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Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty, The

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THE RECOGNITION AND EVOLUTION OF TRIBAL SOVEREIGN IMMUNITY UNDER FEDERAL LAW: LEGAL, HISTORICAL, AND NORMATIVE REFLECTIONS ON A FUNDAMENTAL ASPECT OF AMERICAN INDIAN SOVEREIGNTY

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"It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union."[1]

"[Indian tribes are] distinct, independent political communities, retaining their original natural rights . . . ."[2]

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. . . . Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."[3]

"[Tribal immunity] predates the birth of the Republic[.]"[4]

I. INTRODUCTION

A. *General Background*

The doctrine of sovereign immunity is a curious feature of Anglo-American jurisprudence. It is a doctrine that has long and widely been hailed in the United States as essential to the sovereignty of a nation or state, transcending definitional categories and extending to the legal

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1. *The Federalist* No. 81 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan U. Press 1961).
2. *Worcester v. Ga.*, 31 U.S. 515, 559 (1832).
3. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 58 (1978).
4. *R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994).

definitions of sovereignty developed with respect to many kinds of sovereign entities.[5] Firmly rooted in federal common law,[6] the doctrine of immunity protects the federal government as well as the states from nonconsensual suit, except in certain narrowly prescribed circumstances.[7] Sovereign immunity also has been recognized under

5. By "definitional categories," I refer to those recognized with respect to different types of sovereign entities. As set forth more fully below, sovereign immunity has been recognized in the United States as inherent to the sovereignty of states, the federal government, American Indian tribes, and foreign nations, each of which derives its sovereign authority from different sources.

6. *Compare* Erwin Chemerinsky, *Federal Jurisdiction* 349 (3d ed., Aspen 1999) ("[*F*]*ederal common law*" is "the development of legally binding federal law by the federal courts in the absence of directly controlling constitutional or statutory provisions."), *with* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 890 (1986) (Although she acknowledges that "[n]o definition of [the term] is inherently incorrect, [Field chooses to] use 'Federal common law' to refer to any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional."); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 5 (1985) ("'Federal common law,' . . . means any federal rule of decision that is not mandated on the face of some authoritative text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense."). While the development of the doctrine of sovereign immunity with respect to the states enjoys a dimension of constitutional interpretation insofar as it may be linked to the Eleventh Amendment, as demonstrated below, the doctrine of sovereign immunity predominantly has been recognized and developed as a matter of federal common law.

7. For instance, federal and state immunity may be circumscribed by Congressional abrogation or by voluntary waiver. With respect to Congressional abrogation, the Supreme Court has limited Congress's power to abrogate state immunity to clear and unequivocal waivers of state immunity enacted pursuant to Congress's enforcement powers under the Fourteenth Amendment. *See e.g. Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (The Fourteenth Amendment was intended to limit state sovereignty, and Congress can, pursuant to that Amendment, "provide for private suits against the states or state officials which are constitutionally impermissible in other contexts."). Congress, however, may not abrogate state immunity pursuant to its powers under the Commerce Clause. *See Seminole Tribe v. Fla.*, 517 U.S. 44 (1996); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) [hereinafter *College Savings I*] (holding that Congress lacks power under Section 5 of the Fourteenth Amendment to abrogate state immunity to hold states accountable in federal court for patent infringements prohibited by federal law).

In addition, the Court, while upholding the general principle that Congress may abrogate state immunity under the Fourteenth Amendment, has struck down a series of other Congressional efforts at abrogating state immunity pursuant to Congress's Fourteenth Amendment enforcement power by imposing stringent fact-finding requirements on Congress. *See e.g. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) [hereinafter *College Savings II*] (false-advertising portions of federal Trademark Remedy Clarification Act allowing suits against states improper abrogation under the Eleventh Amendment because Congress failed to establish an underlying substantive right with respect to trademark protection deserving of enforcement under the Fourteenth Amendment); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (federal Age Discrimination in Employment Act constituted unconstitutional abrogation of sovereign immunity on the grounds that age has not been recognized as deserving of the most stringent constitutional protections and Congress failed to establish sufficient record and pattern of age discrimination by states); *Bd. of Trustees of the U. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Congress lacks Fourteenth Amendment power to waive state sovereign immunity under the Americans with Disabilities Act because it failed to establish a sufficient record and pattern of discrimination by states). State action that derogates federal law may also be circumscribed through the filing of suits for prospective injunctive relief against state officers. *See infra* n. 54.

federal law with respect to foreign nation-states and American Indian nation-tribes, entities that are external to the constitutional system of government.

The principle of sovereign immunity is deeply imbedded in our constitutional system of government and in the ordering of power and relationships between the different sovereign entities such as American Indian tribes and foreign nations, which intersect it. Jurisprudentially, the doctrine has been established virtually as a sacrosanct corollary of sovereign authority: namely, if an entity is recognized under federal law as possessing an independent and inherent basis for exercising sovereign authority, it will naturally be immune from suit unless certain circumstances, also recognized under federal law, occur to abrogate that immunity. As an interpretive matter, therefore, the recognition of sovereign immunity and the force of law it is afforded depends significantly on the extent to which an entity's sovereignty is recognized as a matter of federal law. Principles of federalism and notions regarding the proper allocation of power and decision-making authority between the states, federal government, tribes, and foreign nations therefore permeate and influence the law of sovereign immunity.[8]

In recent years, the United States Supreme Court has been active in defining a kind of "new federalism"[9] in which states have gained

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8. By "federalism," I refer, throughout this paper, generally, to the allocation of power between the federal and state governments. It has emerged as a distinct doctrinal area, a blend of constitutional law and federal common law. Considerations of separation of powers, or the allocation of power between the different branches of the federal government, also influence the debate. For a discussion of the underlying prominence of these two themes with respect to federal jurisdiction, *see* Chemerinsky, *supra* n. 6, at 33-35.

With respect to the allocation of power between these constitutionally-rooted forms of government and those of American Indian tribes, a separate body of law—referred to as "federal Indian law" or "Indian law"—has evolved. As one scholar describes: "The term 'Indian Law' . . . refers primarily to that body of law dealing with the status of the Indian tribes and their special relationship to the federal government, with all the attendant consequences for the tribes and their members, the states and their citizens, and the federal government." William C. Canby, Jr., *American Indian Law in a Nutshell* 1 (West 1998). Federal Indian law is distinct from "the internal law that each tribe applies to its affairs and members," a separate doctrinal area of the law that is typically referred to as "tribal law." *Id.* at 3.

While federalism and federal Indian law traditionally have occupied separate doctrinal categories, a number of scholars—including the author of this paper—have recognized the need to integrate the two, advocating that considerations of tribal sovereignty be included in the study of federalism. For a more in-depth discussion of this point, *see* Frank Pommersheim, *"Our Federalism" in the Context of Federal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. Colo. L. Rev. 123, 124 (2000) (criticizing the failure of federal court teachers and scholars to adequately include discussion of tribal sovereignty in the study of federalism: the "failure of federal courts' scholars to identify and discuss the tribal sovereign, particularly tribal courts, seriously restricts, even distorts, the purview of contemporary federalism."). *See generally* Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 Mont. L. Rev. 313 (1997).

9. A number of scholars have used the term "new federalism" to refer to the Rehnquist Court's expansion of state sovereignty and its concomitant restriction of Congressional

increasing authority vis-à-vis the federal government, and Congress has been constrained in enacting legislation that could conceivably impose unwanted limits or requirements on states.[10] Consistent with this trend, the Rehnquist Court has decided a number of cases regarding state immunity from suit, all of which have been protective of state immunity.[11]

During this same period of time, the Court also has been active in altering the contours of tribal sovereignty. In contrast to its jurisprudence with respect to the states, however, the Rehnquist Court has been considerably less protective of tribal sovereignty. For instance, it has limited tribes' exercise of regulatory and judicial jurisdiction and other aspects of sovereign authority. In the process, it has reversed some of the presumptive rules of interpretation that previously applied to tribal sovereignty.[12]

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power to regulate or delimit state sovereignty. *See e.g.* Michael Crusto, *The Supreme Court's "New" Federalism: An Anti-Rights Agenda?*, 16 Ga. St. U. L. Rev. 517 (2000); Robert Knowles, Student Author, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 Nw. U. L. Rev. 735 (2001); Stephen R. McAllister & Robert L. Glicksman, *Federal Environmental Law in the "New" Federalism Era*, 30 Envtl. L. Rep. 11122 (2000); Ronald D. Rotunda, *The New States Rights, the New Federalism, the New Commerce Clause, and the Proposed New Abdication*, 25 Okla. City U. L. Rev. 869 (2000); Mary-Christine Sungaila, *United States v. Morrison: The United States Supreme Court, The Violence Against Women Act and The "New Federalism,"* 9 S. Cal. Rev. L. & Women's Stud. 301 (2000); Mark Tushnet, *What is the Supreme Court's New Federalism?*, 25 Okla. City U. L. Rev. 927 (2000).

The term "New Federalism" also has been used to characterize the Reagan Administration's attempts to dismantle welfare programs. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 Fla. L. Rev. 499, 500 (1995). Originally, it may have been used to refer to a balance of power between states and the federal government in which federal rights may have been more expansive. *See e.g.* Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L.J. 421 (1974).

10. Specifically, the Court has restricted Congress's power to enact legislation pursuant to the Commerce Clause, Section 5 of the Fourteenth Amendment, and other structural interpretations of the Constitution. *See e.g. U.S. v. Morrison*, 529 U.S. 598 (2000) (declaring invalid a provision of the Violence Against Women Act and restricting Congress's power to enact civil rights legislation pursuant to the Commerce Clause and the Fourteenth Amendment); *Printz v. U.S.*, 521 U.S. 898 (1997) (declaring invalid a federal statute commandeering state executive officials based in large part upon a structural interpretation of the Constitution that protect states from federal regulation); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (declaring unconstitutional the Religious Freedom Restoration Act and limiting Congressional power to enact civil rights legislation under Section 5 of the Fourteenth Amendment); *U.S. v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun Free Schools Act as exceeding Congress's power under the Commerce Clause). *See* cases cited *supra* n. 7.

11. *See e.g. Garrett*, 531 U.S. 356; *Kimel*, 528 U.S. 62; *College Savings II*, 527 U.S. 666; *College Savings I*, 527 U.S. 627; *Alden v. Maine*, 527 U.S. 706 (1999); *Idaho v. Coeur d'Alene Tribe*, 501 U.S. 2618 (1997); *Seminole Tribe*, 517 U.S. 44.

12. For instance, the Court circumscribed tribal civil adjudicatory jurisdiction over cases arising from the activities of nonmembers on state-held right-of-ways or, by extension, other non-Indian-held fee land within the exterior boundaries of tribal reservations. *See Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (A tribal court may not exercise subject matter jurisdiction over a personal injury action between two non-Indians that arose from an accident on a state highway, even though the highway was on tribal trust land within the exterior boundaries of the reservation.). For a comparison of the Court's holding in *Strate* with its sovereign immunity jurisprudence, *see infra* Part III.D.3.

