

2023

## Without Reservation: Ensuring Uniform Treatment in Bankruptcy While Keeping in Mind the Interests of Native American Individuals and Tribes

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### Recommended Citation

Connor D. Hicks, Without Reservation: Ensuring Uniform Treatment in Bankruptcy While Keeping in Mind the Interests of Native American Individuals and Tribes, 28 Fordham J. Corp. & Fin. L. 341 (2023).

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# **WITHOUT RESERVATION: ENSURING UNIFORM TREATMENT IN BANKRUPTCY WHILE KEEPING IN MIND THE INTERESTS OF NATIVE AMERICAN INDIVIDUALS AND TRIBES**

*Connor D. Hicks\**

## **ABSTRACT**

The Bankruptcy Code (“Code”) exists as a mechanism for good faith debtors to discharge debts and seek a “fresh start” in life and finance. 11 U.S.C. § 106(a) ensures that not only are all debtors treated uniformly, but that all creditors, including governmental creditors which may otherwise enjoy immunity from suit, are equally subject to the jurisdiction of Bankruptcy courts and bound to the provisions of the Code.

However, a recent circuit split has demonstrated one niche yet significant instance in which a debtor may not receive the same treatment as their counterparts. While § 106 contains an express waiver of sovereign immunity of all “governmental units,” several courts have held that its language does not feature the specificity necessary to incorporate Native American tribal entities within this waiver. Under this interpretation, tribal entities are not bound by the Code and can effectively disregard debtor protections contained therein. As a result, debtors residing on or near tribal lands who frequently deal with financial institutions owned or operated by a tribal government may not receive the same treatment of their debts as other debtors. This Article seeks to address the current split in light of the history of tribal sovereignty and recommend Congressional action which ensures uniform treatment for Native American debtors while keeping in mind the historical implications of tribal sovereignty.

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## INTRODUCTION

Ever since its inception, the United States federal government contemplated imposing its own laws upon the inhabiting tribal peoples.<sup>1</sup> That imposition and the power associated with it has “always been deemed a political one, not subject to be controlled by the judicial department of the government.”<sup>2</sup> The abuse of this power, whether direct or concealed, is well-documented, and seldom questioned. And while initial congressional reasoning may have attempted to justify it as a means of ensuring peace and preventing further war between the states and the tribes, this use of governance over the tribes is and always was “more of a sword for the government than a shield for the tribes.”<sup>3</sup>

Jurisdiction has been an omnipresent consideration regarding governance of the tribes in this nation.<sup>4</sup> However, the lines of this jurisdiction were blurred at time of constitutional enactment, and remained so for half a century until clarification through a trilogy of U.S. Supreme Court opinions authored by Chief Justice John Marshall.<sup>5</sup> These cases, along with subsequent legislative enactments which will be discussed herein, served to delineate between two classifications: (1) where tribes were a “domestic dependent nation” of the United States; and (2) where the tribes were self-governing.<sup>6</sup> Specifically, great thought

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1. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 558 (1903).
  2. *Id.* at 565.
  3. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 43 (6th ed. 2015).
  4. See U.S. CONST. art. 1, § 8, cl. 3.
  5. *Johnson v. M’Intosh*, 21 U.S. 543, 604-05 (1823) (holding that private citizens could not purchase land directly from Native Americans); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (determining the Cherokee Nation to be a “domestic dependent nation” of the United States, rather than a foreign nation); *Worcester v. Georgia*, 31 U.S. 515, 540, 586 (1832) (confirming that federal law controls on Native American lands, to the exclusion of state governments and foreign European Nations).
  6. This Article will address the foundations of tribal sovereignty as a precursor to tribal sovereign immunity. The two are inherently distinct, yet inextricably intertwined. One does not exist without the other. More specifically, a bankruptcy article is a necessary place to address the jurisprudence relating to tribal sovereignty—that is, a tribe’s rights to self-govern. Tribal law is one of few areas into which bankruptcy law and scholarship rarely delve. Nevertheless, tribal sovereignty and the case law on which it was founded are important predecessors to the legal theories associated with the topic

was put into determining which system of laws would govern when a Native American was the perpetrator or victim (or both) of a crime on federally-designated tribal reservation lands.<sup>7</sup> The governing principles of criminal jurisdiction have remained fairly constant, with some notable updates, since the enactment of the Major Crimes Act in 1885.<sup>8</sup>

Regardless of what considerations were given to tribal laws by the Founding Fathers and the earliest members of Congress, the application of bankruptcy rules and procedures to Native Americans and the tribal lands on which many resided was never considered at length.<sup>9</sup> The Constitution did not regard Native Americans as citizens<sup>10</sup> and the provisions of the earliest bankruptcy laws were available only to citizens.<sup>11</sup> However, it is also well-evidenced that Congress was unsure as to how bankruptcy laws should operate.<sup>12</sup> Only one single clause of the Constitution explicitly addresses bankruptcy, and it served to grant Congress the authority to create bankruptcy laws which otherwise would not exist.<sup>13</sup>

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of this Article. *See generally* Nathalie Martin, *Brewing Disharmony: Addressing Tribal Sovereign Immunity Claims in Bankruptcy*, 96 AM. BANKR. L.J. 145 (2022).

7. CANBY, *supra* note 3, at 149-51.

8. 18 U.S.C. § 1153. As will be discussed, the Supreme Court's recent opinion in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) has significantly complicated the intertwinement of state and federal law in the criminal context, but prior to this decision's clear divergence from precedent, the law was quite clear.

9. Notably, the 1898 attempt to codify Bankruptcy laws did make reference to "Indian Territory," but effective implications of this language were de minimis. Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978). Some of the later failed bankruptcy acts passed prior to the modern code did not concern treatment of the tribes or their members.

10. While Native Americans had means of obtaining citizenship previously, all Native Americans were not considered citizens of the United States until 1924. 8 U.S.C. § 1401(b).

11. Bradley Hansen, *Bankruptcy Law in the United States*, ECON. HIST. ASS'N, <https://eh.net/encyclopedia/bankruptcy-law-in-the-united-states/> [<https://perma.cc/3KLR-NQY5>] (last visited Mar. 6, 2023).

12. *See generally* Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016 (2003). In fact, at the time of the enactment of the Constitution many state constitutional considerations still included the use of debtors' prisons. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 93 (3d ed. 2005). Imprisonment of debtors did not end in whole until well into the 19th century. *See id.*

13. U.S. CONST. art. I, § 8, cl. 4.

While seemingly important in a nation which quickly became a world economic power,<sup>14</sup> Congress took 2 centuries to create functional bankruptcy laws. Before the enactment of the current Bankruptcy Code (the “Code”) in 1978, Congress tried and failed to enact sustainable bankruptcy laws four times.<sup>15</sup> Further, due to the complexity of many provisions of the Code and the rarity of the Supreme Court taking up bankruptcy case appeals, the Code is ever evolving, and many pertinent questions of general application remain unanswered.

Additionally, it is important to consider the financially vulnerable environments in which many contemporary tribe members reside.<sup>16</sup> Native Americans living on tribal lands frequently rank among the bottom in most major economic categories. For example, in 2019, average household income of Native Americans was \$49,906.<sup>17</sup> The national

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14. See FRIEDMAN, *supra* note 12, at 199 (“Bankruptcy and related laws were important in a dynamic economy, an economy of risk takers, an economy so dependent on credit. People take risks when the risks are not too overwhelming. . . . Bankruptcy laws are nets that catch falling merchants.”).

15. Primarily done in a haste following periods of significant financial distress, Congress passed deficient bankruptcy systems in 1800, 1841, 1867, and 1898. Each Act included some form of foundational inadequacy which the current Code sought to remedy. See generally Zywicki, *supra* note 12. Further, this included several periods in which there were no active bankruptcy laws at all. *Id.* at 2018. Between 1841 and 1867, there was no federal bankruptcy and thus states had to fill in with their own “insolvency laws, stay laws, and exemption laws.” See FRIEDMAN, *supra* note 12, at 416. Interestingly, once federal bankruptcy laws were reinstated in 1867, a significant minority was unhappy that the laws included both voluntary and involuntary bankruptcy. The result, according to the minority, was a system which could force “farmers and merchants” to “be ‘squeezed’ into a ‘straightjacket’ more ‘benefitting the madmen of Wall Street.’” *Id.* at 416.

16. Oklahoma and New Mexico are two of the three states with the highest tribal population as a percentage of total state population. Adriana Rezal, *Where Most Native Americans Live*, U.S. NEWS & WORLD REP. (Nov. 26, 2021), <https://www.usnews.com/news/best-states/articles/the-states-where-the-most-native-americans-live> [<https://archive.ph/zjoec>]. Generally speaking, the two states also consistently rank among the ten states with the highest poverty rate. Andrew DePietro, *U.S. Poverty Rate by State in 2021*, FORBES (Nov. 4, 2021, 3:27 AM), <https://www.forbes.com/sites/andrewdepietro/2021/11/04/us-poverty-rate-by-state-in-2021/?sh=368402811b38> [<https://archive.ph/vCSpu>]. In 2021, New Mexico had the third-highest poverty rate (19.1 percent) and Oklahoma ranked eighth (15.7 percent). *Id.*

17. *Profile: American Indian / Alaska Native*, U.S. DEP’T HEALTH AND HUM. SERVS. OFF. MINORITY HEALTH, <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=62> (last visited Mar. 25, 2023).

average household income at the same time was \$68,703.<sup>18</sup> Furthermore, that same year, the Native American family poverty rate was 20.3 percent.<sup>19</sup> While this number marked substantial progress from 25 years prior when nearly half of Native American families were living in poverty, it was nearly triple the national average in the United States.<sup>20</sup>

Due to the limited demographic data in bankruptcy filings, it is impossible to know how many of the nearly 640,000 annual non-business bankruptcy filers are Native Americans.<sup>21</sup> However, 22 percent of the nation's 5.2 million Native Americans live on tribal lands, accounting for approximately 1.15 million people.<sup>22</sup> Bankruptcy of any of those 1.15 million would necessarily implicate any lenders located on one of the 943

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18. Jessica Semega et al., *Income and Poverty in the United States: 2019*, U.S. CENSUS BUREAU (Sept. 15, 2020), <https://www.census.gov/library/publications/2020/demo/p60-270.html>.

19. U.S. DEP'T HEALTH AND HUM. SERVS. OFF. MINORITY HEALTH, *supra* note 17.

20. Randall Akee, *Sovereignty and Improved Economic Outcomes for American Indians: Building on the Gains Made Since 1990*, WASHINGTON CENTER WASH. CTR. FOR EQUITABLE GROWTH (Jan. 14, 2021), <https://equitablegrowth.org/sovereignty-and-improved-economic-outcomes-for-american-indians-building-on-the-gains-made-since-1990/> [<https://perma.cc/6YPR-LMRA>]. In 1990, a 25.7 percent Native American unemployment rate and per capita income of \$9,624 for those tribal members that did find employment contributed to 47.7 percent of Native American families living below the poverty line. Despite three decades of progress, American Indian wages lag behind the national trend, evidenced by the fact that the average wage of a Native American was higher in 1998 than it is today. *See id.* fig. 1.

21. Average of the previous 5 years of bankruptcy filings, including the significant decline in filings post-COVID. (2017 – 765,863, 2018 – 751,186, 2019 – 752,160, 2020 – 522,808, 2021 – 399,269). *Bankruptcy Filings Drop 24 Percent*, U.S. CTS. (Feb. 4, 2022), <https://www.uscourts.gov/news/2022/02/04/bankruptcy-filings-drop-24-percent> [<https://perma.cc/H73F-2XG9>]. Bankruptcy scholars are still unclear why filings after March of 2020 are down, rather than up, but most believe it is attributable to the COVID-era government aid programs which “helped keep individuals and businesses afloat.” Maria Chutchian, *Bankruptcy Filings Are Creeping Back Up in Early 2022*, REUTERS (Apr. 5, 2022), <https://www.reuters.com/legal/transactional/bankruptcy-filings-are-creeping-back-up-early-2022-2022-04-05/> [<https://perma.cc/A42X-B7UZ>]; Laurence Darmiento, *Bankruptcies Are Way Down During the Pandemic. Here's Why*, L.A. TIMES (Mar. 23, 2021), <https://www.latimes.com/business/story/2021-03-23/covid-19-bankruptcies-pandemic> [<https://perma.cc/VF8X-EBZU>].

22. *Living Conditions*, NATIVE AM. AID, [http://www.nativepartnership.org/site/PageServer?pagename=naa\\_livingconditions](http://www.nativepartnership.org/site/PageServer?pagename=naa_livingconditions) [<https://perma.cc/6Z2Z-54WS>] (last visited Mar. 2, 2023).

federally recognized Native American lands who may not be tribal or tribally-owned, but are nevertheless tied to a tribal government.<sup>23</sup>

Notwithstanding the treatment of tribes under federal law, tribes have generally been acknowledged as sovereign entities and accordingly enjoy an immunity from suit comparable to that of the federal government.<sup>24</sup> This immunity from suit encompasses not only the tribe itself, but also any entity which qualifies as an “arm” of the tribe.<sup>25</sup> An “arm” of the tribe can be any economic entity where “factors of the entities’ purpose, structure, financial relation to the tribe and the tribe’s intent indicates such a close relation of the tribe that they share its immunity.”<sup>26</sup> As such, where public and private businesses have no immunity from bankruptcy proceedings and are bound by the Code; tribal businesses possess the same sovereign immunity as the tribe of which they are a part.<sup>27</sup>

Most importantly for this Article’s analysis, tribal sovereign immunity applies to all activities of the tribe, even when commercial rather than governmental.<sup>28</sup> Parallel to the federal government, tribal sovereign immunity stands unless abrogated by an unequivocal waiver by the tribe or an explicit act of Congress.<sup>29</sup> At least as to the states, it is well-settled that the Bankruptcy Clause granted Congress the ability to abrogate sovereign immunity to carry out the purposes of bankruptcy.<sup>30</sup> Congress did just that with the enactment and subsequent amendment of

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23. As of the 2012 census, the United States recognized 566 Indian tribes and provided statistics for 325 “American Indian reservations” and another 618 “tribal designated state areas.” *American Indians and Alaska Natives – By the Numbers*, U.S. DEP’T HEALTH & HUM. SERVS.: ADMIN. FOR NATIVE AMS., <https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-numbers> [https://perma.cc/XP5E-93CV] (last visited Mar. 2, 2023).

24. See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); see also CANBY, *supra* note 3, at 99-114.

25. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1186 (10th Cir. 2010); see *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032 (11th Cir. 2001).

26. CANBY, *supra* note 3, at 105.

27. See *Martin*, *supra* note 6, at 171, 173 (2022).

28. *Bay Mills Indian Cmty.*, 134 S. Ct. at 2025, 2037, 2041 (2014).

29. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

30. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362-63 (2006).



11 U.S.C. § 106(a).<sup>31</sup> However, it remains unclear as to how this provision applies to Native American tribal governments and their related business entities. Whether bankruptcy laws apply to tribes depends on the answer to one question—is a Native American tribe a “governmental unit” within the context of the Bankruptcy Code?

The district courts’ attempt to resolve this issue has created a federal circuit split. Resolution of this split would ensure that Native Americans are treated equally and would allow bankruptcy attorneys in tribal areas to adequately provide bankruptcy services to tribal debtors. It is important for tribal creditors to know how their lending arrangements may be treated in bankruptcy.<sup>32</sup> This question implicates not only issues in the Code, but also issues with tribal independence and governance.

This Article will address the current treatment of tribal nations within the context of bankruptcy law.<sup>33</sup> Specifically, it will focus on tribal sovereign immunity in bankruptcy as it relates to 11 U.S.C. § 106(a) and the current circuit split on the matter.<sup>34</sup> This Article has four parts; it starts with analyzing the historical deference (or lack thereof) to tribal judiciaries and law-making bodies under federal law. Part I will look at the development of tribal jurisdiction over criminal and non-criminal legal matters and the development of law addressing the tribal nations into the current status of tribal sovereign immunity.<sup>35</sup> After addressing those foundational legal issues, this Article will address the recent divergence

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31. “Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section . . . .” 11 U.S.C. § 106(a).

32. Further, this Article will address recent trends of independent financial institutions using the tribes’ protections to perpetrate abusive financial acts.

33. See generally Gregory W. Dalton, *A Failure of Expression: How the Provisions of the U.S. Bankruptcy Code Fail to Abrogate Tribal Sovereign Immunity*, 81 WASH. L. REV. 645 (2006); Joshua Santangelo, *Bankrupting Tribes: An Explanation of Tribal Sovereign Immunity as Reparation in the Context of Section 106(a)*, 37 EMORY BANKR. DEV. J. 325 (2021).

