

5-12-2020

P2P LENDING CAN INCREASE CAPITAL TO CAPITALLY STARVED INDIAN COUNTRY

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Recommended Citation

Nichols, Craig (2020) "P2P LENDING CAN INCREASE CAPITAL TO CAPITALLY STARVED INDIAN COUNTRY," *American Indian Law Journal*: Vol. 8 : Iss. 2 , Article 2.

Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol8/iss2/2>

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Cover Page Footnote

Craig Nichols is a rising 3L at the J. Reuben Clark Law School at BYU with a B.S. in finance from BYU. He is a registered member of the Oneida tribe on the Six Nations of the Grand River reserve in Ontario, Canada. He wishes to thank Professor Michalyn Steele for being a role model and for inspiring him to follow his passions. A very special thanks to Cloie Chapman, Christine Kettel, Shelsea Chilumuna, Grace Porter, Davis Leigh, Samantha Mintz-Gentz, Kia Hellrigel, Lara Diaconu and all the editors at the American Indian Law Journal at Seattle University for providing thoughtful comments on this article.

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By Craig Nichols

I. INTRODUCTION.....	46
II. THE IMPORTANCE OF TRIBAL SOVEREIGN IMMUNITY IN BUSINESS.....	47
III. TRIBAL ECONOMIC BACKGROUND: GENERAL UNDERPINNING AS TO WHY INDIAN COMMUNITIES NEED INVESTMENT.....	48
<i>A. Native American Reservations' Financial Woes</i>	49
<i>B. Indian Casinos are Not the Gold Standard for Economic Development in Indian Country</i>	50
<i>C. American Indian Poverty Generally</i>	51
IV. PREVIOUS ENDEAVORS FOR INDIAN ECONOMIC DEVELOPMENT.....	52
V. PEER-TO-PEER (P2P) LENDING.....	59
<i>A. Understanding Bad Debt as a Background to P2P Lending</i>	59
<i>B. P2P Lending Platforms Explained</i>	61
VI. CONCLUSION.....	67

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I. INTRODUCTION

Misleading stereotypes of Indian casinos providing an unlimited amount of among capital to Indian communities juxtapose the economic realities of financial deserts and poverty, in which many tribal communities find themselves. This article proposes, with Congressional blessing, that a peer-to-peer (P2P) financial instrument directed toward federally recognized tribes and members with tax-exempt status and capped interest rates of twenty percent could provide the right incentives to overtake predatory lending practices within reservations. Altruism mixed with manageable interest rates could be the right catalyst to help tribal communities prosper through self-determination. Many Native American communities have been neglected and underserved by our financial system. Past endeavors have been marginally helpful, and there are some ways for federally recognized tribes to think about c-corporations that could help ensure Indian ownership for years to come through the use of classified stock issuances, shareholder rights plans, and staggered boards.

This article progresses through (1) the Importance of Tribal Sovereign Immunity in Business; (2) Tribal Economic Background: General Underpinning as to why Indian Communities Need Investment; (3) Previous Endeavors for Indian Economic Development; and finally (4) Peer-to-Peer (P2P) Lending Solutions. P2P lending typically entails unsecured loans funded through a single or many lenders to borrowers that request the loans through online platforms. The online host should use some form of proprietary algorithms to determine the risk factor of each borrower and assign an interest rate accordingly. The platform could group several borrowers in the same risk category together to provide some mitigation of total loss to the lender. The lender then can choose which

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risk pool she would like to invest in. The ideas presented in this article assume that tribal businesses do not want to be purchased and owned by non-Indian entities.

There are myriad financial instruments and avenues for businesses to raise capital, many of which are unavailable to federally recognized tribes for a plethora of reasons. However, this article does not represent an exhaustive list of potential capital resources. Rather, this article focuses only on a few options that may be uniquely positioned to benefit Indian tribes namely the c-corporation structure and anti-takeover provisions. The discussion will also cover peer-to-peer lending that is uniquely crafted to limit the highest interest rate to twenty percent and petitions the United States Congress to make peer-to-peer lending income tax free where the interest earned is derived from investments into federally recognized tribes or their members. The corporate structure and anti-takeover provisions are listed as more of a critique of current recommendations followed by forward innovation using peer-to-peer lending as a source of capital.

II. THE IMPORTANCE OF TRIBAL SOVEREIGN IMMUNITY IN BUSINESS

Tribal sovereign immunity works in the same manner as the sovereign immunity that protects the United States from liability in its domestic courts.¹⁷⁰ Tribal governments can only be subject to suit when Congress expressly authorizes it or when the tribal government has effectively waived its sovereign immunity.¹⁷¹ Cases like *Kiowa Tribe v. Mfg. Techs.* help showcase the importance of understanding tribal sovereignty when contracting with Indian tribes. In *Kiowa Tribe v. Mfg. Techs.*, the tribe defaulted on an agreement to purchase stock from Manufacturing Technologies and Manufacturing Technologies was left with no remedies because the tribe did not waive its sovereign immunity.¹⁷² The Supreme Court held that tribes are immune from suits on contracts, regardless of whether they involved governmental or commercial activities on or off the reservation.¹⁷³ The case continued the longstanding tradition of tribal immunity as a fundamental and inherent attribute of tribal sovereignty.¹⁷⁴ Although tribal sovereign immunity still exists today, the Supreme Court

¹⁷⁰ DAVID H. GETCHES ET AL, CASES AND MATERIALS ON FEDERAL INDIAN LAW §447 (7th ed. 2017).

¹⁷¹ *Id.*

¹⁷² See *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751 (1998).

¹⁷³ *Id.*

¹⁷⁴ Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law*, 37 TULSA L. REV. 661663 (2002) (*Kiowa Tribe v. Mfg. Techs* continued tradition of tribal community and sovereignty).

has driven holes in tribal sovereignty. For example, the Court upheld Washington's imposition of state tax on Indian sold cigarettes on Indian reservations to non-Indians.¹⁷⁵ This set a precedent of immunity that could be problematic because it is not appealing for investors to put their money into an agreement that can be barred from legal remedies when conflicts arise. However, tribal sovereignty could be a beneficial thing when doing business as a joint venture because tribal businesses can provide a secure way to develop new technologies or industries. It may benefit Indian tribes under certain circumstances to expressly waive sovereign immunity, such as enterprises that seek to raise outside capital. Investors are in the business of making money and potential legal remedies could help establish goodwill between lender and borrower.

