to abrogate such immunity.<sup>52</sup> In the bankruptcy context, sovereign immunity can prevent creditors from exercising certain remedies against tribes and can prevent Indian nations from being made subject to federal and state court jurisdiction.<sup>53</sup> Although tribes have the power to

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<sup>47</sup> Galanda, *supra* note 28.

<sup>48</sup> 25 U.S.C. § 461 (1934) (current version at 25 U.S.C. § 5101 (2018)).

<sup>49</sup> Galanda, *supra* note 28.

<sup>50</sup> Blake F. Quackenbush, *Cross-Border Insolvency & The Eligibility of Indian Tribes to Use Chapter 15 of the Bankruptcy Code*, 25 T.M. COOLEY L. REV. 61 (2012).

<sup>51</sup> See David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 LEWIS & CLARK L. REV. 173, 186 (2004) (“If being sovereign means to be superior in position to all others, or at least independent of and unlimited by any other, tribes are not in fact sovereign, nor have they recaptured any substantial sovereignty from the national government.”); see also Stephen J. Lubben, *Sovereign Bankruptcy Hydraulics*, N.Y.U. ANN. SURV. OF AMER. L. (forthcoming), available at SSRN: <https://ssrn.com/abstract=2923407> (“[S]overeignty and sovereign immunity occur along a continuum.”); Corina Rocha Pandeli, Note, *When the Chips are Down: Do Indian Tribes with Insolvent Gaming Operations have the Ability to File for Bankruptcy Under the Federal Bankruptcy Code?*, 2 U.N.L.V. GAMING L.J. 255, 259 (2011) (describing tribes as enjoying a “relatively sovereign relationship with the federal government”).

<sup>52</sup> Cartwright, *supra* note 10; Florida Paraplegic, Ass’n, Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126 (11th Cir. 1999) (holding that, although Title III of the Americans with Disabilities Act can apply to public accommodations run by tribes, Congress did not unequivocally abrogate the tribe’s sovereign immunity to a cause of action under the Act). For a discussion of the tension between tribal sovereignty and Congress’s plenary power over tribes, see Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams’ Algebra*, 30 ARIZ. L. REV. 413, 422 (1988). For an argument that this tension is problematic, see Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence’s Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439, 443 (1988) (“The effects . . . of a diminished, unequal status for any racial minority in United States law cannot begin to be attacked and erased until the *contradictions* in the legal status of that minority group are recognized and rejected.”) (emphasis in original).

<sup>53</sup> Moses, *supra* note 20.

regulate their own “internal and social relations,” because another authority (Congress) can abrogate their immunity, they do not possess “the full attributes of sovereignty.”<sup>54</sup> Thus, although tribes are free to “make their own laws and be ruled by them,” tribal sovereignty is more attenuated when Indian nations engage in commerce with non-tribal entities, and Congress may use its plenary power to abrogate tribal sovereign immunity in certain circumstances.<sup>55</sup>

As a general matter, many courts extend comity<sup>56</sup> or full faith and credit<sup>57</sup> to tribal court orders. Tribal sovereign immunity from suit also generally extends to tribal casinos, businesses, and some tribal-affiliated corporations.<sup>58</sup> In general, tribes are only subject to suit in contract if the tribe and contract counterparty expressly negotiate a sovereign immunity waiver.<sup>59</sup> In practice, these waivers are quite common, and some tribes have even agreed to waive immunity on a blanket basis for all tribal businesses incorporated under the IRA.<sup>60</sup> But despite the use of sovereign immunity waivers in practice, Indian nations have successfully challenged these waivers in court and sometimes had them invalidated.<sup>61</sup> Thus, a sovereign immunity waiver is not a guarantee that a creditor or contract counterparty will be able to subject a tribe to suit outside of tribal court. Furthermore, application of sovereign immunity to tribal businesses and commercial activities (rather than to the tribe itself) has been called into question in recent years.<sup>62</sup>

When tribal entities engage in commerce, the implications of their sovereign status can be disputed, whether due to an explicit immunity waiver or the entity’s

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<sup>54</sup> United States v. Kagama, 118 U.S. 375, 381 (1886) (holding that Congress possesses the power to extend federal criminal jurisdiction to Indians on reservations).

<sup>55</sup> Williams v. Lee, 358 U.S. 217, 220 (1959).

<sup>56</sup> See, e.g., Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997) (determining that principles of comity govern whether a court should recognize and enforce a tribal court judgment).

<sup>57</sup> See, e.g., Jim v. CIT Fin. Servs. Corp., 533 P.2d 751 (N.M. 1975) (holding that tribal laws are entitled to full faith and credit in New Mexico courts).

<sup>58</sup> See Galanda, *supra* note 28; see also Bales v. Chickasaw Nation Indus., 606 F. Supp. 2d 1299 (D.N.M. 2009) (holding that tribal corporation was entitled to sovereign immunity with respect to non-Native American employee’s claims of race and age discrimination).

<sup>59</sup> Galanda, *supra* note 28.

<sup>60</sup> Galanda, *supra* note 28; Haddock & Miller, *supra* note 51, at 194 (“[M]ost, if not all, Indian tribes have prospectively waived, and will prospectively waive, their immunity in specific contracts to facilitate business deals.”).

<sup>61</sup> Moses, *supra* note 20.

<sup>62</sup> Padraic I. McCoy, *Sovereign Immunity and Tribal Commercial Activity: A Legal Summary and Policy Check*, 57 FED. LAW. 41, 42 (2010); Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2045 (2014) (Thomas, J., dissenting) (arguing that expanding tribal immunity to a tribe’s off-reservation commercial activities is “unsupported by any rationale for [sovereign immunity] doctrine, inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty”).

more attenuated sovereign status due to abrogation or the nature of the commercial engagement. The resulting uncertainty with respect to tribal status impacts tribes' treatment under the Bankruptcy Code.<sup>63</sup>

### 3. Eligibility for Bankruptcy

Section 109 of the Bankruptcy Code governs debtor eligibility. There is no “uniform treatment or definitive classification of a tribe” in § 109 or, indeed, anywhere in the Code.<sup>64</sup> According to § 109, only a “person” or a “municipality” may be a debtor under the Code.<sup>65</sup> “Person” is defined broadly in the Code and includes individuals, partnerships, and corporations; however, a “governmental unit” is not a person.<sup>66</sup> Instead, a “governmental unit” is defined in the Code as “United States; State; Commonwealth; District; Territory; foreign state; department, agency or instrumentality of [each of the foregoing]; or other foreign or domestic government.”<sup>67</sup> Although tribes are not explicitly listed in either definition, courts have determined that Native American tribes fall within the category of a “governmental unit.”<sup>68</sup> For Code purposes, this suggests both that Congress may have abrogated tribal immunity with respect to the Code<sup>69</sup> and that Indian nations cannot access the Code for bankruptcy protection.<sup>70</sup>

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<sup>63</sup> See Lubben, *supra* note 51 (“[P]ushing against sovereignty increases the need for a governmental entity to have access to sovereign bankruptcy.”).

<sup>64</sup> R. Spencer Clift III, *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177, 211 (2002) (claiming a lack of clarity in the Code with respect to tribes and arguing that “Congress must clearly and plainly authorize the use of tribal property or enact legislation that insures, guarantees, and safeguards tribes from financial stress”).

<sup>65</sup> 11 U.S.C. § 109(a).

<sup>66</sup> 11 U.S.C. § 101(41).

<sup>67</sup> 11 U.S.C. § 101(27).

<sup>68</sup> See, e.g., *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1058 (9th Cir. 2004) (“[T]he category ‘Indian Tribes’ is simply a specific member of the group of domestic governments.”); *In re Platinum Oil Props. LLC*, 465 B.R. 621, 643 (Bankr. D.N.M. 2011) (“The language ‘or other foreign or domestic government found in [§ 101(27)] includes Indian tribes.”); *Russell v. Fort McDowell Yavapai Nation (In re Russell)*, 293 B.R. 34, 44 (Bankr. D. Ariz. 2003) (“[O]ther foreign or domestic governments in § 101(27) unequivocally, and without implication, includes Indian tribes as ‘governmental units.’”).

<sup>69</sup> In 1994, Congress amended § 106 to demonstrate its intent to abrogate the sovereign immunity of governmental units. Although the impact on tribal immunity is disputed, there is at least an implication that the sovereign immunity of tribes classified as “governmental units” is abrogated. See, Clift, *supra* note 10; 1-7 Cohen’s Handbook of Federal Indian Law, §7.05 (LexisNexis 2017) (noting division in the courts as to whether the Code waives tribal immunity); American Indian Law Deskbook §7:2 (May 2017) (noting that, while the Ninth Circuit has held that Congress has expressly abrogated sovereign immunity in this context, other courts disagree); Cartwright, *supra* note 10 (noting that “an overwhelming majority of courts have held that tribes are governmental units” under the Bankruptcy Code).

<sup>70</sup> Cartwright, *supra* note 10.

To understand why tribes do not qualify as debtors eligible under the Bankruptcy Code, it is useful to know each of the possible chapters available for prospective debtors.<sup>71</sup> Chapters 7, 9, 11, 12, 13, and 15 of the Code each outline a different process for prospective debtors to take. Chapter 7 of the Code governs the process of liquidation,<sup>72</sup> while chapters 11<sup>73</sup> and 13<sup>74</sup> address reorganization and individual debt adjustment, respectively. Chapter 9 of the Code provides for the adjustment of municipal debt,<sup>75</sup> while chapter 12 deals with family farmers and family fishermen.<sup>76</sup> Finally, chapter 15 of the Code provides a way for foreign representatives in bankruptcy proceedings outside of the United States to access U.S. courts.<sup>77</sup>

As “governmental units,” tribes do not qualify to file for bankruptcy under either chapters 7 or 11 of the Code, because both of these chapters require a debtor to be a “person.”<sup>78</sup> Furthermore, only individuals (i.e. individual human beings) may use chapter 13 to reorganize their debts.<sup>79</sup> Although chapter 9 of the Code addresses the adjustment of debts of municipal governments, a tribe does not qualify under this chapter either because chapter 9 debtors must be “municipalities,” which must be governed by a U.S. State.<sup>80</sup> Indian nations are not subject to or instrumentalities of U.S. States and so would not qualify as a “municipality” under the Code either.<sup>81</sup> Tribes also are unlikely to meet the very

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<sup>71</sup> For an in-depth discussion as to why tribes themselves are ineligible for bankruptcy relief under the Code, see Pandeli, *supra* note 51, at 269–73.

<sup>72</sup> “Chapter 7 – Liquidation,” 11 U.S.C. § 701 et seq.

<sup>73</sup> “Chapter 11 – Reorganization,” 11 U.S.C. § 1101 et seq.

<sup>74</sup> “Chapter 13 – Adjustment of Debts of an Individual with Regular Income,” 11 U.S.C. § 1301 et seq.

<sup>75</sup> “Chapter 9 – Adjustment of Debts of a Municipality,” 11 U.S.C. § 901 et seq.

<sup>76</sup> “Chapter 12 – Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income,” 11 U.S.C. § 1201 et seq.

<sup>77</sup> “Chapter 15 – Ancillary and Other Cross-Border Cases,” 11 U.S.C. § 1501 et seq.

<sup>78</sup> 11 U.S.C. § 109(b), (d). Section 109(d) contains other categories of debtors eligible to file for chapter 11, but none of them would encompass tribes. 11 U.S.C. § 109(d) (referencing a “railroad,” “an uninsured State member bank, or a corporation organized under Section 25A of the Federal Reserve Act . . . .” as eligible for chapter 11).

<sup>79</sup> 11 U.S.C. § 109(c) (“Only an individual with regular income . . . may be a debtor under chapter 13 of this title.”).

<sup>80</sup> 11 U.S.C. § 101(40) (“The term ‘municipality’ means political subdivision or public agency or instrumentality of a State.”).

<sup>81</sup> Even if chapter 9 were modified so that a tribal debtor could be considered a qualifying “municipality,” chapter 9 may be inapt for other reasons. For example, chapter 9 is not designed to deal with complex debt structures, which tribal debtors, thanks to their intertwined relationships with tribes, may have. Vincent S.J. Buccola, *The Logic and Limits of Municipal Bankruptcy Law*, 86 U. CHI. L. REV. at 40 (forthcoming 2019) (noting that chapter 9 was designed to address the debt of special purpose municipalities with “simple capital structures”). The overall purpose of a tribal debt restructuring is more akin to that of a chapter 11 case than a chapter 9 case; in particular, liquidation is not an option for chapter 9 debtors. *In re Mount Carbon Metro. Dist.*, 242 B.R. 18, 41 (Bankr. D. Colo. 1999) (“[T]he legislative purpose underlying [chapter 9] . . . is to allow an

specific definitions of “family farmer” or “family fisherman” to qualify for debt adjustment under chapter 12.<sup>82</sup> Finally, although some have proposed to allow tribes access to bankruptcy court via chapter 15, Indian nations are markedly different from the foreign representatives contemplated by chapter 15<sup>83</sup> and, for reasons explained below, likely would not be able to successfully use chapter 15 of the Bankruptcy Code either.

Tribal corporations and other business entities owned by tribes are arguably distinct from the tribe itself.<sup>84</sup> Thus, if a tribal corporation met the Code’s definition of a “person,” it could be eligible to file under chapters 7 or 11.<sup>85</sup> However, the sparse case law, discussed below, suggests that tribal corporations and other tribal business entities may be barred from bankruptcy relief under the Code if they are too closely affiliated with the tribe itself.<sup>86</sup>

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insolvent municipality to restructure its debts in order to continue to provide *public* services.”) (emphasis added); Andrew B. Dawson, *Pensioners, Bondholders, and Unfair Discrimination in Municipal Bankruptcy*, 17 U. PA. J. BUS. L. 1, 5 (2014) (noting that chapter 11 serves the “purposes of promoting reorganization and of maximizing returns to creditors”). Chapter 9 also presupposes a relationship between the municipality and the state in which the municipality is located, a feature that is not present in the tribal business context. *See, e.g.*, 11 U.S.C. § 109(c)(2) (requiring state authorization to enter bankruptcy); Fed. R. Bankr. P. 2018(c) (“Representatives of the state in which the debtor is located may intervene in a chapter 9 case.”). Finally, the amount of control a municipality loses in a chapter 9 may by itself make a modified chapter 9 an unpalatable option, for reasons discussed *infra*.

<sup>82</sup> 11 U.S.C. § 101(18), (19), (19A), (19B), (20) (defining the terms “family farmer,” “family farmer with regular annual income,” “family fisherman,” “family fisherman with regular annual income,” and “farmer,” respectively).

<sup>83</sup> 11 U.S.C. § 101(24) (“The term ‘foreign representative means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding.”).

<sup>84</sup> Kim & Koenig, *supra* note 17.

<sup>85</sup> *See* 11 U.S.C. § 109 (defining “corporation” as an “association having a power of privilege that a private corporation, but not an individual or a partnership possesses” and as an “unincorporated company or association”).

<sup>86</sup> These entities include corporations organized under section 17 of the Indian Reorganization Act, which provides that the Secretary of the Interior may issue a charter of incorporation to tribes. Indian Reorganization Act, 25 U.S.C. § 461 et seq. (1934) (current version at 25 U.S.C. § 5101 (2018)). The Department of the Interior has determined that Section 17 only allows such charters to be issued to tribes (as opposed to tribal members). For a critical discussion of this issue, *see* Post of Gabriel Galanda, *Amend IRA Section 17 to Allow Federal Incorporation For Tribal Members*, GALANDA BROADMAN, (Jan. 8, 2012), <http://galandabroadman.com/blog/2012/01/amend-ira-section-17-to-allow-federal-incorporation-for-tribal-members> (last visited Mar. 22, 2018). In the context of whether tribal corporations can have sovereign immunity, several courts have articulated various tests to determine whether the tribally-created entity is an “arm of the tribe” and thus enjoys sovereign immunity. *See, e.g.*, *Matter of Ransom v. St. Regis Mohawk Educ. & Cmty. Fund*, 86 N.Y.2d 553 (N.Y. Ct. App. 1995) (multi-factor test); *People ex rel. Owen v. Miami Nation Enterprises*, 386 P.3d 357 (Cal. Super. Ct. 2016) (five-factor test). For further discussion of the development of tribal corporations formed under the Indian Reorganization Act and their sometimes complex relationship with tribal governments, *see* Miller, *supra* note 46, at 44–46.