Significantly, however, the Court has declined to reverse precedent recognizing and establishing the doctrine of tribal immunity. In May 1998, the Court expressly reaffirmed the principle of tribal sovereign immunity, rejecting a challenge to the application of tribal immunity brought in the context of a business dispute between the Kiowa tribe and a non-Indian enterprise.[13] In doing so, it continued a longstanding tradition of federal common law in which tribal immunity has been recognized as a fundamental and inherent attribute of tribal sovereignty. The evolution and development of this tradition is at the heart of this paper and is described more fully below.[14]

While the federal judiciary has developed one line of reasoning and precedent with respect to tribal immunity, Congress also has considered and enacted legislation addressing the sovereign immunity of tribes, circumscribing tribal immunity in certain narrowly prescribed circumstances.[15] Similarly, the federal government through its Executive Branch has demonstrated a longstanding commitment to tribal sovereignty.[16] While each of the branches have developed their own jurisprudence and policies with respect to tribal immunity, Congress and the Court—often in concert with the Executive Branch—have engaged in substantive dialogue about the appropriate scope of tribal immunity. This dialogue in itself has been influential in defining the parameters of tribal immunity.

In its 1998 decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, for instance, the Court presented a number of "reasons to doubt the wisdom of perpetuating the doctrine" while "defer[ring] to the role Congress may wish to exercise in this important judgment."[17] Congress, at the time the Court deliberated over and rendered its decision in *Kiowa Tribe*, was actively reconsidering the

13. *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998). A more recent opinion by the Supreme Court also addresses the issue of tribal immunity; however, and as set forth more fully below, the case did not significantly alter the Court's jurisprudence with respect to tribal immunity. *See C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001). Rather, it addressed whether an arbitration clause contained within a construction contract to which the Citizen Band was a party constituted a clear waiver of the tribe's sovereign immunity against a suit to enforce an arbitration award. *Id.* at 414.

14. *See infra* Part III. Consistent with longstanding principles of federal Indian law, the Court also has consistently deferred to the plenary power of Congress to resolve the debate over the ongoing viability of tribal immunity. For a discussion of the plenary power doctrine, *see infra* Part IV.A.

15. A more detailed discussion of the circumstances in which Congress has abrogated tribal immunity is set forth below. *See infra* Part IV. Congress has also enacted legislation—the Foreign Sovereign Immunities Act—limiting the natural immunity of foreign nations. For a discussion and comparison of this legislation, *see infra* Parts II.3. and IV.3.h.

16. The Executive Branch has endorsed tribal sovereignty through its Executive Orders as well as its intervention in litigation, including appeals before the Supreme Court, and in testimony before Congress. *See infra* nn. 427-40 and accompanying text.

17. *Kiowa Tirbe*, 523 U.S. at 758.

doctrine, and the Court was aware of this fact.[18] After months of deliberation and Congressional hearings, however, Congress declined to implement the sweeping changes recommended by the Court.[19] In 2000 Congress enacted legislation that, in the end, had little substantive impact on the scope of tribal immunity.[20] The Supreme Court has not altered the Court's fundamental position regarding tribal immunity even as it addressed the issue in the context of a specific contractual provision.[21]

Significantly, Congress and the Supreme Court, each faced with argument and testimony advocating a change in tribal immunity, declined to change significantly the status quo with respect to tribal immunity. While Congress has carved out some exceptions to tribal immunity in certain contexts,[22] the legal principle that tribes retain an inherent immunity from suit persists as a matter of federal law. Tribes, like states, the federal government, and foreign nations, continue to enjoy a natural immunity from suit, an immunity that has been derived from the recognition under federal law of each entity's sovereign status. Unless a tribe expressly and unequivocally waives such immunity or Congress clearly and unmistakably abrogates it, tribes may not be hailed into court.

B. Scope of Article

This Article traces the recognition and evolution of tribal sovereign immunity as the doctrine has emerged under federal law, including federal statutory law, judicial precedent, and selected orders and actions of the Executive Branch. It examines the theoretical underpinnings of the doctrine, as reflected in federal common law and in the public policies debated and enacted by Congress. It synthesizes various strands of contemporary debate about the topic, and documents the way in which the doctrine has been shaped by interplay and dialogue between the different branches of the federal government. Written in light of a number of recent judicial decisions and legislative enactments, it is intended as a reflective piece about the development of tribal sovereign immunity. The hope is that it may serve also as an interpretive backdrop for future legislative debate and litigation

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18. *See id.*

19. *Id.* Congress considered the Supreme Court's opinion in *Kiowa Tribe* in its deliberations. It also considered the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C.A. § 1605 *et seq.* (West 2001), and the Court's suggestion that it apply the restrictions set forth in FSIA to tribes.

20. Congress enacted the Indian Tribal Economic Development and Contracts Encouragement Act of 2000 and the Tribal Tort Claims and Risk Management Act of 2000. For a discussion of these enactments, *see infra* Part IV.C.3.

21. *See C & L Enter.*, 532 U.S. 411.

22. *See infra* Parts IV.2-3.

regarding tribal immunity and, more generally, for comparative consideration of the law of sovereign immunity that has developed with respect to states and the federal government.[23]

The Article makes the following observations. First, despite recent legislative proposals to eviscerate tribal immunity and opportunities to delimit its scope through federal litigation, the doctrine of tribal immunity remains surprisingly intact, relatively free from unwanted incursions by state and private entities and subject only to abrogation by the federal government. As set forth more fully below, it is firmly rooted in contemporary and historical decisions of the Supreme Court. It has remained intact even while the Supreme Court has limited other aspects of tribal sovereignty such as the civil adjudicatory jurisdiction of tribal courts.[24] With few exceptions, the doctrine of tribal immunity has been protected by Congress. It has been protected even in the face of legislative proposals that would have resulted in wholesale evisceration of the doctrine and even in view of Congressional testimony revealing instances in which immunity barred a remedy to persons injured by tribal governments or officials. Its survival in the face of significant adversity is testimony to the enduring and inherent nature of the sovereignty of American Indian tribes.

Analyzing the development of the doctrine of tribal immunity, including the basis for its authority and the way in which it has evolved, also provides unique insight into the meaning of the doctrine of immunity as a more general principle of Anglo-American jurisprudence. So long as a governmental entity is recognized by the United States as possessing some form of sovereign status, then basic suit immunity is

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23. By way of self-disclosure, which is often essential to one's legitimacy in commenting upon issues of central importance to indigenous people and the laws that purport to define their relationships with others, I am not a Native American. This fact has caused me great pause in writing about Native Americans or even the body of law known as "federal Indian law." I have spent a significant portion of my life living and working with, reading about, and otherwise immersing myself in a number of indigenous cultures, customs, laws and traditions, as well as in studying the Anglo-American doctrinal field of federal Indian law. As an attorney I have represented individual Native Americans before the courts of the Navajo Nation and the Nez Perce Tribe. These experiences combined with my personal connection to other ethnic minorities such as the Basques, although in no way a substitute for being a Native American, have cultivated in me a respect for and understanding of the importance of the autonomy, self-determination, and cultural integrity of indigenous peoples. I write this piece about federal Indian law fully aware that I am relying upon and perpetuating a doctrine that has been identified by at least one Native American scholar as "white Man's law." *See* Williams, *infra* n. 108. The Article is, in fact, about the federal law of one aspect of tribal sovereignty. I am hopeful, however, that to the extent any written piece in the form of a law review article may have an impact, the research and views set forth in this piece will be instructive to others engaged in strengthening and advocating for tribal self-determination and sovereignty. At the very least, I hope it will not undermine their efforts.

24. The current Supreme Court has markedly limited tribal adjudicatory jurisdiction in a number of recent decisions. *See e.g. Nev. v. Hicks*, 121 S. Ct. 2304 (2001); *Strate*, 520 U.S. 438. The evolution of the court's doctrine regarding tribal adjudicatory jurisdiction is set forth more fully below. *See infra* Part III.D.3.

deemed to attach, subject only to abrogation by Congress or by voluntary waiver by persons authorized to speak on behalf of the relevant sovereign entity. The fact that suit immunity is universally recognized—no matter how perceptively weak, foreign, inferior or marginalized the sovereign entity is within the federal system may be construed as proof of the fundamental nature of the link between sovereignty and immunity. The fact that immunity has emerged as an inherent and essential corollary that attaches to a number of types of sovereignty, each with different historical and legal bases for their sovereignty, is further indication of this fact.

An analysis of the emergence and development of the doctrine of tribal immunity reveals that tribal immunity from suit is something that is consistently recognized as arising inherently from tribes' long-recognized and firmly rooted sovereignty. Developed without reference to or basis in the Constitution, the doctrine emerges and is perpetuated in the precedent of the Supreme Court as a veritable truth or natural law of sovereignty. The doctrine has proven to be resilient even in the face of contemporary criticism of the doctrine, and it remains intact even as other areas of tribal sovereignty have been eroded by contemporary decisions of the Court. Its resilience may be attributed to the general Anglo-American reverence for immunity as much as it may be construed as testimony of the ongoing strength of tribal sovereignty. As such, in-depth exploration of the development of the doctrine of immunity in the context of tribal sovereignty provides an opportunity to examine the underlying historical, political, and jurisprudential rationales behind the doctrine.

Finally, studying the development and evolution of tribal immunity presents an opportunity to explore many of the practical and normative consequences of immunity as a general corollary of sovereignty. It also provides a context for exploring the dynamics and force of interbranch dialogue and constitutional interpretation.

Part II of this Article briefly summarizes the contours of the federal law of sovereign immunity with respect to the federal government, states, and foreign nations. Part III traces the development of the federal common law of tribal immunity through decisions of the United States Supreme Court and, to some extent, other courts within the federal judiciary. Part IV examines Congressional activity in the area of tribal immunity. A brief discussion of the Executive Branch's protection of tribal sovereignty, self-determination, and economic development is set forth in Part V. Part VI synthesizes the various strands of federal law regarding tribal sovereign immunity, describing the doctrine's impact on tribal self-governance and economic development and setting forth interpretive possibilities for future litigation and dispute-resolution in the area. Finally, the Article concludes in Part VII with a challenge to

tribal governments to take advantage of the current state of the law regarding tribal immunity and continue to enhance their legitimacy and powers of self-governing by developing and strengthening appropriate remedies for tribal members and others to obtain redress for disputes with tribal governments.

II. THE NON-TRIBAL CONTOURS OF SOVEREIGN IMMUNITY IN THE UNITED STATES: COMPARATIVE PRINCIPLES

A. The Constitutional Design: Federal and State Sovereign Immunity

As a matter of federal law the doctrine of sovereign immunity has been recognized with respect to the federal government as well as the states.[25] While the federal government and many states have provided for voluntary waivers of their immunity, the federal law governing immunity recognizes and preserves the power of each of these entities to define when and under what circumstances each sovereign will permit suit or other legal action against itself. With respect to both the states and the federal government, the doctrine of immunity has been recognized pursuant to federal common law as arising inherently from each entity's sovereign status. Congress has abrogated federal immunity in certain circumstances and has attempted to do so with respect to the states as well in order to allow for enforcement by ordinary citizens of rights guaranteed under federal law.

1. A Brief History of Federal Immunity

As early as 1821, the Supreme Court declared that "[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States[.]"[26] Other decisions have affirmed this principle.[27] "Only Congress can consent to suits against the United

25. With respect to local governments, it has been established that the doctrine of sovereign immunity does not apply. *See e.g. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279-81 (1977); *Lincoln County v. Luning*, 133 U.S. 529 (1890). However, local governments and officials in some circumstances have been successful in claiming that the performance of certain tasks renders them part of the state government for the purposes of the doctrine of immunity. *See e.g. McMillan v. Monroe County*, 520 U.S. 781 (1997) (Despite the fact that sheriffs are elected and paid locally in the relevant jurisdiction, county sheriff in Alabama is a state, not local, official because the sheriff's office is created by the state constitution and enforces the state law.); *Freeman v. Oakland Unified Sch. Dist.*, 179 F.3d 846 (9th Cir. 1999) (Local school board in California is part of the state government and, hence, is immune from suit.). Other cases wherein local officials have attempted to render themselves arms of the state for the purposes of immunity, however, have not been successful. *See e.g. Hudson v. City of New Orleans*, 174 F.3d 677 (5th Cir. 1999) (Parish district attorney's office in Louisiana is not an arm of the state and, hence, is not entitled to sovereign immunity.); *Brotherton v. Cleveland*, 173 F.3d 552 (6th Cir. 1999) (County coroner not entitled to immunity from suit because he, not the state, was responsible for the policy which was the basis of the lawsuit.).