34. 11 U.S.C. § 106(a) in its current form reads: “Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following [provisions of the Code].”

35. While criminal law has minimal application to Bankruptcy, the interrelations between the tribes and the federal government since post-colonial times has primarily revolved around jurisdiction of crimes in Native American country. Thus, the topic is the most aptly manicured for establishing this relationship and its development into the current posture. Very rarely has Congress considered federal laws relating to finance in tribal lands outside the application of gaming.

from these precedents by the Supreme Court in *Oklahoma v. Castro-Huerta* and how this decision in tribal criminal law could foreshadow the negative result that unaddressed questions of federal jurisdiction and its application to the many tribes may create if the matter is left to develop unsupervised.<sup>36</sup>

Part II will focus on current sovereign immunity understandings within the Code and applicable case law following the amendments to 11 U.S.C. § 106. Part II will also compare the recent settling of the question of sovereignty in bankruptcy as it relates to certain federal agencies and states to the current unresolved question of treatment of tribes under § 106. Further, it will compare tribal immunity to other individual-specific considerations when tribal members file for bankruptcy, such as “per capita payments.”<sup>37</sup>

Part III will delve into the current circuit split as to tribal sovereign immunity in bankruptcy. It will address the majority position and then counter with the minority’s viewpoint. This portion will focus primarily on the varying interpretations of 11 U.S.C. § 106(a) and its purported application to tribal entities.<sup>38</sup> The circuit split will be solved by answering whether Congress intended to include tribal governments and associated tribal financial entities as “domestic governments” within the Code.

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36. See generally *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

37. As will be explained further herein, “per capita payments” were a requirement of the Federal Indian and Gaming Regulatory Act of 1988, 25 U.S.C. § 2710. In return for permitting tribes to create gambling centers on tribal lands, Congress required net revenues from the activity to be used for specific purposes, one being ensuring the general welfare of the tribe and its members. These payments are one such method of complying with the statute, providing all members of the tribe monthly or quarterly payments based on a set percentage of the tribe’s profits in the period. See *In re Musel*, 631 B.R. 744, 756 (Bankr. D. Minn. 2021); 25 U.S.C. § 2710(b)(3). In *Musel*, the debtor was a tribal member of the Pokagon Band of Potawatomi Indians. The Band’s gaming ordinance required 57 percent of gaming revenues to be distributed to qualifying members. Accordingly, the debtor received, on average, \$750 per month. This case and several others which will be addressed herein dealt with the treatment of these per capita payments in the context of a bankruptcy estate.

38. Note the emphasis on tribal entities, rather than individuals. It is well settled law that the assertion of sovereign immunity by a tribe does not impair jurisdiction over individual tribal members when the individual is not acting within their capacity as a representative of the tribe. See *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 174 (1977); *Tamiami Partners, Ltd. v. Micosukee Tribe of Indians*, 63 F.3d 1030, 1051(11th Cir. 1995); *Romanella v. Hayward*, 933 F. Supp. 163, 167-68 (D. Conn. 1996), *aff’d* 114 F.3d 15 (2d Cir. 1997); *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1048 (E.D. Wis. 1999).

Lastly, Part IV will reconcile both sides of the circuit split with perceived congressional intent. Considering the sovereignty afforded to tribes in criminal and other non-bankruptcy contexts, this Article will recommend the proper statutory clarification of 11 U.S.C. § 106 while taking caution not to intrude into important tribal sovereignty considerations and recalling the Code's interest in uniform opportunity of a fresh start to all honest debtors.

## I. HISTORY OF TRIBAL IMMUNITY FROM EX PARTE CROW DOG TO *OKLAHOMA V. CASTRO-HUERTA*

### A. PRECEDENTIAL BACKGROUND OF TRIBAL SOVEREIGN IMMUNITY

On August 5, 1881, members of the Brulé Lakota tribe convened a meeting which involved tribal chief Spotted Tail and former tribal police captain Crow Dog.<sup>39</sup> Notably, Spotted Tail was not selected chief by the tribe as was custom, but was instead appointed by George Crook, head of the Bureau of Indian Affairs' ("BIA") Department of the Platte at the time.<sup>40</sup> While the reason for the meeting and what transpired during it remains unclear, the conclusion is well-documented: Spotted Tail was murdered by gunshot.<sup>41</sup>

At that time, the policy of the federal government in the BIA and western territories had largely been to stay uninvolved in crimes only involving Native Americans and allow the tribal justice systems to run their course unfettered.<sup>42</sup> Just as states were left to prosecute state crimes and civil affairs, so were tribes left to litigate most matters in "Indian Country."<sup>43</sup> Many tribes had foundational justice systems which

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39. See CHARLES A. EASTMAN, INDIAN HEROES AND GREAT CHIEFTAINS 40 (1919). The tribal territory exists in what became South Dakota approximately a decade later. *Territories to Statehood, the Northern West*, LIBR. OF CONG., <https://guides.loc.gov/chronicling-america-northern-west-territories> [<https://perma.cc/X7EA-VTMV>] (last visited Mar. 2, 2023).

40. See EASTMAN, *supra* note 39, at 11.

41. *Ex parte* Crow Dog, 109 U.S. 556, 557 (1883); John Rockwell Snowden, *Ex Parte Crow Dog*, ENCYCLOPEDIA OF THE GREAT PLAINS, <http://plainshumanities.unl.edu/encyclopedia/doc/egp.law.016> (last visited July 11, 2022).

42. Snowden, *supra* note 41. However, the BIA's choice to appoint a new chief in direct contravention of the tribe's interests indicated a clear divergence from this policy.

43. The meaning of the term "Indian Country" has changed considerably over the years, until it was given its current definition by Congress in 1948. See 18 U.S.C. § 1151. This new definition confines "Indian Country" to (a) all land within the limits of any

universally did not mirror U.S. courts and jury systems, but involved methods more similar to modern day arbitration.<sup>44</sup> Brulé Lakota law at the time required discussions between peacemakers and the families of the parties involved, which—rather than taking any punitive measure against the offender—would “restore harmony and order” to the tribe.<sup>45</sup> As a result of this practice, for the murder of Spotted Tail, the tribe ordered Crow Dog to pay the family \$600 (equivalent to more than \$17,000 today), eight horses, and one blanket.<sup>46</sup> Determining this to be an inadequate resolution to murder within its boundaries and abandoning previous policy of non-intervention with Native American affairs, the Dakota territory chose to try Crow Dog for the crime and ultimately sentenced him to death.<sup>47</sup> He then brought a writ of habeas corpus, challenging the conviction as unconstitutional and outside the district’s jurisdiction.<sup>48</sup>

The Supreme Court determined the question to be straightforward: do states (or at this time a territorial government) have criminal jurisdiction in Indian Territory?<sup>49</sup> The Court walked through the

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Indian reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and (c) all Indian allotments. This definition applies in both the criminal and the civil context. CANBY, *supra* note 3, at 140 (citing *Alaska v. Native Vill. of Venetie*, 522 U.S. 520 (1998)).

44. See *The History of Tribal Courts*, MASHANTUCKET (WESTERN) PEQUOT TRIBAL NATION, <https://www.mptn-nsn.gov/tchistory.aspx> [<https://perma.cc/MXP9-65CA>] (last visited Mar. 2, 2023).

45. Snowden, *supra* note 41.

46. *Id.*; *Crow Dog Case*, UNIV. ALASKA-FAIRBANKS, <https://uaf.edu/tribal/academics/112/unit-1/crowdogcase.php> [<https://perma.cc/4D9K-PA4V>] (last visited Mar. 2, 2023).

47. *Ex parte Crow Dog*, 109 U.S. 556, 557 (1883); Snowden, *supra* note 41.

48. *Ex parte Crow Dog*, 109 U.S. at 557-58.

49. Specifically:

The district court has two distinct jurisdictions. As a Territorial court it administers the local law of the Territorial government; as invested by act of Congress with jurisdiction to administer the laws of the United States, it has all the authority of circuit and district courts; so that in the former character, it may try a prisoner for murder committed in the territory proper, under the local law . . . except the District of Columbia, *to the Indian country*, and it becomes necessary, therefore, to inquire whether the locality of the homicide, for which the prisoner was convicted of murder, is within that description.

numerous provisions applicable to tribal governance at the time.<sup>50</sup> Specifically, the Court noted that statutes requiring turnover of a perpetrator in Native American Territory did not address the instance in which both the perpetrator and victim were tribal members.<sup>51</sup> Ultimately, the Court came to the conclusion that the Dakota territory did not have the jurisdiction to handle criminal matters involving two members of a tribe on tribal land and while the justification represents an archaic view on Native Americans, the result was nevertheless the correct one.<sup>52</sup> Although basing the conclusion on the nineteenth century Court's perceived "free though savage life" of natives, it nonetheless held that foundational principles of justice require that local courts to which the members were accustomed were the proper place for adjudication of criminal matters, rather than territorial courts imposing different laws than those under which the tribes customarily operated.<sup>53</sup> Ultimately, said the Court, Congress uniformly intended that crimes "by Indians against

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*Ex parte Crow Dog*, 109 U.S. at 560 (citing U.S. Rev. Stat. § 2145 (1875)) (emphasis added).

50. *Id.* at 561-66.

51. *Ex parte Crow Dog*, 109 U.S. at 567 ("[I]t is quite clear from the context that this [statute] does not cover the present case of an alleged wrong committed by one Indian upon the person of another of the same tribe.").

52. The Court states in harsh contrast to views of the modern day:

It is a case where, against an express exception in the law itself, that law . . . is sought to be extend over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to *subject them to responsibilities of civil conduct, according to rules and penalties of which they have no previous warning; which judges them by a standard made by others and not for them . . .*

*Id.* at 571 (emphasis added).

53. While somewhat tip-toeing around implications of sovereign immunity jurisprudence, this conclusion goes more along the lines of modern criminal intent theory such as that in *Lambert v. California*, 355 U.S. 255 (1957) (holding that an ordinance which requires registration if previously convicted of a felony to be unconstitutional when applied to a person with no knowledge of the statute) and *Morissette v. United States*, 342 U.S. 246 (1952) (overturning conviction of criminal conversion when defendant removed spent bomb casings from the property and believed the property to have been abandoned, thus negating the intent element of the criminal statute).

each other were left to be dealt with by each tribe for itself, according to its local customs.”<sup>54</sup> As a result, the death sentence was determined void.<sup>55</sup> Crow Dog regained his freedom and returned to the Rosebud reservation, where he lived until his death in 1912.<sup>56</sup>

While the ruling amounted to a judicial reaffirmation of the BIA’s previous hands-off approach to crime only involving Native Americans, any celebration would be short-lived. In direct response to the Court’s ruling, Congress passed the Major Crimes Act (“MCA”) 2 years later.<sup>57</sup> The MCA would expressly return a large portion of the criminal jurisdiction afforded to the tribes in *Ex parte Crow Dog* back to the federal government.<sup>58</sup> While the original MCA restricted this jurisdiction to what were considered the most severe crimes,<sup>59</sup> later amendments expanded it to essentially all significant criminal acts.<sup>60</sup>

*Crow Dog* was not the first Supreme Court case addressing tribal immunity. Half a century earlier, the Court faced a much broader question of tribal sovereign immunity in *Worcester v. Georgia*.<sup>61</sup> In response to

54. *Ex parte Crow Dog*, 109 U.S. at 571-72 (citing *United States v. Joseph*, 94 U.S. 614, 617 (1876)).

55. *Id.*

56. *Death of Crow Dog, Indian Who Killed Spotted Tail Passes Away*, STOUX CITY J., Sept. 2, 1912, at 6 (available at [https://www.newspapers.com/image/?clipping\\_id=53299584&fcfToken=eyJhbGciOiJIUzI1NiIsInR5cCI6IkpXVCJ9.eyJmcmVILXZpZDkxOTB9.Z7pMLrOQPzwxOeUf5f0KhDoJUUScdP12DokutfJqrZE](https://www.newspapers.com/image/?clipping_id=53299584&fcfToken=eyJhbGciOiJIUzI1NiIsInR5cCI6IkpXVCJ9.eyJmcmVILXZpZDkxOTB9.Z7pMLrOQPzwxOeUf5f0KhDoJUUScdP12DokutfJqrZE)).

57. 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153).

58. *Id.*

59. Murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. *Id.*

60. The current statute includes federal jurisdiction for murder, manslaughter, kidnapping, maiming, sexual abuse, assault, child abuse and neglect, arson, burglary, robbery, and theft of more than \$1,000. Further, the 1986 amendment provides that any acts not defined under federal law are to be defined by the applicable state in which the reservation is located. Thus, even though the jurisdiction to prosecute is held exclusively by the federal government, if the crime is not one that is defined by federal statute, the criminal definition of the state controls, rather than that of the relevant tribal judiciary. 18 U.S.C. § 1153(b).

Several laws in recent years have further complicated this analysis and jurisdiction is more convoluted in states where these laws apply. See 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (commonly known as “Public Law 280,” granting state jurisdiction over criminal and civil proceedings involving Native Americans with limited exceptions in Alaska, California, Minnesota, Nebraska, Oregon, and Washington).

61. 31 U.S. 515, 579 (1832). This case reversed *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) from just a year earlier. There, the Cherokee Nation had challenged targeted

removal efforts by the Georgia government in the 1820s, the Cherokee nation established a constitutional government in 1827 with a national capital in New Echota, Georgia.<sup>62</sup> Samuel Worcester was a Christian missionary tasked by the American Board of Commissioners for Foreign Missions with converting Cherokee members.<sup>63</sup> Taking a particular liking to the people, Worcester became an influential part of the Cherokee's attempts to resist the Georgia government's removal efforts.<sup>64</sup> Once aware of Worcester's presence among the tribespeople, the Georgia legislature enacted a law requiring "white persons" residing on Cherokee lands to seek a license from the state to do so.<sup>65</sup> Worcester and several other missionaries refused to do so, and were arrested in violation of the law.<sup>66</sup>

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Georgia laws. While the Court ultimately held that it did not have jurisdiction over a tribe's constitutional challenge, John Marshall's dicta referring to the Cherokee nation as a "domestic, dependent nation" existing under a guardianship of the United States would have significant impact in later decisions including several bankruptcy opinions pertinent to the issues addressed herein. *Cherokee Nation*, 30 U.S. at 17-18 ("Though the Indians are acknowledged to have an unquestionable, and heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cessation to our government . . . . These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state or the citizens thereof, and foreign states."). The dissent, however, presented the viewpoint that the court would endorse in *Worcester* a year later. *Cherokee Nation*, 30 U.S. at 59 (Thompson, J., dissenting) ("And if they, as a nation, are competent to make a treaty or contract, it would seem to me to be a strange inconsistency to deny them the right and the power to enforce such a contract.").

62. New Echota would remain the capital for less than a decade before the tribe was forcibly removed. While the Cherokee Nation had once encompassed parts of seven Southeastern states (Alabama, Georgia, Kentucky, North Carolina, South Carolina, Tennessee, and Virginia), the New Echota Treaty would move the majority of the tribe to its current 7,000 square-mile location in Eastern Oklahoma. See TIM ALAN GARRISON, *Worcester v. Georgia*, in NEW GA. ENCYCLOPEDIA (last edited Feb. 20, 2018), <https://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832/> [<https://archive.ph/TbXaQ>]; *Cherokee Nation History*, CHEROKEE NATION, <https://www.cherokee.org/about-the-nation/history/> [<https://perma.cc/Z5BA-P4RQ>] (last visited Mar. 2, 2023).

63. GARRISON, *supra* note 62.

64. *Id.*

65. *Id.*

66. Samuel Worcester was additionally the postmaster for New Echota and was briefly released from custody for having been in the territory under the authority of the federal government. However, his freedom would be short-lived, and he was immediately arrested again after he was terminated from the position under the direction of Georgia governor George R. Gilmer. *Id.*

After a trial and conviction, Worcester was sentenced to 4 years in prison.<sup>67</sup>

On appeal before the Supreme Court, Cherokee lawyers representing the missionaries successfully argued that the Cherokee Nation remained a sovereign nation with protections from interference by state government.<sup>68</sup> Writing for the majority, Chief Justice John Marshall held the Cherokee Nation to be “a distinct community occupying its own territory in which the laws of Georgia can have no force.”<sup>69</sup> While several other cases over the next 2 centuries would confirm Indian sovereignty, few would share the importance and significance of *Crow Dog* and *Worcester*.<sup>70</sup> In 1983, Justice Brennan referred to *Worcester* as “perhaps the most expansive declaration of Indian independence from state regulation ever uttered by this Court . . . .”<sup>71</sup> While a significant win for the interests of tribes and their members, many members of Congress were not happy with the result and several scholars see it as a foundational point in President Jackson’s attempts to move the tribes west of the

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67. *Id.*; *Worcester v. Georgia*, 31 U.S. 515, 536 (1832).