To date, two tribal-affiliated entities (aside from the Alaska Native Corporations discussed below)<sup>87</sup> have sought to be debtors in U.S. bankruptcy proceedings. In the first case, *In re Santa Ysabel Resort and Casino*, a casino owned and operated by the Iipay Nation filed for bankruptcy<sup>88</sup> after “struggling financially for years” with “debts of more than \$50 million.”<sup>89</sup> In its initial filings with the bankruptcy court, the debtor casino argued that it was a separate legal entity from the Iipay tribe and thus eligible to file for chapter 11 as an “unincorporated company.”<sup>90</sup> Three parties in interest, including another Native American tribe (incidentally, also the debtor’s largest creditor) and the United States Trustee, filed motions to dismiss the case, arguing that the debtor was ineligible because the casino was merely an arm of the tribe itself.<sup>91</sup> The parties moving for dismissal contended that there was no legal distinction between the tribe and the entity that ran the casino.<sup>92</sup> As evidence, the objecting parties pointed to the loan documents, which provided that the tribe was the obligor that owned and operated the casino and which did not distinguish between the tribe and the casino entity.<sup>93</sup> The bankruptcy court granted the parties’ motions to dismiss by summary order and did not write an opinion.<sup>94</sup> Without access to bankruptcy relief, the casino was unable to negotiate with its creditors, including the County of San Diego, which the tribal chairman characterized as “unwilling

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<sup>87</sup> As discussed in Part I.C, *infra*, Alaska Native Corporations have also filed under the Bankruptcy Code. As Part I.C explains, these corporations are distinct from other tribal corporations. For this reason, they are discussed separately.

<sup>88</sup> *In re Santa Ysabel Resort and Casino*, Case No. 12-09415-PB11 (Bankr. S.D. Cal. 2012).

<sup>89</sup> J. Harry Jones, *Santa Ysabel Casino Goes Out of Business*, THE SAN DIEGO UNION-TRIBUNE (Feb. 3, 2014), <http://www.sandiegouniontribune.com/business/sdut-santa-ysabel-casino-debt-2014feb03-htmlstory.html>.

<sup>90</sup> Omnibus Statement of Facts and Omnibus Declaration of David Chelette in Support Thereof, *In re Santa Ysabel Resort and Casino*, Case No. 12-09415-PB11 (S.D. Cal. July 3, 2012), available at <https://turtletalk.files.wordpress.com/2012/07/omnibus-statement-of-facts-and-events.pdf> (“The Debtor is an unincorporated company.”).

<sup>91</sup> County of San Diego’s Motion to Dismiss Debtor’s Bankruptcy Case; Memorandum of Points and Authorities in Support Thereof, *In re Santa Ysabel Resort and Casino*, Case No. 12-09415-PB11 (S.D. Cal. Aug. 7, 2012), available at <https://turtletalk.files.wordpress.com/2012/08/san-diego-county-motion-to-dismiss.pdf>; Memorandum of Points and Authorities in Support of Motion to Dismiss Bankruptcy Case for Lack of Eligibility and Authority, *In re Santa Ysabel Resort and Casino*, Case No. 12-09415-PB11 (S.D. Cal. Aug. 2, 2012), available at <https://turtletalk.files.wordpress.com/2012/08/yavapai-apache-motion-to-dismiss.pdf>; Acting United States Trustee’s Motion to Dismiss Case, *In re Santa Ysabel Resort and Casino*, Case No. 12-09415-PB11 (S.D. Cal. Aug. 7, 2012), available at <https://turtletalk.files.wordpress.com/2012/09/us-motion-to-dismiss.pdf>.

<sup>92</sup> See, e.g., Acting United States Trustee’s Motion to Dismiss Case, *supra* note 91, at 1 (“The Debtor’s structure, purpose, and authorization to conduct business activities by a tribal ordinance make it clear that it is an inclusive part of the Iipay Nation of Santa Ysabel and is not a separate legal entity.”).

<sup>93</sup> See, e.g., *id.* at 8.

<sup>94</sup> Minute Order, *In re Santa Ysabel Resort and Casino*, Case No. 12-09415-PB11 (S.D. Cal. Sept. 4, 2012), available at <https://turtletalk.files.wordpress.com/2012/09/dct-minute-order.pdf>.

to renegotiate its financial agreement with the tribe in the face of economic hardship.”<sup>95</sup> Faced with mounting debt, holdout creditors, and no access to bankruptcy court, the casino shut its doors in early 2014, and 115 employees lost their jobs.<sup>96</sup>

In the second proceeding, a tribally chartered corporation wholly owned by a tribe filed for bankruptcy relief in Arizona. The debtor, ‘Sa’ Nyu Wa Inc., owned and operated the Skywalk at the Grand Canyon and filed for bankruptcy after a \$28 million arbitration award was entered against it after a dispute over a development agreement.<sup>97</sup> In its initial filings with the court, the debtor claimed to be “a tribal corporation that is separate from the [Hualapai] Nation and from other corporations or instrumentalities of the Nation.”<sup>98</sup> Perhaps seeking to distinguish its situation from that of the Santa Ysabel Resort and Casino, the tribal corporation presented evidence that it had its own board of directors and that the corporation, rather than the tribe, was the party to the development agreement in dispute.<sup>99</sup> The debtor also argued that the arbitration award was enforceable only against the corporation and was not collectible from the tribe.<sup>100</sup>

No one challenged the debtor’s eligibility for bankruptcy in the ‘Sa’ Nyu Wa case.<sup>101</sup> Ultimately, however, “the debtor and developer settled their dispute and consensually dismissed the case.”<sup>102</sup> Thus, the ‘Sa’ Nyu Wa case does not provide much clarity with respect to how a tribal corporation might proceed in bankruptcy.

The dearth of legal precedent, combined with ambiguities in applying the Bankruptcy Code to tribal entities, make it impossible to be certain whether a tribal entity will be eligible for bankruptcy relief. The cases to date shed little light on the issue due to the lack of published legal opinions. Although the

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<sup>95</sup> Jones, *supra* note 89, at 1.

<sup>96</sup> *Id.*

<sup>97</sup> See Christine L. Swanick et al., *Tribal Court Bankruptcy Petition Raises Issues of First Impression for Bankruptcy Court*, SHEPPARD MULLIN RICHTER & HAMPTON LLP (Mar. 7, 2013), available at <https://www.lexology.com/library/detail.aspx?g=c5097886-3631-438b-b774-d4a992fc65b4>.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Kim & Koenig, *supra* note 10, at 19 (“While several contemporaneous articles questioned whether the debtor was an eligible filer, no parties-in-interest challenged the debtor’s eligibility . . .”).

<sup>102</sup> *Id.*; see ‘Sa’ Nyu Wa, Inc. *Bankruptcy New Filing Alert: Motion for Order Dismissing the Bankruptcy Case and/or Converting the Case to Chapter 7*, CHAPTER 11 CASES (May 21, 2014), available at <http://chapter11cases.com/2014/05/21/sa-nyu-wa-inc-bankruptcy-new-filing-alert-motion-for-order-dismissing-the-bankruptcy-case-and-or-converting-the-case-to-chapter-7/>.

question of a tribal corporation's eligibility for bankruptcy may be fact-dependent, the state of the law is unclear as to whether and under what circumstances tribal entities will be eligible to be debtors in bankruptcy. Tribal corporations may thus find themselves in a catch-22: they may experience the same debt problems as an ordinary business established under state law, but they may be deemed too closely affiliated with an Indian nation to qualify for bankruptcy protection.

Even if a tribe—or, more likely, a tribal business—were deemed eligible to file for bankruptcy, however, tribal entities are likely to encounter distinct difficulties when proceeding under the Bankruptcy Code. As explained in more detail below, fundamental inconsistencies in law and policy relating to tribal entities make relief improbable, if not outright impossible, for tribal debtors to attain, even if eligibility-related problems could be overcome.

### *B. Obstacles to Tribal Bankruptcy*

Given tribal entities' significant role in U.S. commerce and the uncertainties present in U.S. bankruptcy law with respect to tribal debtors, it makes sense to provide a clear path allowing tribal entities to access structured debt relief. Nevertheless, tribal entities and others may find such access objectionable on several grounds. In particular, applying laws created without tribal input, such as the Bankruptcy Code, may be seen as the imposition of Western norms and legal traditions onto tribes. Some Indian law scholars have criticized this imposition in other contexts, arguing that it is tantamount to colonization and "a diminution of tribes' inherent right to govern themselves."<sup>103</sup> They point out that the United States' own theory of Indian sovereignty supports the perpetuation of Indian nations' autonomous existence, even if tribal decisions conflict with Western ideals.<sup>104</sup> Thus, if the Bankruptcy Code were adapted such that it clearly applied to tribal debtors, its application may still be considered an undesirable infringement on tribal autonomy.

In some respects, all debtors trade the loss of some autonomy in exchange for bankruptcy's benefits. By consenting to the jurisdiction of the bankruptcy court (and, in some cases, to a trustee's handling of their assets), debtors in bankruptcy necessarily give up some of their abilities to manage their own affairs and make their own decisions in exchange for the benefit of a discharge of debt. Yet, sovereign debtors arguably pay a higher price for a fresh start than

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<sup>103</sup> Trevor Reed, *Who Owns Our Ancestors' Voices? Tribal Claims to Pre-1972 Sound Recordings*, 40 COLUM. J.L. & ARTS 275, 300 (2016).

<sup>104</sup> Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 800 (2007).

non-sovereign debtors by giving up their full sovereign rights to enter bankruptcy. Perhaps recognizing this significant sacrifice, Congress has not made bankruptcy a remedy for U.S. states.<sup>105</sup> Even if Congress has abrogated tribal sovereign immunity for bankruptcy purposes, a bankruptcy judge's (or trustee's, or creditor's) ability to divest tribes of property or dictate how that property is to be used represents a significant loss of independence that tribes and tribal scholars may not consider to be a fair trade-off, particularly given the current Bankruptcy Code's limited usefulness to tribal entities, explained further below.

A related concern about allowing tribal entities access to structured debt relief comes from possible incompatibilities between tribal and Western notions of property.<sup>106</sup> Bankruptcy law is based, in part, on the notion that non-bankruptcy law governing property rights should generally be respected in the bankruptcy system.<sup>107</sup> But if a tribal debtor were to file for bankruptcy, and if its creditors were non-tribal entities, would tribal law or state property law apply in the bankruptcy case?<sup>108</sup> And if tribal law concerning property applied, how would a bankruptcy court, which likely lacks expertise in tribal property law, interpret it? In other contexts, scholars have noted that federal courts may feel uncomfortable enforcing property interests arising under tribal law, particularly when the type of property at issue lies outside of those courts' general expertise.<sup>109</sup> Uncertainties surrounding application of property law principles

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<sup>105</sup> Jennifer Burnett, *3 Questions on State Bankruptcy*, THE COUNCIL OF STATE GOVERNMENTS, [http://www.csg.org/pubs/capitolideas/enews/issue65\\_3.aspx](http://www.csg.org/pubs/capitolideas/enews/issue65_3.aspx) (quoting Prof. Kenneth Katkin: "The federal bankruptcy code does not allow—and has never allowed—state governments to declare bankruptcy"). Some scholars, however, believe bankruptcy should be made available to the states. *See, e.g.*, David A. Skeel Jr., *States of Bankruptcy*, 79 U. CHI. L. REV. 677 (2012) (arguing for state bankruptcy).

<sup>106</sup> *See* Reed, *supra* note 103, at 285 (noting that the Supreme Court has expressed beliefs that indigenous property rules are "based on incomprehensible customs"); Miller, *supra* note 16, at 764–75 (describing Indian conceptions of private property and noting conflicting views on private ownership of land, as well as a demonstrated understanding of private property principles on the part of native peoples); *but see* ROBERT J. MILLER, *RESERVATION CAPITALISM: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY* 11–12 (Univ. Neb. Press 2012) (summarizing Indian private property rights and noting that "the only major difference between Indigenous principles of property and Euro-American concepts was in how those societies viewed the private ownership of land").

<sup>107</sup> *See generally* *Butner v. United States*, 440 U.S. 48 (1979) (holding that a property issue arising in bankruptcy should be resolved by reference to state law).

<sup>108</sup> Existing cases may provide some guidance on this issue. *See* American Indian Law Deskbook § 5:19 (May 2017) (collecting cases and noting that "a state's interests will justify regulation of a tribe or its members only 'in exceptional circumstances'"); *In re DeCora*, 396 B.R. 222, 225 (W.D. Wis. 2008) (finding that tribal law was determinative of lien-holder priority in a bankruptcy proceeding because the tribe's "interest in controlling the distribution of its revenue far outweighs [the State's] interest in enforcing its commercial code").

<sup>109</sup> *See* Reed, *supra* note 103, at 306 ("It is clear that Congress and the courts believe indigenous groups are entitled to control their lands, culture, and membership by means of sovereign governments operating under distinct ontological frameworks, but they are also uncomfortable with enforcing indigenous entitlements that

may make it difficult for contract counterparties and lenders to price the risk of lending to tribal entities on a secured basis.

Other key differences between the Bankruptcy Code and federal laws governing Indian nations suggest that Congress was not contemplating bankruptcy as a possibility for tribal debtors when it created the Bankruptcy Code. In particular, if a tribal gaming operation, such as a casino, were to file for bankruptcy, conflicts between the Code and the IGRA would need to be resolved. For example, the IGRA requires a tribe to hold the sole proprietary interest in any gaming operation.<sup>110</sup> The IGRA would thus be violated if a tribal gaming operation filed for bankruptcy and a trustee began operating the debtor's business pursuant to § 1108 of the Bankruptcy Code.<sup>111</sup> But even if the debtor remained in control of the business, as is common in a chapter 11 bankruptcy case, the Code-prescribed duty of the debtor-in-possession to preserve estate assets for the benefit of creditors would conflict with the IGRA's limitations on creditors' ability to force a change in management or to assume control of a tribal gaming facility.<sup>112</sup>

Perhaps most critically, bankruptcy law's absolute priority rule conflicts with the IGRA's requirement that only the tribe itself can control and possess an Indian gaming operation.<sup>113</sup> The IGRA would thus mandate that equity interests remain in the organization even if the debtor's more senior creditors were not fully repaid.<sup>114</sup> This presents a direct conflict with the absolute priority rule, which stipulates, effectively, that creditors must be paid in full before equity can receive anything in a bankruptcy.<sup>115</sup> The absolute priority rule is at the heart of the chapter 11 distributional system, and the Supreme Court recently reinforced the importance of complying with the rule in the context of a plan or structured

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arise from these ontological formations that cannot be justified through the logics of American jurisprudence.”).

<sup>110</sup> Indian Gaming Regulatory Act, 25 U.S.C. § 2710 (1988) [hereinafter IGRA].

<sup>111</sup> 11 U.S.C. § 1108 (“[T]he trustee may operate the debtor’s business.”).

<sup>112</sup> IGRA at § 2710; see Steven T. Waterman, *Tribal Troubles – Without Bankruptcy Relief*, AM. BANKR. INST. J., Jan. 2010, at 33. Similar problems arise in the non-profit sector. See, e.g., Bruckner, *supra* note 11, at 727 (“Nonprofit colleges’ lack of shareholders and the nondistribution constraint prevent a bankruptcy filing from shifting control of that enterprise from its current management.”).

<sup>113</sup> IGRA, *supra* note 110.

<sup>114</sup> See Stephan A. Hoover, Comment, *Forcing the Tribe to Bet on the House the Limited Options and Risks to the Tribe when Indian Gaming Operations Seek Bankruptcy Relief*, 49 CAL. W.L. REV. 269, 297 (2013); see also Steven T. Waterman, *Tribal Troubles—Without Bankruptcy Relief*, AM. BANKR. INST. J., Jan. 2010, at 44 (noting that IGRA’s sole proprietary-interest requirement would prohibit a restructuring that converts debt into equity and that § 1129’s subjugation provisions could not be satisfied without a 100% repayment plan if the tribe retains the “sole proprietary interest,” as IGRA requires).