III. TRIBAL ECONOMIC BACKGROUND: GENERAL UNDERPINNING AS TO WHY INDIAN COMMUNITIES NEED INVESTMENT

Economic development for many federally recognized Indian tribes has been elusive even as Congress has promoted a policy of self-sufficiency for Indian tribes since the 1970s. Robert A. Williams, a federal Indian legal scholar, said in 1982 that:

[t]he road to economic and social development for Indian Nations in the United States is impeded by an intractable host of tangible and intangible barriers.¹⁷⁶ Territorial remoteness, an inadequate public infrastructure base, capital access barriers, land ownership patterns, and an underskilled labor and managerial sector combine with paternalistic attitudes of federal policy makers to stifle Indian Country development and investment.¹⁷⁷ The design of programs and policies to assist Indian people in successfully mitigating these barriers to economic and social self-sufficiency remains the greatest and most difficult challenge faced by the United States government in the execution of its trust responsibility to Indian Nations.”¹⁷⁸

¹⁷⁵ *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980); See also Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservations Borders*, 12 LEWIS & CLARK L. REV. 1003, 1005-06 (2008).

¹⁷⁶ Robert A. Jr. Williams, *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335 (1985).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

Many of these barriers still exist today and of particular concern to this article are the barriers to capital as a consequence of territorial remoteness.

A. *Native American Reservations' Financial Woes*

Many Native American reservations are financial deserts, meaning they lack basic financial instruments everyday Americans take for granted such as personal loans, mortgages, and other basic access to credit.¹⁷⁹ Indian reservations are not predominantly located on pristine land with a myriad of natural resources or financial resources. Indians Nations occupied the entire continent, but as time went on, Indians were removed through treaties, warfare, and unilateral abrogation by the United States.¹⁸⁰ The creation of Indian reservations was never designed with Indian economic development in mind, rather the locations of the reservations were selected and size reduced in order to provide economic development opportunities to non-Indians on the previously owned tribal lands.¹⁸¹ In the modern era some pundits who advocate for for-profit businesses cite statistics that “show that the ‘productivity’ of agricultural trust land is [ninety percent] lower than land owned by for-profit businesses, without actually noting that most trust land is arid and non-irrigable.”¹⁸² Indian businesses have been tasked with generating governmental revenues on reservations because Indian tribes lack a robust tax base.¹⁸³ This article will not cover Indian power to tax in depth, but it

¹⁷⁹ Native American Financial Services Association, *Native-owned Banks and Credit Unions: Serving the Underserved*, BANKS & CREDIT UNIONS, NEW, TRIBAL SOVEREIGNTY, (Feb. 5. 2019), available at <https://nativefinance.org/news/native-owned-banks-and-credit-unions-serving-the-underserved/> [https://perma.cc/UY2M-F6PT].

¹⁸⁰ Alex Tallchief Skibine, *Symposium: Indigenous Economic Development: Sustainability, Culture, and Business: Tribal Sovereign Interests Beyond the Reservations Borders*, 12 LEWIS & CLARK L. REV. 1003, 1005 (2008).

¹⁸¹ *Id.*

¹⁸² Matthew L.M. Fletcher, Keynote Address, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 776 (2004) (citing Terry L. Anderson, *How the Government Keeps Indians in Poverty*, WALL ST. J., Nov. 22, 1995, at A10).

¹⁸³ Alex Tallchief Skibine, *Symposium: Indigenous Economic Development: Sustainability, Culture, and Business: Tribal Sovereign Interests Beyond the Reservations Borders*, 12 LEWIS & CLARK L. REV. 1003, 1005 (2008) (“[I]t has to be understood that, when it comes to economic development, Indian tribes are not just acting as businesses to make money for their shareholders when venturing beyond their reservations. They are in the process of raising governmental revenues because they do not have a tax base on the reservation. They lack such tax base because the Supreme Court has severely curtailed their power to tax non-members, while at the same time allowing state taxation of non-Indians, and Indian land held in fee, located within reservations. In addition,

is worth noting that Indian tribes do have the ability to tax businesses on Indian reservations. However, if the business is non-Indian the state would also tax the same business creating double taxation, a strong disincentive for non-Indian businesses to operate in Indian country.¹⁸⁴ The most famous examples of federally recognized tribes operating businesses on reservation are Indian casinos.

B. Indian Casinos are Not the Gold Standard for Economic Development in Indian Country

Indian casinos have been perceived by many as cash cows that generate generous amounts of revenue for Native populations, notwithstanding that misconception, Native Americans on reservations remain the poorest identifiable group in the United States.¹⁸⁵ Casinos are only profitable when their locations are close to major metropolitan areas, which is the case for only a handful of Indian casinos.¹⁸⁶ As a result, the stereotype of Indian tribes becoming rich and not having to pay taxes could not be further from the truth.¹⁸⁷ Sadly, even with some economic development over the past half century, most Native Americans are poorer than other U.S. communities.¹⁸⁸ Therefore, the stereotypical very

the tribes cannot tax land held in trust by the United States for individual tribal members.”).

¹⁸⁴ See Matthew L.M. Fletcher, Keynote Address, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 771 (2004).

¹⁸⁵ Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy*, 4–14 (Nov. 2010) (unpublished working paper) (on file with the Harvard University library system).

¹⁸⁶ *Id.*

¹⁸⁷ Nathalie Martin & Joshua Schwartz, *Regulation in the Fringe Economy Symposium: The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH & LEE L. REV. 751, 756 (2012).

¹⁸⁸ *Id.* See Armen H. Merjian, *Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609, 611–12 (2010). Professor Merjian States:

Native Americans are, in truth, among the very poorest Americans. As the United States Civil Rights Commission explains, “Native Americans still suffer higher rates of poverty, poor educational achievement, substandard housing, and higher rates of disease and illness. Native Americans continue to rank at or near the bottom of nearly every social, health, and economic indicator.” Fully 23.6% of Native Americans live below the poverty line, and 34% of Native American children live in families with household incomes below the poverty line. Roughly 90,000 Native American families are homeless or under-housed, and nearly half of reservation households are

profitable Indian casino tends to happen only in more densely populated areas, and is a misconception of the broader facts that Indian casinos are not a lucrative proposal for many federally recognized tribes, especially in remote areas within the United States.

C. American Indian Poverty Generally

The average income per American Indian household on reservations was \$24,249, compared to \$41,884 overall, according to the last census data for American Indians on reservations in 2000.¹⁸⁹ Native populations remain at the highest level of poverty, percentagewise, when compared to all other racial groups. Data from 2016 United States Census reported that reservation Indians have a twenty six and two tenths percent poverty rate as compared to the national fourteen percent poverty rate.¹⁹⁰ In recent years there have been signs of economic progress being sustained.¹⁹¹ These economic developments are not attributable to outside government injection of resources, nor do they indicate cultural change or Native American assimilation into the dominant non-native society.¹⁹² American Indian populations are dealing with significant levels of poverty and many other societal ills that plague life on and off the reservation, many of which have origins with United States policy that took self-sufficient people into the despair of dependency. In order to alleviate some of these ills, United States policy must not go backward but rather forwards with indigenous populations leading the way. Congress as a whole needs to be receptive to the advice and policy advocated by tribes because the tribes are uniquely positioned to understand the problems that need to be alleviated.

crowded or severely crowded. One in five of those houses lack adequate plumbing facilities.