26. *Cohens v. Va.*, 19 U.S. 264, 411-12 (1821).

27. *See e.g. Kennecott Copper Corp. v. State Tax Commn.*, 327 U.S. 573, 580 (1946)

States; the Executive is powerless to waive the federal government's sovereign immunity."[28] The principle that the United States may not be sued absent express authorization by Congress has been firmly established as a matter of federal common law. The fundamental legal basis for its existence in the common law, however, is less clear. Devoid of any express basis in the text of the Constitution, it seems to have emerged rather from an assumption that permeates Anglo-American jurisprudence: namely, that immunity is an inherent attribute of sovereignty.[29] Despite the doctrine's lack of authoritative roots[30] and criticisms[31] that have been mounted against it, however, there is little to indicate the Supreme Court may take steps to alter it. Waivers have been created by Congress, authorizing suit against the government in a number of narrowly prescribed circumstances.[32]

(Frankfurter, J., dissenting); *U.S. v. Lee*, 106 U.S. 196, 204 (1882) ("[T]he United States cannot be lawfully sued without its consent in any case[.]"); *Hill v. U.S.*, 50 U.S. 386, 389 (1850).

28. Chemerinsky, *supra* n. 6, at 589-90 (citing *U.S. v. Shaw*, 309 U.S. 495 (1940)); *Munro v. U.S.*, 303 U.S. 36 (1938); *Finn v. U.S.*, 123 U.S. 227 (1887). Congressional waiver, moreover, must be clear and unequivocal. *See* Chemerinsky, *supra* n. 6, at 590 (citing *Lane v. Pena*, 518 U.S. 187 (1996)).

29. Chemerinsky, *supra* n. 6, at 590 (citing Kenneth Davis, *Administrative Law Treatise* vol. 5, 6-7 (2d ed., Carswell 1984); Charles H. Koch, Jr., *Administrative Law and Practice* vol. 2, 210 (1985)). Although there is no express reference to federal immunity, Justice Frankfurter once suggested that sovereign immunity was "embodied in the Constitution." *Kennecott Copper*, 327 U.S. at 580 (Frankfurter, J., dissenting).

30. *See e.g. Lee*, 106 U.S. at 207 ("[T]he principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.").

31. Commentators have criticized the doctrine on the grounds that it is anachronistic, derived from ancient principles of English common law and imported into America's legal system at a time when the United States and its states were fledgling entities susceptible to ruin by the costs of money judgments. *See e.g.* Noel Fox, *The King Must Do No Wrong: A Critique of the Current Status of Sovereign and Official Immunity*, 25 Wayne St. L. Rev. 177 (1979); James S. Sable, Student Author, *Sovereign Immunity: A Battleground of Competing Considerations*, 12 Sw. U. L. Rev. 457 (1981). Others have criticized the doctrine because it renders the government above the law, thereby ensuring that some individuals will be unable to recover redress for injuries they have sustained at the hands of the government. *See* Chemerinsky, *supra* n. 6, at 591-92; John E. H. Sherry, *The Myth That the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and the New York Courts of Claims*, 22 Admin. L. Rev. 39, 56 (1969). The effect of our current policy of distributing absolute versus qualified immunity among government officers has also been called into question. *See e.g.* Peter H. Schuck, *Suing Government* 82, 89-92 (Yale U. Press 1983). Finally, the doctrine has been criticized in light of the Supremacy Clause of the Constitution on the grounds that the Clause supercedes interpretations borrowed from the English common law. *See* Chemerinsky, *supra* n. 6, at 592. For a more complete discussion of the normative and policy considerations of the doctrine, *see infra* Part VI.B.

32. *See e.g.* 5 U.S.C.A. § 702 (West 2001) (The Administrative Procedures Act) (authorizing suits for injunctive relief); 28 U.S.C.A. §§ 1346, 2671-880 (West 2001) (The Federal Tort Claims Act, which authorizes suits for the negligent torts of United States employees); 28 U.S.C.A. §§ 1346(a), 1491 (West 2001) (the Tucker Act, which authorizes suits for breach of contract and other monetary claims). In addition to these statutes, the Supreme Court has created one exception to the general rule that the federal government is immune from suit, authorizing suits for injunctive relief against federal officers who are acting outside the boundaries of their legal authority or pursuant to an unconstitutional statute. *See e.g. Schneider v. Smith*, 390 U.S. 17 (1968); *Larson v. Dom. & For. Com. Corp.*, 337 U.S. 682 (1949). *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*,

2. State Sovereign Immunity

> [T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.[33]

The development of the law of state sovereign immunity has followed a complicated and tortuous path. The source and justification for the doctrine is the subject of much debate. The Eleventh Amendment of the United States Constitution informs many decisions interpreting the doctrine of state immunity.[34] However, much Eleventh Amendment jurisprudence has been based largely upon other considerations such as debates about the common law that may have existed prior to the ratification of the Constitution as well as fundamental notions about sovereignty in which immunity arises as a natural corollary to sovereign power.[35] Abandoning textual interpretations of the Eleventh Amendment, the Court has relied upon historical interpretations of the structure and balance of power between the states and the federal government.[36]

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403 U.S. 388 (1971) (inferring cause of action for money damages against federal agents from a constitutional provision).

33. *Alden*, 527 U.S. at 713.

34. The Eleventh Amendment reads: "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." U.S. Const. amend. XI. Ratification of the Eleventh Amendment followed the Supreme Court's decision in *Chisholm v. Ga.*, 2 U.S. 419 (1793), upholding a citizen of South Carolina's suit against Georgia to recover a debt incurred during the Revolutionary War for the provision of materials. Chemerinsky, *supra* n. 6, at 394. An intense reaction by states to the *Chisholm* decision resulted in approval of the Eleventh Amendment within three weeks of the decision by both houses of Congress, and ratification by the requisite number of states within a year. *Id.* at 395. The presidential proclamation of the Eleventh Amendment declaring its proper ratification, however, did not take place until three years later. *Id.* For a more comprehensive discussion of the ratification of the Eleventh Amendment, *see* John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* 12-29 (Oxford U. Press 1987). *See generally* Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (Greenwood Publishing Group 1972); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983); James Pfander, *History and State Suability: An Explanatory Account of the Eleventh Amendment*, 83 Cornell L. Rev. 1269 (1998).

35. In a late nineteenth century interpretation of the Eleventh Amendment, for instance, the Supreme Court deviated markedly from a textual interpretation of the amendment, creating a defense of immunity even with respect to a suit brought against a state by one of its own citizens. *See Hans v. La.*, 134 U.S. 1 (1890). Subsequent decisions both expanding and delimiting the sovereign immunity of states have cited *Hans* and other precedent, policies, and historical sources in crafting the federal common law of state sovereign immunity. The Supreme Court has been particularly active in expanding states' immunity protection in recent years. *See supra* n. 7.

36. *See e.g. Alden*, 527 U.S. 706 (holding that probation officers employed by the state of Maine could not sue state in Maine courts for alleged violations of the Fair Labor

In one of its earliest interpretations of the Eleventh Amendment, the Supreme Court departed from the plain language of the Amendment, holding that immunity applied to suits brought against states by their own citizens even though such suits were not covered by its terms.[37] Acknowledging that the plain meaning of the Eleventh Amendment did not apply to the circumstances of the case, the Court noted the "anomalous result" that would occur if a state could be sued in federal court by its own citizens but not by citizens of other states or foreign nations.[38] It concluded that neither the drafters and signatories of the Constitution nor those that ratified the Eleventh Amendment could have intended such a result since "[t]he suability of a State, without its consent, was a thing unknown to the law."[39]

The Court's decision in *Hans* initiated a debate over the history of the ratification of the Eleventh Amendment that has included the development of a number of theories regarding the meaning of state sovereign immunity in light of circumstances surrounding the ratification of the Constitution as well as the Eleventh Amendment.[40]

Standards Act). The Court in *Alden* employed textual interpretations of the Eleventh Amendment and premised its decision upon an interpretation of the immunity that was enjoyed by the states prior to the ratification of the Constitution and, hence, was embodied in the structure and historical context of that document. *Id.*

A number of commentators have analyzed and critiqued the Court's decision in *Alden v. Maine*. *See e.g.* John Allotta, Student Author, *Alden v. Maine: Infusing Tenth Amendment and General Federalism Principles into Eleventh Amendment Jurisprudence*, 51 Case W. Res. L. Rev. 505 (2001); Mark Strasser, *Chisholm, The Eleventh Amendment, and Sovereign Immunity: On Alden's Return to Confederation Principles*, 28 Fla. St. U. L. Rev. 605 (2001); Louise Weinberg, *Sovereignty and Union: The Legends of Alden*, 76 Notre Dame L. Rev. 1113 (2001).

37. *Hans*, 134 U.S. 1.

38. *Id.* at 10. The Court determined "in the light of history and experience and the established order of things" that those who ratified the Constitution could not have intended the state to be subjected to suit by any individual; nor could those who ratified the Eleventh Amendment. *Id.* at 13-14. The Court stated:

> It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other States, or of foreign states, was indignantly repelled?

Id. at 15.

39. *Id.*

40. One "theory of the Eleventh Amendment is that it recognized and reinstated common law immunity . . . enjoyed by the states prior to the adoption of Article III [of the Constitution]." Chemerinsky, *supra* n. 6, at 396 n. 1. Under this theory, the states enjoyed common law immunity as to all suits brought against them, whether by citizens of their own state or by persons and entities external to it. Consequently, the Eleventh Amendment and the Court's interpretation in *Hans* are viewed to have reinstated, not constitutionally imposed, an immunity that the Supreme Court in *Chisholm* failed to recognize. For a discussion of this theory, *see e.g.* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L. J. 1 (1988). Another theory is that the Eleventh Amendment acts as a constitutional restriction on the subject matter jurisdiction of federal courts and bars suits against states. *See* Chemerinsky, *supra* n. 6, at 398-400. Yet another, is that the Amendment was intended only to restrict the jurisdiction of federal courts over cases brought against states that are founded exclusively

Subsequent decisions by the Court have reflected an ongoing debate about the legal basis for state sovereign immunity, as well as its historical roots. While four of the current Supreme Court justices and a number of prominent scholars favor a more restrictive interpretation of the scope of sovereign immunity, the majority of the members of the Court favor the expansive interpretation set forth originally in *Hans*.[41]

In a series of decisions supporting state sovereign immunity, the majority of the members of the Court have increasingly moved away from textual analyses of the Amendment to ones linked more to public policy, history, common law, and even natural law principles. As the Supreme Court recently acknowledged in upholding *Hans*: "Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'"[42] More recently, the Supreme Court even renounced the suggestion that the Eleventh Amendment is the proper authority for state sovereign immunity.[43] Stated the Court:

> [T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretation by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.[44]

Over time, then, the text of the Constitution has become largely peripheral to the law regarding state sovereign immunity, giving way to a larger debate about inherent sovereignty that is rooted in political theory and divergent theories regarding the doctrine's historical roots.[45] Considerations of federalism have driven many recent developments in

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on diversity jurisdiction and, consequently, that the Supreme Court's decision in *Hans* was erroneous. *Id.* at 400-01. The Rehnquist Court is split over its support for the last two theories. Chief Justice Rehnquist and Justices Scalia, Kennedy, O'Connor, and Thomas support the more expansive jurisdictional interpretation of sovereign immunity; Justices Breyer, Souter, Stevens, and Ginsberg support the more restrictive diversity view of sovereign immunity. *Id.* at 401-02.