<sup>115</sup> 11 U.S.C. § 1129(b)(2)(B)(ii).

dismissal of a case.<sup>116</sup> Thus, the IGRA's conflict with the absolute priority rule is significant. Even if deemed eligible to file for chapter 11, if a tribal debtor cannot propose a plan that conforms with absolute priority—and compliance with the IGRA likely means it cannot—it will be unable to use the bankruptcy system to restructure its debts.<sup>117</sup>

In sum, the IGRA's limitations on management of a tribal gaming operation conflict with specific Bankruptcy Code provisions.<sup>118</sup> Because confirmation of a chapter 11 plan of reorganization requires compliance with all regulatory provisions, including the IGRA,<sup>119</sup> it would be nearly impossible for a tribal gaming operation to successfully restructure its debts under chapter 11 of the Bankruptcy Code.

There are several other obstacles for tribal debtors seeking to use the U.S. bankruptcy system. For example, the National Indian Gaming Commission (“NIGC”) must approve all “management contracts” for tribal gaming operations, including agreements like trust indentures,<sup>120</sup> and some courts have interpreted this mandate as giving the NIGC broad discretion in construing these agreements as management contracts.<sup>121</sup> Tribes themselves are also different from other entities that restructure their debts under the Bankruptcy Code. These differences arise from tribes' structure, governmental interrelationship, and dependence on the federal government.<sup>122</sup> Certain federal laws, regulations, and

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<sup>116</sup> *Czyzewski v. Jevic Holding Corp.*, 136 S. Ct. 1242 (2016).

<sup>117</sup> In certain instances, as in the case of some bankruptcies of nonprofit debtors, courts have held that the absolute priority rule does not apply. This is typically because these courts have determined that the nonprofit's members do not hold equity interests in the nonprofit and that they do not derive an economic benefit based on their membership interests. See Kavita Gupta, *Representing a Nonprofit Debtor in Bankruptcy*, 31 CAL. BANKR. J. 843, 855–57 (2012) (collecting cases); Pamela Foohey, *Chapter 11 Reorganization and the Fair and Equitable Standard: How the Absolute Priority Rule Applies to All Nonprofit Entities*, 87 ST. JOHN'S L. REV. 31, 39 (2012) (“[C]ourts overall . . . hold that the absolute priority rule is inapplicable to nonprofits.”). In the case of a tribal corporation bankruptcy, it is unlikely that this exception would apply to excuse compliance with the absolute priority rule, because unlike members of a nonprofit, tribes do derive economic benefit based on their interests in the corporation. Indeed, this was the very purpose of IGRA. See Part I.A.1 *supra*.

<sup>118</sup> Hoover, *supra* note 10, at 296–98 (noting that appointment of a trustee under § 1104 of the Code would be prohibited under the IGRA).

<sup>119</sup> 11 U.S.C. § 1129(a)(3) (noting that the plan must not be “forbidden by law”).

<sup>120</sup> Blaine I. Green, Craig A. Barbarosh, & Daron T. Carreiro, *Seventh Circuit Rejects Bond Indenture and Its Waive of Tribal Sovereign Immunity, But Allows Leave to Amend for Equitable Claims*, PILLSBURY (Oct. 31, 2011), <https://www.pillsburylaw.com/en/news-and-insights/seventh-circuit-rejects-bond-indenture-and-its-waiver-of-tribal.html> (last visited Feb. 7, 2018).

<sup>121</sup> Hoover, *supra* note 10, at 276; *Wells Fargo Bank N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 699–700 (7th Cir. 2011) (holding that indenture was an unapproved management contract for the Indian gaming facility and was therefore void as a violation of the IGRA).

<sup>122</sup> Waterman, *supra* note 112, at 87.

treaties apply uniquely to tribal entities;<sup>123</sup> consequently, some scholars have analogized tribal corporations to certain regulated industries, such as public utilities, rather than run-of-the-mill corporations.<sup>124</sup> This unique regulatory backdrop has led some scholars to conclude that bankruptcy is unworkable for Indian nations and their businesses.<sup>125</sup>

A tribe's relationship with the federal government further complicates matters.<sup>126</sup> The federal government holds about eleven million acres of real property in trust for tribes,<sup>127</sup> meaning that tribes must obtain express approval from the government in order to sell, convey, or otherwise encumber the trust property.<sup>128</sup> This property is also shielded from alienation under state laws.<sup>129</sup> This trust arrangement, with its corresponding restraint on alienation, was designed to protect and even benefit Indian nations by guaranteeing tribal possession of land and protecting tribal land from sale by state authorities for infractions like nonpayment of taxes.<sup>130</sup> When an entity is financially distressed, however, restraints on alienation like the ones that apply to tribes may negatively impact an entity's ability to access financing.<sup>131</sup> Prospective creditors are naturally hesitant to lend to entities in financial distress. To entice a creditor to loan money, a distressed entity may therefore seek to offer creditors a lien on unencumbered property as security for that loan. Such scenarios are common in

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<sup>123</sup> See *Frequently Asked Questions*, U.S. DEPT. OF INTERIOR INDIAN AFFAIRS, <https://www.bia.gov/frequently-asked-questions> (explaining the Bureau of Indian Affairs and the work that it does with tribal governments).

<sup>124</sup> Waterman, *supra* note 112, at 87.

<sup>125</sup> *Id.* (suggesting non-bankruptcy alternatives, such as a bailout, for financially struggling tribal businesses).

<sup>126</sup> See Miller, *supra* note 46, at 38 (“[T]he federal government is heavily involved in most business dealings in Indian Country.”).

<sup>127</sup> Miller, *supra* note 46, at 37.

<sup>128</sup> Purchases or grants of lands from Indians, 25 U.S.C. § 177 (“No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.”); Leases of restricted lands, 25 U.S.C. § 415 (2012) (providing that leasing of trust lands must be approved by the Secretary of the Interior); FRED ANDREW SEATON & ELMER F. BENNETT, *FEDERAL INDIAN LAW* 685 (U.S. Gov’t Printing Office, 1958); see Haddock & Miller, *supra* note 51, at 221 (“That so many of their assets remain under governmental trust under outdated policy rationales creates great difficulty for indigenous peoples.”); Miller, *supra* note 46, at 36 (“‘Trust lands’ are lands that tribal governments or individual Indians own as the beneficial owner but the United States owns the legal title and is the legal owner.”).

<sup>129</sup> *Cf. id.* See Cohen’s Handbook, *supra* note 69, at § 16.03(4)(d)(iii) (describing how involuntary transfers of allotments, including those that may occur in bankruptcy, are impermissible and noting that “if an allottee becomes a bankrupt, title to the allotment does not pass to the bankruptcy trustee”).

<sup>130</sup> SEATON & BENNETT, *supra* note 128, at 685.

<sup>131</sup> See Miller, *supra* note 46, at 44 (“The fact that the United States retains the trusteeship and legal ownership of these lands makes them almost totally unavailable for borrowing money and for developing economic activities.”).

bankruptcy, particularly in the early stages of a case, in order to provide the debtor with adequate funding to proceed with the bankruptcy case.<sup>132</sup> Because tribes may not encumber trust property without the federal government's consent, a tribal debtor's ability to obtain financing quickly by offering up unencumbered property may be severely limited if the tribe owns few to no non-trust assets.<sup>133</sup>

Tribes and tribal corporations thus face severe roadblocks if they seek to use the Bankruptcy Code. Even if a tribal debtor were deemed eligible to file for bankruptcy, the Code's incompatibility with tribal norms, federal laws, and policies such as the trust relationship make use of the Code unappealing at best and downright impossible at worst.

### *C. Incompatibility Illustrated: Alaska Native Corporations*

There is perhaps no better illustration of the incompatibility of bankruptcy and tribal law than the cases of Alaska Native Corporations. Alaska Native Corporations are regional and village corporations established by the Alaska Native Claims Settlement Act ("ANCSA").<sup>134</sup> Signed into law in 1971, ANCSA was, at the time, the largest land claims settlement in U.S. history.<sup>135</sup> In return for the abrogation of Native claims to certain aboriginal land, Alaska Natives<sup>136</sup> received land and money from the federal government, which were divided among the various tribal corporations established under the law.<sup>137</sup>

The Act and its amendments created 13 regional economic development corporations.<sup>138</sup> Alaska Natives hold stock in these corporations, enabling them to earn income, remain in their traditional villages, and preserve their culture.<sup>139</sup> The Act enjoyed significant support from Natives and non-Natives alike and was

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<sup>132</sup> See 11 U.S.C. § 364 (contemplating mechanisms that a debtor may use to obtain credit).

<sup>133</sup> Moses, *supra* note 20 ("[T]here are important limitations on what collateral tribes can grant their lenders without obtaining federal approval, including, for example, limitations on the ability of a tribe to encumber its land.")

<sup>134</sup> 43 U.S.C. §§ 1601–24 (1971).

<sup>135</sup> Monica E. Thomas, *The Alaska Native Claims Settlement Act: Conflict and Controversy*, POLAR RECORD, 1986, [http://www.alaskool.org/projects/ancsa/articles/mthomas/ancsa\\_conflict.htm#Historical\\_perspective](http://www.alaskool.org/projects/ancsa/articles/mthomas/ancsa_conflict.htm#Historical_perspective).

<sup>136</sup> "Native" is defined in the ANCSA as, *inter alia*, "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian . . . Eskimo, or Aleut blood, or combination thereof." 43 U.S.C. § 1602(b).

<sup>137</sup> E. Budd Simpson, *Doing Business with Alaska Native Corporations: A New Model for Native American Business Entities*, ABA BUS. L. SECT., July/Aug. 2007 <https://apps.americanbar.org/buslaw/blt/2007-07-08/simpson.shtml>.

<sup>138</sup> Thomas, *supra* note 135.

<sup>139</sup> *Id.*



created with substantial involvement from Alaska Natives.<sup>140</sup> Because they were created for specific purposes under a federal statute, Alaska Native Corporations are considered “unique,” even in the world of federal Indian law, and represent a type of entity that is different from most other tribal and non-tribal corporations.<sup>141</sup>

Since their creation, a few regional and village corporations have filed for bankruptcy.<sup>142</sup> During the course of the bankruptcy proceedings, “conflicts between the legislative purposes inherent in ANCSA and in the Bankruptcy Code have come to light,” leading scholars to argue that “the two statutes do not mesh well.”<sup>143</sup> Notably, the Alaska Native Corporations, created by a political process, were fundamentally different from the voluntary corporations that characterize much of U.S. commerce.<sup>144</sup> In addition, the ANCSA, like the IGRA, directly inverted the priority scheme of the Bankruptcy Code, dictating that Native shareholders receive priority over their creditors.<sup>145</sup> Scholars studying the Bankruptcy Code and the ANCSA noted additional conflicts between the two statutes relating to taxation; obligations with respect to land; income; and conflicts with the Code’s liquidation and plan confirmation provisions.<sup>146</sup> In short, “[r]esolving the conflicts between the Bankruptcy Code and ANCSA is not easy, as neither statute was drafted with a view to harmonizing with the other.”<sup>147</sup> Although the Native Corporations that filed for bankruptcy were able to use the bankruptcy system, they found the Bankruptcy Code an inappropriate framework,<sup>148</sup> leading scholars to conclude that the only way to reconcile the Code with the ANCSA was to “relax” interpretations of both statutes.<sup>149</sup>

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<sup>140</sup> *Alaska Native Claims Settlement Act*, ALASKA HUMANITIES FORUM, <http://www.akhistorycourse.org/modern-alaska/alaska-native-claims-settlement-act> (last visited Feb. 6, 2018).

<sup>141</sup> Simpson, *supra* note 137 (emphasizing these entities’ uniqueness and highlighting some of the distinctive opportunities they represent); DAVID S. CASE & DAVID A. VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* 198 (3rd ed., Univ. of Alaska Press 2012) (1978) (describing the ANCSA as an “evolving” experiment).

<sup>142</sup> Kathryn A. Black, David H. Bundy, Cynthia Pickering Christianson, & Cabot Christianson, *When Worlds Colide: Alaska Native Corporations and the Bankruptcy Code*, 6 ALASKA L. REV. 73 (1989), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1251&context=alr>.

<sup>143</sup> *Id.* at 75.

<sup>144</sup> *Id.* at 86; *see also id.* at 91 (“Many of the Bankruptcy Code’s most fundamental underlying assumptions about corporations . . . do not apply to Native corporations at all.”).

<sup>145</sup> *Id.* at 90.

<sup>146</sup> *Id.* at 101.

<sup>147</sup> *Id.* at 130.

<sup>148</sup> *See* CASE & VOLUCK, *supra* note 141, at xii (suggesting that the 1991 amendments to ANCSA and the sale of Native net operating losses, rather than the bankruptcy process itself, “rescued several Native corporations from bankruptcy”).

<sup>149</sup> Black, *supra* note 142, at 131.

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The Bankruptcy Code appears ill-equipped to handle tribal debtors of all sorts. Although tribal entities regularly transact in the U.S. commercial sphere, it is not clear that these entities, when faced with financial difficulty, will be able to play by the normal rules of the Bankruptcy Code without requiring adjustments to both bankruptcy and tribal law. The U.S. Bankruptcy Code is fundamentally incompatible in many ways with the laws and policies pertaining to tribal entities.

#### *D. The Case for Tribal Debt Relief*

If a tribal debtor cannot effectively use the Bankruptcy Code, should it be cut off from the structured debt relief the Code provides? There are several reasons why structured debt relief may be valuable to tribal debtors. One reason relates to these entities' asymmetrical treatment in the bankruptcy system. Despite the lack of clarity surrounding tribal entities' eligibility to be *debtors* in bankruptcy, tribal entities can be and have been forced to use the system when they are *creditors* of a debtor in bankruptcy.<sup>150</sup> The law is clear that parties adverse to tribes may bring the tribe (or a tribal business) into existing bankruptcy proceedings as either a party in interest or a creditor.<sup>151</sup> This means that “[c]ourts can force tribes to participate in a system from which they cannot simultaneously derive a benefit.”<sup>152</sup>

Of course, Indian nations are not the only entities that can be brought into court as creditors without being able to use the system as debtors. Banks and other financial institutions are treated in the same manner,<sup>153</sup> and the federal government, the largest creditor in the country,<sup>154</sup> cannot file for bankruptcy. But providing tribal entities with access to debt relief could bestow distinct

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<sup>150</sup> Cartwright, *supra* note 10, at 104 (“In a clear majority of courts, Native American sovereign immunity is abrogated, and tribal casinos are subject to numerous federal statutes, including the Bankruptcy Code when they are creditors.”); Cohen’s Handbook, *supra* note 69, at § 2.03 (finding that “several cases have concluded, often without discussion, that the Code applies to the commercial activities of tribes as creditors”); *In re White*, 139 F.3d 1268 (9th Cir. 1998) (holding that tribe’s participation as a creditor in bankruptcy waived immunity from adjudication of its claim in bankruptcy proceedings).

<sup>151</sup> See, e.g., *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004) (holding that because Congress abrogated Indian tribes’ sovereign immunity under the Bankruptcy Code, debtor’s adversary proceeding against the Navajo Nation could proceed in bankruptcy court).

<sup>152</sup> Hogan, *supra* note 10.

<sup>153</sup> See generally Hynes & Walt, *supra* note 13.