Native Americans have a lower life expectancy than any other ethnic group in the United States, and they suffer higher rates of illness for many diseases. “On average, men in Bangladesh can expect to live longer than Native American men in South Dakota.” Elderly Native Americans are 48.7% more likely to suffer from heart failure, 173% more likely to suffer from diabetes, and 44.3% more likely to suffer from asthma than the general population. Meanwhile, one in three Native Americans lack health insurance coverage.

¹⁸⁹ Cornell & Kalt, *supra* note 16, at 4-14.

¹⁹⁰ United States Census Bureau, *American Indian and Alaska Native Heritage Month: November 2017*, Oct. 6, 2017, <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html> [<https://perma.cc/2HQJ-PXC5>].

¹⁹¹ Cornell & Kalt, *supra* note 16, at 4-14.

¹⁹² *Id.*

The data and economic reports that Stephen Cornell and Joseph P. Kalt bring up in their article help to debunk the implicit bias of a dominant society that has tried forced assimilation with a paternalistic superiority.¹⁹³ The current era of self-determination for American Indians is leading to sustainable economic prosperity and as progress continues the prosperity debunks the paternalistic idea that American Indians are not capable of self-sufficiency. Paternalistic nature is referring to a dominant society superimposing its held beliefs of superior cultural values and beliefs upon another.

The trust responsibility the United States government took upon itself has led to economic advancement for non-Indians at the expense of Indians, which has resulted in generational poverty and dependency. This article's intent is to help the reader reevaluate unconscious biases of Indian self-determination. The prior eras of federal Indian policy such as the Treaty era, Allotment era, Termination era, have sowed the seeds of extreme skepticism for promoting Indian self-sufficiency. These eras combined to make over a century of Congressional policy affecting American Indians. Even in the current policy era of Indian self-determination, American Indians can still be viewed as inferior through the lens of Congress' trust responsibility and the paternalistic tendencies of Congress when exercising the Indian Commerce Clause in the United States Constitution. The powers of Congress toward federal Indian policy is a two-edged sword: Congress has the power to grant more rights to federally recognized tribes, yet, the same tribes could also easily be terminated with that same power as was the case of many tribes during the Termination era. Native populations have untapped potential to prosper if these communities are allowed to maintain tribal sovereignty coupled with the right tools. This article does not present an exhaustive list but offers the idea of P2P lending as a potential source of capital and economic development for Native American reservations, both individually and professionally.

IV. PREVIOUS ENDEAVORS FOR INDIAN ECONOMIC DEVELOPMENT

Tribal economic development is essential to the self-determination policy that started in the 1970s; Congress has passed legislation “to provide Indian Tribes and individuals capital in the form of loans and grants to promote economic and other development.”¹⁹⁴ A major obstacle

¹⁹³ *See id.*

¹⁹⁴ Evan Way, *Raising Capital in Indian Country*, 41 AM. INDIAN L. REV. 167, 173 (2016) (citing H.R. REP. NO. 93-907 (1974), as reprinted in 1974 U.S.C.C.A.N. 2873, 2874, 1974 WL 11451)

is finding solutions to stimulate the private sector on federally recognized reservations.¹⁹⁵ Funds raised through Tribal Economic Development Bonds¹⁹⁶ along with tribal municipal debt are limited to “essential government functions.”¹⁹⁷ The reservation private sector is essentially left behind when a large portion of potential funds are restricted to government functions only.¹⁹⁸ Another substantial hurdle for tribal governments is finding outside investors to purchase Tribal Economic Development Bonds and municipal debts.¹⁹⁹

More broadly, often for small startup companies, debt can be issued by tribes in the form of tax-exempt or non-tax exempt bonds.²⁰⁰ There has to be the right combination of tax-exempt status and/or interest rates to entice investors to purchase bonds from tribal governments; theoretically tax-exempt bonds should attract outside investors even with lower interest rates compared to other bonds because the “returns are federally tax-exempt.”²⁰¹ But again the municipal bonds are essentially limited to use for government functions, which would not benefit private economic development activities in Indian Country. The hurdles also pose a challenge in navigating the Securities and Exchange Commission’s (SEC) reporting and registration compliance paperwork. It can be difficult for certain tribal governments that lack the experience with this compliance function.

Tribal economic development bonds and tribal municipal debt are very limited in their ability to fund economic development projects outside of government infrastructure and often times tribal businesses are tasked with providing the necessary funding for the reservation’s public services in addition to making a profit and paying their employees.

Tribal business can take many forms, including a: (1) Limited Liability Company (LLC);²⁰² (2) Section S 17 corporation under the Indian Reorganization Act of 1934;²⁰³ (3) Incorporation I under tribal law;²⁰⁴ or (4) Joint Venture with an outside company.²⁰⁵

¹⁹⁵ *Id.* at 174.

¹⁹⁶ *Id.* at 173 (“Tribal Economic Development Bonds under a provision in the American Recovery and Reinvestment Act of 2009 ... [are] capped at roughly \$2 billion.”).

¹⁹⁷ *Id.* (citing *Tribal Bonds Financing: The Basics*, INTERNAL REVENUE SERV., <http://www.irsvideos.gov/Governments/Tribes/TribalBondsFinancingTheBasics> [https://perma.cc/5ATQ-WV4Z] (last visited Oct. 2, 2015)).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *See id.* at 174.

²⁰¹ *Id.*

²⁰² *Id.* at 174.

²⁰³ *Id.* at 175.

²⁰⁴ *Id.* at 176.

²⁰⁵ *Id.*

A limited liability company is required to be filed under state law, thus removing tribal sovereign immunity and would be subject to federal and state taxes, in addition to any potential taxes imposed by the tribe.²⁰⁶ Creating an Indian-owned business carries several potential risks, including (1) the potential of losing Indian control if the business/corporation is purchased by a non-Indian entity, and (2) the removal of safeguards from which Indian business and non-Indian partners could benefit, such as sovereign immunity. In the Indian Reorganization Act of 1934, Indians were offered an opportunity to incorporate a business with unique benefits called a Section 17 Corporation.

A Section 17 Corporation is an incorporated Indian business that must be wholly owned by the tribe, means that it cannot raise capital through the avenues used by many for-profit corporations, such as issuing preferred stock or common stock, because that would dilute the ownership to include non-Indian investors.²⁰⁷ This is a substantial restriction for tribal business because the capital accessible to most corporations is simply not available for Indian Section 17 corporations. At the same time the Section 17 corporation typically waives sovereign immunity in order to engage in normal practices such as contracting.²⁰⁸ A benefit for organizing as a Section 17 corporation is the possibility to have the Secretary of the Interior to pay for the chartering process of creating the corporation.²⁰⁹ If a Section 17 corporation appears too restrictive for Indian business another option would be to simply incorporate under tribal law.