68. GARRISON, *supra* note 62; *Worcester*, 31 U.S. at 559.

69. *Worcester*, 31 U.S. at 561.

70. *See, e.g.*, *United States v. Kagama*, 118 U.S. 375, 385 (1886) (confirming constitutionality of the MCA); *Williams v. Lee*, 358 U.S. 217, 223 (1957) (holding that tribal court was the proper forum for a civil case involving a non-Native American doing business on a reservation with tribal members who reside on the reservation); *Antoine v. Washington*, 420 U.S. 194, 207-8 (1975) (holding that treaties and laws must be construed in favor of the tribes); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding tribes do not have criminal jurisdiction over non-Native Americans residing on reservation lands); *United States v. Wheeler*, 435 U.S. 313, 332 (1978) (holding that the Double Jeopardy clause does not bar federal prosecution of a tribal member who has already been prosecuted by a tribal government for the same crime); *Solem v. Bartlett*, 465 U.S. 463, 481 (1984) (holding that a tribe’s allowing of non-Indian settlement on tribal lands does not constitute an intent to diminish reservation boundaries and tribal boundaries are not reduced except by an explicit act of Congress); *Duro v. Reina*, 495 U.S. 676, 697-98 (1990) (holding that tribes cannot prosecute Indians who are members of another recognized tribe for crimes committed on the reservation of which they are not a registered member); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020) (holding once a reservation is established, it retains reservation status until disestablished). Because the Creek Reservation in Eastern Oklahoma was never disestablished, it remained “Indian country” and the state of Oklahoma accordingly lacked jurisdiction to prosecute enrolled members of tribes for crimes committed on the reservation. *Id.*

71. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 563 (1983).



Mississippi River.<sup>72</sup> That expansion of rights would last nearly two decades, until called to question just months ago.<sup>73</sup>

The Supreme Court's 2020 *McGirt* decision complicated things for the state of Oklahoma.<sup>74</sup> The decision analyzed congressional treatment of reservations in line with the statehood of Oklahoma and determined that the Muscogee Creek Reservation had never been disestablished.<sup>75</sup> Accordingly, the tribal boundaries established in 1866 still exist today and with it, criminal jurisdiction for crimes committed by enrolled tribal members on the reservations of Eastern Oklahoma was stripped from the state and returned to the federal government.<sup>76</sup>

While *McGirt* expanded tribal jurisdiction, its aftermath led to a situation where the Oklahoma courts were reluctant to prosecute tribal

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72. The opinion resulted in one of President Jackson's more notable attributed quotes: "John Marshall has made his decision, now let him enforce it." Jeffrey Rosen, *Supreme Court History: The First Hundred Years*, THIRTEEN, <https://www.thirteen.org/wnet/supremecourt/antebellum/history2.html> [<https://perma.cc/22QL-LDPC>] (last visited Mar. 2, 2023). Further, "there is little question that the decision was not popular with the Jacksonians who were anxious to hasten the exodus of the tribes from lands east of the Mississippi." CANBY, *supra* note 3, at 21.

73. It's important to note that unlike sovereign immunity of the states, this immunity does not arise out of the Constitution. Rather, tribal sovereign immunity is a matter of common law, a judicially created doctrine, not deriving from the Eleventh Amendment or an act of Congress. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751–52, 756, 759 (1998) (noting that the doctrine of tribal immunity developed "almost by accident" and is said to rest in the Supreme Court's decision in *Turner v. United States*, 248 U.S. 354, 358 (1919)). See generally, Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (*In re Greektown Holdings, LLC*), 917 F.3d 451 (2015).

74. See generally *McGirt*, 140 S. Ct. 2452.

75. *Id.* at 2478–79. As will be discussed herein in its relation to the more recent *Castro-Huerta* case, many tribal attorneys attribute this win in tribal rights to Justice Gorsuch. Gorsuch was also the lone conservative to rule in favor of tribes in the Court's 5–4 decision in *Castro-Huerta* and authored the dissent. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2505–27 (2022) (Gorsuch, J., dissenting).

76. *McGirt*, 140 S. Ct. at 2478; *Google Maps Recognizes Boundaries of Oklahoma Reservations Following McGirt Ruling*, NATIVE NEWS ONLINE (Sept. 23, 2020), <https://nativenewsonline.net/currents/google-maps-recognizes-boundaries-of-oklahoma-reservations-following-mcgirt-ruling> [<https://archive.ph/IO72m>]. While focused on the Creek reservation, the decision effectively applied to five tribes (unofficially known by the federal government as the "civilized tribes"). *Id.* The Cherokee, Choctaw, Chickasaw, Creek, and Seminole tribes comprise the majority of Eastern Oklahoma. The land affected spans over 29,000 square miles and includes most of Tulsa, the state's second-largest city. 1.8 million people live on this land, only 10–15 percent of whom are Native American. *McGirt*, 140 S. Ct. at 2482 (Roberts, J., dissenting).

members in the eastern half of Oklahoma,<sup>77</sup> including the city limits of Tulsa, home to nearly half a million residents and a crime rate nearly triple the national average.<sup>78</sup> As with most other expansions of tribal rights throughout the years, celebration by tribal proponents would be short-lived. The more conservative Court would undo the progress of tribal sovereignty case law in *Castro-Huerta*, which signified a sizeable reduction in tribal deference.<sup>79</sup>

Put simply, Oklahoma courts following the *McGirt* decision questioned what jurisdiction they had over crimes against natives occurring in the newly-expanded “Indian country.”<sup>80</sup> Faced with this conundrum, the Court determined that state governments, in addition to the appropriate federal government, shared concurrent jurisdiction to prosecute crimes perpetrated by non-Native Americans against Native American victims in “Indian country.”<sup>81</sup> The dissent, authored by Justice Gorsuch, characterized the decision as a state “unlawful power grab at the expenses of the [tribes].”<sup>82</sup>

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77. *Castro-Huerta*, 142 S. Ct. at 2488-89.

78. *Tulsa OK Crime Rate 1999-2018*, MACROTRENDS, <https://www.macrotrends.net/cities/us/ok/tulsa/crime-rate-statistics> [<https://archive.ph/K2VRn>] (last visited Mar. 6, 2023).

79. *See generally Castro-Huerta*, 142 S. Ct. 2486.

80. *Id.* at 2488–90:

Castro-Huerta’s case exemplifies a now-familiar pattern in Oklahoma in the wake of *McGirt*. The Oklahoma courts have reversed numerous state convictions on that same jurisdictional ground. After having their state convictions reversed, some non-Indian criminals have received lighter sentences in plea deals negotiated with the Federal Government. Others have simply gone free.

According to the opinion, Oklahoma courts claimed an estimated 18,000 cases per year would be transferred to Federal and Tribal Governments following the *McGirt* decision. *Id.* at 2490.

81. *Id.* at 2504. The decision represented a complete disregard of tribal sovereignty which had been considered well-settled law since *Crow Dog*. *Id.* at 2521 (Gorsuch, J., dissenting).

82. *See id.* at 2505–27 (Gorsuch, J., dissenting). For a far more intelligible analysis of the negative effects of this decision from the tribal perspective, see Wayne L. Ducheneaux, II, *Oklahoma v. Castro-Huerta: Bad Facts Make Bad Law*, NATIVE GOVERNANCE CTR. (July 14, 2022), <https://nativegov.org/news/castro-huerta/> [<https://perma.cc/77DJ-X6P2>].

## II. TRIBAL SOVEREIGN IMMUNITY IN THE BANKRUPTCY CONTEXT

To understand the unique nature of sovereign immunity in bankruptcy, it is necessary to compare the sovereign immunity of tribes to that of state governments and federal agencies. Further, there are instances involving the individual debtor in bankruptcy in which application of tribal law is necessary. This treatment is not uniform, and clarification of the deference afforded to tribes by the Code is instrumental to ensure equal treatment in bankruptcy. One such instance is prevalent when a tribal member who receives tribal “per capita payments” files for bankruptcy relief. As such, it is worth discussing the inconsistent treatment of tribes and tribal debtors in this area to more broadly appreciate the specific sovereignty issues this Article addresses.

### A. PER CAPITA PAYMENTS

#### *1. How per Capita Payments Came to Exist*

Beyond sovereign immunity, another context where tribal interests may be treated differently in bankruptcy is in the classification of “per capita payments” under the Federal Indian and Gaming Regulatory Act of 1988 (“IGRA”).<sup>83</sup> The current circuit split on these payments must be examined to properly understand the adjacent circuit split in sovereign immunity of tribes in bankruptcy. While the legal grounds and rationale for each are different, they still remain intrinsically related in the overall scheme of tribal recognition.

As early as the 1960s, several Native American tribes opened high-stakes bingo parlors in order to generate revenue for the tribal entity.<sup>84</sup> For the most part, these types of establishments were prohibited within the states in which they were operating.<sup>85</sup> While federal entities and most local officials supported this expansion and saw it as a way to decrease tribal dependency, states were not as willing to permit these operations in direct contravention of state laws.<sup>86</sup> As revenue grew, tribes extended

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83. 25 U.S.C. § 2710.

84. Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 45 (2007).

85. *Id.* (California, Florida, Maine, New York, and Wisconsin).

86. *Id.* at 46 (“Congress authorized several states, including California and Wisconsin, to exercise criminal jurisdiction over Indian Country. Soon other states, such as Florida, took advantage of the statute.”).

operations beyond bingo and into more lucrative gaming, such as slots, poker, blackjack, and other table games.<sup>87</sup> Tribal ideology supported this course of action because federal jurisdiction preempted criminal laws on tribal lands. Hence, any relevant state prohibitions did not apply to the tribal lands.<sup>88</sup>

While some states resorted to arresting patrons as they left the reservation as a method of prosecuting gaming, others were more aggressive in challenging the tribes directly.<sup>89</sup> California was one such state which criminalized this type of gaming and in the 1980s, the Cabazon Band of Mission Indians challenged California and Riverside County in federal court to affirm the tribe's rights.<sup>90</sup> The games were a major employer and income source for members of the tribe and essentially the only means of revenue for the tribal entity.<sup>91</sup> Effectively, the gaming income was the only thing preventing the sovereign tribe from being wholly financially dependent on the United States. Nevertheless,

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87. *Id.* (first citing *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980); and then citing *United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986)).

88. *Williams v. Lee*, 358 U.S. 217, 220 (1959) (“Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.”).

89. Fletcher, *supra* note 84, at 46 (citing STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* 11-13 (2005)).

90. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204-06 (1987). Gaming of this type was permitted only by charitable organizations in California. CAL. PENAL CODE ANN. § 326.5 (West 1987). The tribe was operating not only bingo games, but also “draw poker and other card games[.]” *Cabazon Band of Mission Indians*, 480 U.S. at 204. The games were open to the public and “played predominantly by non-Indians coming onto the reservations.” *Id.*

91. *Id.* at 205. Referencing a parallel comparison to popular “tribal smokeshops” on reservation lands, the opinion cited the decisions in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134 (1980). *Confederated Tribes of Colville* stood for the premise that while tribal members could not be charged the state cigarette excise tax for purchases on tribal lands, non-Indians were escaping the same tax on tobacco products by entering the reservation, purchasing large quantities of tobacco, and then leaving the reservation to consume them. *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 145. The Court held that the state’s interest in collecting the excise tax from non-Indians outweighed the burden that the collection of the tax had on the tribes. *Id.* at 157. *Moe* addressed a similar motor vehicle tax application. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 469.

California sought to eradicate gaming on tribal lands within the state and the Cabazon Band challenged this course of action.<sup>92</sup>

The challenge reached the Supreme Court in 1987 and the Court ruled in favor of the tribe.<sup>93</sup> The Court effectively removed virtually all existing regulation on gaming on Indian reservations.<sup>94</sup> A tribe's ability to seek revenue through gambling and obtain a degree of financial independence despite state prohibitions was affirmed.

The decision sparked a boom in gaming on tribal lands. An industry which had previously been limited primarily to small bingo games suddenly underwent rapid expansion.<sup>95</sup> While it is unclear how many tribes were operating casinos at the time, within 10 years of the decision there were 281 tribal-operated gaming facilities in the nation.<sup>96</sup> Eight states which had an outright prohibition on casinos nevertheless had the only casinos in the state on tribal lands.<sup>97</sup> The tribal gaming industry would generate \$4.5 billion annual revenue for tribes.<sup>98</sup> As in the wake of the *Crow Dog* and *Worcester* decisions a century earlier, states saw *Cabazon Band* as a threat to their jurisdiction within their own borders and immediately pushed Congress for comprehensive federal regulation

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92. See generally *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

93. *Id.* Justice Stevens authored a dissent, joined by O'Connor and Scalia, which endorsed the opposite premise: that Indian-managed gambling (or any activity on tribal lands which otherwise violated state law) was not exempt from state law *until* Congress explicitly made it so. See *id.* at 222-24 (Stevens, J., dissenting) ("Congress expressly provided that the criminal laws of the State of California 'shall have the same force and effect within such Indian country as they have elsewhere within the State.'") (internal citations omitted). Stevens would further argue that "tribal entrepreneurs, like others who might derive profits from catering to non-Indian customers, must obey applicable state laws." *Id.* at 222.

94. NAT'L GAMBLING IMPACT STUDY COMM'N, NATIVE AMERICAN GAMING <https://govinfo.library.unt.edu/ngisc/research/nagaming.html> [<https://perma.cc/6QX4-5YR2>] (last visited Mar. 2, 2023).

95. See *id.*

96. *Id.*

97. See *id.*

98. *Id.* Of the 106 tribes who received a portion of the \$1.6 billion in net income from casino operators in 1995, 10 tribes accounted for over half. *Id.* The same year, Indian tribes generated the same revenue as the second-largest gambling city in the nation, Atlantic City, and passed the city in revenue the following year. *Id.*

of tribal gaming.<sup>99</sup> Despite significant tribal opposition,<sup>100</sup> Congress passed the IGRA and established the National Indian Gaming Commission (“NIGC”) less than 16 months after the *Cabazon* ruling.<sup>101</sup>

While proponents of the IGRA touted the law as a “crackdown” on Indian gaming, it largely allowed gambling operations on reservations to continue to flourish, merely providing federal governing standards for the tribes.<sup>102</sup> One of the most important of these requirements was a form of mandated tribal profit sharing with enrolled members, called “per capita payments.”<sup>103</sup> Congress defined these payments as “the distribution of money or other thing of value to all members of the tribe, or to identified groups of members, which is paid directly from the net revenues of any tribal gaming activity.”<sup>104</sup> These payments are distributed to all registered members, generally on a quarterly basis.<sup>105</sup>

The payment plan must ultimately be approved by the federal government, but nevertheless creates a mandatory method of ensuring that tribal members also reap the benefit of gaming on tribal lands and are ensured a consistent flow of residual income.<sup>106</sup> These payments usually

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99. Adam Creppelle, *The Tribal per Capita Payment Conundrum: Governance, Culture, and Incentives*, 56 GONZ. L. REV. 483, 492-93 (2020) (first citing Justin Neel Baucom, *Bringing Down the House: As States Attempt to Curtail Indian Gaming, Have We Forgotten the Foundational Principles of Tribal Sovereignty*, 30 AM. INDIAN L. REV. 423, 427 (2006); and then citing Fletcher, *supra* note 84, at 50).

100. *In re Kedrowski*, 248 B.R. 439, 441 (Bankr. W.D. Wis. 2002) (“In fact, many tribes opposed the passage of the Act because certain provisions gave the states considerable influence over gaming on Indian lands.”) (citing Eric Henderson, *Ancestry and Casino Dollars in the Formation of Tribal Identity*, 4 RACE & ETHNIC ANC. L.J. 7, 13 (Spring 1998)).

101. The bill passed the House with nearly 80 percent of the vote. *House Vote #826 in 1988 (100th Congress)*, GOVTRACK (Sept. 27, 1988), <https://www.govtrack.us/congress/votes/100-1988/h826> [<https://perma.cc/9BFV-HRG6>].

102. Further, the Act sought to protect the tribes, as it prohibited any outside entity from gaining too much control over a tribal gaming enterprise, ensuring primarily that crime syndicates largely responsible for many gaming operations up to that time would not be able to set up operations under tribal governance. *See* Martin, *supra* note 6, at 170.