<sup>154</sup> Brief for the United States as Amicus Curiae, *Lamar, Archer & Cofrin, LLP v. R. Scott Appling*, No. 16-1215 at 21 (“The United States is the largest creditor in the Nation and frequently appears as a creditor in bankruptcy cases.”).

commercial benefits. For example, some research has shown that access to debt relief provides more certainty at the lending stage and may even open up new lending options.<sup>155</sup> In contrast, the economic uncertainty that characterizes a lack of access to bankruptcy relief looms large in the face of a tribal entity's default.<sup>156</sup> This uncertainty about whether relief is available and what form it will take increases transaction costs at the lending stage and may deter non-tribal entities from entering into loans with tribes and their affiliated businesses.<sup>157</sup> In some cases, lack of access to bankruptcy gives creditors leverage over a business in distress: without the threat of bankruptcy looming, creditors may be able to coerce distressed entities into accepting terms that favor them and/or give them substantial control over operations.<sup>158</sup>

In the tribal gaming context, the IGRA's restrictions on equity in a tribal business may prevent creditors from exercising some traditional remedies, such as foreclosure on tribal property or a debt-for-equity swap.<sup>159</sup> But even gaming lenders retain some leverage. For example, gaming lenders can freeze the credit markets for tribal gaming entities if a gaming business refuses to cooperate or negotiate in good faith.<sup>160</sup> The gaming industry in particular is incredibly reliant on credit, so an industry-wide freeze would be particularly harmful.<sup>161</sup> Lenders can also take steps to increase their leverage by asking the National Indian Gaming Commission, which approves contracts, for a determination that their loan agreement is not a "management agreement" under the IGRA, such that any sovereign immunity waivers the gaming company executes would be enforceable.<sup>162</sup> Additionally, lenders who transact with non-gaming tribal

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<sup>155</sup> See Stephan A. Hoover, *Forcing the Tribe to Bet on the House the Limited Options and Risks to the Tribe When Indian Gaming Operations Seek Bankruptcy Relief*, 49 CAL. W.L. REV. 269 (2013); cf. Barry E. Adler, *A World Without Debt*, 72 WASH. U.L.Q. 811 (1994) (arguing that "a world without debt or bankruptcy . . . is efficient").

<sup>156</sup> Hoover, *supra* note 155.

<sup>157</sup> See Hogan, *supra* note 10; Thomas Weathers, *Encouraging Business with Indian Tribes: A Brief Discussion of the Tribal Exhaustion Doctrine*, AMERICAN BAR ASSOCIATION, Dec. 2008, <https://apps.americanbar.org/buslaw/blt/2008-11-12/weathers.shtml> (noting that many nonnative companies and lawyers "may hesitate to do business with Indian tribes for fear of the unknown"); Haddock & Miller, *supra* note 51, at 223 (suggesting that tribes might reassure investors by structuring contracts "with an eye to facilitating federal court intervention in disputes . . .").

<sup>158</sup> See David McAfee, *Marijuana Industry Can't Partake in Bankruptcy Protection*, BLOOMBERG BNA 29 BBLR 717 (June 20, 2017).

<sup>159</sup> Scott J. Greenberg & Jeffrey H. Taub, *When Tribal Gaming Goes Sour... Rights & Remedies in an Unclear Legal Environment*, CADWALADER WICKERSHAM & TAFT LLP, Apr. 11, 2011, <https://www.lexology.com/library/detail.aspx?g=d7d11d74-d3a9-45dd-ba14-5ed3d20d34dd>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

businesses may have more traditional remedies available to them in the face of a tribal business unable or unwilling to repay debt.

Tribal entities in fiscal distress currently face a no-win situation: their uncertain eligibility status, combined with the incompatibility of the Bankruptcy Code with other laws and policies governing tribes, make using the existing bankruptcy system difficult if not impossible. Nevertheless, tribal entities seeking comprehensive debt relief have nowhere else to turn if they have engaged in commerce with other entities. This is because tribal law cannot be used to “bind dissenting non-tribal lenders.”<sup>163</sup> In addition, bankruptcy offers distinct benefits—including an automatic stay preventing creditor action and the ability to restructure debt over the objection of creditors—traditionally unavailable outside of the Bankruptcy Code.<sup>164</sup> Thus, tribal law on its own is not a substitute for bankruptcy when a tribal entity has engaged in commercial transactions with non-tribal entities. If tribal insolvency law cannot address the debt restructuring, and if Indian nations are similarly precluded from using the Bankruptcy Code, this suggests that Congress should devise a path for relief.<sup>165</sup>

As tribal entities continue to engage in commerce with others, it will become increasingly likely that they will encounter the same risks that all businesses face, including debt overhang, holdout creditors, and the need for breathing space to adjust debts. Indeed, the rise of claims trading and distressed debt purchases, where parties with no prior interests in the debtor purchase claims in the hope of making a large return or to thwart a reorganization, makes it likely that tribal entities, like other U.S. businesses, will be faced with increasing numbers of creditors uninterested in a consensual debt restructuring.<sup>166</sup> Bankruptcy is distinctly equipped to address these problems by providing access

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<sup>163</sup> Kim & Koenig, *supra* note 17. The tribal exhaustion doctrine, which requires litigants to exhaust their tribal remedies before proceeding in state or federal court, likely does not apply to bankruptcy cases because federal law designates federal courts as the exclusive fora for bankruptcy claims. *See* Weathers, *supra* note 157 (“Exhaustion is not required where . . . federal law expressly provides that a claim can only be heard in federal court.”)

<sup>164</sup> For an in-depth discussion of bankruptcy’s unique attributes, *see* Coordes, *Gatekeepers Gone Wrong*, *supra* note 11, at 1206–07. Of course, as described *infra*, recently Congress has expanded access to bankruptcy tools to entities not eligible for Code-based relief.

<sup>165</sup> For a similar argument in the contexts of municipal bankruptcy and Puerto Rico, *see* Mitu Gulati & Robert K. Rasmussen, *Puerto Rico and the Netherworld of Sovereign Debt Restructuring*, 91 S. CAL. L. REV. 133, 149 (2017) (“[T]he power to enact a debt adjustment scheme is an integral part of a state’s sovereign power, and . . . Congress cannot take that power away and put nothing in its place.”).

<sup>166</sup> *See generally* Randolph J. Haines & John Worth, *Trading in Bankruptcy Claims*, 1992 ANN. SURV. OF BANKR. L. 1 (1992) (explaining various motivations for trading in bankruptcy claims); Anthony J. Casey, *Auction Design for Claims Trading*, 22 AM. BANKR. INST. L. REV. 133, 133 (2014) (“Claims are traded regularly in today’s large corporate bankruptcy cases . . . the volume has increased dramatically in the last decade.”).

to specific tools, namely nonconsensual debt adjustment and the automatic stay, that are not available elsewhere.<sup>167</sup> At bottom, when tribes and tribal businesses have a demonstrated need for these relief mechanisms, they should be able to access these tools.

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There are valid concerns about granting tribal debtors access to bankruptcy and about the ways in which the Code conflicts with other federal laws, regulations, and policies toward tribes. Despite these concerns, access to structured debt relief can provide distinct benefits for Indian nations, including increased certainty, more options for tribal entities struggling with debts or holdout creditors, and the ability to access a valuable set of tools traditionally defined by access to the Bankruptcy Code.

Tribes that engage in commerce with non-tribal entities are effectively injecting themselves onto a broader commercial playing field. Indeed, Indian nations often willingly submit themselves to non-tribal law in commercial circumstances by, for example, waiving sovereign immunity as a concession to doing business.<sup>168</sup> If tribal laws, norms, and customs can be reconciled with Western ones in the commercial context, it seems inappropriate to limit the debt relief tribal entities can obtain by foreclosing tribal debtors' access to bankruptcy relief. The next Part will discuss what appropriate bankruptcy relief for tribal entities might look like. Recent experiences suggest that when the Bankruptcy Code excludes a particular prospective debtor, it is not necessary to try and reconcile the Code with conflicting laws that apply to that entity. Instead, Congress can enact special legislation that provides structured debt relief tailor-made for entities not eligible to be debtors under the Bankruptcy Code.

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<sup>167</sup> See Laura N. Coordes, *Gatekeepers Gone Wrong: Reforming the Chapter 9 Eligibility Rules*, 94 WASH. U.L. REV. 1191 (2017); see also Michelle M. Harner, *Rethinking Preemption and Constitutional Parameters in Bankruptcy*, 59 WM. & MARY L. REV. 147, 198 (2017) (noting that the Supreme Court has "repeatedly described a discharge of a debtor's financial obligations as one of the hallmarks of a bankruptcy law that is within the exclusive purview of Congress under the Bankruptcy Clause"); Lubben, *supra* note 51, at 10 ("Insolvency systems are designed for debtors that risk having their value destroyed by individualistic creditor behavior.").

<sup>168</sup> See ROBERT J. MILLER, *RESERVATION CAPITALISM: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY* 98 (Univ. Neb. Press 2013) (noting that "there are literally thousands of examples of tribal governments voluntarily waiving their immunity in contracts" and citing the Confederated Tribes of the Siletz Indian Reservation in Oregon, which had waived immunity in thirty-five of its approximately 275 business contracts).

## II. SEARCHING FOR RELIEF: THE BANKRUPTCY CODE AND BEYOND

If we accept that tribal debtors should be eligible for structured debt relief, we must next consider where such relief should come from. Scholars have made various proposals to reform or adapt the Bankruptcy Code to provide a clearer path for tribal eligibility. Others have suggested that non-bankruptcy mechanisms, such as bailouts, may be more appropriate forms of debt relief. After critically reviewing existing proposals, this Part examines the possibility of taking an alternate path: looking outside the Bankruptcy Code to design tailor-made structured debt relief.

### A. Existing Proposals

Observers have long been troubled by tribal entities' lack of access to bankruptcy relief. Over the years, they have proposed various mechanisms to create access for these entities. This subsection surveys existing proposals and offers some commentary on their potential benefits and drawbacks.

#### 1. Proposals for Determining Eligibility

Several proposals deal with the question of how to deem tribal entities eligible for relief under the Bankruptcy Code. A recent proposal suggests that courts find that Native American commercial entities are eligible for bankruptcy using the *Tuscarora-Coeur D'Alene* doctrine.<sup>169</sup> This doctrine splits tribal activities into two categories: those that are "governmental" and those that are "commercial" in nature.<sup>170</sup> The doctrine divides tribal pursuits so that tribal economic activities can be regulated in a manner similar to private-sector business activities in the contexts of federal employment and benefits laws.<sup>171</sup>

The *Tuscarora-Coeur D'Alene* doctrine derives from two cases. In the first, *Federal Power Commission v. Tuscarora Indian Nation*, the U.S. Supreme Court held that "a general statute in terms applying to all persons includes Indians and their property interests."<sup>172</sup> In the second, *Donavan v. Coeur D'Alene Tribal Farm*, the Ninth Circuit limited the application of *Tuscarora*, holding that it does not apply if (1) the law in question deals with intramural tribal self-governance; (2) application would contradict relevant treaties; or (3)

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<sup>169</sup> Amanda L. Cartwright, *Can Native American-Owned Casinos File for Chapter 11?*, AM. BANKR. INST. J., Oct. 2012, at 50.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 51.

<sup>172</sup> *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

legislative history demonstrates that Congress did not intend for the law to abrogate tribal sovereignty.<sup>173</sup>

The synthesized *Tuscarora-Coeur D'Alene* doctrine has been applied to find that Native American commercial activities, including casino operations, are subject to acts of Congress.<sup>174</sup> The doctrine thus limits tribal sovereign immunity to purely intramural governmental matters.<sup>175</sup> Using the proposal in question, a court could extend the doctrine to the Bankruptcy Code to find that Native American commercial entities are subject to U.S. bankruptcy law and that they are eligible for bankruptcy.<sup>176</sup>

Another suggestion for tribal debtor eligibility comes from the immunity doctrine.<sup>177</sup> An early motivation for granting tribes sovereign immunity was the fear that tribes might otherwise be subjected to economic hardship.<sup>178</sup> Indeed, many Indian nations are still in a precarious economic state such that they are not financially strong enough to withstand suit.<sup>179</sup> Some have argued that if a tribal entity is protected by immunity, it has less of a need to file for bankruptcy due to this protection.<sup>180</sup> Courts could therefore use the immunity doctrine to determine whether a tribe's sovereignty precludes the entity from filing for bankruptcy.<sup>181</sup> For example, under this proposal, a tribal business may not be covered by tribal immunity and may thus be able to access the bankruptcy system if (1) the business is sufficiently distinct from the tribe or (2) the tribe voluntarily waives the immunity upon incorporation.<sup>182</sup> Thus, under this proposal, there would be two categories of tribal enterprises: (1) those protected by immunity that cannot file for bankruptcy, and (2) those without immunity that can file.<sup>183</sup> This approach appears similar to the one the court in the *Santa Ysabel Resort and Casino* case used to determine that the business in that case was ineligible for bankruptcy.

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<sup>173</sup> *Donovan v. Coeur D'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

<sup>174</sup> Cartwright, *supra* note 169, at 103.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*; *see also* *San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306 (D.C. Cir. 2007) (holding that National Labor Relations Act applied to an Indian-owned casino because applying the Act to a tribe's commercial activities would not impair tribal sovereignty).

<sup>177</sup> Hogan, *supra* note 10, at 571.

<sup>178</sup> *Id.* at 590.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 614.

<sup>181</sup> *Id.* at 613.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

Finally, Emir Aly Crowne, Andrew Black and S. Alex Constantin have argued that when a tribal corporate entity voluntarily enters into a business contract with non-tribal investors, that entity must be made subject to both bankruptcy law and to the terms of the agreements it undertakes because “[b]eing a commercial participant entails being commercially responsible.”<sup>184</sup> These scholars contend that when a tribe voluntarily enters the public marketplace in a commercial capacity, it is subjecting itself to all of the relevant rules and regulations of that space, including the rules of bankruptcy.<sup>185</sup>

The above proposals offer various pathways to tribal eligibility for bankruptcy but do not explain how a tribal bankruptcy should proceed once the entity is deemed eligible. As the discussion in Part I shows, conflicts between the Bankruptcy Code and other federal laws that apply to tribes present the need for clarification and adjustment before a tribal debtor can proceed with bankruptcy. Thus, although there is uncertainty surrounding eligibility that should be clarified, if tribal debtors are to successfully use the bankruptcy system, the inquiry cannot stop at the eligibility stage.

## 2. *Alternative Mechanisms*

A second group of proposals calls for exploration of alternative mechanisms to assist tribes. For example, Blake Quackenbush has proposed using chapter 15 for tribal bankruptcy, arguing that this chapter of the Bankruptcy Code may “bridge the jurisdictional gap between tribal courts and U.S. [b]ankruptcy courts.”<sup>186</sup>

Chapter 15, which was designed to facilitate cooperation between U.S. courts and foreign courts in cross-border insolvency cases,<sup>187</sup> may not be a good fit for Indian nations for several reasons. First, Indian tribes are distinct from the foreign states where companies seeking to use chapter 15 are based, as Quackenbush himself acknowledges.<sup>188</sup> Due to the restraints on tribal sovereignty discussed in Part I, treating a tribe as the equivalent of a sovereign nation for purposes of chapter 15 bankruptcy recognition is a technically difficult proposition. In particular, chapter 15 presupposes that the other sovereigns involved in a case have well-developed laws and public policies

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<sup>184</sup> Emir Aly Crowne, Andrew Black, & S. Alex Constantin, *Not Out of the (Fox)Woods Yet: Indian Gaming and the Bankruptcy Code*, 2 UNLV GAMING L.J. 25, 26 (2011).

<sup>185</sup> *Id.* at 44.

<sup>186</sup> Quackenbush, *supra* note 10, at 69.

<sup>187</sup> *See generally* 11 U.S.C. § 1501 et seq.

<sup>188</sup> *See* Quackenbush, *supra* note 10, at 76.



related to bankruptcy. Thus, to use chapter 15 successfully, tribes would have to enact “substantial portions” of the Bankruptcy Code—portions which, due to their conflicts with the IGRA and other federal Indian law, would need to be further adapted for tribal use.<sup>189</sup> In all, applying chapter 15 of the Bankruptcy Code to accommodate tribal debtors would require significant adaptations, to both chapter 15’s application and to tribal law itself. Thus, simply arguing that tribal debtors should use chapter 15 does not resolve the conflicts identified in Part I.