A tribal business that decides to incorporate under tribal law may present challenges for outside investors due to their unfamiliarity of tribal laws of incorporation and how tribal sovereignty will be used if the business fails, as well as the potential to be taxed by the federally recognized tribe.²¹⁰ The use of sovereign immunity and how taxes will impact a business have left outside investors weary of tribal businesses incorporated under tribal law and those uncertainties may be too powerful, at least, to overcome.²¹¹

A joint venture between an Indian-owned business and a non-Indian-owned business unique opportunities depending on the location of the tribes in question, but “many tribes possess needed assets in the form of an available labor force, water rights, and a strategic location.”²¹² A joint venture presents the underlying assumption that an Indian-owned

²⁰⁶ *Id.* at 174.

²⁰⁷ *Id.* at 175.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 176.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 177.

business already exists to be able to work with a non-Indian business. These are only a few of the considerations that tribes must weigh before deciding on a particular business structure. There are numerous grants and government programs that could be beneficial to Indian business, such as Historically Underutilized Business Zones Program (HUBZone), which helps Indian businesses to be prioritized for federal contracts.²¹³ In order for an Indian business to qualify the tribe must meet four criteria:

- (1) it must be a small business by SBA [Small Business Administration] standards;
- (2) at least 51[percent] of the business must be owned and controlled by an Indian tribe;
- (3) its principal office must be located within land that is considered Indian Country; and
- (4) at least 35 [percent] of its employees must reside in Indian Country.²¹⁴

The HUBZone program would benefit small Indian businesses that can meet the criteria, but the program is still very limited in scope and the type of business would be dependent upon the federal contracts that are available to the Indian business. While this program looks good on paper, it lacks real incentives for Indian business because there is no guarantee that an Indian business will be selected for any federal contracts in question.

The Indian Incentive Program (IIP) allows a prime contractor to receive a 5 percent rebate from the government for using Indian-owned subcontractors in defense contracts.²¹⁵ The amount subcontracted to Indian subcontractor must be at least \$500,000 in order to qualify for the IIP. ²¹⁶ If that amount is met, then theoretically the tribal subcontractors would be more competitive than non-Indian subcontractors. A rebate is another idea. The \$500,000 amount of work the requirement may present obstacles and exclude many of the projects available to contractors near reservation land. Furthermore, the niche of defense contracts for the United States also present paperwork for both the prime contractor and the Indian-owned subcontractor which could be onerous and may not be worth the five percent rebate. However, if a prime contractor were an Indian-owned business working in defense contracts, it could hire more tribal subcontractors through this program.²¹⁷ The IIP presents another very

²¹³ *Id.* at 177.

²¹⁴ *Id.* (citing 15 U.S.C. § 632 (2012)).

²¹⁵ *Id.* at 178. (citing *Indian Incentive Program (IIP)*, U.S. DEP'T OF DEFENSE: OFF. OF SMALL BUS. PROGRAMS, <https://business.defense.gov/Programs/Indian-Incentive-Program/> [<https://perma.cc/K3T8-S4GN>]).

²¹⁶ *Id.*

²¹⁷ *Id.*

small niche area for federally recognized tribes to gain more capital but presents too many restrictions to be of a large value.

Another program designed for small tribal-owned businesses in designed to aid rural areas is the United States Department of Agriculture's (USDA) Rural Business Development Grants (RBDG) Program, which allows for grants of "with very few restrictions on the funds."²¹⁸ The small business must have less than 50 employees, have less than \$1 million in revenue, and have a location, ranging from about \$10,000 up to \$500,000, outside a city population of 50,000 or more inhabitants.²¹⁹ Unfortunately, many rural tribes that should qualify for this type of grant may not because the remote nature already presents a large hurdle to clear, making creating a business difficult. It could be possible, however, for farming businesses or internet businesses to be started in rural communities that could take advantage of this grant.

Scholars have presented other potential solutions for Indian tribes to raise capital, including for tribes to incorporate as a C-corporation under Delaware law and issue common stock.²²⁰ A C-corporation is the most common type of business entity and is a legal structure for a corporation in which the shareholders (owners) are taxed separately from the entity.²²¹ C-corporations require several formalities, such as maintaining voting records and minutes to display transparency.²²² C-corporations that are incorporated in Delaware are shown to provide more value than non-Delaware corporations²²³ partly due to the structures and consistency from the Delaware Chancery Court judges that are "regularly exposed to complex cases provides them with valuable training" and "no other state has specialized business court: [other states] instead allocate shareholder claims to elected judges, many of whom have little experience with corporate law and transactions.²²⁴ That backdrop adds efficiency and confidence in business transaction, which "reduces transaction costs and uncertainty about legal liability.²²⁵ This is all good news most companies looking to incorporate and -companies will have to weigh their own unique factors when deciding where or if to incorporate because . . .

One disadvantage to incorporating in this approach, in theory, is that because a tribal C-corporation would be equivalent to any other C-

²¹⁸ *Id.* at 178–79.

²¹⁹ *Id.*

²²⁰ *Id.* at 180–83.

²²¹ Julia Kagan, *C Corporation*, INVESTOPEDIA, Jul. 2, 2019, <https://www.investopedia.com/terms/c/c-corporation.asp> [<https://perma.cc/3NHN-TNFS>].

²²² *Id.*

²²³ Rob Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525–58 (2001).

²²⁴ *Id.* at 540.

²²⁵ *Id.*

corporation in the marketplace, it could face a hostile takeover from a non-Indian entity, which could result in an Indian business being owned and operated by non-Indians.²²⁶ This could create disincentives for providing benefits to the reservation where the initial Indian business originated from because non-Indian owners may want to see more profit rather than the benefit to Indian communities.

For this reason, Delaware may not be the best choice for tribally owned businesses to incorporate if the tribe wants to maintain control and ownership of the corporation in perpetuity. A common way for a corporation's founders to maintain control is through dual-stock classification, which differentiates founder stock and common stock, resulting in added revenue through common stock with little to no voting rights, while the founders stock maintains the majority of the voting privileges.²²⁷ Classified stocks have been used successfully by many large corporations and are attractive to investors even though they dramatically reduce the voting rights of outside investors.²²⁸ Issuing classified shares can provide a good opportunity for the founders to maintain control, and still raise capital that is vital for the purchasing of assets.²²⁹

Tribes could protect their interest in a C-corporation with several traditional tactics used by non-tribal C-corporations, including: (1) classified stock, (2) a shareholder rights plan, or (3) staggered boards. Successful Native American corporations could offer classified stock to help maintain the vision for the company's growth and future endeavors without the worry of being replaced in a proxy contest. It may be beneficial for an Indian-owned corporation to have a shareholder rights plan

²²⁶ *Id.* at 541 (Delaware law is “relatively pro-bidder” when it comes to its takeover law which raises “fewer obstacles to hostile bids than in other states.” A hostile takeover happens when a company is targeted for purchase without the board of directors approval.).