103. Some tribal ordinances, such as that of the Prairie Band of Potawatomi Indians of Kansas, refer to them as “per capita distributions” but the idea is the same and derived from the IGRA. *See In re McDonald*, 353 B.R. 287, 289-90 (Bankr. D. Kan. 2006).

104. 25 C.F.R. § 290.2 (2020).

105. Creppelle, *supra* note 99, at 493-94.

106. Creppelle, in an often-critical analysis of the mandatory payments, summarizes the procedure for tribes more thoroughly than is necessary here:

approach \$1,000 a year, but some of the more lucrative tribal gaming operations can pay each member more than \$1 million per year.<sup>107</sup> No matter the amount, these payments are a substantial source of income to a community of individuals who are faced with the highest poverty rate and lowest labor force participation rate of any racial group in the nation.<sup>108</sup> Thus, issues can arise when a tribal member files bankruptcy and treatment of the payments is not uniform across all bankruptcy districts.

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To distribute per capita payments to tribal citizens, a tribe must develop and obtain federal approval of a tribal revenue allocation plan. The tribal revenue allocation plan must contain a document averring that the tribe has approved the plan and must account for how all of the gaming enterprise's net revenue are allocated. Within sixty days of receipt, the federal government will approve or disapprove of the tribal revenue allocation plan. If denied, the tribe can appeal. Once the plan is approved, most tribes issue per capita payments on a quarterly basis. However, tribes can issue per capita payments once or twice a year. Some tribes make monthly per capita payments. The tribal revenue allocation plan cannot dedicate all gaming revenues to per capita payments; rather, the per capita payments must leave enough money in tribal coffers to fund at least one purpose deemed proper under IGRA.

*Id.*

107. Crepelle, *supra* note 99, at 484 n.6–7 (first citing Dave Polermo, *Tribal Gaming's Dirty Secret*, GLOB. GAMING BUS. MAG. (Feb. 25, 2016), <https://ggbmagazine.com/article/tribal-gamings-dirty-secret/> [<https://perma.cc/6CPZ-QZWE>] (“In many cases, per capita payments are minimal, amounting to less than \$ 1,000 a year.”); and then citing *Inside the Richest Native American Tribe in the U.S. Where Casino Profits Pay \$1M a Year to Every Member*, DAILY MAIL (Aug. 12, 2012, 5:02 PM), <https://www.dailymail.co.uk/news/article-2187456/Shakopee-Mdewakanton-Tribe-Casino-revenue-pays-member-1million-year.html> [<https://archive.ph/2nHzD>]). The debtor in *McDonald* received varying quarterly payments averaging \$826 per quarter, or \$3,304 per year. 353 B.R. at 289. The debtor in another Kansas case, *In re Howley*, received approximately \$400 per month, or \$4,800 per year, from the same tribe. 439 B.R. 535, 537 (Bankr. D. Kan. 2010). Wisconsin's Ho-Chunk Nation was paying the debtor in *In re Kedrowski* approximately \$2,000 quarterly, or \$8,000 per year. 284 B.R. 439, 441 (Bankr. W.D. Wis. 2002).

108. *Native American Poverty*, RED RD., <https://theredroad.org/issues/native-american-poverty/> [<https://perma.cc/8TUJ-P6TA>] (last visited Mar. 2, 2023).

## 2. Treatment of per Capita Payments in Bankruptcy

The commencement of a bankruptcy case creates an “estate” composed of all legal or equitable interests of the debtor in property.<sup>109</sup> The scope of this provision is broad,<sup>110</sup> and essentially all income and assets which are not otherwise exempted by some provision of the Code become “property of the estate” and must be turned over to the trustee for distribution to creditors.<sup>111</sup> In ordinary circumstances, the scope of this property is determined by the laws of the state.<sup>112</sup> However, the analysis becomes complicated when tribal ordinances are involved. Several bankruptcy courts in districts with significant tribal populations have been tasked in recent years with addressing whether per capita payments are included within this definition of estate property and income.<sup>113</sup> However, the caselaw is limited and comes to varying conclusions, depending generally on the laws of the tribe involved. In fact, the few courts that have addressed the issue have primarily involved the same two tribes—the Potawatomi Nation and the Ho-Chunk Nation.<sup>114</sup>

In holding that these payments are not property of the estate post-petition, courts rely upon principles of tribal sovereignty. Specifically, and as is required by the Code, courts look to “applicable nonbankruptcy law.”<sup>115</sup> While this nonbankruptcy law will conventionally be the applicable state property law or commercial codes, within a bankruptcy involving a tribal member it will potentially include federal or tribal law.<sup>116</sup> In one example, the Minnesota Bankruptcy Court held that where the state of Minnesota has the authority to define property rights “with respect to property within its jurisdiction,” so does the Lower Sioux Community.<sup>117</sup> Because Minnesota enjoys the application of its state property law definitions in bankruptcy, there is “no credible reason why

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109. 11 U.S.C. § 541.

110. See *Chappel v. Proctor (In re Chappel)*, 189 B.R. 489, 493 (B.A.P. 9th Cir. 1995); *In re Brunswick Hosp. Ctr., Inc.*, 156 B.R. 896, 900 (E.D.N.Y. 1993); *In re Miller*, 16 B.R. 790, 791 (Bankr. D. Md. 1982).

111. 11 U.S.C. §§ 541–542.

112. See *Miner v. Bay Bank & Tr. Co. (In re Miner)*, 185 B.R. 362, 366 (N.D. Fla. 1995); *In re Bridgepoint Nurseries, Inc.*, 190 B.R. 215, 219 (Bankr. D.N.J. 1996).

113. *In re Musel*, 631 B.R. 744, 747-48 (Bankr. D. Minn. 2021).

114. *Id.* at 747.

115. 11 U.S.C. § 541.

116. *In re Fess*, 408 B.R. 793, 795-96 (Bankr. W.D. Wis. 2009).

117. *Dietz v. Barth (In re Barth)*, 485 B.R. 919, 922 (Bankr. D. Minn. 2013).



the Lower Sioux nation does not enjoy similar authority . . . .”<sup>118</sup> With this support, the court held that future per capita payments were not property of the estate because, under Lower Sioux laws, they are identified as a contingent “periodic payment” rather than a property right.<sup>119</sup>

The same court came to a similar conclusion with a debtor of a different Minnesota tribe 8 years later.<sup>120</sup> There, future per capita payments were not property of the bankruptcy estate because the Pokagon Band of Potawatomi Indians’ Revenue Allocation Plan expressly prevented the creation of any vested property right or interest in the payments.<sup>121</sup> The Western District of Wisconsin came to the same conclusion.<sup>122</sup> While these courts have ruled in favor of tribal debtors, they are seemingly in the minority.<sup>123</sup>

Conversely, most courts that have addressed the issue hold that post-petition per capita payments are a property interest which become

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118. *Id.*

119. *Id.* at 921 (“The plaintiffs argue that Minnesota law determines future per capita payments to be contingent property interests and that the interests of the defendants became property of the bankruptcy estates under 11 U.S.C. § 541(a) upon the bankruptcy filings. However, Minnesota law does not apply to these per capita payments. Tribal law does.”).

120. *See In re Musel*, 631 B.R. 744, 752 (Bankr. D. Minn. 2021). Importantly, the court criticized the *Kedrowski* court’s choice to apply state law in its analysis. *Id.* “Notably, the *Kedrowski* court based its conclusions mainly on the relevant state law, which does not apply in the face of tribal sovereignty—particularly where that sovereignty is explicitly and federally granted.” *Id.*

121. *Id.* at 747.

122. *In re Fess*, 408 B.R. 793, 798 (Bankr. W.D. Wis. 2009) (holding that a Chapter 7 debtor’s future interest in payments from tribal gambling revenues was not subject to turnover under 11 U.S.C. § 541(a)(1) because the Ho-Chunk Nation expressly prevents anyone other than the tribal member from having any right in the payment).

123. On different grounds, the Eastern District of North Carolina Bankruptcy Court has also held in favor of tribal debtors at the expense of creditors. In *In re Meier*, the court denied the trustee’s motion to turnover future payments. No. 13-02323-8, 2013 Bankr. LEXIS 4928, at \*6 (Bankr. E.D.N.C. Nov. 21, 2013). The debtor received, on average, less than \$4,000 per year in payments from the Pokagon Band of Potawatomi Indians. *Id.* at \*5. Although noting that the tribe had a “clear intent to preclude sale or transfer of the right to receive payments to anyone outside of the tribe[,]” the court avoided the question of whether the payments were property of the bankruptcy estate. *Id.* at \*6, \*14. Nevertheless, the court denied the trustee’s motion because doing so would inhibit the debtor’s “fresh start” as envisioned by the Bankruptcy Code. *Id.* at \*15.

property of the estate.<sup>124</sup> While the Minnesota bankruptcy courts have given great deference to the relevant tribal gaming ordinances, many courts will apply state law unless the tribal provisions explicitly preclude the future payments from becoming property of the estate.<sup>125</sup> The Ninth Circuit Bankruptcy Appellate Panel (“B.A.P.”) held as much in an unpublished opinion in 2006.<sup>126</sup>

Accordingly, while it appears that courts are willing to grant deference to tribal property definitions when clear and explicit, that deference is not guaranteed in certain bankruptcy courts. Tribes that wish to protect per capita payments in bankruptcy should adopt ordinances that explicitly disavow any individual property right in the per capita payments.<sup>127</sup> However, as will be further discussed in relation to sovereign

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124. See, e.g., *Ho-Cak Fed. v. Herrell (In re DeCorra)*, 396 B.R. 222, 225 (Bankr. W.D. Wis. 2008) (“[T]he Nation’s interest in controlling the distribution of its revenue far outweighs Wisconsin’s interest in enforcing its commercial code. The right of the Nation to distribute its own assets as it sees fit is central to self-governance; Wisconsin’s interest in uniform treatment of creditors is minimal by comparison.”).

125. See *Johnson v. Cottonport Bank*, 259 B.R. 125, 130-31 (Bankr. W.D. La. 2000) (rejecting the bank’s argument under Louisiana property law that payments were not a property right and could not be property of the estate and comparing per capita payments to intangible property interests, such as the right to receive an annuity, insurance proceeds, accounts receivable, or federal program entitlements); *In re Kedrowski*, 284 B.R. 439, 445 (Bankr. W.D. Wis. 2002) (defining property rights under state law and comparing the tribal per capita payments to those of a partner in a partnership or Wisconsin’s “dairy termination” payments); *Brown v. Locke (In re Brown)*, No. NC-06-1101, 2006 Bankr. LEXIS 4902, \*14-15, \*25-30, \*32-33 (B.A.P. 9th Cir. Sept. 28, 2006) (Pomo Indians of the Sherwood Valley Rancheria ordinance arguably denied any vested property right in future payments, but the 9th Cir. B.A.P. applied both California state property law and the ordinance because of conflicting provisions of the ordinance, holding the future payments were property of the bankruptcy estate); *In re McDonald*, 353 B.R. 287, 294 (Bankr. D. Kan. 2006) (rejecting debtors’ argument that Potawatomi Code created a trust in the payments which would exempt them from the bankruptcy estate); *In re Howley*, 439 B.R. 535, 539, 541-42 (Bankr. D. Kan. 2010) (relying largely on *McDonald* in rejecting debtor’s use of tribal exemptions to exempt per capita payments where the debtor was an enrolled member but did not reside on tribal lands and rejected debtor’s argument that the tribal exemption was “local law” within the meaning of 11 U.S.C. § 523(b)(3)(A)).

126. See *Brown*, 2006 Bankr. LEXIS 4902 at \*14-15.

127. For broader analysis outside of the exclusive bankruptcy context, see *United States v. Puyallup Tribe of Indians*, 2014 U.S. Dist. LEXIS 49978 (W.D. Wash. Apr. 9, 2014); *Clay v. Comm’r*, 990 F.3d 1296 (11th Cir. 2021); Arthur Acevedo, *An Argument in Support of Tax-Free Per-Cap Distribution Payments Derived from Native American Nations Gaming Sources*, 37 N. ILL. U.L. REV. 66 (2016); Pippa Browde, *Tax Burdens*

immunity, a higher court's adjudication or, preferably, Congressional textual clarification may be necessary to confirm the deference to tribal laws in bankruptcy.

#### B. STATE AND AGENCY IMMUNITY

In many judicial contexts, the government's immunity from suit is absolute.<sup>128</sup> However, the Code and the fresh start envisioned by it justify one limited exception.<sup>129</sup> Ordinarily, no immunity is greater than that enjoyed by the states under the Eleventh Amendment.<sup>130</sup> Until 1990, it was understood that this state immunity was impenetrable, even in the bankruptcy context—two Supreme Court cases towards the turn of the century affirmed as much.<sup>131</sup> In *Hoffman*, the Court provided footing for extending protections of governmental sovereignty to bankruptcy through the Code.<sup>132</sup> The Court held that § 106 did not authorize a monetary recovery against a state in bankruptcy.<sup>133</sup> The Court went a step further three terms later in *Nordic Village*.<sup>134</sup>

When the corporate debtor in *Nordic Village* filed for Chapter 11, an officer and shareholder of the debtor drew a \$26,000 check from the corporate account to pay off his own federal tax liabilities.<sup>135</sup> Upon discovery of the fund transfer, the trustee commenced an adversary proceeding against the Internal Revenue Service (IRS) to recover the funds.<sup>136</sup> The bankruptcy court permitted recovery of the transferred

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*and Tribal Sovereignty: The Prohibition on Lavish and Extravagant Benefits Under the Tribal General Welfare Exemption*, 20 NEV. L.J. 651, 685-87 (2020).

128. See generally Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521 (2003); Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529 (1992).

129. See 11 U.S.C. § 106(a).

130. See U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

131. See *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 101 (1989); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 32-33 (1992).

132. See *Hoffman*, 492 U.S. at 101.

133. *Id.* at 102.

134. See *Nordic Vill.*, 503 U.S. at 39.

135. *Id.* at 31.

136. *Id.*

funds.<sup>137</sup> After the Northern District of Ohio and a divided panel of the Sixth Circuit affirmed, the Supreme Court overturned the decision.<sup>138</sup> Focusing specifically on § 106(c) and reading it with—rather than in isolation from—subsections (a) and (b), the Court determined that the language lacked the unequivocal textual expression of Congressional intent required for a waiver of governmental immunity.<sup>139</sup> As such, governmental entities still enjoyed sovereign immunity from attempted claims for monetary relief against them within a bankruptcy case.<sup>140</sup> However, the Code was amended shortly after *Nordic Village*, and uncertainty would once again be omnipresent.

Congressional amendment of § 106 in 1994 effectively overruled *Hoffman* and *Nordic Village* within at least some bankruptcy contexts, and more expressly waived “sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief” in bankruptcy.<sup>141</sup> The Supreme Court confirmed this a decade later in *Katz*.<sup>142</sup>

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137. *Id.* For the non-bankruptcy practitioner, avoidance actions are taken by the trustee (or debtor-in-possession) to force a creditor or other insider who has received a transfer of funds or assets within a certain period of the bankruptcy filing to return the funds to the bankruptcy estate for the benefit of creditors in the bankruptcy action. *See* 11 U.S.C. § 547. For a more barebones explanation of the avoidance process, see Harry J. Giacometti & Samantha J. Fitzpatrick, *Avoiding Avoidance Actions in Bankruptcy*, N.J.L.J. (Mar. 2, 2022), <https://www.law.com/njlawjournal/2022/03/02/avoiding-avoidance-actions-in-bankruptcy/>. *See also* *Cook v. United States (In re Yahweh Ctr., Inc.)*, 27 F.4th 960, 964 (4th Cir. Mar. 8, 2022) (“‘[A]voiding’ a transfer of property or an obligation makes the transfer or obligation null and void. In other words, whatever property the debtor transferred is returned to the debtor and any obligation the debtor incurred goes away. If a transfer or obligation is avoided, it is as if neither ever happened.”).

138. *Nordic Vill.*, 503 U.S. at 31, 39.

139. *See id.* at 33-37. The Court rested on precepts of statutory interpretation which emphasize “the traditional principle that the Government’s consent to be sued ‘must be construed strictly in favor of the sovereign,’ and not enlarge[d] . . . beyond what the language requires.” *Id.* (internal citations omitted).

140. *Id.* at 39. Thus, under the reading of § 106 as it stood in 1992, “[n]either § 106(c) nor any other provision of law establishes an unequivocal textual waiver of the Government’s immunity from a bankruptcy trustee’s claims for monetary relief.” *Id.*

141. 140 Cong. Rec. 27693 (1994); *see* 11 U.S.C. § 106(a).