An alternative proposal suggests that Congress could simply consider a bailout for fiscally distressed tribal entities.<sup>190</sup> A bailout for tribal debtors is not as simple as it may seem, however. Bailout proposals are politically charged and are often extremely unpopular, with many contending that an offer of a bailout encourages reckless behavior.<sup>191</sup> In addition, if numerous tribal entities were suffering from severe financial distress, due perhaps to another acute recession, Congress may be in the difficult position of having to pick and choose which Indian nations it would offer to bail out.<sup>192</sup> Thus, bailouts may be both politically unpopular and economically undesirable.

In sum, alternatives to traditionally considered avenues for tribal bankruptcy are creative but likely difficult to implement, requiring adjustment in both legal and political contexts.

### 3. Clarification

The final set of proposals simply calls for clarification to the Bankruptcy Code when it comes to tribes.<sup>193</sup> In particular, Congress could refine provisions relating to tribes’ status and eligibility under the Code, as well as whether Indian nations may be subject to involuntary bankruptcy petitions.<sup>194</sup> One commentator

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<sup>189</sup> See Quackenbush, *supra* note 10, at 81–82.

<sup>190</sup> See Waterman, *supra* note 110, at 87.

<sup>191</sup> See, e.g., Sita Slavov, *The Hidden Cost of Bank Bailouts*, U.S. NEWS & WORLD REPORT, Sept. 26, 2013, <https://www.usnews.com/opinion/economic-intelligence/2013/09/26/study-shows-bank-bailouts-are-an-incentive-to-be-reckless> (citing research that suggests bailing out banks “made the financial system riskier”); Daniel Mitchell, *Why the Bailout is Bad for America*, REALCLEARPOLITICS, Oct. 1, 2008, [https://www.realclearpolitics.com/articles/2008/10/financial\\_bailout\\_would\\_impose.html](https://www.realclearpolitics.com/articles/2008/10/financial_bailout_would_impose.html) (arguing that bailouts “will hurt the U.S. economy in the short run and long run”).

<sup>192</sup> See Adam J. Levitin, *Bankruptcy’s Lorelei: The Dangerous Allure of Financial Institution Bankruptcy*, Feb. 6, 2018, available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3120145](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120145) (“Bailouts create opportunities for government favoritism.”).

<sup>193</sup> See Clift, *supra* note 10, at 207.

<sup>194</sup> See *id.*

has suggested that Congress settle the matter of tribal eligibility using either “appropriate legislation or statutory amendment to the Code.”<sup>195</sup>

Cohen’s Handbook on Federal Indian Law notes that applying the Code to tribal government debtors is “problematic” and suggests that these debtors be dealt with “by the tribes themselves and by the executive or legislative branches of the federal government.”<sup>196</sup> Yet, Cohen’s Handbook also notes that tribally owned business entities “should be entitled to petition in bankruptcy.”<sup>197</sup> Cohen’s Handbook does not, however, elaborate on how issues with tribal government debtors should be addressed nor on how a tribal business might navigate the Bankruptcy Code if deemed eligible to file.

In other words, amending the Code or creating new legislation with tribes specifically in mind would provide clarity where there is currently only confusion. This Article has already detailed the challenges that amending the Code would entail, given the significant conflicts with the IGRA and other federal laws. However, providing clarity through “appropriate legislation” is an as-yet-underexplored avenue.

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Although the existing proposals contemplate various ways in which tribal debtors could access the bankruptcy system, none have resolved the thornier problem of reconciling the Bankruptcy Code with the body of federal law, policy, and customs relating to Indian nations. Indeed, scholars have been unable to articulate how a bankruptcy would proceed should a tribal debtor be deemed eligible.<sup>198</sup> Until recently, the prospect of structured debt relief for tribal debtors seemed inconceivable. As the next subsection explains, however, recent events offer significant promise on this front.

### *B. Specialized Laws for Otherwise Ineligible Entities*

This subsection provides the necessary backdrop for this Article’s proposal: Congress should enact special legislation providing tailored bankruptcy relief to tribes. Although this proposal may seem radical, it is not unprecedented. Indeed, Congress has twice recognized that the Bankruptcy Code is not an appropriate

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<sup>195</sup> *Id.* at 252.

<sup>196</sup> Cohen’s Handbook, *supra* note 69, at § 2.03.

<sup>197</sup> *Id.*

<sup>198</sup> See Pandeli, *supra* note 51, at 274–79 (concluding that a chapter 7 liquidation would be “legally challenging, impractical and against federal policy with respect to Indian tribes” and that a chapter 11 reorganization would come with “caveats,” including an inability to use a debt-for-equity swap).

solution and has instead adopted new and entirely personalized debt relief laws, once in the context of Puerto Rico, and once in the context of financial institutions. Each will be discussed in turn.

### 1. PROMESA

In 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”),<sup>199</sup> marking a new approach to bankruptcy law in the United States.<sup>200</sup> PROMESA is not a pure bankruptcy law; rather, the legislation recognizes Puerto Rico’s unique status as a U.S. territory with a complicated debt structure, providing a mixture of Bankruptcy Code-based rules and procedures and sovereign debt restructuring practices to aid Puerto Rico in its financial struggles.<sup>201</sup>

PROMESA, which was passed in response to Puerto Rico’s severe economic crisis, was designed uniquely for Puerto Rico and has no application to other U.S. debtors, including other U.S. territories.<sup>202</sup> Signed into law by President Obama, PROMESA allows Puerto Rico to enter into a form of bankruptcy and creates a financial oversight board to govern the territory’s fiscal decisions.<sup>203</sup> PROMESA has been described as one of “the most collaborative and bipartisan pieces of legislation” that Congress has passed in recent years.<sup>204</sup>

PROMESA’s enactment occurred one day before Puerto Rico defaulted on substantial payment obligations,<sup>205</sup> and the events leading up to PROMESA’s passage were turbulent. In 2014, Puerto Rico, already deeply in debt and concerned that its municipalities were not eligible for relief under the

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<sup>199</sup> See *PROMESA: A Summary of the Puerto Rico Oversight Legislation*, KUTAK ROCK NEWS & PUBLICATIONS, Sept. 7, 2016, <http://www.kutakrock.com/PROMESA-Puerto-Rico-Oversight-Economic-Stability-Act/> [hereinafter PROMESA Summary].

<sup>200</sup> See Cheryl D. Block, *Federal Policy for Financially-Distressed Subnational Governments: The U.S. States and Puerto Rico*, 53 WASH. U.J.L. & POL’Y 215, 232 (2017) (describing PROMESA as a “hybrid procedural approach to restructuring Puerto Rico’s otherwise unpayable debt”).

<sup>201</sup> See *id.*; see also James Spiotto, *Beyond Hurricane Maria: Federal Action in Puerto Rico with PROMESA*, MUNINET GUIDE, Dec. 7, 2017, <https://muninetguide.com/federal-action-in-puerto-rico/> (noting that PROMESA was designed to be a mixture of past mechanisms used to resolve governmental financial distress).

<sup>202</sup> See Sheelah Kolhatkar, *Profiting from Puerto Rico’s Pain*, THE NEW YORKER (Nov. 6, 2017) (noting that Puerto Rico has been described as “America’s own Third World country”).

<sup>203</sup> See *id.*

<sup>204</sup> See Melissa Jacoby, *Aurelius Seeks a Do-Over; Puerto Rico and the Appointments Clause Litigation*, CREDIT SLIPS, Jan. 8, 2018, [http://www.creditslips.org/creditslips/2018/01/aurelius-seeks-a-do-over-puerto-rico-appointments-clause-litigation.html?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+creditslips%2Ffeed+%28Credit+Slips%29](http://www.creditslips.org/creditslips/2018/01/aurelius-seeks-a-do-over-puerto-rico-appointments-clause-litigation.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+creditslips%2Ffeed+%28Credit+Slips%29).

<sup>205</sup> See PROMESA Summary, *supra* note 199.

Bankruptcy Code,<sup>206</sup> passed its own Recovery Act to try and address its problems firsthand.<sup>207</sup> The Recovery Act would have enabled some of Puerto Rico's instrumentalities to adopt debt restructuring plans.<sup>208</sup> The U.S. Supreme Court quickly declared the Recovery Act invalid on the grounds that the Bankruptcy Code preempted the Act.<sup>209</sup> According to the Court, Puerto Rico was subject to the Bankruptcy Code, even though its municipalities were ineligible to file under the Code, because the territory fell within the Code's definition of a "State."<sup>210</sup> Therefore, the Recovery Act was preempted by the Bankruptcy Code's provision prohibiting states from enacting their own bankruptcy legislation. Puerto Rico's path to structured debt relief thus entailed exhausting all possible legal options before Congress acted.

PROMESA is "the first of its kind in many respects."<sup>211</sup> Key features of the Act include an automatic stay, which stayed all actions and litigation against Puerto Rico and its instrumentalities to collect or enforce liabilities or claims and actions to possess or control their property;<sup>212</sup> the oversight board, which has broad authority and discretion over the territory;<sup>213</sup> a path for Puerto Rico and its instrumentalities to file a case to reorganize debts via a plan of adjustment;<sup>214</sup> and provisions for collective creditor action to modify bond terms.<sup>215</sup> Many Bankruptcy Code provisions are incorporated into PROMESA, including the Code's conditions for a court to confirm a bankruptcy plan.<sup>216</sup> Yet overall, PROMESA goes beyond Code-based bankruptcy relief to address Puerto Rico's unique needs as a territory.<sup>217</sup> As much as PROMESA and the Bankruptcy Code share certain characteristics, PROMESA makes significant departures from the Code, notably in the inclusion of the oversight board and

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<sup>206</sup> The Bankruptcy Code "allows only the municipalities of *states* to declare bankruptcy." Jose A. Cabranes, *3 Main Reasons Why Puerto Rico Can't Declare Bankruptcy*, BUSINESS INSIDER, July 22, 2015, <http://www.businessinsider.com/3-main-reasons-why-puerto-rico-cant-declare-bankruptcy-2015-7> (last visited Feb. 28, 2018) (emphasis in original).

<sup>207</sup> *See id.*; Puerto Rico Public Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71.

<sup>208</sup> *See* PROMESA Summary, *supra* note 199.

<sup>209</sup> *See* Franklin California Tax-Free Trust, 136 S. Ct. 1938.

<sup>210</sup> *See id.* The Court also noted, however, that Puerto Rico was not a "State" for purposes of determining whether a state's municipalities may be debtors under the Code. *Id.*

<sup>211</sup> PROMESA Summary, *supra* note 199.

<sup>212</sup> *See* Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2194 (2016).

<sup>213</sup> *See* PROMESA Summary, *supra* note 199.

<sup>214</sup> *See generally* Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §2161 et seq. (2016).

<sup>215</sup> *See* PROMESA summary, *supra* note 199; Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2231 et seq. (2016).

<sup>216</sup> *See* PROMESA Summary, *supra* note 199.

<sup>217</sup> *See id.*

creditor collective action clauses, as well as in allowing the territory itself to adjust all of its debts “in a comprehensive process.”<sup>218</sup> “PROMESA is thus not solely for the purpose of adjusting or reorganizing the debts of Puerto Rico or covered instrumentalities, but has broader purposes.”<sup>219</sup>

Since its passage, PROMESA, and the oversight board in particular, have been the subject of much debate and criticism. In 2017, one of Puerto Rico’s creditors, hedge fund Aurelius Capital Management, sued, seeking a dismissal of the debt relief proceedings and a declaration that the oversight board was unconstitutional.<sup>220</sup> Notably, Aurelius argued that the board’s creation violated the Constitution’s Appointments Clause.<sup>221</sup> Although the board’s members answer to the President, their appointments were never confirmed by the Senate.<sup>222</sup> Aurelius also argued that the process for appointing the board’s members violates separation of powers principles.<sup>223</sup> Namely, six out of the seven board members were, according to Aurelius, “hand-picked” by Congress.<sup>224</sup> Aurelius sought to bar the oversight board from operating until it has been “validly constituted.”<sup>225</sup>

Although the court ultimately held that establishment of the oversight board was constitutional,<sup>226</sup> the Aurelius litigation highlights some of the uncertainties that can be exploited in new legislation such as PROMESA. In addition, because PROMESA is different from a typical U.S. bankruptcy proceeding, Puerto Rico and those affected by its financial crisis have had to hire numerous experts to help interpret the law and chart the way forward.<sup>227</sup> The Puerto Rican

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<sup>218</sup> Colin Dwyer, *Puerto Rico Makes Unprecedented Move to Restructure Billions in Debt*, NPR, May 3, 2017, <https://www.npr.org/sections/thetwo-way/2017/05/03/526750751/puerto-rico-makes-unprecedented-move-to-restructure-tens-of-billions-in-debt> (calling PROMESA “a bankruptcy process custom-built for Puerto Rico’s debt crisis”).

<sup>219</sup> PROMESA Summary, *supra* note 215.

<sup>220</sup> Tom Hals, *Aurelius Hedge Fund Seeks to Toss Puerto Rico’s Bankruptcy Filing*, REUTERS (Aug. 7, 2017), <https://www.reuters.com/article/us-puertorico-debt-bankruptcy/aurelius-hedge-fund-seeks-to-toss-puerto-ricos-bankruptcy-filing-idUSKBN1AN27H>.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Opinion and Order Denying the Aurelius Motions to Dismiss the Title III Petition and for Relief from the Automatic Stay, *In re Fin. Oversight & Mgmt. Bd. for P.R.*, No. 17 BK 3283-LTS, Doc. # 3503 (Jul. 13, 2018).

<sup>227</sup> Elizabeth Olson, *Judge Pushes Back Against \$75M in Fees for Puerto Rico Bankruptcy*, BLOOMBERG BNA BANKR. L. REP. (Mar. 19, 2018) (quoting the court-appointed fee examiner’s report, which stated that the Puerto Rico bankruptcy presents “profound” legal issues and that “financial and legal professionals working on these cases have confronted massive challenges of time and distance, analysis and advocacy, with little directly applicable precedent”).

government alone had paid nearly \$300 million to advisors as of November 2017, with the amount projected to grow as the territory continues to pursue a debt restructuring under the new law.<sup>228</sup> As the territory already does not have enough money to go around, funds paid to advisors represent money that will not go toward paying creditors.

Austerity measures<sup>229</sup> and the influence of the oversight board have also been the subject of substantial criticism. On the island, the board is colloquially known as “La Junta,” a reference to a ruling group that comes to power by force.<sup>230</sup> Protests have erupted in San Juan, Puerto Rico’s capital, in response to the board and the measures it has imposed.<sup>231</sup> Residents and observers have expressed concern that “the whole democratic process [is breaking] down” due to PROMESA.<sup>232</sup> Even the United Nation’s Commissioner on Human Rights has weighed in, noting that “Puerto Rico’s human rights [are]...being massively undermined by the economic and financial crisis and austerity policies.”<sup>233</sup>

In passing PROMESA, Congress made a deliberate choice to pursue an individualized solution to Puerto Rico’s pressing debt problems.<sup>234</sup> As scholars have observed, Congress could have chosen to amend the Bankruptcy Code to extend its relief to Puerto Rico and its political subdivisions.<sup>235</sup> The fact that chapter 9 of the Code did not apply to Puerto Rico’s municipalities has even been described as a “technical error.”<sup>236</sup>

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<sup>228</sup> Kolhatkar, *supra* note 202 (“If we don’t come out of this with a new and super-improved Puerto Rico . . . this has just been a total waste of time.”).

<sup>229</sup> See Michelle Kaske, *Greek Tragedy Redux? Puerto Rico Embraces Risky Austerity Plan*, BLOOMBERG BNA BANKR. L. REP., Mar. 15, 2018 (describing an austerity-focused plan promulgated by Puerto Rico’s governor and noting that “self-imposed discipline is bound to increase the pain, much as it did in Greece”).

<sup>230</sup> Ed Morales, *Puerto Rico’s Political and Economic Crisis Deepens*, THE NATION, May 24, 2017, <https://www.thenation.com/article/puerto-ricos-political-economic-crisis-deepens/>.

<sup>231</sup> *Id.* (“The fiscal oversight board is seen on the island as an external force, emblematic of Puerto Rico’s second-class status.”).