²²⁷ *Id.* at 893.

²²⁸ Benjamin Means, Article, *The Value of Insider Control*, 60 WM. & MARY L. REV., 891 (2019) (“Google, Facebook, and Snapchat have all offered low-vote or no-vote stock to the general public while reserving effective voting control to company founders. These maneuvers are legal under state corporate law codes that do not require each share to have a single vote, and they have been embraced by investors who are eager to acquire equity and are apparently undeterred by the lack of voting influence. Thus, unless regulators or stock indices change the rules to preclude stock-classification, the trend seems likely to continue.”).

²²⁹ Classified stock with little to no voting rights tend to be issued by very large corporations with no immediate need for capital. Investors are usually looking for a return on their investment and many times investors want ownership equity in the corporation through common stock with voting rights to have greater influence on the corporation's mission and goals. There is no definitive answer as to whether classified stock would be the most successful option, but each corporation should use proper due diligence when deciding whether to offer these types of stock as compared to other avenues for raising capital.

provisions within their bylaws as a way of signaling that the Indian directors have no plan of selling the corporation.²³⁰ This is if the company sought acquisition. Staggered boards could also present another way to preserve Indian control of an Indian C-corporation through directors that maintain tribal priorities.²³¹ Having this could help ensure tribal priorities are consistently met through directors.

A C-corporation could be a viable way for Indian businesses to raise outside capital, but if the Indian tribe would like to maintain control of the corporation indefinitely, it would be important to explore more ways to avoid a hostile takeover. This article does not present all of the ways a corporation could raise capital and prevent a takeover, or even other formations of corporations such as b-corporations.²³² There are many ways to incorporate and this article provides a brief introduction to the most common forms and considerations.

²³⁰ Christine Hurt, *The Hostile Poison Pill*, 50 U.C. DAVIS L. REV. 137, 147 (2016) (A shareholder rights plan, or poison pill, in theory is one way for a board to maintain control of a corporation by requiring a would be purchaser to pay an additional premium, price above market value, in order to purchase above a certain threshold of outstanding stock. There are several ways poison pills can be structured, but typically the poison pill is triggered when the acquirer obtains fifteen to twenty percent of outstanding shares. Then the poison pill triggers an added benefit to shareholders other than the acquirer by imposing an additional cost for each share purchases above the threshold. Another benefit is that poison pills can be adopted at any time even after a bid has been made to acquire the target company, which means a corporation does not need to have poison pill provisions in their charter or bylaws, instead if the board of directors at the target company fear a potential takeover they are allowed to create a poison pill in the hopes of preventing a single entity from gaining a majority of shares. Having ownership of the shares equals a majority of voting rights and that majority can replace the board of directors with its own directors who would approve the acquisition).

²³¹ K.J. Martin Cremers & Simone M. Sepe, *The Shareholder Value of Empowered Boards*, 68 STAN. L. REV. 67, 70 (2016) (In a staggered board the directors are grouped into different classes, typically three, such that each class of directors are up for reelection in successive years. A staggered board helps to protect directors from the threat of early removal by shareholders or by an acquirer-shareholder. A would-be acquirer would have to first purchase enough shares to gain a majority influence in the corporation and then propose its own directors at the annual shareholder meeting with the hopeful election of its directors the would-be acquirer could then receive a majority vote from the board of directors approving the sale of the target company. With a staggered board the would-be acquirer would have to wait at least two election cycles and a lot can change in the interim.)

²³² Certified B Corporation, *About B Corps*, <https://bcorporation.net/about-b-corps> [<https://perma.cc/4424-3P7Q>] (last visited Dec. 11, 2019) (B-corporations focus on societal purposes it elects to pursue rather than the shareholder primacy norm, which is the idea that maximizing profits for the owner shareholders is the primary purpose of the corporation. Rejecting the shareholder primacy norm, a B-corporation can elect to focus on societal goals rather than maximizing returns for shareholders.)

V. PEER-TO-PEER (P2P) LENDING

In the era of the internet, small businesses now have greater access to markets, such as, including peer-to-peer (P2P) lending. P2P lending presents a potential solution for helping Native Americans gain access to capital. Many Americans already have access to P2P funding, which can be a lifeline for economic security and independence. In order to understand P2P lending, it is important to understand some background about the debt industry and the potential biases that lending institutions may have toward minority borrowers.

A. *Understanding Bad Debt as a Background to P2P Lending*

The inherent risks associated with lending money are reflected, at least in part, in the interest rate that lenders offer.²³³ Debts can be collected directly by the original creditor, however, many debts that are not repaid are transferred to debt collection companies that try to collect debt on a contingency basis or the bad debts are sold outright and collected in the third-party debt collection company's own name.²³⁴ “[A]pproximately [ninety-five percent] of all consumer debt is paid on time, and less than half of consumers have been reported as thirty or more days late on a payment” and “approximately two in ten consumers have been more than ninety days overdue on an account at some time.”²³⁵

Abuses from debt collectors cause serious harm to all consumers, and particularly to financially vulnerable consumers.²³⁶ Sometimes consumers are forced to pay more money than they owe, causing them to fall deeper into debt, sometimes leading to job loss and domestic instability.²³⁷ Unfortunately, access to reasonable credit is not a right in

²³³ Alicia Tuovila, Investopedia, “Bad Debt”, (Aug. 8, 2019), <https://www.investopedia.com/terms/b/baddebt.asp> [<https://perma.cc/33YE-M5GR>] (When uncollectable debt has no chance of being repaid the company will write it off as bad debt expense).

²³⁴ Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and its Regulation*, 28 LOY. CONSUMER L. REV. 167, 170 (2016).

²³⁵ *Id.* at 170–71.

²³⁶ Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry*, (Jan, 2013), <https://www.ftc.gov/news-events/media-resources/consumer-finance/debt-collection> [<https://perma.cc/5QD4-NSLX>] (According to the Federal Trade Commission (FTC) debt buyers “paid an average of 4.0 cents per dollar of debt face value.” In one study the FTC analyzed data on more than 5,000 debt buyer portfolios with a face value of \$143 billion but was acquired for \$6.5 billion dollars).