142. *See* *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 377-78 (2006). Despite *Nordic Village* being decided just 14 years earlier, the Court, by 5-4 majority, determined that the ratification of the Bankruptcy Clause itself had subordinated state sovereign immunity rather than subsequent congressional action. *Id.* at 358-59, 377-78; *see also* *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 443 (2004). The Court did take

Faced with the same question of immunity addressed by *Nordic Village* and *Hoffman* less than 2 decades earlier, the *Katz* Court would affirm the notion that the Bankruptcy Clause had expressly granted Congress the power of limited subrogation of sovereign immunity in order to carry out the fundamental purposes of bankruptcy law.<sup>143</sup> Similar arguments of immunity made by the IRS and other governmental entities have been rejected under the express language of § 106(a) as amended following *Nordic Village*.<sup>144</sup> Despite amendment, the immunity of “governmental units” in bankruptcy is still not resolved,<sup>145</sup> but a significant majority has developed at least as it pertains to states and federal agencies.<sup>146</sup> However, the determination is far more complicated when applied to tribal entities, as the question of whether a Native

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caution to note that this abrogation was one within a “limited sphere.” *Katz*, 546 U.S. at 378.

143. See *Katz*, 546 U.S. at 362-63.

144. See *Cook v. United States (In re Yahweh Ctr., Inc.)*, 27 F.4th 960, 966 (4th Cir. 2022); *Hunsaker v. United States*, 902 F.3d 963, 966–67 (9th Cir. 2018) (awarding the debtors damages for the IRS’s violation of the automatic stay notwithstanding claim of sovereign immunity); *Lockhart v. Jackson (In re Lockhart)*, No. 17-532, 2021 Bankr. LEXIS 1698, at \*5, \*9 (Bankr. N.D.W. Va. June 24, 2021) (holding that the IRS and a state child support agency are “governmental units” within the meaning of § 106(a), and that they have no sovereign immunity to defend them from an action pertaining to an alleged violation of the automatic stay). Coincidentally, the Supreme Court started 2023 by hearing oral arguments on this matter as they relate to the bankruptcy of Puerto Rico. Specifically, the case centers on whether a government board created by Congress to oversee Puerto Rico’s restructuring has immunity from suit in bankruptcy. See *Fin. Oversight & Mgmt. Bd. v. Cooperativa de Ahorro (In re Fin. Oversight & Mgmt. Bd.)*, 41 F.4th 29, 37 (1st Cir. 2022).

145. This question revolves around § 106’s use of the term “governmental unit” as defined within 11 U.S.C. § 101(27), which expressly reads:

The term “governmental unit” means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or *other foreign or domestic government*.

(emphasis added). Thus, whether the provision applies to the tribes is conditioned on whether the tribes fall within the definition of an “other foreign or domestic government.” *Id.*

146. See generally *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006).

American tribe is to be considered a “governmental unit” under the terms of the Code is yet to be definitively ascertained.

### C. THE VARYING INTERPRETATIONS OF § 106

The modern application of the principle of tribal sovereignty was established in a case in which a tribe was the unsuccessful litigant. In 1996, the Supreme Court was faced with Florida’s challenge of the Indian Gaming Regulatory Act as a violation of their constitutional sovereign immunity.<sup>147</sup> *Seminole Tribe of Florida* involved a Congressional attempt to allow tribes to sue states in direct contravention of the Eleventh Amendment.<sup>148</sup> The Act authorized tribes to bring suit in federal court if states refused to negotiate regarding Native American gaming activities within the state.<sup>149</sup>

In answering the question favorably for state interests, the Court established the two-part test regarding abrogation of sovereign immunity which remains pertinent to this overarching analysis.<sup>150</sup> First, a court must determine whether “Congress has ‘unequivocally expresse[d] its intent to abrogate the immunity[.]’”<sup>151</sup> If the intent is clear and unequivocal, the court must then determine that it was enacted pursuant to a valid grant of power from the states in the Constitution.<sup>152</sup> While the Court did determine that the intent was clear, it nevertheless determined that the Eleventh Amendment prevented Congressional authorization of suits against nonconsenting states.<sup>153</sup>

The majority opinion’s dicta and an explicit reaffirmation a decade later would control the extension of this principle to bankruptcy until 2006.<sup>154</sup> Following *Seminole Tribe*, the majority of courts went so far as

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147. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47, 51 (1996).

148. *See id.*

149. Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A).

150. *See generally Seminole Tribe*, 517 U.S. 44.

151. *Id.* at 55.

152. *See id.*

153. *Id.* at 56, 72.

154. *See id.* at 72 n.16 (“Although the copyright and bankruptcy laws have existed practically since our Nation’s inception, and the antitrust laws have been in force for over a century, there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States.”); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001) (confirming that Congress cannot abrogate sovereign immunity provided under the Eleventh Amendment by course of Article I powers). Of note, this case concerned an attempted congressional abrogation via the Commerce Clause and thus is a parallel but distinguishable scenario to later analyses of

to hold that § 106(a) was plainly unconstitutional.<sup>155</sup> For example, the Third Circuit elaborated that the question was effectively no different from that in *Seminole Tribe* and there was no “principled basis to distinguish the Bankruptcy Clause from other Article I clauses.”<sup>156</sup> In upholding § 106(a), the Court would have to differentiate its passage from those within Congress’s Article I powers in order to uphold its abrogation of immunity. It did just that in 2006.<sup>157</sup>

In *Central Virginia Community College v. Katz*, the Supreme Court was faced with the factual scenario where the bankruptcy trustee for a chain of bookstores filed complaints against several Virginia state colleges, alleging preferential transfers.<sup>158</sup> Because only one college had filed a claim in the case, the remainder argued that as “arms of the state” they were immune from suit under the Eleventh Amendment.<sup>159</sup> The Court rejected this approach and in a deep dive into the canonical justifications for the Bankruptcy Clause, held that the several states’ passage of the Constitution acted, to some extent, as a waiver of their sovereign immunity within the realm of bankruptcy.<sup>160</sup> Specifically, the

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congressional abrogation via the Bankruptcy Clause. *See id.* at 360. As expressed herein, the Bankruptcy Clause brings with it a historical surrender of state power which the Commerce Clause partially lacked. *See generally* Martin, *supra* note 6.

155. *See* NVR Homes, Inc. v. Clerks of the Circuit Courts (*In re* NVR, L.P.), 189 F.3d 442, 447 (4th Cir. 1999); Sacred Heart Hosp. v. Dep’t of Pub. Welfare (*In re* Sacred Heart Hosp. of Norristown), 133 F.3d 237, 245 (3d Cir. 1998); Mitchell v. Franchise Tax Bd. (*In re* Mitchell), 209 F.3d 1111, 1120 (9th Cir. 2000).

156. *Sacred Heart Hosp.*, 133 F.3d at 243.

157. *See generally* Katz, 546 U.S. 356 (2006).

158. *Id.* at 360.

159. *Id.*

160. *See id.* at 362:

Bankruptcy jurisdiction, at its core, is *in rem*. *See Gardner v. New Jersey*, 329 U.S. 565, 574, 67 S. Ct. 467, 91 L.Ed. 504 (1947) (“The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*”). As we noted in *Hood*, it does not implicate States’ sovereignty to nearly the same degree as other kinds of jurisdiction. *See* 541 U.S., at 450–451, 124 S. Ct. 1905 (citing admiralty and bankruptcy cases). That was as true in the 18th century as it is today. Then, as now, the jurisdiction of courts adjudicating rights in the bankrupt estate included the power to issue compulsory orders to facilitate the administration and distribution of the *res* [sic]. It is appropriate to assume that the Framers of the Constitution were familiar with the contemporary legal context when

Supreme Court came to the “ineluctable conclusion” that “States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to ‘Laws on the subject of Bankruptcies.’”<sup>161</sup> Accordingly, the question of sovereign immunity as to states and their sub-units became well-settled law. However, the application of the same question as to the federal government, its many agencies, and other governments implicated by the Code remained.

Other bankruptcy courts have made the analysis increasingly difficult where sovereign immunity has been addressed only in very narrow bankruptcy contexts.<sup>162</sup> Further, Native American sovereign immunity is uniquely different from that of the state and federal governments.<sup>163</sup> Thus, while courts may have made a definitive determination on whether tribal immunity is abrogated in that specific context, they left the door open to the broader question.<sup>164</sup>

#### D. WHY SOVEREIGNTY IN BANKRUPTCY MATTERS

With the foundations of this analysis laid, it becomes necessary to establish why such a niche area of interest is nevertheless important. One

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they adopted the Bankruptcy Clause – a provision which . . . reflects the States’ acquiescence in a grant of congressional power to subordinate to the pressing goal of harmonizing bankruptcy law sovereign immunity defenses that might have been asserted in bankruptcy proceedings.

161. *Id.* at 377 (first citing *Blatchford v. Native Vill. Of Noatak*, 501 U.S. 775, 779 (1991); and then citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

162. *See In re Nat’l Cattle Cong.*, 247 B.R. 259, 272 (Bankr. N.D. Iowa 2000), in which the court held that that Congress had not unequivocally abrogated the tribe’s sovereign immunity via 11 U.S.C. § 106(a). The Sac and Fox tribe’s proof of claim with a disclaimer of waiver did not waive immunity. *Id.* The tribe was allowed to elect between withdrawing its proof of claim and removing its waiver disclaimer, but it could not pursue a claim in the case and still retain its sovereign immunity. *Id.* *See also* *Stringer v. Chrysler (In re Stringer)*, 252 B.R. 900, 901 (Bankr. W.D. Pa. 2000) (bankruptcy court’s jurisdiction to hear adversary proceeding does not operate to pierce an Indian nation’s immunity from suit).

163. This sovereign immunity is more limited than that of the federal and state governments and even distinct from that enjoyed by other independent nations. *See* Steven T. Waterman, *Tribal Troubles—Without Bankruptcy Relief*, 24 AM. BANKR. INST. J. 44 (2010).

164. Specifically, the legal reasoning that resulted in the questions as to state abrogation in bankruptcy offers no context to the analysis as it applies to the tribes.



of the primary reasons behind the development of the Code is the protection of the well-intentioned debtor. Specifically, the Code exists to provide a “fresh start” to debtors who otherwise may have no means of digging themselves out of financial demise which may appear insurmountable.<sup>165</sup> Along with the Code comes its many protections, including those which grant protection to the debtor they would not otherwise receive in daily life. Protections such as the “automatic stay” grant the debtor a breathing spell from payments, collection attempts and foreclosure, creditor communications, and other actions intertwined with debt collection which so regularly burden a debtor outside the realm of bankruptcy.<sup>166</sup> With very narrow exceptions, the automatic stay bars all collection attempts upon the filing of bankruptcy, allowing the debtor a time period to get their financial affairs in order in preparation for attempting to obtain their financial “fresh start.”<sup>167</sup>

Violations of the automatic stay can result in significant penalties and thus, the experienced creditor or debt collector rarely risks violating its provisions. A debtor who is in the position of bankruptcy filing has likely faced collection attempts for months, and this protection is generally a welcome period of calm before the bankruptcy proceedings begin. Further, the debtor receives assurance that if they are successful in their bankruptcy, *all* creditors will be bound to the bankruptcy discharge and their debt will be placed in a position where it is much more manageable.<sup>168</sup> Specifically in the context of a Chapter 13 debtor, a

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165. See, e.g., William C. Whitford, *Changing Definitions of Fresh Start in U.S. Bankruptcy Law*, 20 J. CONSUMER POL’Y 179, 179 (1997) (“U.S. consumer bankruptcy law is nearly unique in the world in its commitment to the ‘fresh start.’”).

166. 11 U.S.C. § 362(a) (“a petition filed . . . operates as a stay, applicable to all entities”). This bar includes collection attempts; commencement or continuation of legal, quasi-legal or tax liability proceedings; enforcement of a judgment; any act to obtain possession of debtor’s property or create a lien as to the same; and setoff of any debt owed to the debtor. *Id.*

167. “Section 362 of the Bankruptcy Code is effective upon petition filing and operates as a breathing spell from collection attempts. The stay is automatic and applicable to all entities to stay all collection attempts outside of the bankruptcy forum.” Lockhart v. Jackson (*In re Lockhart*), No. 1:17-bk-00532, 2021 WL 2632765, at \*6 (Bankr. N.D.W. Va. June 24, 2021) (citing *Chicago v. Fulton*, 141 S. Ct. 585, 589 (2021)).

168. In Chapter 7, this is generally true where most, if not all, or the debtor’s remaining debt is discharged by the completion of the bankruptcy, which in theory operates as a permanent injunction against creditors attempting to collect pre-bankruptcy debt. In Chapter 13, this is effectuated through the terms of the Chapter 13 plan, which

confirmed bankruptcy plan binds the debtor and all creditors to its terms, whether or not the creditor is provided for in the plan and regardless of whether the creditor has objected to, accepted, or rejected the plan.<sup>169</sup>

Thus, the Code's protections preventing collection and provisions binding creditors to the repayment of debt under the terms of the plan act as an important buffer between debtor and creditor and as an equalizer between one creditor and the other. If one creditor were not bound by these protections and terms, it would be able to enforce its will at the expense of other creditors and in violation of the debtor's right to a fresh start. This situation arises where a creditor is immune from the bar on collection attempts, able to withhold or offset income which would otherwise become part of the bankruptcy estate, enforce judgments and liens which would otherwise be treated through the bankruptcy process, and, perhaps most importantly, be bound by the repayment terms of the plan in a Chapter 13 case. Where a creditor can sidestep all these aforementioned considerations by claiming sovereign immunity, the bankruptcy process cannot function as intended. This is the dilemma created when tribes and their business entities enjoy sovereign immunity in the bankruptcy context.

### III. THE CURRENT CIRCUIT SPLIT

The starting point of statutory interpretation is "the language of the statute itself."<sup>170</sup> Whereas courts can usually come to a consensus reading of Congressional intent under this analysis, unanimity has evaded bankruptcy, district, and circuit courts of the nation on this specific matter. Because it is so infrequently implicated, only a small number of higher courts have ruled on the question. However, of the four circuits to have faced the question, an even split has resulted. Specifically, the First and Ninth Circuit have held in favor of abrogation, whereas the Sixth and Eighth Circuit have taken the opposite position.<sup>171</sup> The split exists on what

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creates a monthly payment plan for the debtor and binds the creditors to its terms, regardless of the pre-bankruptcy obligations.

169. 11 U.S.C. § 1327(a).

170. *Philadelphia v. Nam* (*In re Gi Nam*), 273 F.3d 281, 286 (3d Cir. 2001).

171. Two district courts have fallen on the side of abrogation: the Northern District of New York and District of New Mexico. The District of New Jersey has held for non-abrogation, thus resulting in a 2-2 circuit split and 4-3 overall national split. *See generally* *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004); *Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians* (*In re Coughlin*), 33 F.4th 600 (1st Cir. 2022); *Turning Stone Casino v. Vianese* (*In re Vianese*), 195 B.R. 572 (Bankr.

is essentially one question of congressional intent: whether, as defined by 11 U.S.C. § 101(27), a tribal government is a “domestic government” within the context of the Bankruptcy Code.<sup>172</sup>

A. THE SLIM MAJORITY – THE COURTS HOLDING FOR TRIBAL SOVEREIGN  
IMMUNITY ABROGATION UNDER § 106

Shortly following the amendments to § 106 in the aftermath of *Nordic Village*, the Bankruptcy Court for the Northern District of New York was put in an important position as one of the first courts to address the practical extent of the sovereign immunity waiver under the new provision.<sup>173</sup> The case happened to be one which revolved specifically around tribal sovereign immunity, allowing New York—one of the few districts on the East Coast that regularly deals with tribal issues—to become the first to rule on the application of the new § 106 to the tribes.<sup>174</sup>

In *Turning Stone*, an Oneida-owned casino filed a claim in a non-native couple’s Chapter 7 as one of the debtors owed more than \$16,000 relating to gambling debts.<sup>175</sup> Specifically, the casino testified that the husband had applied for and received an “extension of credit and check cashing privileges” at the casino less than a year before the couple filed

N.D.N.Y. 1995); *In re Platinum Oil Props., LLC*, 465 B.R. 621 (Bankr. D.N.M. 2011); *but see* *Bucher v. Dakota Fin. Corp. (In re Whitaker)*, 474 B.R. 687, 697 (B.A.P. 8th Cir. 2012); *Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC)*, 917 F.3d 451, 467 (6th Cir. 2019); *Subranni v. Navajo Times Publ’g Co. (In re Star Grp. Commc’ns., Inc.)*, 568 B.R. 616 (Bankr. D.N.J. 2016).