<sup>232</sup> *Id.*

<sup>233</sup> “Puerto Rico: Human Rights Concerns Mount in Absence of Adequate Emergency Response,” U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, Oct. 30, 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22326&LangID=E>.

<sup>234</sup> For an argument that Title III of PROMESA violates the uniformity requirement of the Bankruptcy Clause, see Stephen J. Lubben, *PROMESA and the Bankruptcy Clause: A Reminder About Uniformity*, 12 BROOK. J. CORP. FIN. & COM. L. 53, 54–55 (2017) (suggesting that extension of PROMESA to include the U.S. Virgin Islands could “potentially defuse the uniformity issue”).

<sup>235</sup> John A. E. Pottow, *What Bankruptcy Law Can and Cannot Do for Puerto Rico*, 85 REV. JR. U.P.R. 689, 700 (2016).

<sup>236</sup> *Id.* (“I testified a year ago urging Congress to fix [the error], but for mysterious reasons it has not yet done so despite long-pending legislation.”).

In creating a debt restructuring path for Puerto Rico outside of the Bankruptcy Code, Congress demonstrated that for certain entities, in this case territories with “layers upon layers of debt,”<sup>237</sup> ordinary bankruptcy law is inapt. As a quasi-sovereign U.S. territory, Puerto Rico is situated differently from other debtors under the Bankruptcy Code.<sup>238</sup> PROMESA is thus an example of Congress’ ability to design tailored bankruptcy relief for special entities.

The experience with PROMESA lends further support to extending specialized bankruptcy relief to tribal entities. Thanks in part to their quasi-sovereign status, tribal entities face roadblocks to using the Bankruptcy Code. Yet, PROMESA also serves as a cautionary tale of the repercussions of waiting for a crisis to strike before passing legislation. Puerto Rico’s financial crisis and legal limbo spurred Congress to act; if Congress had deliberated more thoroughly on PROMESA’s effects on the commonwealth and its citizens, it could perhaps have avoided some of the problems Puerto Rico is facing as it struggles to adjust its debt under the guidance of the oversight board.

## 2. *Dodd-Frank*

After the 2008 financial crisis, Congress saw the need for serious bank financial reform.<sup>239</sup> Banks are ineligible to file under the Bankruptcy Code; instead, the Federal Deposit Insurance Corporation (“FDIC”) can exercise substantial control when a bank becomes insolvent.<sup>240</sup> In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act” or the “Act”) to provide comprehensive regulatory reform and to better prepare banks to face fiscal distress.<sup>241</sup>

The Dodd-Frank Act was designed to mitigate the systemic risk of the collapse of significant financial institutions.<sup>242</sup> The Act created the Financial Stability Oversight Council, which monitors U.S. financial markets, and requires certain large financial companies to submit periodic reports and “living wills”

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<sup>237</sup> Pottow, *supra* note 235, at 701.

<sup>238</sup> See, e.g., Frank Shafroth, *Fiscal Economic Dislocation?*, THE GMU MUNICIPAL SUSTAINABILITY PROJECT, Jan. 22, 2017, <https://fiscalbankruptcy.wordpress.com/2018/01/22/fiscal-economic-dislocation/> (describing federal tax reform that “treats Puerto Rico as a foreign jurisdiction”).

<sup>239</sup> *The Dodd-Frank Act: A Cheat Sheet*, MORRISON & FOERSTER, 2010, <http://media.mof.com/files/uploads/Images/SummaryDoddFrankAct.pdf>.

<sup>240</sup> See generally Hynes & Walt, *supra* note 13 (explaining that the FDIC acts as a receiver when a bank becomes insolvent). In contrast, bank holding companies can and do file for bankruptcy. *Id.* at 987 n.2.

<sup>241</sup> *The Dodd-Frank Act*, *supra* note 239, at 2.

<sup>242</sup> Post of David S. Huntington, *Summary of Dodd-Frank Financial Regulation Legislation*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG., July 7, 2010, <https://corp.gov.law.harvard.edu/2010/07/07/summary-of-dodd-frank-financial-regulation-legislation/>.

that outline steps to be taken in the event of financial distress.<sup>243</sup> Notably, the Act established a so-called “orderly liquidation mechanism,” which allows the FDIC to seize, break up, and wind down a failing financial company whose failure would threaten financial stability across the U.S.<sup>244</sup> In its role as a receiver for these institutions, the FDIC wields significant powers, including the power to take over and manage the company’s assets, merge the company with another company, create a “bridge financial company,” and transfer any of the company’s assets or liabilities without approval.<sup>245</sup> Under the same orderly liquidation provisions, the government can provide a loan to the failing financial institution, and such loan must be backed by the assets of the firm and recovered either in the resolution process itself or from the largest members of the financial industry.<sup>246</sup>

Like tribal debtors, financial institutions cannot use the Bankruptcy Code as currently constituted. Indeed, “the failure of a systemically important financial institution is materially different from that of most non-financial businesses.”<sup>247</sup> Yet, Congress provided tools to aid these struggling financial institutions. Congress did not enact bankruptcy relief for financial institutions;<sup>248</sup> however, it did provide these institutions with a set of tools tailored to address their unique status and position in the United States. Like a big bank failure, the financial failure of tribal entities is materially different from that of a non-tribal entity, in particular given the tribal entity’s need to coordinate with other federal regulators.

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*; Adam J. Levitin, *Bankruptcy’s Lorelei: The Dangerous Allure of Financial Institution Bankruptcy*, Feb. 6, 2018, available at SSRN (noting that Dodd-Frank “includes an ‘Orderly Liquidation Authority,’ that gives federal regulators broad powers to place failing ‘financial companies’...that pose systemic risk into a receivership administered by the Federal Deposit Insurance Corporation”).

<sup>245</sup> Huntington, *supra* note 242.

<sup>246</sup> *Id.*

<sup>247</sup> Levitin, *supra* note 244.

<sup>248</sup> Congress has recently been contemplating bankruptcy for banks. Financial CHOICE Act of 2017, H.R. 10 (proposing to replace Dodd-Frank’s Orderly Liquidation Authority with a bankruptcy procedure to address the failure of systemically important financial institutions). For a discussion as to why bankruptcy is inapt for banks, see, e.g., Mark Roe, *Don’t Bank on Bankruptcy for Banks*, PROJECT SYNDICATE, Oct. 18, 2017, <https://www.project-syndicate.org/commentary/bank-bankruptcy-regulations-by-mark-roe-2017-10> (“Restructuring a mega-bank requires pre-planning, familiarity with the bank’s strengths and weaknesses, knowledge of how to time the bankruptcy properly in a volatile economy, and the capacity to coordinate with foreign regulators.”).



### III. DESIGNING TRIBAL DEBT RELIEF

PROMESA and the Dodd-Frank Act illustrate two instances where Congress looked beyond the Bankruptcy Code to provide relief for entities that were not included in the Code's eligibility provisions. Like territories and financial institutions, tribes are not contemplated as prospective debtors under the Bankruptcy Code. And just as Puerto Rico and many banks found themselves in situations where a debt restructuring was desirable, Indian nations and their businesses may encounter similar scenarios. It is thus not inconceivable that Congress would enact structured debt relief for tribal entities. And, as PROMESA and Dodd-Frank show, this debt relief need not come from the Bankruptcy Code. Instead, Congress can create specialized legislation for entities for whom use of the Code would be impractical.

This Part sketches out some key features of structured debt relief for tribal entities and flags potential issues to be resolved. Because this Article's proposal calls for substantial input from the groups the legislation would impact, the Article does not attempt to draft the proposed legislation in detail. Rather, what follows are guidelines as to what specialized bankruptcy relief for tribal debtors should look like.

#### A. *Key Features and Benefits*

The previous Parts identified several major problems with allowing tribal debtors to use the Bankruptcy Code. Although tribal entities often engage in commerce as if they were ordinary commercial players, they simply cannot be treated like ordinary commercial debtors. Specialized bankruptcy legislation for tribal entities would give tribal debtors and their creditors the same certainty afforded to other entities when they take out loans or otherwise engage in commerce.

##### 1. *Substance*

Bankruptcy laws for tribal debtors should provide these entities with access to the same basic tools afforded to other debtors under the Bankruptcy Code—namely, protection from creditor debt collection attempts via an automatic stay, and the means to allow tribal debtors to liquidate (in the case of a tribal business entity) and to adjust their debts without the full consent of all creditors. These tools are the hallmarks of U.S. bankruptcy law and are part of what distinguish

bankruptcy from other forms of debt relief.<sup>249</sup> Thus, the general purpose of a tribal bankruptcy law should be consistent with bankruptcy's overarching goals: resolving debt overhang, eliminating holdout creditors, and providing breathing space to financially distressed debtors.

To achieve these goals, however, adjustments will have to be made to acknowledge the ways in which tribal debtors are uniquely situated. For example, although tribes are sovereign, tribal sovereignty is unlike the sovereignty of an independent nation, whose sovereignty cannot be abrogated by a higher power.<sup>250</sup> If bankruptcy law is to apply to tribal entities, it is important that bankruptcy not overly detract from tribal sovereignty. Specialized bankruptcy legislation should therefore recognize Indian nations' unique status and contain provisions that balance respect for tribal sovereignty with the goals of bankruptcy law. For example, any tribal bankruptcy should be voluntary,<sup>251</sup> meaning that the bankruptcy process should be initiated only by the tribal entity itself, rather than a creditor or other party in interest. In this way, tribal debtors will not be forced into bankruptcy. In addition, tribal debtors should be granted exclusivity,<sup>252</sup> meaning that they should be the only entities able to propose a plan of liquidation or debt adjustment. Incorporating these elements into the legislation protects tribal sovereignty interests. In addition, these provisions may make tribes who are not involved in commerce feel more comfortable with the legislation, since they will not be forced into a bankruptcy filing or forced to comply with a plan imposed upon them.<sup>253</sup>

The sovereign nature of Native American tribes suggests that a tribal bankruptcy law could also draw upon sovereign debt restructuring tools, for example by providing for the use of collective creditor action to modify the terms of a debt instrument. Similar to what Congress did in PROMESA, tribal bankruptcy law could draw from a mixture of sovereign debt restructuring tools

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<sup>249</sup> See Coordes, *Gatekeepers Gone Wrong*, *supra* note 167, at 1206–07 (delineating bankruptcy's unique functions).

<sup>250</sup> See “The Issue of Sovereignty,” GLOBALIZATION 101 (2016), <http://www.globalization101.org/the-issue-of-sovereignty/> (last visited Feb. 26, 2018) (“State sovereignty is the concept that states are in complete and exclusive control of all the people and property within their territory.”).

<sup>251</sup> 11 U.S.C. § 301(a) (“A voluntary case . . . is commenced by the filing with the bankruptcy court of a petition . . . by an entity that may be a debtor.”).

<sup>252</sup> See, e.g., 11 U.S.C. § 1121(b) (noting that “only the debtor may file a [chapter 11] plan until after 120 days after the date” the bankruptcy petition is filed).

<sup>253</sup> Such “opt-in” features have become a trend with respect to recent congressional legislation as it pertains to tribes. See, e.g., Tribal Law and Order Act of 2010, H.R. 725, 111th Cong. (2010) (requiring tribes to actively opt in if they want expanded punitive abilities); Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013) (designating “participating tribes,” which can elect to use special domestic violence criminal jurisdiction).

and domestic bankruptcy provisions that recognize that tribal debt might be hybrid in nature—a mix of ordinary commercial loans and loans and guarantees backed by the tribe itself. Incorporating sovereign debt restructuring practices into the proposed legislation may be particularly valuable if a tribe itself were to seek a debt restructuring, or if a tribal business entity’s debt was linked so closely to the tribe itself (i.e. through guarantees, cross-default provisions, or other contractual stipulations) that the tribe was heavily involved in the bankruptcy process.<sup>254</sup>

Several other important features of the proposed law deserve consideration. It will be critical to establish rules for determining what property becomes property of the debtor’s bankruptcy estate, available for distribution to creditors. It will also be necessary to develop a property distribution system that is fair to creditors yet respects external constraints such as the IGRA’s requirement that the tribe be in control of any tribal gaming operation. As a starting point for addressing these issues, Congress might look at bankruptcy reorganizations for nonprofits, churches, and heavily regulated entities. Courts have sometimes held that different rules apply in these bankruptcies,<sup>255</sup> and scholars have offered creative proposals to reconcile the application of the Bankruptcy Code to nonprofit and church debtors.<sup>256</sup>

A critical part of many bankruptcy cases is debtor-in-possession (“DIP”) lending, in which a creditor extends money to the debtor to allow the debtor to proceed in bankruptcy. DIP lenders may be creditors the debtor has previously dealt with, or they may be entirely new lenders. Regardless of their identity, DIP

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<sup>254</sup> Scholars have suggested, for example, that tribal governments might provide start-up loans and other sorts of funding to businesses operated on reservations. Miller, *supra* note 16, at 857–58.

<sup>255</sup> See, e.g., *In re Wabash Valley Power Ass’n*, 72 F.3d 1305 (7th Cir. 1995) (holding that absolute priority rule was not violated when debtor’s plan contemplated cooperative members remaining in control of reorganized debtor); *In re Whittaker Mem’l Hosp. Ass’n*, 149 B.R. 812 (Bankr. E.D. Va. 1993) (holding that absolute priority rule not violated when individuals retained control of a non-profit hospital after bankruptcy); *In re Gen. Teamsters, Warehousemen and Helpers Union, Local 890*, 265 F.3d 869 (2001) (noting that the absolute priority rule is generally applied to *for-profit corporations* facing bankruptcy) (emphasis added).

<sup>256</sup> There is a growing body of scholarly literature on this topic. See, e.g., Pamela Foohey, *Chapter 11 Reorganization and the Fair and Equitable Standard: How the Absolute Priority Rule Applies to All Nonprofit Entities*, 86 ST. JOHN’S L. REV. 31 (2012) (arguing that the fair and equitable standard encompasses more than the absolute priority rule and that, viewed in this light, the rule can be applied to nonprofits); Amelia Rawls, Comment, *Applying the Absolute Priority Rule to Nonprofit Enterprises in Bankruptcy*, 118 YALE L.J. 1231 (2009) (proposing a framework for courts to adjudicate absolute priority claims in nonprofit bankruptcies); Reid K. Weisbord, *Charitable Insolvency and Corporate Governance in Bankruptcy Reorganization*, 10 BERKELEY BUS. L.J. 305 (2013) (proposing for the appointment of bankruptcy examiners in nonprofit reorganizations involving substantial charitable assets because, among other problems, the absolute priority rule does not apply in this context). For a discussion of tensions that arise in church bankruptcy cases, see David A. Skeel, Jr., “Sovereignty” *Issues and the Church Bankruptcy Cases*, 29 SETON HALL LEGIS. J. 345 (2005).

lenders typically exercise a substantial amount of power and influence over the debtor during the case.<sup>257</sup> Indeed, many scholars have expressed concern about the outsize influence of DIP lenders.<sup>258</sup> Similarly, in the sovereign debt restructuring context, lenders who provide bailouts or other emergency funds to sovereign nations often attach stringent conditions to their loans and impose severe austerity measures.<sup>259</sup> It will be important for tribal bankruptcy legislation to provide a DIP lending structure that does not accord undue influence to DIP lenders or to the U.S. government, which holds property in trust for many Indian nations. Giving the tribal debtor the exclusive ability to propose a plan may help curtail lenders' influence. Another possibility would be to provide standards for adjudicator scrutiny over DIP loan terms to ensure that the terms are not unduly onerous for the tribal debtor and do not impinge upon tribes' right to self-govern. Alternatively, using its plenary powers, Congress could simply allow trust properties to be offered to creditors when a tribal debtor is in bankruptcy. This could give tribal debtors a broader choice of potential DIP lenders as well as decrease the federal government's oversight over trust properties.<sup>260</sup>

In general, Congress should tread carefully when it comes to oversight of the debtor. Both PROMESA and the Dodd-Frank Act provide for substantial external oversight of the financially distressed entities in question. The PROMESA oversight board exercises significant authority over Puerto Rico and its instrumentalities,<sup>261</sup> while the FDIC and other financial regulators exert substantial control over a struggling financial institution under the Dodd-Frank Act.<sup>262</sup> As discussed, the oversight board in particular has been the subject of much criticism, as observers and critics note that it wields its power despite its members not being democratically elected.