²³⁷ Federal Trade Commission, *Debt Collection*, <https://www.ftc.gov/news-events/media-resources/consumer-finance/debt-collection> [<https://perma.cc/4MGY-4FF9>] (last visited Dec. 12, 2019) (“Some collectors

the United States. The words from the U.S. House of Representatives in 1974 still ring true today when talking about Native American tribes:

Lacking their own capital, they must rely on the private money markets. Yet, these resources are practically closed to them. Indian tribes and individuals have been categorized as poor credit risks in the private market for reasons often beyond their control. As a consequence, private credit, if available at all, is only available at interest rates so high as to be prohibitive²³⁸

The financial crisis of 2008 further exacerbated these challenges, particularly for Native Americans. Many pundits, news channels, and talk radio hosts propagated the idea that racial minorities and lending to racial minorities were the primary reason for the market collapse.²³⁹

The minority-borrower narrative maintains that because of government intrusion into the home lending industry, through the Community Reinvestment Act of 1977 (CRA), Fannie Mae, and Freddie Mac, lenders were forced to provide loans to extremely risky minority borrowers, who themselves were overreaching by trying to purchase homes that they had no business buying. Because lenders had no choice but to provide loans to risky minority borrowers, subprime loans became the avenue of choice for lenders to overreaching minority borrowers and it was because of the then-current failure of black and brown homeowners to pay their mortgages that the subprime mortgage industry collapsed. Thus, as the story purports, the financial market crisis is ultimately traceable to minority Americans and governmental social welfare. With precious little evidence to support this scapegoating, many U.S. citizens have embraced this minority-borrower narrative with vigor.²⁴⁰

Unfortunately, scapegoating rhetoric can have an influence on fuel. Yet, during the time of the financial crisis, P2P lending started to accelerate as a response to provide capital to many people when bank loans were unavailable. Today, P2P lending presents another opportunity for raising capital in Indian Country.

harass and threaten consumers, demand larger payments than the law allows, refuse to verify disputed debts, and disclose debts to consumers' employers, co-workers, family members, and friends").

²³⁸ Evan Way, Comment, *Raising Capital in Indian Country*, 41 AM. INDIAN L. REV. 167, 169 (2016) (Citing H.R. Rep. No. 93-907 (1974)).

²³⁹ See Andre Douglas Pond Cummings, *Racial Coding and the Financial Market Crisis*, Utah L. Rev. 141, 142 (2011).

²⁴⁰ *Id.* at 147–48. *Id.* (citing Jeff Davis, *Minority Subprime Mortgages Have Caused the Financial Crisis*, Altermedia.info (Sept. 23, 2008)).

B. P2P Lending Platforms Explained

Peer-to-peer (P2P) lending is typically a transaction where unsecured loans are given directly from lender to borrower through an online platform. P2P lending is not to be confused with payday loans that are generally used to help people through a short-term shortage of money.²⁴¹ However, payday loans are often predatory in that they charge excessive fees and interest. For example, a woman took out \$5,000 principal and the payday lending agency turned it into a \$42,000 debt.²⁴² That being said, P2P lending falls under the umbrella of financial technology (Fintech).²⁴³ Fintech is a term used to describe technologies that seeks to improve and automate the delivery and use of financial services, while attempting to take market share from traditional brick and mortar financial institutions.²⁴⁴ For example, Fintech has more than doubled in the unsecured personal loans market from 22.4 percent to 49.4

²⁴¹ Nathalie Martin & Joshua Schwartz, Regulation in the Fringe Economy Symposium, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH & LEE L. REV. 751, 755 (2012). (Payday loans were originally created to help people with a cash shortage between now and their payday. “In reality there are now many varieties of short-term loans of this kind, and the loan terms vary markedly. In one common example, a consumer borrows money at a rate of between \$ 15 and \$ 25 per \$ 100 for a period of fourteen days or fewer. In other words, if a consumer got paid four days ago but is already out of cash, she can go borrow, for example, \$ 400 between now and her next payday (now ten days away). To get that \$ 400 at the \$ 15-per-\$100 rate, she will need to have a checking account and will write a check, or authorize an automatic debit, for \$ 460 post-dated to her next payday. When payday comes, she can either let the check or debit clear, or she can go in and pay another \$ 60 to borrow the same \$ 400 for the next two weeks. Interest rates for these loans range from around 400% per annum to over 1,200%, and the industry is largely unregulated in most of the country. Payday lending is one of the fastest growing segments of the consumer credit industry. As Francis notes, [b]y 2005, there were more payday-loan stores in the United States than McDonald’s, Burger King, Sears, J.C. Penney, and Target stores combined.”)

²⁴² Nathalie Martin & Joshua Schwartz, Regulation in the Fringe Economy Symposium, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH & LEE L. REV. 751, 755 (2012) (“Native Community Finance, a community development corporation located on the Laguna Pueblo, recently provided a loan to pay off an internet payday loan given to Western Sky Loans. Under the terms of the loan, the consumer would have paid back \$42,000 to borrow \$5,000. The consumer told the executive director of Native American Finance that she thought the loan was O.K. because it was being offered by a tribe.”) See interview with Marvin Gin, Exec. Dir., Native Am. Fin.

²⁴³ See Julia Kagan, *Financial Technology – Fintech*, Investopedia (Dec. 11, 2019), <https://www.investopedia.com/terms/f/fintech.asp> [<https://perma.cc/JQ88-GXSP>].

²⁴⁴ *Id.*

percent, from 2015 to 2019 respectively.²⁴⁵ An unsecured loan is a loan that is issued with no collateral; collateral typically comes in the form of assets that can be forfeited upon default (failure or inability to pay back the loan payments) of the loan to provide some form of insurance to the lender.²⁴⁶ The majority of P2P lending is done using unsecured loans.

P2P lending platforms intermediate between lenders and borrowers in unique ways that differ from traditional banks.²⁴⁷ P2P lending emerged before the 2008 financial crisis but gained traction during the great recession as traditional financial institutions were struggling and helped borrowers with lower credit scores to request loans on P2P lending platforms.²⁴⁸ Initially, P2P “enabled economically marginal and geographically isolated borrowers to obtain loans on terms that were otherwise difficult for them to obtain through traditional or even fringe financial markets.”²⁴⁹ However, once the SEC started to regulate the P2P lending industry, the requirements for borrowers increased on the for-profit P2P lending platforms, such as Lending Club and Prosper.²⁵⁰ Lending Club and Prosper are two of the most successful P2P platforms that connect lenders and borrowers for personal unsecured loans. The minimum credit scores to originate a loan on Prosper were 640 and 660 on Lending Club.²⁵¹ Borrowers are assigned letter grades based on the borrower’s credit score, credit history, requested loan amount, and past delinquencies.²⁵² The appeal of P2P lending is that the interest rates offered on these P2P platforms tend to be lower than traditional unsecured bank loans or credit cards.²⁵³ The individual’s financial profile will determine the interest rate; however, data from a 2011 report shows the annual percentage rate for a three-year loan was six and nine tenths percent for Prosper and six and eight tenths percent for Lending Club. Currently,

²⁴⁵ See *Experian Study Finds Fintechs More Than Doubled Personal Loan Market-Share in Four Years*, Payment Journal, (Dec. 11, 2019), <https://www.bloomberg.com/press-releases/2019-09-24/experian-study-finds-fintechs-more-than-doubled-personal-loan-market-share-in-four-years> [https://perma.cc/QB5W-BAL2].