172. See 11 U.S.C. § 106(a), which cross-references the definitions provided in § 101(27).

173. *Turning Stone Casino v. Vianese (In re Vianese)*, 195 B.R. 572, 575-76 (Bankr. N.D.N.Y. 1995).

174. See *id.* Of the 29 federal districts east of the Ohio River, only nine have a tribal reservation within their borders. Of the 25 reservations located within these east coast districts, three, the Onondaga, Oneida, and Saint Regis Mohawk reservations, are located within the Northern District of New York’s geographical bounds. See *Indian Lands of Federally Recognized Tribes of the United States*, BUREAU OF INDIAN AFFS., <https://www.bia.gov/sites/default/files/dup/assets/bia/ots/webteam/pdf/idc1-028635.pdf> [<https://perma.cc/Y97W-4858>] (last visited Mar. 2, 2023). Northwestern New York was once home to the Iroquois Confederacy, comprising six powerful tribes who resided across nearly the entirety of what is currently the State of New York. *The Six Nations Confederacy During the American Revolution*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/the-six-nations-confederacy-during-the-american-revolution.htm> [<https://perma.cc/MK6Q-GPUX>] (last visited Mar. 2, 2023).

175. 195 B.R. at 574.

for bankruptcy.<sup>176</sup> While he had attempted to pay the debt months before the couple filed, the check was returned for insufficient funds.<sup>177</sup> The tribe initiated an adversary proceeding under § 523 to have the gambling debt determined non-dischargeable.<sup>178</sup> However, the case did not focus on the husband's debt, instead addressing the casino's claim against the spouse, who both parties contended had no personal involvement in the casino debt, and the attorney's fees associated therewith.<sup>179</sup>

The court quickly dismissed the claim against the spouse, and took up the matter of awarding attorney's fees against the Oneida tribe as proscribed by 11 U.S.C. § 523, against which the tribe claimed immunity.<sup>180</sup> The court considered the implications of tribal sovereignty *and* sovereign immunity, and found abrogation by two methods, first determining that "in commencing the adversary proceeding, [the tribe] necessarily consented to the Court's jurisdiction to determine any *related* claims brought adversely against it."<sup>181</sup> Essentially, the court determined that the Code requires that a tribe consent to jurisdiction when it files a claim in the bankruptcy case, thereby waiving any claim to immunity.<sup>182</sup>

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176. *Id.*

177. *Id.*

178. *Id.* at 573-74. For clarification, § 523 sets out certain debts which are non-dischargeable in bankruptcy. 11 U.S.C. § 523. The provision is primarily purposed to prohibit wrongful discharge and punish the dishonest debtor. Among these non-dischargeable debts are gambling-related debts.

179. *See id.*

180. *Id.* at 574-75.

181. *Id.* at 575 (citing *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995)).

182. *Id.* The application is the same for all governmental entities under the language of § 106(b):

A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

Were it the case that tribes always choose to file a claim in the bankruptcy case, this analysis may end here. *See also* *Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC)*, 917 F.3d 451, 464 (6th Cir. 2019):

While the Supreme Court has long held that such waiver is possible for non-tribal sovereigns, few courts have had the opportunity to

The court then went a step further by delving into the new amendments to § 106 and finding that tribal entities, as “domestic dependent nations,” fell within the Code’s definition of a “governmental unit.”<sup>183</sup> This meant that the immunity tribes enjoy outside of bankruptcy is explicitly abrogated by § 106.<sup>184</sup> Thus, under *In re Vianese*, a tribal entity not only forfeits any claim to immunity by filing a claim in the bankruptcy case, but immunity of the tribe as to the debtor is stripped in totality in bankruptcy purely by the existence of § 106, regardless of whether the creditor files a claim in the case.<sup>185</sup>

The most recent opinion on the matter came from within the First Circuit. Brian Coughlin took an \$1,100 payday loan from a lender owned wholly by the Lac Du Flambeau Band of Lake Superior Chippewa Indians (“the Lac”).<sup>186</sup> Less than a year later, he filed for Chapter 13, listing the Lac as a creditor for his debt, which had accrued nearly \$500 in interest in just months due to an exorbitant interest rate.<sup>187</sup> Despite awareness of

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extend the Supreme Court’s holding to Indian tribes. Those that have had the opportunity, however, have largely chosen to do so, holding that certain types of litigation conduct by tribes constitute a sufficiently clear waiver of tribal sovereign immunity. (internal citations omitted).

However, and as will be discussed herein, this is rarely the case, particularly in districts where tribes have reason to believe they still enjoy sovereign immunity in bankruptcy.

183. *Turning Stone Casino v. Vianese (In re Vianese)*, 195 B.R. 572, 575-76 (Bankr. N.D.N.Y. 1995). This is a direct reference to Marshall’s language in the *Cherokee Nation* opinion, evidencing the impact that this simple statement still carries in tribal law contexts to this day. This time, however, the court references the 1991 tax case of *Okla. Tax Comm’n v. Citizen Band of Potawatomi Indian Tribe*, which held that a tribe is not subject to state sales tax for sales made to tribal members. 498 U.S. 505 (1991).

184. *Id.* at 575.

185. This distinction is essentially meaningless within the court which sides with the majority in holding for Congressional abrogation. Under this application, a tribal creditor enjoys no immunity as to a debtor in bankruptcy. However, as evidenced in *Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600 (1st Cir. 2022), this distinction is of great significance where courts do not hold for abrogation, as it creates the ability for the tribal creditor to get around bankruptcy law (and the protections it affords to distressed debtors) where the tribe does not file a claim in the case.

186. *Coughlin*, 33 F.4th at 604.

187. *Id.* The loan included a 108 percent interest rate. Notably, there has been a significant push among the larger tribal nations in recent years to enact consumer protection laws in Indian Country. See NATIVE ASSETS RSCH. CTR., BUILDING TRUST:

the automatic stay and Coughlin's repeated requests to contact his bankruptcy attorney, the Lac continued direct collection attempts.<sup>188</sup> According to Coughlin, the attempts became so intimidating that he eventually attempted to take his own life.<sup>189</sup>

The collection attempts were precisely the type which an informed creditor would cease as soon as notice of bankruptcy filing is received.<sup>190</sup> However, the Lac defended its actions based on the belief that it was immune from suit, including a suit to enforce the automatic stay.<sup>191</sup> While the bankruptcy court agreed with the Lac, the First Circuit ultimately overturned on appeal, determining that sovereign immunity was abrogated in § 106(a).<sup>192</sup> The analysis, according to the court, came down to whether a tribal government is a "domestic government" as enumerated in § 101(27).<sup>193</sup> After a substantial analysis of the historical treatment of tribal governments dating back to Justice Marshall's "domestic, dependent nation[]" language, the court ruled against the tribe and found that the Code abrogates tribal sovereign immunity.<sup>194</sup>

The *Coughlin* dissent, referencing and siding with *Buchwald Capital Advisors*,<sup>195</sup> put great weight on the noticeable absence of any explicit mention of tribal entities in the statute.<sup>196</sup> In fact, Chief Justice Barron went a step further, pointing out that antiquated bankruptcy provisions had expressly mentioned the tribes where necessary, yet § 106(a)

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CONSUMER PROTECTION IN NATIVE COMMUNITIES, Research Report 2011-5 (Jan. 2011), [https://www.cdfifund.gov/sites/cdfi/files/documents/\(54\)-building-trust-consumer-protection-in-native-communities.pdf](https://www.cdfifund.gov/sites/cdfi/files/documents/(54)-building-trust-consumer-protection-in-native-communities.pdf) [<https://perma.cc/32VK-AYAY>].

188. *Coughlin*, 33 F.4th at 604.

189. *Id.*

190. The automatic stay acts as a "breathing spell" and protects a debtor from any action that would interfere with the debtor's ability to effectively reorganize. *Houck v. Substitute Tr. Servs.*, 791 F.3d 473, 480-81 (4th Cir. 2015); 11 U.S.C. § 362.

191. *Coughlin*, 33 F.4th at 604.

192. *Id.* at 605.

193. *Id.*

194. *Id.* at 606–08. While a complex analysis, the First Circuit's determination boils down to a two-step approach under the definition of a "domestic government" in 11 U.S.C. § 101(27). First, the court postured that "there is no real disagreement that a tribe is a government." *Id.* at 605. Second, tribes are within the "sphere of authority" of the United States and accordingly a tribal government fits squarely within the definition of a domestic government. *Id.* at 606.

195. *Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings)*, 917 F.3d 451, 460 (6th Cir. 2019).

196. *Coughlin*, 33 F.4th at 613 (Barron, J., dissenting).

deliberately fails to mention tribes.<sup>197</sup> While persuasive in reasoning, the majority ultimately undermined this approach as a misplaced “magic words” test and ruled in favor of abrogation of tribal immunity in bankruptcy.<sup>198</sup>

A decade earlier in *Platinum Oil*, the Bankruptcy Court for the District of New Mexico came to the same conclusion as the First Circuit.<sup>199</sup> Importantly, *In re Platinum Oil Properties* is the only case to extend the majority position to corporate bankruptcies.<sup>200</sup> Although it carries little precedential weight nationally, it nevertheless bears discussion.

Platinum Oil filed Chapter 11 bankruptcy and accordingly filed its declaration, claiming a right in two oil and gas leases on lands of the Jicarilla Apache Nation.<sup>201</sup> The tribe ultimately contested Platinum’s interests in the mineral rights.<sup>202</sup> In attempting to enforce its own rights, the tribe argued that sovereign immunity insulated it from the binding effects of a confirmed Chapter 11 plan.<sup>203</sup> The court determined that tribal governments fell within the definition of “governmental unit” in § 106(a)’s cross-reference,<sup>204</sup> such that it met the burden for a clear and equivocal waiver by Congress.<sup>205</sup> This holding was in line with the same court’s position prior to the amendment to § 106(a).<sup>206</sup>

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197. *Id.*:

In fact, if unusually well informed, such a reader could not help but notice one more thing too. Congress made express reference to ‘Indian Territory’ in a precursor attempt to set the rules of the road for bankruptcy under federal law. Yet in the provision of the Code addressing whether Indian tribes would retain their sovereign immunity, Congress for some reason chose not to make any mention of the tribes at all.

198. *Id.* at 608.

199. *In re Platinum Oil Props., LLC*, 465 B.R. 621 (Bankr. D.N.M. 2011).

200. *See generally id.*

201. *In re Platinum Oil Props., LLC*, 465 B.R. at 626.

202. *Id.*

203. *Id.* at 642. The Chapter 11 plan with which the tribe was concerned was not necessarily the one at issue, but a previous plan resulting from the 2004 bankruptcy of Golden Oil Company, which effectively assigned the rights subject to this adversary proceeding. *Id.*?

204. 11 U.S.C. § 101(27).

205. *In re Platinum Oil, LLC*, 465 B.R. at 643.

206. *See In re Sandmar Corp.*, 12 B.R. 910, 916 (Bankr. D.N.M. 1981).

In *Krystal Energy*, which likely carries the most authority against the tribes' position, the Ninth Circuit held that there was an explicit abrogation of tribal sovereign immunity within § 106.<sup>207</sup> The Ninth Circuit, overturning the District of Arizona, determined that Congress intended for tribes to fall within the "governmental unit" catch-all of § 101(27).<sup>208</sup> In interpreting this language, the Court determined that where the definition included foreign *and* domestic governments and where Indian tribes are certainly governments, it must fall within the definition of one or the other.<sup>209</sup>

More specifically referencing the language of *Cherokee Nation*, the court found that as "domestic dependent nations," tribal governments equivocally fall within the definition of a domestic government.<sup>210</sup> In determining there was an abrogation of tribal sovereign immunity, the court found solace in the fact that defining tribes as a governmental unit also granted them special treatment within certain provisions of the Bankruptcy Code which they would not otherwise receive if not included within this definition.<sup>211</sup>

#### B. THE NON-ABROGATION APPROACH

In the most cited opinion on the subject of tribal sovereignty in bankruptcy, the Eighth Circuit Court of Appeals held that § 106 did not expressly abrogate tribal sovereign immunity.<sup>212</sup> The case involved several adversarial proceedings against the Lower Sioux Indian Community's subsidiary finance corporation.<sup>213</sup> The proceedings sought turnover of per capita payments owed to debtors and a lien asserted by the

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207. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056-57 (9th Cir. 2004).

208. *Krystal Energy*, 357 F.3d at 1057. The Bankruptcy Court for the District of Arizona was faced with what could have been a similar factual scenario less than 2 years prior, but because the tribe had filed a claim in the case, the court only had to determine that the tribe's immunity had been waived. *See Warfield v. Navajo Nation (In re Davis Chevrolet, Inc.)*, 282 B.R. 674, 678 (Bankr. D. Ariz. 2002). However, the court did make note, without proffering its own view on the question, that both sides concurred that the tribe fell within the definition of a "governmental unit" within the Code. *Id.* at 678 n.2.

209. ". . .[U]nless one entertains the possibility of extra-terrestrial states." *Krystal Energy*, 357 F.3d at 1057.

210. *Id.* at 1057-58.

211. *Id.* at 1060.

212. *Bucher v. Dakota Fin. Corp. (In re Whitaker)*, 474 B.R. 687, 697 (B.A.P. 8th Cir. 2012).

213. *Id.* at 689-90.



tribal entity relating thereto.<sup>214</sup> The Chapter 7 trustees initiated adversarial proceedings to recover the payments in order to maximize distribution for the creditors in the individual bankruptcy cases.<sup>215</sup> Citing *In re National Cattle Congress*, the court took the strict approach that Congressional abrogation requires explicit mention of the “Indian tribes.”<sup>216</sup>

In referencing certain environmental acts which abrogated tribal sovereign immunity by specifically defining “Indian Tribes” within relevant entities, the court held that the same is necessary in all instances of congressional abrogation, including within the Bankruptcy Code.<sup>217</sup> The Eighth Circuit adopted this test, as applied in several sister circuits within different contexts, to find that where the language of a federal statute does not explicitly include “Indian tribes” in definitions of parties subject to suit or does not specifically assert jurisdiction over “Indian tribes,” courts find the statute’s language insufficient to express an unequivocal abrogation of tribal sovereign immunity.<sup>218</sup> The court acknowledged the circuits that held differently, specifically noting the

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214. *Id.*

215. *Id.* at 690. The court noted that, absent a bankruptcy filing, the tribal revenue would be exempt from garnishment due to sovereign immunity implications.

216. *Id.* at 691. Specifically, the court quoted *In re Nat’l Cattle Cong.*, 247 B.R. 259 (Bankr. N.D. Iowa 2000) inasmuch as holding:

Courts have found abrogation of tribal sovereign immunity in cases where Congress has included “Indian tribes” in definitions of parties who may be sued under specific statutes. *See Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) (finding congressional intent to abrogate Tribe’s sovereign immunity with respect to violations of the Resource Conservation and Recovery Act, [which expressly included “an Indian tribe or authorized tribal organization” in the definition of “municipalities” covered by the Act]); *Osage Tribal Couns. v. U.S. Dep’t of Lab.*, 187 F.3d 1174, 1182 (10th Cir. 1999) (same re Safe Drinking Water Act [which also included “Indian Tribes” in the definition of “municipalities covered by the Act]). “Where the language of a jurisdictional grant is unambiguous as to its application to Indian tribes, no more is needed to satisfy the *Santa Clara* requirements than that Congress unequivocally state its intent.” *Osage Tribal Couns.*, 187 F.3d at 1182.

*Bucher*, 474 B.R. at 691.

217. *Id.*

218. *Id.* at 691 (citing *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357-58 (2d Cir. 2000)).

Ninth Circuit’s opposite holding in *Krystal Energy*,<sup>219</sup> but nevertheless determined the application to be incorrect in light of the Supreme Court’s application to other tribal sovereign immunity questions.<sup>220</sup>

The Eighth Circuit walked through the inferences necessary to reach the same conclusion as that of the abrogating majority.<sup>221</sup> According to the court, the connection of one precedent to another to reach the conclusion necessary for § 106 to provide for abrogation is one too tenuous to support a finding of an unequivocal expression of congressional intent.<sup>222</sup> The court attempted to bolster its conclusion by pointing to the lack of evidence that Congress even considered the application of § 106 to the tribes.<sup>223</sup> Put plainly, the Eighth Circuit’s holding is the result of a facial reading of the statute. Under *Bucher v. Dakota Finance Corp. (In re Whitaker)*, where the statutory language does not explicitly abrogate tribal sovereign immunity, no further analysis is necessary.<sup>224</sup>

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219. *Id.* at 695 (citing *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004)).