41. Chemerinsky, *supra* n. 6, at 401-02.

42. *Seminole Tribe*, 517 U.S. at 54 (quoting *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 779 (1991)).

43. *See Alden*, 527 U.S. at 712.

44. *Id.* at 712-13.

45. Analysis of the Supreme Court's jurisprudence with respect to state sovereign immunity is a vast topic, with much contemporary significance and change in the development of federal common law. Discussion of state sovereign immunity and comparison of state and tribal sovereign immunity therefore lies beyond the scope of this paper.

the Supreme Court's jurisprudence on the matter.[46] Value judgments about the proper scope of state sovereignty within the United States and the remedies that should be available to individuals to seek remedies for and protection against violations of federal and Constitutional rights also underlie these decisions.

Whatever its purported jurisprudential basis, the federal judiciary, most notably the Supreme Court, has delineated the contours of state sovereign immunity. The Court has held that the Constitution prohibits suits against states in federal court by a state's own citizens,[47] by citizens of another state,[48] and by citizens of other countries.[49] It has also precluded suits by foreign nations[50] and by tribes.[51]

On the other hand, the Supreme Court has authorized suits by one state against another so long as the state is suing to protect its own interests rather than those owed to individual citizens.[52] Sovereign immunity does not bar suits against states brought by the federal government.[53] Exceptions to immunity have been created in some circumstances for suits brought against individual state officers.[54] While

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46. The Rehnquist Court's activism in recent years in strengthening state sovereign immunity has been part of a broader trend in the jurisprudence of federalism that has resulted in the empowerment of states vis-à-vis the federal government. For a short discussion of federalism and the Rehnquist Court, *see* Erwin Chemerinsky, *Forecasting the Future of Federalism*, 37 Tr. 18 (July 2001). Not only has the Court strengthened the protection afforded to state sovereign immunity, but it has also delimited federal power in a number of other jurisprudential areas. For instance, it has determined in several cases that Congress exceeded its power under the Commerce Clause in compelling state regulatory activity. *See e.g. Lopez*, 514 U.S. 549. It has restricted Congress's power to regulate state action under the Fourteenth Amendment's Section 5 enforcement powers. *See e.g. City of Boerne*, 521 U.S. 507 (declaring the Religious Freedom Restoration Act ("RFRA") unconstitutional on the grounds that the Fourteenth Amendment only authorizes Congress to provide remedies for rights recognized by the courts and Congress in RFRA had intruded impermissibly on the Court's power to interpret and accord meaning to substantive constitutional rights); *Morrison*, 529 U.S. 598 (striking down portions of the Violence Against Women Act on the grounds that neither the Commerce Clause or the Fourteenth Amendment provided Congress with the authority to enact those provisions). *See* cases cited *supra* n. 7.

Other cases protecting states from federal regulatory authority have been rooted in the Tenth Amendment as well as structural interpretations of the Constitution. *See e.g. N.Y. v. U.S.*, 505 U.S. 144 (1992); *Printz*, 521 U.S. 898.

47. *Hans*, 134 U.S. 1.

48. *See e.g. In re N.Y.*, 256 U.S. 490 (1921); *Smith v. Reeves*, 178 U.S. 436 (1900). The bar applies against suits by individuals against territories of the United States. *See e.g. Fred v. Rogue*, 916 F.2d 37, 38 (1st Cir. 1990).

49. *Id.*

50. *Principle of Monaco v. Miss.*, 292 U.S. 313 (1934).

51. *Seminole Tribe*, 517 U.S. 44; *Blatchford*, 501 U.S. 775.

52. *See e.g. Colo. v. N.M.*, 459 U.S. 176, 182 n. 9 (1982); *Md. v. La.*, 451 U.S. 725, 738 (1981).

53. *See e.g. U.S. v. Miss.*, 380 U.S. 128 (1965); *U.S. v. Tex.*, 143 U.S. 621 (1892).

54. In *Ex Parte Young*, the Supreme Court held that the Eleventh Amendment does not preclude suits against state officers for injunctive relief, even where the result could be to enjoin the implementation of official state policy. *Ex Parte Young*, 209 U.S. 123, 155-56 (1908). While it has been criticized by some as creating a false or fictional distinction between the state and its officers, this decision has formed the basis for an important means of limiting the effect of state sovereign immunity and of ensuring state compliance

a full exposition of the contours of and exceptions to state sovereign immunity lies beyond the scope of this paper, the development of the federal law of state sovereign immunity has followed a long and complex path, guided largely by debates and public policy concerns over federalism.

3. Basic Principles of Sovereign Immunity with Respect to Extra-Constitutional Entities: The Development of the Doctrine with Respect to Foreign Nations

> For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country.[55]

As with states and the federal government, the federal judiciary and Congress also have recognized the doctrine of sovereign immunity with respect to foreign nations and American Indian tribes. Tribes and foreign nations, however, are not part of the constitutional design, possessing instead an inherent, natural sovereignty that preceded or otherwise remained separate from the sovereign authority of the United States of America. Thus, there is no purported constitutional text to which the origin of the doctrine of immunity may be attributed. As with the jurisprudence of states and the federal government, the federal judiciary has contributed to the development of the doctrine of immunity with respect to foreign nations. In contrast to its role with respect to the states, however, Congress has played a greater role in defining the contours of the federal law regarding foreign nation immunity. So, too, has the Executive Branch.

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with federal law. As one group of scholars has explained: "To be sure, the doctrine of Ex Parte Young has a fictive quality to it; nonetheless, it serves as an effective mechanism for providing relief against unconstitutional conduct by state officers and for testing, in the federal courts, the constitutionality of the state statutes under which they act." Charles Alan Wright *et al.*, *Federal Practice and Procedure* vol. 13 § 3524 (West 1994). In subsequent cases, the Court expanded its holding in *Ex Parte Young* to grant injunctive relief even if it imposes a prospective financial burden on the state, so long as such costs are ancillary to the prospective injunctive relief. *See Graham v. Richardson*, 403 U.S. 365 (1971); *Quern v. Jordan*, 440 U.S. 332, 346-49 (1979).

A number of exceptions, however, have been developed with respect to suits against state officers. *See e.g. Coeur d'Alene Tribe*, 521 U.S. 261 (suit against state by tribe to quiet title to submerged lands under Lake Coeur d'Alene is precluded by Eleventh Amendment); *Seminole Tribe*, 517 U.S. 44 (Eleventh Amendment bars suit against state officers to enforce federal statutes—in this case the Indian Gaming Regulatory Act, which contains comprehensive enforcement mechanisms.); *Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1994) ("[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment."); *Edelman v. Jordan*, 415 U.S. 651 (1974) (Eleventh Amendment bars suits' against state officers for retroactive relief, including payment of damages for past violations of federal law, but not prospective injunctive relief.). For more information about sovereign immunity and suits against officers, *see generally* Wright *et al.*, *supra*; David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 Sup. Ct. Rev. 149; Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. Chi. L. Rev. 435 (1962).

55. *Verlinden B.V. v. C. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

The development of the federal law regarding foreign immunities is rooted in executive policy and Supreme Court acknowledgement and implementation of such policy. It has been defined significantly by Congressional enactment as well. In 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA").[56] The legislation codified a view of sovereign immunity that evolved with respect to foreign nations as a matter of international customary law and was adopted by the United States State Department and a number of federal courts.[57]

While it provides a general presumption of immunity for foreign nations, the FSIA expressly waives such immunity in a number of circumstances. For instance, the Act waives the immunity of foreign nations for actions arising out of "commercial activity" engaged in by such nations.[58] It further requires that the commercial activity have some connection with the United States, allowing federal courts to exercise jurisdiction over the following categories of activity: (1) commercial activities carried out within the United States,[59] (2) actions performed within the United States that are connected to commercial activities carried out outside the United States,[60] and (3) actions that have a direct effect within the United States even though performed outside of its territorial boundaries.[61] The Act also waives immunity for the tortious acts of the nation or its officials[62] or where immunity has been waived by contract.[63] In addition, FSIA restricts the ability of foreign nations to claim immunity with respect to counterclaims.[64] Responding to growing national sentiment that absolute immunity gave foreign states an unfair competitive advantage in business transactions and denied legal recourse to citizens who suffered injury at the hands of the state, the FSIA essentially restricts the sovereign immunity of foreign

56. 28 U.S.C.A. §§ 1602-1611 (West 2001).

57. The view that emerged was commonly referred to as a "restrictive theory" of foreign sovereign immunity insofar as it began to embrace restrictions on the scope of sovereign immunity accorded to foreign nation-states under federal law. For a more detailed discussion of the development of this theory, *see infra* nn. 69–73 and accompanying text.

58. 28 U.S.C.A. § 1605(a)(2) (West 2001).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* § 1605(a)(5).

63. *See id.* § 1605(a)(1), (6).

64. 28 U.S.C.A. § 1607 (West 2001). Foreign states are precluded from asserting their immunity from counterclaims that arise when the state is a plaintiff where (1) the counterclaim is based upon a situation in which the foreign state would not be immune were it sued separately, (2) the relief sought is substantially the same as that sought by the foreign state, and (3) the counterclaim arises from the same transaction or occurrence as that of the underlying suit by plaintiff. *Id.* The Act also provides for exceptions to immunity "for certain actions 'in which rights in property taken in violation of international law are in issue,' Section 1605(a)(3); actions involving rights in real estate and in inherited and gift property located in the United States, Section 1605(a)(4); and certain actions involving maritime liens, Section 1605(b)[.]" *Verlinden B.V.*, 461 U.S. at 488 n. 11.

nations to public or governmental activities.[65]

Prior to the enactment of FSIA, foreign nations, like American Indian nations and other sovereign entities recognized by the United States, enjoyed virtually absolute immunity from suit in domestic courts under common law. The United States Supreme Court articulated this principle as early as 1812 in *The Schooner Exchange v. M'Faddon*.[66] In that case, which involved a dispute over ownership of a French warship harbored in a United States port, Chief Justice Marshall held that a foreign state was immune from suit in the courts of the United States by virtue of the "perfect equality and absolute independence of sovereigns[.]"[67] To hold otherwise, the United States Attorney had argued, would "amount to a judicial declaration of war."[68]

As time passed and trade with foreign nations increased, however, a more restrictive view of foreign immunity began to permeate international customary law.[69] As one commentator has noted, the restrictive theory "generally posits that a foreign sovereign should be subject to suit for its actions if a private person would be subject to suit for the same conduct in the jurisdiction where the action is brought."[70] Under this theory, immunity is limited to suits involving a foreign sovereign's public acts but does not extend to claims involving the state's strictly commercial acts.[71] A number of foreign states attempted to apply a more restrictive view of sovereign immunity where foreign sovereigns engaged in commercial activities.[72]

In 1952, the State Department formally adopted this view in a document known as the "Tate Letter." In this letter, the Department announced its policy "to follow the restrictive theory of sovereign immunity[.]"[73] Implementation of the policy by the State Department

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65. *See* 28 U.S.C.A. §§ 1602, 1603 (West 2001). The FSIA also reserves immunity for the activities of foreign nations that have little or no connection to the United States. *See id.* at §§ 1602-11.