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<sup>257</sup> Adam J. Levitin, *Bankruptcy's Lorelei: The Dangerous Allure of Financial Institution Bankruptcy*, Feb. 6, 2018, available at SSRN (noting that "call[ing] the shots" in a bankruptcy case "is what DIP lenders do").

<sup>258</sup> See, e.g., Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381, 406–07 (2015) (critiquing occasions when "the debtor and its powerful supporters—including its lawyers and postpetition lenders—run every aspect of the case"); Michelle M. Harner & Jamie Marincic, *Behind Closed Doors: The Influence of Creditors in Business Reorganizations*, 34 SEATTLE U.L. REV. 1155, 1158 (2011) (noting that creditors' self-interest is the most common reason for creditor disputes).

<sup>259</sup> See, e.g., Laura N. Coordes, *When Borders Dissolve*, 93 CHI-KENT L. REV. 649 (2018) (describing the effects of austerity measures imposed in Greece).

<sup>260</sup> Such an arrangement would have broader implications for the federal government's relations with Indian nations, a discussion of which is beyond the scope of this Article.

<sup>261</sup> Morales, *supra* note 230.

<sup>262</sup> Adam J. Levitin, *Bankruptcy's Lorelei: The Dangerous Allure of Financial Institution Bankruptcy*, Feb. 6, 2018, available at SSRN (noting that Dodd-Frank's Orderly Liquidation Authority "gives federal regulators substantial discretion in whether to trigger the authority and gives the FDIC substantial discretion in implementing a receivership").

As a measure of respect for tribal sovereignty, tribal bankruptcy legislation should break with this pattern of extreme external oversight and instead consider a more limited approach to interference with tribal affairs. The protests in Puerto Rico and the backlash from the United Nations, described previously, should serve as cautionary tales about the perils of enacting changes without the consent of the governed.<sup>263</sup> To ensure minimal interference with tribal affairs, Congress could draw upon chapter 9 of the Bankruptcy Code, which prohibits undue influence with municipal affairs, for inspiration.<sup>264</sup> Recognition that tribal entities carry potentially weighty sovereignty concerns is important to avoid the knee-jerk imposition of significant external oversight.

Another key consideration will be the individual or panel running the proceedings. Entities restructuring their debts under the Bankruptcy Code do so primarily under the auspices of bankruptcy judges.<sup>265</sup> In contrast, under PROMESA, a district court judge oversees the restructuring proceedings.<sup>266</sup> Although Congress's precise reasons for choosing a district judge over a bankruptcy judge are unclear,<sup>267</sup> the drafters may have believed there were distinct benefits to district court oversight that would inure to Puerto Rico, perhaps because unlike bankruptcy judges, district courts are Article III judges.<sup>268</sup> Additionally, in sovereign debt restructurings, there is a growing practice of using arbitration to resolve claims.<sup>269</sup> Thus, it need not be a given

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<sup>263</sup> See Coordes, *When Borders Dissolve*, *supra* note 259 (discussing the drawbacks of enacting significant changes in the absence of political will). For a view that PROMESA actually gives the oversight board too little power in certain respects, see David A. Skeel, *Reflections on Two Years of P.R.O.M.E.S.A.*, 87 REVISTA JURIDICA UPR 862 (2018).

<sup>264</sup> In practice, however, judges in chapter 9 cases regularly exercise substantial authority. See Laura N. Coordes, *Formalizing Chapter 9's Experts*, 116 MICH. L. REV. 1249; Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REG. 55, 58-59 (2016) (describing judicial work-arounds of chapter 9's limitations); Clayton P. Gillette & David A. Skeel Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 YALE L.J. 1150, 1206 (2016) (discussing ways judges can overcome chapter 9's limitations and arguing that it is appropriate for judges to do so).

<sup>265</sup> See 28 U.S.C. § 157(b)(1) ("Bankruptcy judges may hear and determine all cases under [the Bankruptcy Code].").

<sup>266</sup> 48 U.S.C. § 2168 ("[T]he Chief Justice of the United States shall designate a district court judge to sit by designation to conduct the case.").

<sup>267</sup> See "Puerto Rico: PROMESA and Presiding Judges," ABI, <https://www.abi.org/feed-item/puerto-rico-promesa-and-presiding-judges> (last visited Feb. 8, 2018) (speculating that the Natural Resources Committee, which drafted PROMESA, "may not have been in the best position to appreciate the . . . risks" resulting from appointment of a district judge to oversee Puerto Rico's restructuring proceedings).

<sup>268</sup> See Melissa B. Jacoby, *Presiding over Municipal Bankruptcies: Then, Now, and Puerto Rico*, 91 AMER. BANKR. L.J. 375, 390 (2017) (questioning the accuracy of any perception of greater expertise on the part of these district judges and noting the "significant institutional costs of forfeiting the formidable body of substantive and procedural expertise a bankruptcy judge would have brought to the task").

<sup>269</sup> Abubakar Isa Umar & Muhammad Bello, *The Utility of International Investment Arbitration in Sovereign Debt Restructuring*, 14 U.S.-CHINA L. REV. 335, 336 (2017) ("[D]espite initial skepticism,

that a bankruptcy judge oversee the case. Instead, the merits and drawbacks of various options, including bankruptcy and district court judges and arbitrators, should be discussed to determine the best fit. Among other factors, expertise, the desired role for a judge or arbitrator, and the ability of the parties to play a role in choosing the judges or arbitrators may be relevant to the ultimate decision.<sup>270</sup> For example, bankruptcy judges have specialized expertise in restructuring debt, something that may be valuable in the context of a potentially complex tribal case. On the other hand, giving the parties the ability to choose an arbitrator (or panel of arbitrators) to oversee the case may provide both specialized expertise and reassurance to tribal debtors that they will have a role in selecting their adjudicator. There may also be efficiencies in the arbitration process that are harder to match in a more traditional courtroom setting.<sup>271</sup>

## 2. *Process and Benefits*

The process for creating this specialized tribal bankruptcy law is as important as the substance of the law itself. Although this Article has set forth recommended features, the exact contours of the legislation should be defined in consultation with the parties that the legislation is designed to impact—namely, tribes, tribal businesses, and non-tribal entities that play a significant role in tribal commerce.<sup>272</sup> The Bureau of Indian Affairs, a federal agency tasked with partnering with Indian nations to “help them achieve their goals for self-determination,”<sup>273</sup> would also likely play a role in shaping the new legislation.<sup>274</sup> A collaborative process for drafting the proposed legislation minimizes the risk

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international arbitration is gradually becoming an option for addressing claims arising from sovereign debt defaults.”); see Christoph G. Paulus, *A Standing Arbitral Tribunal as a Procedural Solution for Sovereign Debt Restructurings*, in SOVEREIGN DEBT AND THE FINANCIAL CRISIS, available at [http://siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1238442914363/5969985-1295539401520/9780821384831\\_ch13.pdf](http://siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1238442914363/5969985-1295539401520/9780821384831_ch13.pdf) (discussing a proposal for the creation of a sovereign debt arbitral tribunal).

<sup>270</sup> See also Laura N. Coordes, *Formalizing Chapter 9’s Experts*, 116 MICH. L. REV. 1249 (cautioning that, despite facial limitations on judicial power in chapter 9 cases, judges exert substantial influence and control over a case through the use of appointed experts).

<sup>271</sup> See Melika Hadziomerovic, Note, *An Arbitral Solution: A Private Law Alternative to Bankruptcy for Puerto Rico, Territories, and Sovereign Nations*, 85 GEO. WASH. L. REV. 1263, 1285-86 (2017) (noting the “considerable” “time and cost efficiencies of arbitration”).

<sup>272</sup> For a discussion of the history and practice of consultation and consent in relations between American Indian nations and the United States, see Robert J. Miller, *Consultation or Consent: The United States’ Duty to Confer With American Indian Governments*, 91 N.D.L. REV. 37 (2015).

<sup>273</sup> *Mission Statement*, BUREAU OF INDIAN AFFAIRS, <https://www.bia.gov/bia> (last visited Feb. 7, 2018).

<sup>274</sup> Involving the Bureau of Indian Affairs, while politically likely, may raise its own concerns. See Haddock & Miller, *supra* note 51, at 175 (“Indians would benefit from a reduction in oversight from Washington that would place them on a footing with other citizens.”).

of the new law being perceived as forced upon tribal entities without their input or consent.<sup>275</sup>

Although it may be possible to amend the Bankruptcy Code to allow tribal entities to use it, an advantage of special legislation is that it could be drafted specifically to take account of tribes' unique status and the extensive legal, regulatory, and policy frameworks surrounding tribal entities. By building legislation from the ground up, Congress could accommodate the unique needs of these quasi-sovereign, heavily regulated entities—needs not currently contemplated anywhere in the Bankruptcy Code.

Creation of a new law requires significant time and effort—and complying with that new law may also require time and money.<sup>276</sup> Yet, Congress need not start completely from scratch. Legislators can and should draw upon existing bankruptcy law, tribal law, and sovereign debt restructuring practices to create structured debt relief for tribes, much in the way Congress drew from multiple restructuring techniques when it drafted PROMESA.<sup>277</sup> In addition, by putting effort in to enact a law before a crisis hits and immediate action becomes necessary, Congress can ensure that affected parties have time to react to the effects of the legislation before dire need for relief is demonstrated.

Encouraging action *before* a crisis is one of the primary challenges in bankruptcy law.<sup>278</sup> As the experiences with PROMESA and Dodd-Frank illuminate, relief sometimes appears either just before or even after a crisis has reached a breaking point.<sup>279</sup> Given the extent of tribal entities' engagement in commerce, it seems likely if not certain that the next recession or financial downturn will affect tribal entities, causing them to look for debt relief. Acting now, before a wave of tribal bankruptcies creates uncertainty and instability for Indian nations and the entities that do business with them, can help ensure that when tribal debtors seek bankruptcy relief, adequate, timely relief will be

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<sup>275</sup> This risk is coming to fruition in Puerto Rico, where citizens have protested against PROMESA's oversight board. See Edwin Melendez, *Is Congress' Plan to Save Puerto Rico Working?*, THE CONVERSATION, July 31, 2017, <https://theconversation.com/is-congress-plan-to-save-puerto-rico-working-80785>.

<sup>276</sup> See, e.g., Kolhatkar, *supra* note 202 (discussing the numerous experts Puerto Rico's oversight board hired to assist it with interpreting and carrying out the provisions of PROMESA).

<sup>277</sup> See David Skeel, *Reflections on Two Years of P.R.O.M.E.S.A.*, 87 REVISTA JURIDICA UPR 862 (2018).

<sup>278</sup> See, e.g., Coordes, *Gatekeepers Gone Wrong*, *supra* note 11, at 1214 (discussing literature describing government "officials . . . delay[ing] bankruptcy relief or avoid[ing] it entirely").

<sup>279</sup> Such hasty relief sometimes results in a suboptimal framework. See David A. Skeel, "Single Point of Entry and the Bankruptcy Alternative" in ACROSS THE GREAT DIVIDE: NEW PERSPECTIVES ON THE FINANCIAL CRISIS 313, 314 (Martin N. Baily & John B. Taylor eds., 2014) (contrasting the Title II process Congress devised in Dodd-Frank with the single point of entry strategy regulators actually use to implement a Title II resolution).

available to them. In addition, Congress can avoid possible negative effects of hastily-enacted legislation.<sup>280</sup>

Developing unique legislation tailored to tribal debtors may work well for several additional reasons. First, as previously discussed, reconciling the Bankruptcy Code with other laws governing tribes would be a complex and difficult task. Puerto Rico's experience provides a telling illustration of just how difficult an undertaking this might be. Although many believed that Puerto Rico's municipalities might be eligible for debt relief under chapter 9 of the Bankruptcy Code, the territory *itself* had substantial debt that would not have been addressed even if its instrumentalities were deemed eligible for chapter 9.<sup>281</sup> Similarly, "tribal debt" may take the form of debt owed by a tribe *or* by a tribal corporation. As complex and difficult as enacting new legislation would be, a specialized bankruptcy law would likely be a better fit given potential multiple layers of debt for tribal entities. Further, as discussed, merely amending the Bankruptcy Code to make tribal debtors eligible for bankruptcy would not resolve the numerous conflicts with the IGRA, tribal law and customs, and other federal laws and policies applicable to tribes.

PROMESA is an example of how legislation can be tailored to address a prospective debtor's unique needs.<sup>282</sup> Yet, observers have expressed concern that Congress, in imposing extensive external oversight as a condition of debt relief, has gone a step too far. Seeking input from critical potential players in a tribal bankruptcy may help address this concern in the context of a tribal bankruptcy law. Notably, involving Indian nations in the deliberative process may help tribal entities accept the new law and be more willing to use it in times of distress.<sup>283</sup>

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<sup>280</sup> See John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1 N.Y.U. J.L. & PUB. POL'Y 163, 173 (1997) (noting that "a lack of deliberation, a lack of careful drafting, and the inability to ascertain the people's intent characterize statutes that are hastily enacted by the legislature").

<sup>281</sup> Jose A. Cabranes, *3 Main Reasons Why Puerto Rico Can't Declare Bankruptcy*, BUSINESS INSIDER, July 22, 2015, <http://www.businessinsider.com/3-main-reasons-why-puerto-rico-cant-declare-bankruptcy-2015-7> (noting that an amendment to the Bankruptcy Code would have addressed less than half of Puerto Rico's total debt, leaving the island with "crippling payments" on the other two-thirds of its debt and smothering economic growth).

<sup>282</sup> Patricia Guadalupe, *Here's How PROMESA Aims to Tackle Puerto Rico's Debt*, NBC NEWS, June 30, 2016, <https://www.nbcnews.com/news/latino/here-s-how-promesa-aims-tackle-puerto-rico-s-debt-n601741>.

<sup>283</sup> See Joel Brockner, *Why It's So Hard to Be Fair*, HARV. BUS. REV., Mar. 2006 (proposing that companies pay more attention to stakeholders' needs when undergoing change); Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PENN. L. REV. 1715 (2018) (arguing that there is "a strong public interest in understanding who makes the key decisions [in bankruptcy] and whether that process comports with basic constitutional and democratic norms").



## B. Concerns

Specialized bankruptcy legislation for tribal entities comes with its share of trade-offs. As discussed, starting from “scratch” may be a more expensive and uncertain process than amending existing law. Yet, if tribal entities are to have access to structured debt relief, the process of providing that relief will be a difficult one no matter the route that is taken. Amending the Bankruptcy Code to accommodate tribal debtors would require sorting out and resolving the various conflicts between the Code and other laws and policies that apply to tribes. Simply ignoring the problem and allowing the Bankruptcy Code to continue to apply as-is to tribal debtors is unworkable and would prevent bankruptcy’s rules from applying neutrally and predictably.<sup>284</sup> By contrast, creating new legislation allows Congress to avoid conflicts at the outset and signals that tribal entities are distinct, in many ways, from other debtors. Although creating and implementing a new system is costly, leaving tribal debtors to navigate an ill-fitting bankruptcy system imposes its own significant costs. In the long run, having a system that works for tribal debtors and that addresses the concerns and needs of those affected will ideally provide more efficient results than the status quo.

Another concern may arise from Congress’s constitutional directive to create “uniform” laws on the subject of bankruptcies.<sup>285</sup> Although there is room for debate on what exactly this requires, scholars and jurists have interpreted this provision of the Constitution to prohibit “private” bankruptcy laws that affect only particular debtors.<sup>286</sup> Furthermore, in *Hanover National Bank v. Moyses*, the Supreme Court stated that laws passed on the subject of bankruptcy must be uniform throughout the United States, but that uniformity is geographical rather than personal.<sup>287</sup> This means that the general operation of bankruptcy law must be uniform even though it may result in particular differences in different states. Thus, while diversity in local law inevitably produces non-uniform results in

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<sup>284</sup> See Adam J. Levitin, *Bankruptcy’s Lorelei: The Dangerous Allure of Financial Institution Bankruptcy*, Feb. 6, 2018, available at SSRN (arguing that financial institution bankruptcy is “not workable as a restructuring system” and would “undermine the credibility of the bankruptcy system writ large” if attempted, despite acknowledging that bankruptcy offers the appearance of “neutral,” “predictable,” and “generally applicable” rules).