220. *Id.* at 692-94.

221. *Id.* at 692-93.

222. *Id.* at 693.

223. The Court quite brilliantly states:

While resort to legislative history should not be needed to conclude that a statute explicitly abrogates immunity, the cases relied on by the [parties seeking abrogation] do not refer to any legislative history indicating that Congress even considered the effect of § 106 on tribes’ sovereign immunity. Indeed, despite the fact that Santa Clara Pueblo was decided six months before the 1978 Bankruptcy Code was enacted and held that abrogation of tribal sovereign immunity must be “unequivocally expressed,” Congress did not mention Indian tribes in the statute. Nor did it do so in 1994 when it amended § 106 to clarify its intent with respect to the sovereign immunity of states following *Hoffman v. Connecticut Department of Income Maintenance* and *United States v. Nordic Village, Inc . . . .*

*Id.* at 693. The court further solidified this justification by noting that the “House Report for the Bankruptcy Reform Act of 1994 refers specifically to the sovereign immunity of the ‘States and Federal Government,’ neither of which could even remotely be interpreted to include Indian tribes.” *Id.*

224. For the same reasons, the court determined that the Dakota Finance Corporation enjoyed the same sovereign immunity protections. Specifically, “immunity for subordinate economic entities ‘directly protects the sovereign Tribe’s treasury, which is one of the historic purposes of sovereign immunity in general.’” *Id.* at 696 (quoting *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006)). As an arm or agency of

*Bucher's* holding was expanded into the Sixth Circuit three years later.<sup>225</sup> The Eastern District of Michigan took up the matter of tribal immunity in bankruptcy when the Sault St. Marie Tribe of Chippewa Indians claimed immunity in an attempt to avoid an adversary proceeding against it which stemmed from a \$177 million transfer from the corporate debtor in a Chapter 11.<sup>226</sup> While the bankruptcy court had initially denied the tribe's motion to dismiss based on the tribe's immunity claims, the Eastern District of Michigan reversed on appeal and held for non-abrogation and the Sixth Circuit confirmed.<sup>227</sup> The district court examined the rift created between the *Krystal Energy* and *Bucher* courts and the resulting "irreconcilable conclusions."<sup>228</sup> From the outset, the court noted the lack of the term "Indian tribes" anywhere in the Code.<sup>229</sup> The court rejected a strict application of the "magic word" approach, but did make note that in nearly all instances where Congress has been determined to have meant to abrogate tribal immunity, it did use the term "Indian tribes" in doing so.<sup>230</sup> Ultimately, the lower court did not appear entirely confident in reaching the conclusion that Congress had not abrogated tribal immunity, but nevertheless determined it to be the better option of the two available.<sup>231</sup>

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the tribe, the financial entity was entitled to sovereign immunity as if it were the tribe itself. *Id.* at 696-97.

225. See *Buchwald Cap. Advisors, LLC v. Papas (In re Greektown Holdings, LLC)*, 532 B.R. 680, 684 (E.D. Mich. 2015). The Sixth Circuit affirmed in 2019, adopting non-abrogation as the stance of the Circuit and further widening the rift between the two positions. See also *Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC)*, 917 F.3d 451, 467 (6th Cir. 2019).

226. See *Papas*, 532 B.R. at 683.

227. See *id.* at 701; *Sault Ste. Marie Tribe of Chippewa Indians*, 917 F.3d at 467.

228. See *Papas*, 532 B.R. at 687.

229. *Id.* at 688.

230. See *id.* at 693.

231. The Eastern District of Michigan ultimately found for non-abrogation because it could not conclude "with perfect confidence" that Congress intended to abrogate tribal immunity. Because an affirmative intent to do so is required, it could not find of abrogation. Namely, the lower court had stated that:

While perhaps it may be said with "perfect confidence" that Indian tribes are both "domestic" in character and function as a "government," this Court cannot say with "perfect confidence" that Congress combined those terms in a single phrase in § 101(27) to clearly, unequivocally and unmistakably express its intent to include Indian tribes among those sovereign entities specifically mentioned

While the Sixth Circuit on appeal ultimately reached the same conclusion as the *Bucher* court and confirmed the opinion of non-abrogation, it did so by analysis of Congressional intent, rather than based solely on facial language of the statute.<sup>232</sup> Primarily, the Circuit indicated far more decisiveness in its conclusion than the Eastern District of Michigan. The court most importantly pondered why, if Congress did intend to abrogate tribal immunity, did it not use the same language to do so as it had elsewhere?<sup>233</sup> Accordingly, this approach reaches the same conclusion of non-abrogation with a much broader contextual application than that put forth in *Bucher*. The Sixth Circuit acknowledged Congress's power to abrogate immunity but expressed that the choice to do so must be indisputably communicated.<sup>234</sup> Such a communication was clearly lacking in the passage of § 106 and finding abrogation without definite language would violate Supreme Court guidance on the matter.<sup>235</sup>

The result of this logic is one which does not have the stringent requirement of the uniform use of a single term across all federal regulation abrogating immunity, but rather permits language which merely communicates the intent to do so without a seed of doubt.<sup>236</sup> Most eloquently, the Sixth Circuit concluded by stating that “[i]mmunity doctrines [of all kinds] inevitably carry within them the seeds of occasional inequities . . . . Nonetheless, the doctrine of tribal [sovereign]

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whose immunity was thereby abrogated. While logical inference may support such a conclusion, Supreme Court precedent teaches that logical inference is insufficient to divine Congressional intent to abrogate tribal sovereign immunity.

*Id.* at 697. *Contra Sault Ste. Marie Tribe of Chippewa Indians* 917 F.3d at 469-70 (Zouhary, J., dissenting).

232. *See Sault Ste. Marie Tribe of Chippewa Indians*, 917 F.3d at 461.

233. *Id.* at 461-62. Specifically, the Court looked to the Seventh Circuit's reasoning in the unpublished *Meyers v. Oneida Tribe of Indians of Wis.*, which held for non-abrogation in the Fair and Accurate Credit Transactions Act of 2003 (citing *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC)* No. 15-cv-445, 2015 WL 13186223 (E.D. Wis. Sept. 4, 2015)). The court noted that the Ninth Circuit has favorably cited *Meyers* despite falling on the opposite side of the issue in *Krystal Energy*.

234. *Id.* at 461 (“While it is true that Congress need not use ‘magic words’ to abrogate tribal sovereign immunity, it still must unequivocally express that purpose.” (quoting *F.A.A. v. Cooper*, 566 U.S. 284, 290-91 (2012))).

235. *Id.* at 462-63.

236. This application makes far more sense, under the Sixth Circuit's logic, than finding that an unequivocal expression of intent where Congress merely used perfunctory language which *may* encompass tribes. *Id.* at 459-60.

immunity reflects a societal decision that tribal autonomy predominates over other interests” and accordingly deferred to “Congress and the Supreme Court to exercise their judgment in this important area.”<sup>237</sup>

The final decision in favor of non-abrogation originated out of New Jersey, a state not generally known for its tribal population.<sup>238</sup> Nevertheless, the Bankruptcy Court for the District of New Jersey was faced with the question of tribal sovereignty and sided with the Sixth and Eighth Circuits.<sup>239</sup> There, the creditors of a communications company filed an involuntary Chapter 7 petition and after relief was entered, the trustee brought an adversary proceeding to avoid several preferential transfers to a Navajo newspaper.<sup>240</sup> The Navajo Times filed a motion to dismiss based on being an entity of the Navajo Nation and accordingly enjoying immunity from suit.<sup>241</sup>

Addressing the invocation of sovereign immunity in spite of § 106, the court cited previous decisions finding an absence of the “magic words” needed to abrogate immunity.<sup>242</sup> As such, under the standard rules of statutory interpretation which require the judicial analysis to cease

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237. *Id.* at 467 (citing *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 781 (D.C. Cir. 1986) (internal citations omitted)).

238. While New Jersey has several “state-recognized tribes,” there are no federally recognized tribes inhabiting New Jersey. *New Jersey Tribes*, 500 Nations, [https://www.500nations.com/New\\_Jersey\\_Tribes.asp#:~:text=There%20are%20no%20federally%20recognized%20tribes%20in%20New%20Jersey](https://www.500nations.com/New_Jersey_Tribes.asp#:~:text=There%20are%20no%20federally%20recognized%20tribes%20in%20New%20Jersey) (last visited Mar. 25, 2023); *See generally* *Subranni v. Navajo Times Publ’g Co. (In re Star Grp. Commc’ns., Inc.)*, 568 B.R. 616 (Bankr. D.N.J. 2016).

239. *See generally* *Subranni*, 568 B.R. 616.

240. *Id.* at 618. A preference under 11 U.S.C. § 547 and 550 is a payment made to another creditor or party in the 90 days leading up to bankruptcy filing which takes available assets from the creditors of the bankruptcy. *In re JWW Contracting Co., Inc.*, 371 F.3d 1079, 1081 (2004). The purpose is to “discourage creditors from racing to the courthouse to dismember the debtor during its slide into bankruptcy and to further the prime bankruptcy policy of equal distribution among similarly situated creditors.” *Id.* (citing *Danning v. Bozek (In re Bullion Reserve of N. Am.)*, 836 F.2d 1214, 1217 (9th Cir. 1988)).

241. *Subranni*, 568 B.R. at 618. Somewhat uniquely, the entity was privatized in 2001, to be a “separate, tribally owned business.” By approval of the Navajo Nation Council and with an appropriation of \$500,000 from the Nation’s Business and Industrial Development Fund, the weekly publishing company was organized under the Navajo Nation Corporate Code. Nevertheless, the Articles of Incorporation spelled out that “[t]he Corporation is an instrumentality of the Navajo Nation and is entitled to all of the privileges and immunities of the Navajo Nation . . . .” *Id.* at 619-21.

242. *Id.* at 623-25.

where the language is facially “clear and unambiguous,”<sup>243</sup> the court determined that the language’s lack of any mention of Native American tribes was a clear indication of Congressional intent to exclude the tribes from this waiver.<sup>244</sup> However, beyond just a deepening of the split in application to the tribes as creditors in bankruptcy, this opinion took it an important step further for tribal businesses.

As previously mentioned, the creditor in *Subranni* was not the Navajo Nation, but rather a private publishing company incorporated under Navajo laws.<sup>245</sup> While organized under the law of the tribe and requiring the directors to be members of the tribe, the tribe itself enjoyed no authority to direct the business operations of the company.<sup>246</sup> Nevertheless, the opinion extended immunity to this organization and as such, the opinion could cloud this analysis even further,<sup>247</sup> specifically in

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243. *Id.* at 624-25 (citing *City of Phila. v. Nam (In re Gi Nam)*, 273 F.3d 281, 286 (3d Cir. 2001)).

244. *Id.* at 625.

245. *Id.* at 626.

246. *Id.*

247. It is worth noting that the court went further than determining that it was a business entity owned by the tribe. It then applied a factor analysis that the Western District of Oklahoma has admitted is “rarely uniform” in application. *Subranni*, 568 B.R. at 636 (citing *Somerlott v. Cherokee Nation Distribs. Inc.*, No. CIV-08-429-D, 2010 U.S. Dist. LEXIS 38021, at \*3 (W.D. Okla. Apr. 16, 2010)). This “subordinate economic entity” test is applied to determine whether tribal sovereign immunity is extended to the entity. The test is a ten-factor one to establish whether the corporate actions of the entity are to be effectively deemed actions of the tribe:

- (1) the announced purpose for which the entity was formed;
- (2) whether the entity was formed to manage or exploit specific tribal resources;
- (3) whether federal policy designed to protect Indian assets and tribal cultural autonomy is furthered by the extension of sovereign immunity to the entity;
- (4) whether the entity is organized under the tribe’s laws or constitution rather than federal law;
- (5) whether the entity’s purposes are similar to or serve those of the tribal government;
- (6) whether the entity’s governing body is comprised mainly of tribal officials;
- (7) whether the tribe has legal title or ownership of property used by the entity;
- (8) whether tribal officials exercise control over the administration or accounting activities of the organization;
- (9) whether the tribe’s governing body has power to dismiss members of the organization’s governing body, and
- (10) whether the entity generates its own revenue, whether a suit against the entity would impact the tribe’s fiscal resources, and whether it may bind or obligate tribal funds.

states like Connecticut and Florida where a relatively insignificant tribal presence could nevertheless lead to a plethora of creditor opportunities through the existence of significant tribal casino operations. Connecticut's Mohegan Indian Tribe sits on a reservation of less than a square mile, but operates a Connecticut casino which generated \$1.07 billion in revenue in 2018.<sup>248</sup> Similarly, where Florida is home to only six federally-recognized tribes,<sup>249</sup> the Seminole Tribe owns and operates six casinos across the state which generate \$2.5 billion.<sup>250</sup> Such an extension of non-abrogation could significantly damage non-tribal creditors of debtors in these geographical areas, whether or not the debtor is a tribal member.

#### IV. HOW THE BANKRUPTCY CODE SHOULD ADDRESS TRIBAL SOVEREIGN IMMUNITY AND THE RISKS OF ABUSE WHICH EXIST UNDER THE STATUS QUO

##### A. RISKS OF FINANCIAL ABUSE UNDER THE CURRENT SYSTEM AND WHY TRIBAL SOVEREIGNTY IN BANKRUPTCY MATTERS

As discussed, the resolution to issues addressed by this Article is required not only by the interest of unanimity in application of the Code to tribes, but also by the risks of abuse to consumers, creditors, tribes, and

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Uniband, Inc. v. Comm'r, 140 T.C. 230, 253-54 (2013) (citing *Johnson v. Harrah's Kan. Casino Corp.*, No. 5:04-CV-04-4142-JAR, 2006 U.S. Dist. LEXIS 7299, at \*4-\*6 (D. Kan. Feb. 23, 2006) (internal citations omitted). Not all factors must be present to determine that the entity is a "subordinate economic entity." *Subramni*, 568 B.R. at 631 (citing *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1177 (D.S.D. 2012)). Where not all factors weighed in favor of the tribal entity in *Subramni*, the court nevertheless found it to be a subordinate entity of the Navajo Nation. *See id.* at 631.

248. Brian Hallenbeck, *Annual Reports: Casino Revenues Dipped in Fiscal '18*, DAY (Jan. 5, 2019, 11:00 PM), <https://www.theday.com/local/20190105/annual-reports-casino-revenues-dipped-in-fiscal-18/> [<https://archive.ph/L8Mhm>]. The state's only other federally recognized tribe, the Mashantucket Pequot tribe, also operates a casino which generated nearly \$829 million in the same year.

249. *Understanding Consultation*, FLA. DEP'T. OF TRANSP., <https://www.fdot.gov/environment/na-website-files/faq.shtm> [<https://archive.ph/qCGc3>] (last visited Mar. 2, 2023).

250. Steve Schult, *Florida Commercial Gaming Revenue Sets Quarterly Record*, PLAYFL (May 13, 2022), <https://www.playfl.com/florida-commercial-gaming-revenue/#:~:text=The%20Seminole%20Tribe%20is%20responsible,in%20annual%20gross%20gaming%20revenue.>

bankruptcy filers if a uniform approach is not obtained. Under the current non-abrogation approach, a tribe may ignore the Code, its debtor protections, and the interests of all other creditors by intentionally not filing a claim in the bankruptcy proceedings.

Professor Nathalie Martin recently published an article addressing an issue which runs parallel to the application of § 106.<sup>251</sup> Specifically, Martin addresses the application of several tests which determine when a business entity is an “arm of the tribe” for purposes of tribal sovereign immunity and advocates for its use in the bankruptcy context.<sup>252</sup> Throughout her article, Martin cites numerous developments in commercial law in recent years in which financial institutions partner with tribes in an attempt to skirt state usury laws and, more pertinently to this Article, applicable bankruptcy laws.<sup>253</sup> Not only does this practice undermine the purposes of tribal sovereign immunity, but it results in significant financial abuse of tribes and, more specifically, their registered members.<sup>254</sup> Further, closing the current loophole created by courts which weigh in favor of non-abrogation needs to be a priority. As indicated in *Coughlin*, these protections are in place for several reasons and when the protections no longer exist, significant negative effects result.<sup>255</sup> Not only are debtors rendered vulnerable to abusive collection attempts and legal proceedings, but other good-faith creditors may not receive treatment

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251. See generally Martin, *supra* note 6.