66. 11 U.S. 116 (1812). On sovereign immunity with regard to foreign parties, *see Verlinden B.V.*, 461 U.S. at 486 ("[*Schooner Exchange*] came to be regarded as extending virtually absolute immunity to foreign sovereigns."); *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926).

67. *Schooner Exchange*, 11 U.S. at 137.

68. *Id.* at 126.

69. For a general discussion of this evolution of international law, *see Verlinden B.V.*, 461 U.S. at 486-89. *See* John W. Borchert, *Tribal Immunity Through the Lens of the Foreign Sovereign Immunities Act: A Warrant for Codification*, 13 Emory Intl. L. Rev. 247, 263-64 (1999); Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnatl. L. 33, 39-40 (1978).

70. Borchert, *supra* n. 70, at 264 (citing Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 Va. J. Intl. L. 9, 25 (1970)).

71. *Verlinden B.V.*, 461 U.S. at 487.

72. Borchert, *supra* n. 70, at 264. Belgium and Italy, for example, adopted this view of foreign immunity.

73. Letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952) (reprinted in 26 Dept. St. Bull. 984-985 (1952); *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (1976) (Appendix 2 to opinion

and the courts proved to be complicated, with foreign nations placing diplomatic pressure on the State Department and courts struggling to determine whether sovereign immunity existed.[74] In the end, the FSIA resolved and codified some of the changes in American policy with respect to foreign nations.

III. JUDICIAL PRECEDENT: RECOGNITION OF TRIBAL SOVEREIGN IMMUNITY AS A MATTER OF FEDERAL COMMON LAW

A. *Contemporary Recognition of the Doctrine: Kiowa Tribe*

The Supreme Court has been consistent in recognizing and protecting tribal immunity from suit. In fact, it is one of the aspects of tribal sovereignty that has remained intact even as the current Supreme Court has diminished tribal authority in other areas.[75] Accordingly, the Court has set forth principles that authorize suit against tribes or tribal entities in only a few narrowly construed circumstances such as where Congress expressly abrogates suit immunity or where a tribe clearly waives its immunity from suit.

In one of its most recent articulations of the doctrine of tribal immunity, the Supreme Court held that Indian tribes enjoy sovereign immunity from civil suits on contracts even if those contracts were made off the reservation and regardless of whether those contracts involved commercial or governmental activities.[76] In that case, the Kiowa Tribe's Industrial Development Commission contracted with Manufacturing Technologies, a private entity, for the purchase of certain stock.[77] The Tribe executed and delivered a promissory note sealing the transaction to the company in Oklahoma City, outside the exterior boundaries of the

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of White, J.)); *see Verlinden B.V.*, 461 U.S. at 487 n. 9.

74. *Verlinden B.V.*, 461 U.S. at 487-88 ("[S]overeign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied."). For a more in-depth discussion of this period of American history, *see* Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev. 901, 905-09 (1969).

75. For instance, the Rehnquist Court has circumscribed tribal civil adjudicatory jurisdiction over cases arising from the activities of nonmember defendants. *See e.g. Strate*, 520 U.S. 438 (A tribal court may not exercise subject matter jurisdiction over a personal injury action between two non-Indians that arose from an accident on a state highway, even though the highway was on tribal trust land within the exterior boundaries of the reservation.). Other examples of this phenomenon are set forth below. *See infra* Part III.D.3.

76. *Kiowa Tribe*, 523 U.S. 751. A more recent opinion by the Supreme Court also addresses the issue of tribal immunity; however and as set forth more fully below, the case did not significantly alter the Court's jurisprudence with respect to tribal immunity. *See C & L Enter.*, 532 U.S. 411. Rather, it addressed whether an arbitration clause contained within a construction contract to which the Citizen Band was a party constituted a clear waiver of the tribe's sovereign immunity against a suit to enforce an arbitration award. *See id.*

77. *Kiowa Tribe*, 523 U.S. at 753-54.

Tribe's lands, and the note provided that the Tribe render payments in Oklahoma City.[78] The Tribe then allegedly defaulted, and the company sued in state court based on the note. In response, the Tribe moved to dismiss claiming lack of jurisdiction, relying in part on its sovereign immunity from suit. Denying the Tribe's motion, the trial court entered judgment for the corporation. "The Oklahoma Court of Civil Appeals affirmed, holding [that] Indian tribes are subject to suit in state court for breaches of contract involving off-reservation commercial conduct." The Oklahoma Supreme Court chose not to review the matter, and the United States Supreme Court then granted certiorari.[79]

In reversing the holding of the state appellate court, the Supreme Court grounded its decision upon its own precedent, stating the principle that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."[80] It noted also that its precedents had never drawn a distinction between commercial and governmental activities of a tribe for the purposes of immunity;[81] nor had the Court drawn a distinction based upon where the tribal activities had occurred.[82] Moreover, in holding that states may "apply their substantive laws to tribal activities" in some circumstances,[83] the Court emphasized that it had always recognized the difference between "the right to demand compliance with state laws and the means available to enforce them."[84]

Although it then proceeded to criticize "the wisdom of perpetuating the doctrine"[85] and suggested Congress might circumscribe tribal

78. *Id.* at 754. In a section entitled "Waivers and Governing Law," the contract provided that "[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." *Id.*

79. *Id.*

80. *Id.* (citing *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engr.*, 476 U.S. 877, 890 (1986); *Martinez*, 436 U.S. at 58; *U.S. v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940)).

81. *Id.* at 754-55. Proponents of restricting sovereign immunity often distinguish between commercial and governmental activity and argue for the elimination of immunity whenever a sovereign entity engages in commercial business relations with outside entities. The Foreign Sovereign Immunities Act, for instance, preserves immunity with respect to foreign nations only when they are acting as government, rather than commercial, entities. *See* 28 U.S.C.A. § 1605(a)(2) (West 2001). As discussed more fully below, however, this justification for waiving immunity may be criticized on the grounds that commercial activity involves a mutual contractual relationship in which remedies available in case of default, including waivers of immunity, generally may be bargained for and incorporated into written agreements.

82. *Kiowa Tribe*, 523 U.S. at 754.

83. *Id.* at 755 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962)).

84. *Id.* (citing *Okla. Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991)).

85. *Id.* at 758. In fact, despite the Court's ultimate endorsement of tribal immunity, the Court questioned the validity of its original precedent, describing how it "developed almost by accident" and rests, in some of its opinions, upon a case in which sovereign immunity was tangentially at issue. *Id.* at 756-57 (citing *Turner v. U.S.*, 248 U.S. 354 (1919)). *See Fidelity & Guar.*, 309 U.S. at 506, 512 (citing, among others, *Turner*, 248 U.S. at 358)

immunity,[86] the Court ultimately deferred to Congress as the sole entity with power to reform tribal immunity. The Court concluded that:

> [i]n light of these concerns, we decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.[87]

Despite its concerns regarding the doctrine, the Supreme Court's decision in *Kiowa Tribe* is solid in its endorsement of tribal immunity. Not only does it preserve and uphold Congress's exclusive power to abrogate it, but it refuses to limit the scope of the doctrine based upon considerations that have justified intrusions on sovereign authority in other contexts. For instance, it refuses to extend the exception to commercial activities of sovereign entities that has been created as a matter of federal law with respect to foreign nations, thereby limiting such nations' ability to defend themselves from suit for disputes stemming from commercial transactions. It declines also to limit tribal immunity in the face of off-reservation conduct involving non-Indian entities, resisting the dissent's efforts to distinguish previous precedent protective of tribal immunity on the ground that such cases involved controversies arising on reservation territory.[88] And it upholds tribal

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("These Indian Nations are exempt from suit without Congressional authorization."). The *Kiowa Tribe* Court also challenged the underlying rationale behind the doctrine as "inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities." *Id.* at 757-58. As the Court explained:

> At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. . . . This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. . . . In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.

Id. at 758.

86. *Kiowa Tribe*, 523 U.S. at 758-59. Acknowledging that tribal sovereignty immunity is a matter of federal law, the Court suggest that Congress might reform tribal sovereign immunity as it has with respect to the sovereign immunity of foreign nations: namely, by confining tribal immunity to reservation or noncommercial governmental activities. *See id.* With regard to the latter form of immunity, the Court cites a 1952 State Department letter announcing a federal policy of denying immunity for the commercial acts of a foreign nation that was later codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §§ 1602-1611 (West 2001).

87. *Id.* at 760.

88. *Kiowa Tribe*, 523 U.S. at 762-64 (Stevens, J., joined by Thomas and Ginsburg, JJ., dissenting) ("In sum, we have treated the doctrine of sovereign immunity from judicial jurisdiction as settled law, but in none of our cases have we applied the doctrine to purely off-reservation conduct. Despite the broad language used in prior cases, it is quite wrong for the Court to suggest that it is merely following precedent, for we have simply never considered whether a tribe is immune from a suit that has no meaningful nexus to the

immunity in the face of argument by the dissenting justices that the rule articulated by the court with respect to immunity is both unjust[89] and a form of judicial law-making.[90] The result is that the sovereign immunity and sovereign authority of American Indian tribes is reinforced by this decision, possibly to the extent acknowledged by the dissent, that tribes may enjoy broader immunity than states, the federal government, and foreign nations.[91] Moreover, the decision resolves a conflict between state courts regarding the proper deference to be given to tribal immunity in the context of commercial dealings.[92]

Tribe's land or its sovereign functions.").

89. The dissent unequivocally proclaims that the rule enunciated by the Court "is unjust." *Id.* at 766. It argues that the injustice is particularly great with respect to tort victims who do not have the opportunity to contract for a waiver of sovereign immunity. *Id.* The dissent explains: "[N]othing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships. Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct." *Id.*

90. According to the dissent, "The Court is not merely announcing a rule of comity for federal judges to observe; it is announcing a rule that pre-empts state power. . . . By setting such a rule, . . . the Court is not deferring to Congress . . . —rather, it is creating law." *Id.* at 764-65. The dissent argues that in the absence of a congressional statute or treaty defining tribes' sovereign immunity, the Court would have had to identify more significant federal interests "supporting its extension of sovereign immunity" in order to justify its pre-emption of state power. *Kiowa Tribe*, 523 U.S. at 765 (Stevens, J., joined by Thomas and Ginsburg, JJ., dissenting).

91. *Id.* at 765 ("[T]he rule [articulated by the majority] is strikingly anomalous. Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations?"). The dissent describes further how the federal government "[a]s a matter of national policy" has waived its immunity from tort liability and from liability arising out of commercial activities, and limited the scope of immunity with respect to foreign nations. *Id.* Moreover, it emphasizes how "a State may be sued in the courts of another State." *Id.* "The fact that the States surrendered aspects of their sovereignty when they joined the Union does not even arguably present a legitimate basis for concluding that the Indian tribes retained—or, indeed, ever had—any sovereign immunity for off-reservation commercial conduct." *Id.*

92. The supreme courts of two states—Oklahoma and New Mexico—have held that tribes lose their immunity from suit when they engage in commercial activities outside of reservation boundaries. *See Aircraft Equip. Co. v. Kiowa Tribe*, 939 P.2d 1143 (Okla. 1997); *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (Okla. 1988). Both decisions were rendered before the Supreme Court handed down its decision in *Kiowa Tribe*. The Oklahoma case, *Aircraft Equipment*, was the very case overturned by the Supreme Court in that opinion. *See Kiowa Tribe*, 939 P.2d 1143, 1148 (Okla. 1997), *overruled, Kiowa Tribe*, 523 U.S. 751. In *Padilla*, in a suit between a private roofing contractor and the pueblo doing business as a construction firm, the New Mexico Supreme Court held that off-reservation business conduct by the Pueblo of Acoma was not clothed with the standard immunity afforded by tribes. *Padilla*, 754 P.2d at 850. Each of these decisions arose within a state with a significant tribal presence, and as such, lends insight into the ways in which at least some state courts would be inclined to reconcile their authority with that of tribes operating within their boundaries but for federal precedent and Congressional regulation.