²⁴⁶ See James Chen, *Unsecured Loans*, Investopedia (Dec. 11, 2019), <https://www.investopedia.com/terms/u/unsecuredloan.asp> [https://perma.cc/Y7Z8-G89Z].

²⁴⁷ Lisa T. Alexander, *Cyberfinancing for Economic Justice*, 4 WM. & MARY BUS. L. REV. 309, 336 (2013).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 336–37.

²⁵⁰ *Id.*

²⁵¹ *Id.* quoting Government Accountability Office, *Person-to-Person Lending: New Regulatory Challenges Could Emerge as the Industry Grows*, Report to Congressional Committees 11 (2011), <https://www.gao.gov/new.items/d11613.pdf> [https://perma.cc/7Z5M-2BHX].

²⁵² *Id.*

²⁵³ *Id.* at 339.

the rates for Lending Club can be anywhere between six and nine^{6.95} percent to 35.89 percent and 6.95 percent to 35.99 percent for Prosper.²⁵⁴

These platforms do not make loans directly to borrowers. Rather, they act as intermediaries by using WebBank, an FDIC-insured Utah-chartered industrial bank, that issues the loans to borrowers in exchange for the fee that the P2P platforms charge for origination.²⁵⁵ In essence, the WebBank originates the loans and transfers the loans and the risk of default to the respective P2P platforms, which then sells the loan to the lender, who becomes the creditor of the monthly payments from the borrower.²⁵⁶ The platforms collect their fees from borrower's payments and the remaining amount goes to the lender.²⁵⁷ The P2P platforms retain exclusive rights to service the loans, collect monthly payments from borrowers, and recover any delinquencies.²⁵⁸ They use methodologies to determine when to turn over delinquent loans to third-party collection agencies.²⁵⁹ Defaults can range from less than two percent in 2010²⁶⁰ to five percent in 2014 for their three-year loans²⁶¹, and Lending Club as removed grade E loan requests from its platform as of July 1, 2019.²⁶²

Borrower profiles on the P2P lending platforms allow for borrowers to publish personal narratives that provide context for the loan requested. The prospective lenders can use that information to make value judgments apart from the quantitative risk assessment provided by the platforms.²⁶³ This social context could help facilitate altruistic lending endeavors, and arguably it has already through the non-profit model of Kiva.

Kiva is a P2P lending non-profit organization that connects lenders and borrowers through regional micro-finance organizations

²⁵⁴ Robin Saks Frankel, *Prosper Personal Loans: 2019 Comprehensive Review*, Bankrate (May 15, 2019), <https://www.bankrate.com/loans/personal-loans/reviews/prosper/> [https://perma.cc/PW3J-XGYG].

²⁵⁵ Lisa T. Alexander, *Cyberfinancing for Economic Justice*, 4 WM. & MARY BUS. L. REV. 309, 340 (2013).

²⁵⁶ *See id.*

²⁵⁷ *See id.*

²⁵⁸ *See id.*

²⁵⁹ *See id.*

²⁶⁰ *See id.*

²⁶¹ Simon Cunningham, *Default Rates at Lending Club & Prosper: When Loans Go Bad*, Lending Memo (Oct. 17, 2014), <https://www.lendingmemo.com/lending-club-prosper-default-rates/> [https://perma.cc/7XWF-FSXD].

²⁶² Lending Club, *Interest Rates and Fees*, <https://www.lendingclub.com/investing/investor-education/interest-rates-and-fees> (May 3, 2020), Lending Club, *Lending Club Statistics*, (Nov. 29, 2019), https://wr.perma-archives.org/public/k7m4-y9ay/20200328043018mp_/; <https://www.lendingclub.com/info/demand-and-credit-profile.action> [https://perma.cc/K7M4-Y9AY].

²⁶³ *Id.*

across the globe.²⁶⁴ This is because Kiva does not use its P2P platform to connect borrowers directly to lenders, instead “Kiva aggregates funds from lenders and forwards them to microfinance organizations, which make and manage loans to the borrowers and transmit the repayment to Kiva, which in turn distributes the lenders’ shares of the fund received back to the lenders.”²⁶⁵ One of the key differences between for-profit P2P platforms like Prosper and Lending Club from non-profit P2P platform like Kiva is that the SEC does not regulate Kiva because Kiva’s loans are not securities because there is no opportunity to earn interest on the principal.²⁶⁶ Lenders are only returned their principal.²⁶⁷ This is juxtaposed with the fact that although the lenders on the platform make no interest, the microfinance companies that originate the loans to the borrowers do.²⁶⁸ Foreign microfinance partners to Kiva charge on average thirty-five percent, whereas the United States based lenders charge twelve to nine percent interest rates.²⁶⁹ Kiva is a platform that predominately looks to fund developing nations and does not connect lenders with borrowers directly and Thus, may not encourage lenders to consider markets in the United States, such as American Indian reservations, which undermines Kiva’s utility as a P2P platform for marginalized groups within the United States.²⁷⁰

Fintech lenders have become the largest lender of unsecured loans and accounted for thirty percent of the unsecured installment loan sector in 2016.²⁷¹ In a 2019 study named “Peer-to-Peer Lending Versus Banks: Substitutes or Complements?” Huan Tang sought to answer the question on whether P2P platforms displaced current financial institutions or whether P2P platforms acted as complements in serving underserved credit markets.²⁷² Tang “use[d] a data set from LendingClub, the largest

²⁶⁴ Lisa T. Alexander, *Cyberfinancing for Economic Justice*, 4 WM. & MARY BUS. L. REV. 309, 348 (2013).

²⁶⁵ *Id.* quoting Government Accountability Office, *Person-to-Person Lending: New Regulatory Challenges Could Emerge as the Industry Grows*, Report to Congressional Committees, 14 (2011), <https://www.gao.gov/new.items/d11613.pdf> [<https://perma.cc/MKZ4-35VC>].

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *See id.*

²⁷¹ *See FinTechs Taking Larger Share of Personal Loan Market While Increasing Portfolio Risk-Return Performance*, TransUnion (Dec. 12, 2019), <https://newsroom.transunion.com/fintechs-taking-larger-share-of-personal-loan-market-while-increasing-portfolio-risk-return-performance/> [<https://perma.cc/5QUX-T7SC>].