252. See *id.* at 176-90.

253. *Id.* Justice Stevens’s dissent in *California v. Cabazon Band of Mission Indians* nearly four decades ago may have foreshadowed this issue, extending concerns relating to tribal gambling in contravention of state laws to all other “illegal but profitable enterprises.” 480 U.S. 202, 222 (1987). Specifically, Stevens’s view was that Congress had not preempted a state’s right to enforce its on gambling laws within its borders. Stevens went on to question where the line was drawn, and suggested that if an exemption was provided for tribal gaming, what was to stop tribes from otherwise unlawful business ventures seen as immoral by the common citizen. *Id.* at 222. Despite these concerns, Stevens emphasized that the decision was one for Congress and not the Court. *Id.* at 227.

254. “One of the policies behind sovereignty and to some extent sovereign immunity, is to fortify and protect the economies of the tribes, which have suffered at the behest of the U.S. Government.” Martin, *supra* note 6, at 174. As Martin states plainly, certain high-rate lenders increasingly use a so-called “rent-a-tribe” scheme in which they claim the tribe they are partnered with is the real lender and in turn the tribe receives a small portion of revenue on each loan which, if not affiliated with a tribe, would be illegal under the applicable state’s usury laws. See *id.*

255. *Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600, 625 (1st Cir. 2022).



equal to the casino, payday loan shop, or other financial entity under the umbrella of a tribal government.

Additionally, tribes may benefit if they are included within the Code's definition of a "governmental unit." Were the position of the minority – that § 101(27)'s definitions do not include tribal entities within its meaning – the correct application, then by reference § 109 would prevent tribes from seeking bankruptcy relief generally.<sup>256</sup> For smaller tribes with less economic resources, the availability of a tribal bankruptcy could be extremely helpful.<sup>257</sup> Even for larger tribes with significant casino and gaming operations, a prohibition on tribes filing for bankruptcy could spell financial ruin if casinos see an unexpected decline revenue as they did during the early months of the Coronavirus pandemic.<sup>258</sup>

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256. Steven Waterman, *Bankruptcy Automatic Stay: Tribal Sovereign Immunity Abrogated*, DORSEY & WHITNEY LLP (June 16, 2022), <https://www.dorsey.com/newsresources/publications/client-alerts/2022/06/bankruptcy-automatic-stay> [<https://perma.cc/DDW3-3NHQ>]; Ji Hun Kim & Christopher S. Koenig, *Rolling the Dice on Debtor Eligibility*, 23 AM. BANKR. INST. J., no. 6, 2015. For a more detailed analysis of this conundrum, see Corina Rocha Pandeli, *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. NEV. L.V. GAMING L.J. 255 (2012). See also Laura N. Coordes, *Beyond the Bankruptcy Code: A New Statutory Bankruptcy Regime for Tribal Debtors*, 35 EMORY BANKR. DEV. J. 363, 365-66 (2019) ("Native American tribes and tribal-affiliated businesses . . . are playing an increasingly significant role in U.S. commerce, yet the U.S. Bankruptcy Code makes it difficult, if not outright impossible, for these entities to use the bankruptcy system as debtors.").

257. While this is an abstract consideration, many cities have successfully restructured debt and gone on to lead a substantial revitalization effort thanks to the bankruptcy process. For example, Detroit recently underwent the largest municipal bankruptcy in U.S. history, restructuring approximately \$18 billion in debt. However, the result has been impressive thus far, with significant prospects of financial growth and economic prosperity still developing. See Pete Saunders, *Detroit, Five Years After Bankruptcy*, FORBES (July 19, 2018), <https://www.forbes.com/sites/petesaunder1/2018/07/19/detroit-five-years-after-bankruptcy/?sh=5fec4aebcfcb> [<https://archive.ph/Re8GU>].

258. See *Fact Sheet: Building A New Era of Nation-to-Nation Engagement*, WHITE HOUSE (Nov. 15, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/15/fact-sheet-building-a-new-era-of-nation-to-nation-engagement/> [<https://perma.cc/SN7D-SZQC>] (noting \$1.9 trillion in federal investments in tribal lands, including \$20 billion in emergency funding to offset the devastation that the pandemic had on tribal economies).

However, there are considerations which run opposite the interests of tribes and tribal business entities. Namely, if immunity of the tribes is deemed waived, the tribes and their businesses will be bound to the rules of the Code and terms of the bankruptcy proceedings just as would any other creditor. The tribes will be subject to the same process of vying against other creditors for pennies on the dollar and would be subject to the same unique Code requirements, such as the implementation of the automatic stay, which other creditors must obey from the day that the bankruptcy petition is filed. Integration into conventional bankruptcy processes may not necessarily be in the interest of a tribe's financial institutions, particularly those that seek to exploit the tribe's protections to skirt state consumer protection laws, but there are no apparent benefits to tribes, beyond maintaining the principle of immunity, in maintenance of this status quo in bankruptcy. In fact, maintenance of the status quo occurs at the expense of their registered member debtors.

#### B. HOW THE CIRCUIT SPLIT SHOULD BE RESOLVED

With the incentives and legal history outlined, the questions that remain are: (1) which side of the circuit split is correct; and (2) what method of creating unanimity is best? Neither answer is a simple one. This Article seeks to outline an approach which ensures uniform treatment in bankruptcy while keeping the interests of tribes and their registered members in mind.<sup>259</sup>

In answering the first question, it is apparent that, under the current circuit split and the varying approaches outlined, the courts finding that § 106 lacks the required equivocal waiver necessary for abrogation of tribal sovereign immunity are correct. Specifically, the court's approach in *Buchwald v. Sault Ste. Marie* most aptly lays out the approach which precedentially makes sense.<sup>260</sup> Where all other areas of law which implicate tribal sovereignty require explicit terms abrogating immunity, it seems nonsensical to apply some different test exclusively within the

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259. The interests of the tribes often will not align with their members and vice versa. Quite frequently within this analysis, the tribe's interest in sovereign immunity treatment runs in direct contravention to the tribal debtor's best interests and the protections afforded within the Bankruptcy Code.

260. See *Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC)*, 917 F.3d 451, 471 (6th Cir. 2019).

realm of bankruptcy.<sup>261</sup> On its face, the statute does not explicitly mention tribal entities.

While an analysis may not be as simple as put forth in *Bucher*, the result is the same.<sup>262</sup> As stated in *Buchwald v. Sault Ste. Marie*, a “magic words” test which would require explicit use of the term “Indian tribes” or some other single uniform term should not be necessary,<sup>263</sup> but it simultaneously would not make sense for Congress to use some form of “magic word” elsewhere yet chose not to do so here. Further, if Congress sought to do what the First and Ninth Circuit assert – abrogate sovereign immunity as to all governmental entities which would otherwise enjoy it outside of bankruptcy – why would it enumerate a waiver specific to certain entities rather than simply utilize all-encompassing language which would effectuate the same result with far less complication?

While the non-abrogation approach is the correct approach under the text of the current statute, that does not necessarily mean that this analysis is resolved. Where the creation of a system of uniform bankruptcy laws are within the powers explicitly granted to Congress within the Constitution,<sup>264</sup> a mere judicial determination of Congressional intent based upon the vague language as it currently stands is not a sufficient remedy. Rarely does one constitutionally enumerated power become so intertwined with a matter of bankruptcy law as evidenced by the matter at hand. Further, the implications of this waiver are far more significant where justifications for the settled governmental waiver of § 106 do not necessarily extend to the considerations forming the foundation of tribal sovereignty and sovereign immunity.<sup>265</sup>

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261. As this Article has already outlined, the question which has created the circuit split is as simple as the interpretation of five words. § 106 includes abrogation of immunity of a number of governmental units, and whether or not this abrogation is applicable to the many tribes’ interests revolves exclusively around whether the tribes fit within the definition of an “other foreign or domestic government.”

262. The *Bucher* court determined abrogation would exist only with the explicit use of the term “Indian tribes.” See generally *Bucher v. Dakota Fin. Corp. (In re Whitaker)*, 474 B.R. 687 (B.A.P. 8th Cir. 2012). However, there appear a plethora of terms relating to the tribes that Congress could use to make clear their supposed intent to abrogate.

263. See *Buchwald*, 917 F.3d at 461.

264. See U.S. CONST. art. I, § 8, cl. 4.

265. As was explained as the basis for justification of state sovereign immunity abrogation in *Katz*, considerations as to the rights of the states are implicated quite differently within a bankruptcy proceeding compared to a criminal or constitutional matter. The foundation of bankruptcy in the colonies was a chaotic one, as states were frequently concerned with one jurisdiction not acknowledging the debt discharge of

As presented, the correct conclusion under the Code may not be the best resolution to the issue. However, courts and the practitioners are obligated to adhere to the Code. Ultimately, Congress needs to amend § 106 once again to clarify the application. Congress should amend § 106 to create an unequivocal waiver of all sovereign immunity within the Code. While a uniform waiver of sovereign immunity—specifically one which effectuates an extension of this waiver to the tribes—would carry the appearance of an equitable remedy to other creditors and governments, it is a difficult choice in light of the importance of this protection as it relates to the many tribal governments, their entities, and the court precedence underlying this sovereignty. Conversely, the tribes must have the interest of their members in mind, and the continuance of the non-abrogation position leaves the tribe’s registered members (and non-tribal persons and entities who frequently transact business in tribal land) subject to abuse and outside the protections and considerations of the Bankruptcy Code. The prolongation of debt at interest rates which would otherwise be usurious under state law as was the case in *Coughlin* is one such example.<sup>266</sup> Thus, the question becomes whether the interest in a tribal protection outweighs the bankruptcy system’s “fresh start” interests and what it means for the more than half-a-million individual debtors who file bankruptcy annually.<sup>267</sup>

While abrogation of tribal immunity should not be done lightly, the result in this case is one which treats all government entities – including tribes – the same as any other creditor. To that effect, it ensures that

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another. As such, the states agreed within the Constitution to waive certain rights in bankruptcy they would otherwise enjoy outside of it and concede matters relating to bankruptcy law to the federal government. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362-63 (2006). With this in mind, the Bankruptcy Clause was effectuated with the intention of giving “Congress the power to redress the rampant injustice resulting from States’ refusal to respect one another’s discharge orders.” *Id.* at 377. Where justification is based on states’ waiving of their immunity interests by granting Congress the power to create a uniform system of bankruptcy laws, the tribes were obviously not a party to this decision and any such waiver based upon this logic would render an inequitable result as to the tribes.

266. *Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, 33 F.4th 600, 604 (1st Cir. 2022).

267. *See, e.g., Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 444 (1st Cir. 2000); *see also Bradley v. Fina (In re Fina)*, 550 F. App’x 150, 156 (4th Cir. 2014). More than 591,000 individuals filed for bankruptcy in the year ending on December 31, 2020, down from more than 750,000 the three years prior. *Bankruptcy Filings Continue to Fall Sharply*, U.S. CTS. (Nov. 8, 2021), <https://www.uscourts.gov/news/2021/11/08/bankruptcy-filings-continue-fall-sharply> [<https://perma.cc/TCL5-5PQ2>].

debtors – both registered tribal members and non-tribal – receive the same protections as those who do not transact business with tribal financial entities. Such a conclusion would, to some degree at the expense of the rights of tribes, ensure the rights of all debtors (and particularly those of tribal members) are equally protected. However, the Bankruptcy Code and its purpose and protections are rendered ineffective when debtors do not receive uniform treatment. As tribal members are simultaneously citizens of the United States and the state in which they reside,<sup>268</sup> the negative effects of the different treatment which registered tribal members may receive in a bankruptcy filed under the current system cannot be justified.

Specifically, the sovereignty considerations and the precedential context relating thereto does not necessarily disfavor nor contradict this result as they did the *Castro-Huerta* decision.<sup>269</sup> Bankruptcy law is strictly federal and, as such, would require no waiver within the realm of state law beyond the practical effects it has on a successful debtor and other non-tribal creditors.<sup>270</sup> Since it is now well established that Congress can abrogate a tribe's immunity so long as unequivocally expressed, there are a number of instances within federal jurisprudence where tribal sovereign immunity has been expressly abrogated by Congress.<sup>271</sup> Further, tribes can waive their own immunity, such as when they file a claim in the bankruptcy suit.<sup>272</sup> It should additionally be considered whether tribes

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268. See CANBY, *supra* note 3, at 404 (“While the 1924 statute (8 U.S.C.A. § 1401(b)) makes all native-born Indians United States citizens, it is the Fourteenth Amendment that makes them citizens of the states where they reside as well.”).

269. See *Oklahoma v. Castro-Huerta*, 142 S. Ct 2486, 2505–27 (Gorsuch, J., dissenting).

270. Further, tribes are presumably far more concerned with their sovereignty and implications to sovereign immunity as it relates to their rights to criminal prosecution of crimes in which their members are a victim. The tribes' powers to prosecute relate directly to the interests of the tribe in protecting its members while the interest in sovereignty in bankruptcy runs, at least partially, in contradiction to the express financial interests of its individual members.

271. *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458 (8th Cir. 1993) (holding that where a federal statute clearly indicates that its enforcement mechanism applies to tribes, tribal sovereign immunity cannot bar enforcement of the statute); *Blue Legs v. U.S. Bureau of Indian Affs.*, 867 F.2d 1094 (8th Cir. 1989) (holding the same); *Osage Tribal Council v. U.S. Dep't of Lab.*, 187 F.3d 1174 (10th Cir. 1999) (holding the same).

272. See CANBY, *supra* note 3, at 109-10.

may waive their own immunity in bankruptcy if it would mean ensuring equitable treatment and opportunity to themselves and their members.<sup>273</sup>

While sovereign immunity ordinarily protects the tribe from suit by individual, tribes have come to expect much different treatment within the realm of federal law compared to the protections they enjoy in their state of location. Other solutions to the issues debtors face addressed by this Article, such as taking loans from tribal entities which would otherwise violate the state's applicable usury laws, would be otherwise remedied through infringement upon tribal rights by the state. Further, Congress need only look to the jurisdictional disaster that is the current handling of criminal law in Oklahoma to be persuaded that uniform treatment eclipses tiptoeing around the sovereignty question where tribal and federal concerns overlap.<sup>274</sup> The most practical and equitable conclusion is one that treats tribes the same as all other creditors within the federal bankruptcy realm and accordingly ensures that all debtors receive predictable and uniform treatment across the U.S. bankruptcy system.

### CONCLUSION

With the purpose of the Bankruptcy Code in mind, the correct conclusion is one which renders treatment of debtors unanimous across the country and its many bankruptcy courts. Specifically, Bankruptcy's "fresh start" and what it means to those in financial calamity should remain the pinnacle focus. While the matter is ripe for the Supreme Court to resolve based upon the circuit split as outlined, the proper remedy necessary to ensure that the effects are not more widespread than this niche area of law requires Congress to amend § 106 and/or § 101(27) in order to clearly communicate intent as to abrogation. While the Court can provide a temporary resolution to the split, it has made clear that the power to abrogate is within Congressional discretion.<sup>275</sup> Overarching language which abrogates *all* sovereign immunity otherwise enjoyed would remedy the issue and ensure equal treatment for all debtors in bankruptcy.

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273. Compare this theory with the states which voluntarily waived their right to criminal prosecution on their lands in favor of states with more resources to do so. *See supra* note 60 and accompanying text discussing Public Law 280.

274. *Castro-Huerta*, 142 S. Ct at 2492–93.

275. While the analysis as it relates to the "domestic dependent nations" that are tribes is not as simple as it is when applied to the states, the conclusion *may* nevertheless be the same. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006).

While the sovereign immunity of tribes is an important legal principle which should not be waived on their behalf without significant consideration, the threats an extension of immunity to bankruptcy continues pose to good-faith debtors and their non-tribal creditors outweighs the implications of the tribes when no alternative to bankruptcy is available within the tribal system.<sup>276</sup> As in other areas of law, the remedy is not one which necessarily needs to treat tribes exactly the same as states or federal agencies. The relationship between the federal government and the many tribes is inherently unique. As a “domestic dependent nation” the tribes enjoy a sovereignty unlike that of the states, markedly different from other foreign nations, and yet still subservient in some respects to the federal government. Where such an existence is one of distinctive character, a treatment which ensures protection of the tribe’s interests while putting the interests of tribal and non-tribal debtors pursuant to the purposes of the Code first and foremost may be found by Congress in compromise.

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276. This analysis could be extremely different if the tribes had their own bankruptcy systems to adequately treat their members. The complexity of this proposal far outweighs the benefit it may bring, but it is nevertheless something worth considering. Until such a system were to exist, where the rights of the tribes and its members are in direct conflict, bankruptcy need favor the implications of the tribal debtor, rather than that of the tribal creditor.