Aside from these two cases, however, the prevailing view among federal and state courts about tribal sovereign immunity is that tribes enjoy immunity from suit (in state court) whether acting in a commercial or governmental capacity and regardless of whether the disputed contract or activity took place on or off the reservation. *See e.g. Sac and Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995); *In re Greene*, 980 F.2d 590 (9th Cir. 1992); *Morgan v. Colo. River Indian Tribe*, 443 P.2d 421 (Ariz. 1968).

B. *C & L Enterprises: Interpretation of a Tribal Arbitration Clause*

Following *Kiowa Tribe*, the Supreme Court decided a dispute between a construction company and the Citizen Band Potawatomi Indian Tribe of Oklahoma. The Court construed arbitration provisions set forth in a contract with the Tribe as constituting a clear waiver of the tribe's suit immunity to enforce a resulting arbitration award.[93] That decision, however, was limited to an interpretation of a specific contractual arrangement and did not alter the Court's fundamental position with respect to tribal immunity.[94] The fact that the Court in *C & L Enterprises* declined to revisit the basic tenets of its doctrine regarding tribal immunity even after Congress had considered, but rejected, legislation that would have dramatically limited tribal immunity indicates further its ongoing support of tribal immunity.[95]

C. *Tracing Historical Roots*

In interpreting the impact and durability of the Court's decision in *Kiowa Tribe* with respect to federal law, it is also useful to assess the doctrine's historical roots and the judicial precedent upon which it is based. The Court in *Kiowa Tribe* suggested that its precedent, although clearly protective of the doctrine of tribal immunity, may not have been well-founded, particularly to the extent it is based upon the Court's opinion in *Turner*. A number of commentators have similarly criticized the precedent upon which the doctrine of sovereign immunity has been premised.[96] Some have gone so far as to suggest that the doctrine is a judicially created doctrine, without sound foundation for its development.[97]

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93. *C & L Enter.*, 532 U.S. 411.

94. *Id.* at 414, 418-19. ("This case concerns the impact of an arbitration agreement on a tribe's plea of suit immunity.") In fact, the Court reiterates its holding in *Kiowa Tribe* to support its interpretive rule that "to relinquish its immunity, a tribe's waiver must be 'clear.'" *Id.* at 418. Moreover, it purports to resolve a conflict between the Oklahoma Court of Civil Appeals below that determined that the arbitration clause was insufficiently clear to constitute a waiver of immunity and a number of other state and federal courts that have interpreted similar arbitration provisions to the contrary. *See Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assoc.*, 86 F.3d 656, 661 (7th Cir. 1996); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983); *Val/Del, Inc. v. Superior Court*, 703 P.2d 502, 508-09 (Ariz. App. 1985). *But see Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

95. The proposed legislation and Congressional enactments regarding tribal immunity are discussed in more detail below, *see infra* Part IV.C.

96. *See e.g.* Thomas P. McLish, Student Author, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 Colum. L. Rev. 173 (1988) ("[T]he principles upon which the doctrine of tribal immunity is based do not justify the current breadth of the doctrine."); Ryan T. Koczara, Student Author, *American Indian Law—Sovereign Immunity—Indian Tribes Enjoy Sovereign Immunity from Suits on Contracts, Whether Those Contracts Involve Governmental or Commercial Activities and Whether They Were Made On or Off A Reservation. Kiowa Tribe v. Manufacturing Technologies, Inc.*, 118 S. Ct. 1700, 76 U. Det. Mercy L. Rev. 927 (1999).

97. McLish, *supra* n. 97, at 178 ("The doctrine of tribal immunity . . . is a judicially created doctrine that the federal courts have independently fashioned."); David B. Jordan,

A careful review of judicial precedent, however, when evaluated against the backdrop of Congressional action with respect to tribes and their sovereignty, indicates that the doctrine is neither judicially created, nor exclusively rooted in *Turner*. Rather, the doctrine has long been recognized by all three branches of the federal government as an essential and inherent element of tribal sovereignty.

1. Early Colonial Contact

A fundamental attribute of the sovereignty of American Indian nations, including many of its theoretical premises under federal law, is that the concept of tribal sovereignty predates the ratification of the Constitution and formation of the United States. It arose out of a history in which distinct communities of American Indian peoples lived, created institutions and systems, and governed themselves, sharing territories within North America prior to European contact. It emerged from a tradition of early European contact in which discourse, commercial trade and intercourse, negotiation, and treaty-making regulated interactions and relationships between Indian nations and their people, on the one hand, and European nations and their colonial settlers, on the other hand. As one scholar of Indian law has set forth: "At the time of European discovery of America, the tribes were sovereign by nature and necessity; they conducted their own affairs and depended on no outside source of power to legitimize their acts of government."[98] Chief Justice Marshall explained in an early opinion: "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[99] Many of the principles defining the relationship and division of power between the American Indian tribes and the United States were developed in the context of the English colonizing experience in North America, although other colonial influences contributed as well.[100]

Student Author, *Federal Indian Law: Tribal Sovereign Immunity: Why Oklahoma Businesses Should Revamp Legal Relationships with Indian Tribes After Kiowa Tribe v. Manufacturing Technologies, Inc.*, 52 Okla. L. Rev. 489, 492 (1999). *See generally* Scott D. Donahy, *License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought By Non-Native American Employees of Tribally Owned Business*, 25 Fla. St. U. L. Rev. 679, 701 (1998) (advocates Congressional abrogation of immunity with respect to the rights of non-Native American tribal employees); Brian Lake, Student Author, *The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1996 Colum. Bus. L. Rev. 87, 107 (1996) (arguing that principles of fundamental fairness to off-reservation and non-Indian businesses and individuals warrant abrogation of immunity with respect to off-reservation business activities); David M. LaSpaluto, Student Author, *A 'Strikingly Anomalous,' 'Anachronistic Fiction': Off-Reservation Sovereign Immunity for Indian Tribal Commercial Enterprises*, 36 S.D. L. Rev. 743 (1999).

98. Canby, *supra* n. 8, at 68.

99. *Worcester*, 31 U.S. at 542-43.

100. David H. Getches *et al.*, *Cases and Materials on Federal Indian Law* 52 (4th ed., West

Prior to the formation of and assertion of independence by the United States, the British Crown interacted with tribes as foreign sovereigns.[101] English colonists purchased title to land from local tribes.[102] Britain negotiated treaties with various tribes, as did a number of the colonies. English and European settlers recognized the importance of cooperating with the powerful Indian tribes, treating them as sovereigns possessing full rights of ownership of lands and requiring negotiation and treaty-making.[103] As Felix Cohen explained about land acquisition:

> Whatever theoretical conflicts existed concerning the nature of the respective ownership rights of Indians and Europeans to land in America, practical realities shaped legal relations between the Indians and colonists. The necessity of getting along with powerful Indian tribes, who outnumbered the European settlers for several decades, dictated that as a matter of prudence, the settlers buy lands that the Indians were willing to sell, rather than displace them by other methods. . . . For all practical purposes, the Indians were treated as sovereigns possessing full ownership rights to the lands of America.[104]

As tribes reacted to growing pressure for land and resources exerted upon them by early colonists, the Crown assumed a more protective relationship with respect to tribes, insulating them from encroachments by the colonists.

Early in the nation's history, the newly formed United States followed Britain's example and recognized and interacted with indigenous Nations as separate sovereigns whose existence necessitated nation-to-nation diplomacy and treaty-making. As with the Crown, the federal government asserted control over the regulation of Indian affairs. The Constitution granted to Congress—and only Congress—the power to "regulate Commerce with the Indian tribes."[105] The President acquired the constitutional power to make treaties, including those with tribes, with the consent of two-thirds of the members of the Senate.[106] Federal

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Wadsworth 1998). Some scholars, however, have traced theoretical influences such as the doctrine of discovery to the Spanish colonial era and other episodes of European colonization. *See id.* at 42-52. *See generally* Felix S. Cohen, *The Spanish Origins of Indian Rights in the Law of the United States*, 31 Geo. L. J. 1 (1942); Robert A. Williams, Jr., *The American Indian in Western Legal Thought* 317 (Oxford U. Press 1990); Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination against Indigenous People's Rights of Self-Determination*, 8 Ariz. J. Intl. & Comp. L. 51 (1991); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. Rev. 219; Robert A. Williams, Jr., *Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. Cal. L. Rev. 1 (1983).

101. Felix S. Cohen, *Handbook of Federal Indian Law* 52-55 (Mitchie 1982).
102. *Id.*
103. *Id.*
104. *Id.* at 55.
105. U.S. Const. art. I, § 8, cl. 3.
106. U.S. Const. art. II, § 2, cl. 2.

agents, usually employed within the War Department, were appointed to represent the federal government in its dealings with the various tribes.[107] Hundreds of treaties were entered into with tribes by the United States government.[108] These treaties and the processes utilized in negotiating them across colonial and indigenous cultures form the foundation for much of federal Indian law. As one notable Native American scholar has explained:

> [T]hroughout the nearly two centuries-long period of their initial multicultural encounter, Indians and whites negotiated hundreds of treaties, and engendered a set of legal traditions that today, at least according to the Indian side of the story of Indian rights in this country, forms much of the core of our Federal Indian Law.[109]

Over time, the federal government, through its Executive Branch, continued to centralize and aggregate its power over Indian Affairs, abrogating the involvement of states in this process. While treaties resolved some of these tensions in interests and provided important foundational sources for interpreting and implementing relationships between the various tribes and other entities such as states and the federal government, the federal law regarding the relationship of tribes to other governmental entities developed in other directions as well. Both the Supreme Court and Congress began to define, qualify, and in some circumstances circumscribe tribal sovereignty.

Between 1790 and 1834, Congress enacted a series of Trade and Intercourse Acts that established an early framework for regulating relations between the Indian people and their governments and non-

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107. *See* Canby, *supra* n. 8, at 13.

108. *Id.* at 96. *See* Robert A. Williams, Jr., *"The People of the States Where They Are Found Are Often Their Deadliest Enemies": The Indian Side of the Story of Indian Rights and Federalism*, 38 Ariz. L. Rev. 981, 988 (1996).

109. *See* Williams, *supra* n. 108, at 988. Arguing that "White Man's Indian Law" does not adequately account for the preservation of tribal sovereignty and Indian rights, Professor Williams sets forth an "Indian side of the story" wherein ancient Indian legal traditions of treaty-making form the foundational principles. *Id.* at 982. "In telling the Indian side of the story of the source of the principles in our Indian law that have protected tribes from their deadliest enemies—'the people of the states'—we resituate Indians . . . as a dynamic force in the perpetuation of the core protective principles of Indian rights in America." *Id.* at 987 (citing *U.S. v. Kagama*, 118 U.S. 375, 384 (1886)). The Court in Kagama stated:

> Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by congress, and by this court, whenever the question has arisen.