<sup>285</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>286</sup> Todd Zywicki, *Bankruptcy Clause*, THE HERITAGE GUIDE TO THE CONSTITUTION, <https://www.heritage.org/constitution/articles/1/essays/41/bankruptcy-clause>; see Lubben, *supra* note 234, at 53 (“What it means for a bankruptcy law to be uniform is massively unclear.”).

<sup>287</sup> *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 188 (1902).

bankruptcy cases in different states, this outcome does not contravene the uniformity requirement.<sup>288</sup>

Legal arguments notwithstanding, uniformity is also valuable from a policy perspective. Generally applicable laws, whereby debtors and creditors receive the same treatment, create predictability and certainty and contribute to a perception of overall fairness in the bankruptcy system. Special legislation, as suggested above for tribal debtors, pushes against the policy benefits of uniformity.

In the context of tribal entities, however, uniformity with other types of debtors seems inapt. As discussed above, tribes are sovereign entities that seem to fall outside of the scope of the Bankruptcy Code. In addition, Article I, Section 8 of the U.S. Constitution provides that “Congress shall have the power to regulate Commerce with foreign nations and among the several states, *and with the Indian tribes.*”<sup>289</sup> This indicates that Indian nations were (and should be) considered separate from the federal government, the states, and foreign nations—they are, essentially, in a class by themselves.<sup>290</sup> Indeed, as Part I illustrates, tribal entities are often given special treatment outside of the bankruptcy context to encourage business development. This warrants separate legislation—legislation that would apply uniformly to Indian nations *as a class of debtor*.

If Congress does not act pursuant to its Bankruptcy Clause authority, it could perhaps draw upon other sources of authority to enact the proposed legislation.<sup>291</sup> The Plenary Power Doctrine gives Congress ultimate authority with regard to matters affecting Indian tribes.<sup>292</sup> There is also a trust relationship

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<sup>288</sup> Brian A. Blum, *EXAMPLES & EXPLANATIONS: BANKRUPTCY AND DEBTOR/CREDITOR* 84 (5th ed.) (Aspen 2010).

<sup>289</sup> U.S. CONST. art. I, § 8 (emphasis added).

<sup>290</sup> See also Lubben, *supra* note 234, at 58 (summarizing the Supreme Court’s holding in a uniformity case as providing “Congress with the ability to enact laws dealing with geographically isolated problems, as long as the law operates uniformly upon a *given class* of creditors and debtors”) (emphasis added).

<sup>291</sup> Cohen’s Handbook, *supra* note 69, at § 5.01 (“Congress’s power to give effect to [the Constitution’s Indian commerce clause and treaty clause], coupled with the supremacy of federal law provides ample support for the federal regulation of Indian affairs.”).

<sup>292</sup> *Cotton Petroleum 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.”); *United States v. Lara*, 541 U.S. 193, 200 (2004) (“[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’”); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”); Darrel Smith, *Why Indians are Second Class Citizens: Congress’ Plenary Power, Tribal Sovereignty and Constitutional Rights*, CITIZENS EQUAL

between the federal government and the tribes,<sup>293</sup> which implies that the federal government has a duty to protect tribes. This in turn implies the necessary legislative and executive authorities to effectuate that duty.<sup>294</sup> As noted above, the Commerce Clause of the Constitution explicitly provides that Congress's power to regulate commerce extends to "[c]ommerce . . . with the Indian tribes" rather than commerce *within* the tribes.<sup>295</sup> Accordingly, any bankruptcy-related law that Congress enacts should deal only with situations in which debt problems extend beyond the tribe itself. If a tribe's financial distress is contained within the tribe (i.e., all involved are members of the tribe or otherwise affiliated with the tribe), Indian nations can and should address that distress using tribal law.

Thus, it is likely that Congress has the authority to enact specialized bankruptcy legislation for tribal entities, given their unique status under U.S. law. Separate, specialized legislation for tribes would not impact the uniformity requirement because the same law would be applied equally to all tribal entities.<sup>296</sup>

It is also important to recognize that tribes and tribal businesses are distinct, not just from non-tribal entities, but from each other. The collaborative process this Article proposes for creating the legislation should seek input from a wide range of tribal entities and creditors, as well as experts, legislators, and other policymakers. But involving so many entities in the creation of legislation risks fostering disagreement that could slow down or halt the process. To facilitate progress and ensure that the legislation is completed in a timely manner, the process for getting input could be based on other, similar processes that have resulted in effective legislation in the past, such as the process used to create the ANCSA (described below)<sup>297</sup> or the commissions the American Bankruptcy

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RIGHTS ALLIANCE, <http://citizensalliance.org/indians-second-class-citizens-congress-plenary-power-tribal-sovereignty-constitutional-rights/>.

<sup>293</sup> Stephen L. Pevar, *The Federal-Tribal Trust Relationship: Its Origin, Nature, and Scope*, [www.saige.org/conf/12CO/TrustResponsibilityOutline%20SAIGE2012.doc](http://www.saige.org/conf/12CO/TrustResponsibilityOutline%20SAIGE2012.doc).

<sup>294</sup> *Id.*

<sup>295</sup> Cohen's Handbook, *supra* note 69, at § 5.01 (noting that the Indian commerce clause recognizes tribes "as distinct political entities" and that the clause is "broader in scope" than the portion of the commerce clause dealing with interstate commerce); *see also* THE FEDERALIST NO. 42 (James Madison) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce . . . that the expediency of it seems not likely to be drawn into question."); *but see* Ry. Labor Exec. Ass'n v. Gibbons, 455 U.S. 457, 469 (1982) (cautioning that Congress may not enact nonuniform bankruptcy laws under the Commerce Clause).

<sup>296</sup> Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 227 (1957) ("[I]t is no accident, we think, that the Bankruptcy Clause speaks of 'uniform laws,' rather than one 'uniform law,' which Congress may pass on the subject of bankruptcies, thus leaving Congress a free hand in adopting, if it so desired, different laws for different types of debtors.")

<sup>297</sup> *See* Part I.C, *supra*.

Institute uses to promulgate suggestions for improvements to the Bankruptcy Code.<sup>298</sup> Some amount of compromise will be inevitable in this process, but a collaborative product will help to ensure that tribal entities are not coerced into becoming debtors in a system they do not want or need.

Allowing the parties affected by the legislation to have a say in the drafting process, while democratic, may have other significant downsides. Lobbyists for various sides may battle for influence, and the resulting legislation risks mirroring the preferences of the wealthiest and/or loudest voices. Despite these potential drawbacks, history has demonstrated that it is possible for a collaborative, inclusive drafting process to achieve satisfactory results. The Bankruptcy Code itself is the result of an extensive, collaborative effort involving multiple parties with diverse viewpoints.<sup>299</sup>

Another prominent example of such a process was the one leading to passage of the ANCSA. The Alaska Federation of Natives, a coalition of “more than 400 Alaska Natives representing 17 Native organizations,” was formed to address issues with the land rights of Alaska Natives and was extremely involved in passage of the ANCSA, as well as in providing assistance with implementation of and subsequent amendments to the Act.<sup>300</sup> Although the resulting legislation was not perfect, it received substantial support on both sides of the political aisle.<sup>301</sup> The process leading to the ANCSA’s passage thus illustrates that there are ways to overcome deadlock and ways to work with those most affected under the proposed legislation to achieve a result that is workable and satisfactory. Whether through the development of a coalition interested in bankruptcy issues for tribal debtors, or through some other means, it is possible for the pitfalls of the drafting process to be minimized.

There may be also concerns that treating tribal debtors differently may disadvantage Indian nations and their citizens by subjecting them to different standards than non-tribal entities. These concerns have arisen in other contexts

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<sup>298</sup> *Purpose of the Commission*, ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11, <http://commission.abi.org/purpose-commission> (last visited Feb. 26, 2018); *The ABI Commission on Consumer Bankruptcy*, ABI COMMISSION ON CONSUMER BANKRUPTCY, <https://consumercommission.abi.org/> (last visited Feb. 26, 2018).

<sup>299</sup> See RONALD J. MANN, *BANKRUPTCY AND THE U.S. SUPREME COURT* 24–25 (Cambridge University Press 2017) (“[T]he Code was not produced by the partisan designs of a single party or drafted to satisfy the interests of particular businesses.”).

<sup>300</sup> *History*, ALASKA FEDERATION OF NATIVES, <http://www.nativefederation.org/about-afn/history/> (last visited Feb. 15, 2018).

<sup>301</sup> See Eric F. Myers, *Letter to Rep. Don Young*, AUDUBON ALASKA (May 15, 2013), [http://docs.audubon.org/sites/default/files/documents/representative\\_young\\_-\\_sealaska\\_hr\\_740\\_5-15-13\\_final.pdf](http://docs.audubon.org/sites/default/files/documents/representative_young_-_sealaska_hr_740_5-15-13_final.pdf).

where special legislation has been passed that uniquely applies to tribes. For example, the Indian Child Welfare Act (ICWA)<sup>302</sup> sets distinct federal requirements that apply only to state child custody proceedings involving Indian children.<sup>303</sup> Critics of the ICWA have asserted that it violates the equal protection rights of parents of Indian children by treating them differently from other parents.<sup>304</sup> Indeed, the ICWA is a “dramatic departure” from most state laws involving child custody proceedings and requires significant procedural and substantive differences from a non-Indian child custody proceeding.<sup>305</sup> Like this Article’s proposed legislation, the ICWA was passed in part because of concerns about non-Indian actors failing to appreciate the differences between Indian and non-Indian practices.<sup>306</sup> Although the ICWA has “brought attention to the unique needs of Indian children,”<sup>307</sup> its critics contend that the Act also took away significant personal liberties.<sup>308</sup>

Experience with the ICWA thus demonstrates both the benefits of special legislation in the sense that it can address unique needs and situations, as well as the drawbacks, in the sense that the effects of different treatment may bring disadvantages. For this reason, care should be taken to ensure, as much as possible, that bankruptcy legislation for tribes does not result in inherently unequal treatment or put Indian nations, their citizens, or their creditors at a disadvantage solely because of the fact that the debtor is a tribal entity. Involving tribal entities, creditors, and other representatives in the drafting process, as described above, and ensuring that drafters are given the time necessary to solicit feedback and input on the legislation will be critical to ensuring that the proposed legislation does not have overly adverse results.

Ultimately, this proposal does treat tribal entities differently than other debtors. However, as described in Part I, tribal entities are given different treatment in nearly every other commercial respect, and there is a long history in U.S. law of distinct treatment of Indian affairs.<sup>309</sup> This different treatment has

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<sup>302</sup> 25 U.S.C. § 1901 et seq.

<sup>303</sup> *About ICWA*, NICWA, <https://www.nicwa.org/about-icwa/> (last visited Feb. 13, 2018).

<sup>304</sup> Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J. L., ETHICS & PUB. POL’Y 543, 543-45 (1996).

<sup>305</sup> B.J. Jones, *The Indian Child Welfare Act: The Need for a Separate Law*, AMERICANBAR, [https://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/indianchildwelfareact.html](https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/indianchildwelfareact.html) (last visited Feb. 13, 2018).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> Bakeis, *supra* note 304, at 544.

<sup>309</sup> *See generally* Miller, *supra* note 16 (exploring the federal government’s different treatment of reservation economies compared with the capitalism principles it applies to the rest of the American economy).

been upheld in the courts as based on tribes' unique political status.<sup>310</sup> More specifically, the fact that a tribal debtor experiences financial distress—even the same type of distress as a non-tribal debtor—does not mean that tribal debtors should be expected to conform to the same bankruptcy laws as non-tribal entities when those bankruptcy laws are an ill fit.

#### CONCLUSION: A BROADER PERSPECTIVE

In recent years, Congress has taken the unusual step of creating bankruptcy-like laws tailored to address the unique, complex difficulties of special types of prospective debtors. This Article suggests that Congress could do the same for Native American tribal entities, which are distinctly situated and have effectively been barred from traditional bankruptcy relief. This Article thus reinforces the notion that, in certain circumstances, access to key debt restructuring tools does not have to come through the Bankruptcy Code itself.

If Congress provides tribal entities with their own debt restructuring legislation, it could represent a broadening of U.S. bankruptcy law, as well as a fragmenting of the Bankruptcy Code. As debt structures become increasingly complex<sup>311</sup> and as U.S. states face their own staggering debt problems,<sup>312</sup> it may be desirable for Congress to pass new legislation uniquely tailored to address issues and entities independently of the Bankruptcy Code. Technological developments have also created new potential debtors,<sup>313</sup> along with assets, such

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<sup>310</sup> See, e.g., *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding statutory hiring preference in the Bureau of Indian Affairs because the intent was to aid Indian self-government); *Fisher v. District Court of Sixteenth Jud. Dist. Of Mont.*, in and for Rosebud Cty., 424 U.S. 382, 390 (1976) (“[E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.”); *United States v. Antelope*, 430 U.S. 641 (1977) (holding that statutes providing for prosecution of Indians under federal criminal law due to their enrollment in federally recognized tribes do not violate due process or equal protection).

<sup>311</sup> See, e.g., Puerto Rico’s complex debt, discussed in Part II.B.1 *supra*.

<sup>312</sup> See, e.g., *10 States With Enormous Debt Problems: Report*, HUFFPOST (Oct. 28, 2012), [https://www.huffingtonpost.com/2012/08/28/state-debt-report\\_n\\_1836603.html](https://www.huffingtonpost.com/2012/08/28/state-debt-report_n_1836603.html) (noting that collectively, America’s state governments owe \$4.19 trillion); see also Gulati & Rasmussen, *supra* note 165, at 136 (discussing state debt restructuring and “argu[ing] that while Congress can adjust [the power of states to restructure their debt] by replacing a state’s scheme with one of its own, it cannot, consistent with federalism, prohibit state action while putting nothing in its place.”).

<sup>313</sup> For example, Mt. Gox, a bitcoin exchange, filed for bankruptcy in Japan in 2014. Patrick Riesterer & Waleed Malik, *Recognizing Foreign Proceedings Under the Canadian Bankruptcy and Insolvency Act: Re MtGox Co.*, WEIL BANKRUPTCY BLOG (Nov. 24, 2014), <https://business-finance-restructuring.weil.com/international/recognizing-foreign-proceedings-under-the-canadian-bankruptcy-and-insolvency-act-re-mtgox-co/>. For other examples of new debtor types, including high-technology companies and organizations that exist entirely online, as well as a discussion of the difficulty of the Code accommodating these entities, see Laura N. Coordes, *New Rules for a New World: How Technology and Globalization Shape Bankruptcy Venue Decisions*,

as cryptocurrencies, that simply did not exist when the Code was created.<sup>314</sup> Seen in this light, the Bankruptcy Code is not a static set of tools but rather a launching pad for new ideas. If bankruptcy relief continues to be broadened beyond the Bankruptcy Code itself, further research will be necessary to determine the role of the Bankruptcy Code in the future, and in particular to examine the question of when it is appropriate or necessary to create “personalized,” non-Code-based structured debt relief. Although this Article does not seek to resolve these issues in a conclusory fashion, it does shed some light on their answers. When an entity, be it an Indian tribe, a bank, or a U.S. territory, exhibits distinct differences in structure and function from other entities contemplated by the Bankruptcy Code and experiences the need for bankruptcy-specific tools, special legislation may be warranted. If there are ways to replicate the pattern of providing tailored bankruptcy relief to nontraditional debtor entities, there are likely many prospective debtors that would benefit.

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17 ASPER REV. INT’L BUS. & TRADE L. 85, 93–95 (2017).

<sup>314</sup> See Coordes, *New Rules*, *supra* note 313, at 93.