²⁷² Huan Tang, *Peer-to-Peer Lenders Versus Banks: Substitutes or Complements*, *The Review of Financial Studies*, Volume 32, Issue 5, May 2019, 1900–1938, <https://doi.org/10.1093/rfs/hhy137> [<https://perma.cc/CVD5-SU72>].

P2P lending platform in the United States.”²⁷³ The results of the study indicated that P2P platforms act as substitutes to banks when banks tighten their lending criteria and P2P platforms act as complements when serving smaller loans.²⁷⁴

[W]hen low-quality bank borrowers migrate to P2P platforms; the quality of the P2P borrower pool deteriorates. This result suggests that the credit expansion opportunities brought by P2P lenders only benefit infra-marginal bank borrowers. At the same time, however, P2P platforms complement banks by providing small loans.”²⁷⁵

He suggests that infra-marginal bank borrowers, individuals who are not currently being served by the current financial institutions, and small borrowers are the most likely to benefit from the expansion of P2P lending.²⁷⁶ This would indicate that infra-marginal bank borrowers such as Native Americans currently in poverty could benefit from the expansion of P2P lending.

There are also several platforms for P2P lending for businesses that tailor to different business needs.²⁷⁷ Streetshares is a P2P platform specific to United States veteran-owned businesses.²⁷⁸ P2P platforms can be tailored to any niche that people want to create, personal or business, in the end they all help facilitate the exchange of unsecured loans directly from lenders to borrowers. Federally recognized tribes are in a unique position because they can advocate specific legislation on their behalf through Congress’ trust responsibility.

According to Lisa T. Alexander, Professor of Law, the regulation on for-profit P2P lending from the SEC has caused the P2P platforms to raise their credit score minimums. She asserted “that increased SEC regulation primarily protects investors and lenders and restricts economically marginalized borrowers’ access to [P2P lending] markets.”²⁷⁹ The SEC’s policy are in favor of the investor, but responsible lending that is affordable could become a reality through the creation of tax-free P2P lending to federally recognized tribes and individuals with a

²⁷³ *Id.* at 1910.

²⁷⁴ *Id.* at 1900.

²⁷⁵ *Id.* at 1935.

²⁷⁶ *Id.* at 1934–351094.

²⁷⁷ Jackie Zimmermann, *Best Options for Peer-to-Peer Business Lending*, NerdWallet (June 19, 2019), <https://www.nerdwallet.com/best/small-business/small-business-loans/peer-to-peer-business-loans> [<https://perma.cc/D9YL-ZNY9>].

²⁷⁸ *Id.*

²⁷⁹ Lisa T. Alexander, *Cyberfinancing for Economic Justice*, 4 WM. & MARY BUS. L. REV. 309, 346 (2013).

capped interest rate of twenty percent. Ideally, the interest rates found through P2P platforms would be lower than the current payday lending options and the tax-exemption on the returns could incentivize lenders to lend to tribal members and businesses.

Interest earned from P2P lending platforms are currently taxed as normal salary income, it is not taxed as capital gains.²⁸⁰ Therefore, allowing the potential for tax-free earned interest, even with lower interest rates, could still be a powerful way to entice outside capital lenders to lend to Native American communities. Investors primarily care about the rate of return, but the risks of lending to infra-marginal borrowers, such as Native Americans on reservations, could be overcome and promoted as an altruistic endeavor. Kiva has a proven model of gaining capital with no possibility of return because investors care about the mission Kiva is promoting. The borrowers' profiles on P2P platforms offer the opportunity for lenders to better understand a prospective borrower's situation on top of the normal methodologies such as credit score and income-to-debt ratio among others. The personal aspect that P2P platforms offers could spur more investment because Kiva's model of promoting economic development with the possibility of only receiving the original principal back has been proven to work. It is this paper's position that unlike Kiva, where the microfinance companies can charge on average thirty-five percent²⁸¹, lenders on a P2P platform for Native American communities could still earn at most twenty percent tax-free interest which would still be lower than payday loans, some bank loan offerings, and especially what the international microfinance companies are charging. Therefore, P2P platforms directed toward Native Americans with the help of Congress could provide a viable option for a historically economic depressed demographic and provide the right amount of capital to encourage economic opportunities and development that most Americans take for granted. What better way to innovate the financial landscape than bringing new financial technology to a predominately underutilized demographic? Especially if the capital provided through P2P lending can take the form of a Kiva P2P platform minus the high interest rate microfinanciers, there is a huge untapped resource ready to be developed in the United States.

²⁸⁰ Ryan Lichtenwald, *Lending Club and Prosper Tax Information for 2017*, LendIt Fintech News (Mar. (Mar. 21, 2017), <https://www.lendacademy.com/lending-club-prosper-tax-information-2017/> [https://perma.cc/L3HD-84PT].

²⁸¹ Lisa T. Alexander, *Cyberfinancing for Economic Justice*, 4 WM. & MARY BUS. L. REV. 309, 348 (2013).

VI. CONCLUSION

Economic development of Indian country presents opportunities for novel solutions that can be uniquely tailored to every federally recognized tribes' circumstances. The long history of economic depravity and the diversity among federally recognized tribes present unique barriers that will require innovative solutions to fix age-old issues found within Native communities throughout the United States and beyond. Scholars along with Congress have presented niche solutions for specific areas of Indian country. This article encourages innovators to see the opportunities to expand the economic development and deploy capital to help continue and sustain Native American autonomy. It is this hope that resources will help many struggling communities to grow economically and not rob them with burdensome interest rates or payday lending fees. In the age of the internet, there can be easier and faster ways to connect people's ideas along with the capital to be utilized to realize those ideas in the pursuit of economic development of Indian country. P2P lending uniquely tailored for federally recognized tribes could be another solution for some tribes to develop themselves economically while avoiding the burdensome debts of prior financial instruments offered to them such as payday loans. It also offers a wonderful investment opportunity for people wanting to not only make money but offer a service that makes a difference in a community. Not all borrowers will be responsible, but to only offer loans with burdensome interest rates that exceed thirty percent may not be the proper way forward in the hopes of empowering Native communities economically. Historically, the economically important land was seized at their expense and currently the little they do have is being seized by burdensome interest rates many average Americans could not fathom paying, let alone some of the poorest among us. This article calls on the bold innovators to petition Congress, to create new solutions for economic empowerment among indigenous tribes and to do our collective part to make the future better for Native people. When one group suffers, we all suffer. We lose untapped economic power that everyone can benefit from. It is the hope of this article to encourage the progression of innovation in thoughtful ways that can benefit our society as a whole economically and socially. P2P lending directed toward federally recognized tribes is just the first step.