Kagama, 118 U.S. at 384. Specifically, Williams attributes the lasting protection of tribal sovereignty, at least vis-à-vis the states and their non-Indian residents, to the tribes' involvement and leadership in the creation of a "legal tradition of a treaty as creating a relationship of sacred trust and protection" across indigenous and colonial cultures. Williams, *supra* n. 108, at 994.

Indians or non-tribal entities.[110] Among other things, these statutes made trade with Indians the subject of federal regulation. They also established tribal boundaries and attempted to regulate and prevent encroachments by non-Indians upon Indians or their lands or affairs. Significantly, these Acts did not address matters internal to tribal self-governance, such as the conduct of Indian people or their government structures and systems.[111]

In 1871 Congress unilaterally announced a change in federal policy from one of diplomacy to one of legislative regulation.[112] The Supreme Court subsequently held that Congress had the plenary power to determine the appropriate boundaries of tribal relations with states and the federal government, including the power to abrogate treaties with tribes.[113] Tribes nonetheless continued to enjoy some form of inherent sovereignty derived from their status as self-governing peoples that pre-existed the drafting of the Constitution. Following early Congressional action, the Supreme Court also attempted to resolve some of the tensions between tribal sovereignty and colonial assertion of right and power.

2. The Marshall Trilogy[114]

In one of its first articulations of tribal sovereignty, the Supreme Court recognized that tribes did not surrender the independence and sovereignty inherent in their status as self-governing people.[115] In holding that the Cherokee Nation was not a "foreign state" for the purposes of diversity jurisdiction under the Constitution, thereby depriving the Cherokee Nation of subject matter jurisdiction over a claim against the State of Georgia, Chief Justice Marshall defined tribes as "domestic dependent nations" with rights to occupy their lands subject

110. *See e.g.* 1 Stat. 137 (1790); 2 Stat. 139 (1802); 4 Stat. 729 (1834).

111. Canby, *supra* n. 8, at 12.

112. The legislation provided that "[n]o Indian nation or tribe . . . shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty[.]" 25 U.S.C. § 71 (1871). It did not disturb existing treaties but ended the process of treaty-making with tribes in favor of Congressional legislation or agreements approved by both houses of Congress, thereby aggregating the federal power over Indian Affairs more fully into the hands of Congress. *See id.*

113. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1903). For general information about treaty abrogation and judicial interpretation of such abrogation, *see generally* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 Cal. L. Rev. 601, 623-34 (1975).

114. These opinions are also sometimes referred to as the Cherokee Cases. *See e.g.* Williams, *supra* n. 108, at 982. They consist of a trilogy of cases, each authored by Chief Justice Marshall. In the world of Federal Indian Law or, in the words of Professor Williams' "White Man's Indian Law", they are "sacred texts as far as Indian scholarship is concerned." *Id.* Although Williams' criticizes this grounding and characterization of tribal sovereignty, even he begins his article with a recitation of the trilogy, albeit under the heading "Their Side of the Story." *Id.* at 982-84.

115. *Cherokee Nation*, 30 U.S. at 19-20.

only to the federal government's power to abrogate, define, or alter that right.[116] The Chief Justice explained that "[t]he condition of the Indians in relation to the United States is . . . marked by peculiar and cardinal distinctions which exist nowhere else."[117] Although the Indians were "acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government," Justice Marshall accorded them a unique sovereign status. The legal status of tribes, according to the Chief Justice, was different from that of foreign nations and subject to the sovereignty and authority of the United States, but different also from the states; and such status was derivative of indigenous claims to land and powers of self-governance.[118]

Eight years earlier, in *Johnson v. McIntosh*,[119] the Supreme Court had acknowledged the existence of tribal sovereignty and the legal and moral right to retain possession and occupancy of tribal lands, subject, however, to the power of the discovering colonial nation to extinguish title to indigenous lands.

> [The tribes were] the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion . . . . [However], their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those that made it.[120]

These cases, taken together, established the foundation for federal recognition of a limited yet unique form of inherent sovereignty with respect to Indian nations, that by claim of discovery remained subject to the authority or usurpation by the United States of America.

A year after its holding in *Cherokee Nation*, the Supreme Court further refined its articulation of the relevant jurisdictional boundaries between tribes, states, and the federal government. In *Worcester v. Georgia*, the Court held that an Indian tribe was not subject to the jurisdiction of the state in which it was located.[121] The case arose out of a state court conviction of a non-Indian minister who resided within the

116. *Id.* at 17.
117. *Id.* at 16.
118. *Id.* at 17.
119. 21 U.S. 543, 574 (1823).
120. *Id.* In a subsequent opinion, Marshall explained that the doctrine of discovery was needed to resolve legal claims to land between European nations, thereby avoiding "bloody conflicts, which might terminate disastrously to all." *Worcester*, 31 U.S. at 543 ("The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate.").
121. 31 U.S. at 595-96.

Cherokee Nation and engaged in preaching to the Cherokee Indians but had failed to abide by a state statute requiring him to procure a license or take an oath to defend Georgia's laws and constitution.[122] The minister argued that he was present in the Cherokee Nation "with the permission and approval of the Cherokee nation, and in accordance with the humane policy of the government of the United States, for the civilization and improvement of the Indians"[123] and, hence, could not be indicted or prosecuted under the laws of Georgia. Furthermore, he maintained that the numerous treaties entered into between the United States and the Cherokee Nation constituted acknowledgement by the United States that the Cherokee Nation was a sovereign nation, "authorised [sic] to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America."[124]

Chief Justice Marshall found the Georgia statute to be inapplicable by virtue of the Supremacy Clause and the fact that the Cherokee Nation was a separate sovereign subject only to regulation by the United States. The Court concluded that the Cherokee Nation was "a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of congress."[125] Furthermore, concluded the Court, the "whole intercourse between this nation, is, by our constitution and laws, vested in the government of the United States."[126]

Thus, after these three early cases several foundational principles are acknowledged by the Supreme Court: (1) based upon their indigenous claims to land and political status, tribes enjoy certain sovereignty that preexisted the formation of the United States of America, and (2) this sovereignty is subject to abrogation or diminution only by the federal government, not the states. Furthermore, from the latter principle, together with the Court's determination that the tribes were dependent upon the United States for protection, the principle that the United States owed to tribes a trust responsibility also emerged as a matter of Supreme Court precedent.[127] While the sovereignty enjoyed by

122. *Id.* at 537. The state legislation required that all white persons residing within the boundaries of the Cherokee nation procure a license and take an oath from the governor or his agent by a certain date or be guilty of a high misdemeanor, punishable upon conviction by confinement in the state penitentiary with hard labor for a term of not less than four years. *Id.* at 542. The minister refused to obtain such a permit.

123. *Id.* at 529.

124. *Id.* at 530.

125. *Id.* at 561.

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

127. While the notion of the United States as a fiduciary to the tribes may have emerged as a matter of Supreme Court precedent, it is important to acknowledge that this principle long predated the Supreme Court's first involvement in the development of American

tribes under early federal common law was not absolute, the fact that a form of inherent sovereignty was recognized is significant to the development of other principles of tribal sovereignty such as the doctrine of tribal immunity. In the words of Chief Justice Marshall:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense.[128]

3. Early Protection of Tribal Governments from Suit: Jurisdictional Beginnings

While these early Supreme Court cases provided a framework for acknowledging and defining basic tribal sovereignty as a matter of federal law, other federal cases provided the foundation for the doctrine of tribal immunity. As early as 1895, for instance, the Eighth Circuit Court of Appeals upheld a decision by a territorial court of the United States in Indian Territory that dismissed a suit brought against the Choctaw Nation, its principal chief, and its treasurer by "a white man, and citizen of the United States," to recover attorney's fees alleged to be due for professional services rendered to the Nation.[129] The Court concluded that since Congress had not conferred on the court jurisdiction over an action against the Nation or any of its chief executive officers for an alleged debt or liability, no suit could be maintained against the tribal entities. It noted, however, that Congress had

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Indian/federal relations and federal recognition of tribal sovereignty. As Professor Williams has stated: "Chief Justice Marshall's opinions in the Cherokee Cases are not the foundational sources of the original principles guiding our Federal Indian Law. Marshall was simply perpetuating the principles of a much older tradition originating in the Classical Era of treaty negotiations between Indians and whites on the continent, a tradition which regarded a treaty as a relationship of sacred trust and protection." Williams, *supra* n. 108, at 996.

128. *Worcester*, 31 U.S. at 559-60.

129. *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 373 (8th Cir. 1895).

authorized suit to be brought against the Choctaw Nation in other circumstances.[130] The Court stated:

> The constitutional competency of congress to pass such acts has never been questioned, but no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the Indian Territory in the absence of an act of congress expressly conferring the jurisdiction in the particular case. The political departments of the United States government, by treaties, by acts of congress, and by executive action, have always recognized the Choctaw Nation 'as a state, and as a distinct political society, separate from others, and capable of managing of its own affairs and governing itself'; and the courts are bound by these acts of the political departments of the governments.[131]

Although the Court did not expressly refer to the doctrine of tribal sovereign immunity in so many words,[132] its holding was clearly influenced by the longstanding assumption that immunity is essential to the sovereign authority of Indian nations. Moreover, it expressed that it was the policy of the United States to permit suits against an Indian nation or tribe only in a few rare and specified circumstances. The Court explained:

> Being a domestic and dependent state, the United States may authorize suit to be brought against it. But, for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases, where the subject-matter of the controversy was particularly specified, and was of such a nature that the public interests, as well as the interests of the Nation, seemed to require the exercise of the jurisdiction. It has been the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual. 'It is a well-established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or any other without its consent and permission; but may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state.'[133]

The Court further clarified its recognition of the doctrine of tribal

130. The Eight Circuit referenced, for instance, acts of Congress conferring jurisdiction in the territorial courts over controversies arising between the railroad companies authorized to construct roads through the Indian Territory and the Choctaw Nation and other Indian nations and tribes. It also referred to congressional legislation authorizing suit to be brought by or against Indian Nations to settle controversies between them and the United States and between themselves. *Id.* at 373-74. *See infra* Part IV.B.

131. *Id.* at 374 (citing *Cherokee Nation*, 30 U.S. 1). In support of its conclusion that the Choctaw Nation was an independent sovereign nation, the court also cited the treaty between the United States and the Choctaw Nation of September 27, 1830 (7 Stat. 333 (1830)) and a variety of other cases.

132. In fact, the case primarily involved subject matter jurisdiction.

133. *Thebo*, 66 F. at 375 (citing *Beers v. Ark.*, 61 U.S. 527 (1857)).

sovereign immunity by emphasizing its importance to the exercise of sovereignty by states and the federal government.[134] The Court concluded by identifying the practical importance of maintaining the doctrine with respect to tribes such as the Choctaw Nation, stating: "As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it."[135]

Thirteen years following its ruling in *Thebo*, the Eighth Circuit extended its recognition of tribal sovereign immunity to a suit in equity brought against the principal chief of the Creek Nation seeking specific performance of a written contract and attorneys' fees allegedly owed by the nation for services rendered to it pursuant to the contract.[136] In that case, the attorney, who had been terminated from employment by the Nation, sought to enjoin the principal chief from signing or issuing any warrants upon the general fund of the Creek Nation, or otherwise issuing payment to the subsequently hired attorney or any other person except the plaintiff.[137] Declaring he had no remedy at law by which he could sue or recover salary and damages from the Creek Nation, he also sought to enjoin the subsequently hired attorney from accepting any payment from the Nation and requested that the court declare him the legally constituted national attorney for the Creek Nation, entitled to perform the duties and receive the salary of such position.[138]

What is interesting about the case is that the Eighth Circuit extended its holding in *Thebo* to claims for injunctive relief against an individual tribal officer.[139] Ordinarily, explained the court, an action at

134. In fact, the court explained that the states, after originally claiming no immunity from suits, soon refused to "submit themselves to the coercive process of judicial tribunals," ratifying the Eleventh Amendment to the Constitution. *Thebo*, 66 F. at 375. Unless the "'honor and good faith of the state itself" should permit such judicial recourse, "[o]ne claiming to be creditor of a state is remitted to the justice of its legislature." *Id.* at 376 (citing *Ex parte Ayers*, 123 U.S. 443, 505 (1881)).

135. *Id.* at 376.

136. *See Adams v. Murphy*, 165 F. 304 (8th Cir. 1908). Pursuant to the contract, which provided for cancellation by either party with thirty-days notice "upon good cause shown," the tribe had attempted to terminate its relationship with the plaintiff based upon an unfavorable report it received issued by special inspectors to the federal government. The report indicated that the attorney had been unduly influenced by strong sentiments against another person engaged in service in Indian country so as "to render his statements untrustworthy and to impair his usefulness as a public officer." *Id.* at 307. Thirty days after serving notice on the attorney, the tribe entered into an identical contract with another attorney. Upon receiving notice of the termination, the plaintiff filed the equity action that is the basis for the case.

137. *Id.*

138. *Id.*

139. With respect to state officers, the Supreme Court has held that suits for injunctive relief brought against individual state officers or agents do not constitute a violation of the Eleventh Amendment's protection of state sovereign immunity. *Ex Parte Young*, 209 U.S. 123 (1908).

law for damages would constitute a complete remedy for breach of contract for professional employment. The Creek Nation, however, is exempt from civil suits to recover damages or compel performance of contracts; and the courts cannot compel the principal officer of the Nation to perform acts which would constitute performance of the contract by the Nation if voluntarily undertaken by him.

> [P]olitical societies, like private corporations, can act only through agents, and to constrain those agents is to constrain the society. To say that this tribe is exempt from civil suit on its contracts, and yet compel its principle chief, by judicial process, to take funds from its treasury and turn them over to the court to be applied in discharge of its contracts, is to destroy in practice the very exemption which at the outset is conceded as a legal right.[140]

Moreover, to allow a party to circumvent the law's denial of a remedy of law out of consideration for public policy, "would be a scandal to our jurisprudence, and render equity less just than the law."[141]

In support of its position, the Eighth Circuit relied on precedent, including the underlying policy rationales recognized therein, established in *Thebo*. Like *Thebo*, it acknowledged that the public policy that Indian tribes are exempt from civil suit "has been the settled doctrine of the government from the beginning."[142] The Court also noted that "[i]f any other course were adopted, the tribes would soon be overwhelmed with civil litigation and judgments."[143] The United States court in the Indian Territory, therefore, had no jurisdiction to enforce performance of the attorney's contract with the Creek Nation.

One more case confirmed the federal government's longstanding position with respect to tribal sovereignty and liability to suit prior to the Supreme Court's first formal recognition of the doctrine of sovereign immunity. In *Turner v. United States and the Creek Nation of Indians*,[144] the Supreme Court rejected another claim filed against the Creek Nation for damages sustained by three bands of Creek citizens to an extensive fence-line erected by the plaintiff. Although it hinged its decision on the lack of a substantive right to recover the damages from a governmental entity rather than sovereign immunity, the Court upheld the principle that Indian nations enjoyed immunity from liability unless expressly imposed upon them by Congress.[145] In doing so, it relied upon the fact that the Creek Nation had been recognized by the United States "as a distinct political community, with which it made treaties and which

140. *Adams*, 165 F. at 308.
141. *Id.* at 309. The public policy referred to by the court is that Indian tribes are exempt from civil suit. *Id.* at 308.
142. *Id.*
143. *Id.*
144. *Turner*, 248 U.S. at 356.
145. *Id.* at 357-58.

within its own territory administered its internal affairs."[146] As such and like other governments, including state and municipal governments, it was immune from liability from suit, at least with respect to injuries to persons or properties sustained as a result of mob violence or other failure to keep the peace.[147]

Insofar as the case involved mob activity by tribal members, none of whom officially represented the Creek Nation and only one of whom was employed by the Creek Nation as its treasurer, the Supreme Court in *Kiowa Tribe* was accurate in diminishing the authority of *Turner* as the original source of its precedent on tribal immunity. The opinion does focus upon the general presumption that, absent legislation to the contrary, government entities should not be held liable for failure to maintain the peace, including the spontaneous and destructive actions of a group of individuals, even where certain tribal officers may have been involved. It is important to note two points, however. First, *Turner* was not the exclusive basis for the Supreme Court's first articulation of the doctrine of tribal sovereign immunity as something separate and distinct from subject matter jurisdiction. In *United States v. United States Fidelity & Guaranty Co.*, the Court hearkened back to a "public policy which exempted the dependent as well as the dominant sovereignties from suit without consent" recorded in a number of previous decisions of the federal courts.[148]

Second, the Court in *Turner* undeniably upheld dismissal of a private action brought against the sovereign Creek Nation even where Congress had enacted legislation that directly addressed the plaintiff's dispute with the Nation. Enacted in 1908, the legislation authorized the Court of Claims to "consider, and adjudicate and render judgment as law and equity may require" the claim of plaintiff, Turner, against the Creek Nation for destruction of personal property and the values of loss to pasture for the actions of "any of the responsible Creek authorities, or with their cognizance and acquiescence."[149] The Act did not, however, expressly address the fact that the governing structure of the Creek Nation had been dissolved in a prior act of Congress.[150] Although authority to sue the Creek Nation was implied by the act of 1908, the Court held that there was nothing in the Act that indicated an intent to create a new substantive right. The Court explained:

> Without authorization from Congress, the Nation could not then have been

146. *Id.* at 357.
147. *Id.*
148. *Fidelity & Guar. Co.*, 309 U.S. at 512 nn. 10-11 (citing *Turner*, 248 U.S. at 385; *Cherokee Nation*, 30 U.S. at 8; *Adams* , 165 F. at 308; *Thebo*, 66 F. at 372).
149. *Turner*, 248 U.S. at 356-57 (citing The Act of May 29, 1908, 35 Stat. 444, 457 (1908)).
150. The Court refers to The Act of March 1, 1901, § 46, 31 Stat. 861, 872 (1901). *Turner*, 248 U.S. at 356.

> sued in any court; at least without its consent. . . . The words of the act . . . merely identify claims which the court is authorized to consider. Authority to sue the Creek Nation is implied; but there is nothing in the act which even tends to indicate a purpose to create a new substantive right.[151]

What these early cases demonstrate is that the federal government has long recognized and respected what amounts to tribal immunity from suit even if the Supreme Court did not name the doctrine in so many words until 1940. They demonstrate also that Congress has long been recognized as the only entity with authority to authorize suits against tribal governments. The cases indicate, moreover, that these principles are fundamentally rooted in and derived from an understanding that tribes, like other sovereign entities, possess distinct, political authority over their territory, members, and matters affecting their territory and internal self-governance. As such, tribes possess natural immunity from suit, a fundamental attribute of the sovereign power of any government entity possessing cognizable sovereignty. Tribal immunity, then, emerges in these early cases as a well-established immutable truth, rooted in public policy and well-established custom and tradition between the different branches of the federal government and integrated over time into judicial precedent.

4. Development of Federal Common Law of Tribal Immunity

Between 1940 and 1998, the Supreme Court first named, then clarified, refined and firmly established, the doctrine of tribal immunity as a principle of federal common law. In the first of these cases, *Fidelity & Guaranty*, the Supreme Court refused—in the name of tribal sovereign immunity—to uphold a judgment in federal bankruptcy court fixing a credit obtained against the Choctaw and Chickasaw Nations.[152] The disputed decision involved a bankruptcy proceeding wherein the United States, as trustee of the Nations' interest, sought to recover royalties under a coal-mining lease on behalf of the tribes; the defendant coal company, via its surety, filed a cross-claim against the Nations.[153]

Consistent with its previous rulings, the Court held that the Indian Nations were exempt from suit without Congressional authorization. "It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."[154] Moreover, concluded the court, in filing for relief in the bankruptcy

151. *Id.* at 358.
152. *Fidelity & Guar.*, 309 U.S. 506.
153. *Id.* at 510. The court instituted reorganization of the coal company pursuant to federal bankruptcy law and offset the debtor's cross-claim against the Nation's claim for royalties, leaving a net balance in favor of the debtor. *Id.*
154. *Id.* at 512.

proceedings before the federal courts, the Nations in no way waived their immunity from cross-claims. The Court stated:

> The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts, not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian Nations with their unusual governmental organization and peculiar problems.[155]

Although the Court does cite *Turner* and two lower court decisions in support of its holding,[156] it also refers to the "public policy which exempted the dependent and the dominant sovereignties from suit without consent" originally set forth in Chief Justice Marshall's seminal opinion, *Cherokee Nation v. Georgia*.[157] Therefore, pursuant to the holding of the case, the United States could recover for the Nations royalties from the surety in federal court, but the surety could not maintain its cross-claims against the Nations. The Court concluded that "[p]ossessing . . . immunity from direct suit, we are of the opinion that [Indian Nations] possess similar immunity from cross-suits."[158]

Following its decision in *Fidelity & Guaranty*, the Supreme Court further refined its articulation of tribal sovereign immunity. In *Puyallap Tribe, Inc. v. Department of Game of Washington*,[159] wherein a state had asserted jurisdiction over tribal fishing both within and outside the reservation boundaries, the Court sustained tribal immunity from suit without distinguishing where the tribal activities had occurred. In *Three Affiliated Tribes*,[160] wherein the Three Affiliated Tribes sued Wold

155. *Id.* at 513.
156. *Id.* at 512 (citing *Turner*, 248 U.S. at 358 and others).
157. *Fidelity & Guar.*, 309 U.S. at 512 (citing *Cherokee Nation*, 30 U.S. 1).
158. *Id.* at 513.
159. 433 U.S. 165 (1977). In *Puyallup* the State of Washington sought injunctive and declaratory relief in state court to limit the number of steelhead trout that tribal members could catch with nets both on and off the reservation and to compel the Tribe to report to the state Department of Game the names of members authorized to exercise treaty fishing rights together with the number of steelhead caught by its treaty fishermen each month. The Tribe resisted the authority of the state court order on its own behalf as a sovereign entity and on behalf of the affected tribal members. Although the Court held that the state could regulate the off-reservation fishing activities of individual tribal members over whom it properly obtained personal jurisdiction, it maintained that tribal sovereign immunity protected the Tribe from regulation and suit in state court to compel it to monitor and convey to state authorities the number of fish caught by tribal members. The Court stated: "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Id.* at 172. It relied upon its own precedent as well as that of the Washington Supreme Court. *Id.* (citing *Fidelity & Guar.*, 309 U.S. 506; *State ex rel. Adams v. Superior Ct.*, 356 P.2d 985, 987-88 (Wash. 1960)). The Court also referred to the conclusions of "the commentators." *Id.* (citing U.S. Dept. of Interior, *Federal Indian Law* 491-94 (U.S. Govt. 1958)).
160. 476 U.S. 877. In that case, the Three Affiliated Tribes of the Fort Berthold Reservation brought suit in state court against a non-Indian engineering firm for negligence in the design and construction of a water system for an Indian village located within the external boundaries of the reservation. The firm moved to dismiss the suit for

Engineering in state court for negligence and breach of contract, the Court held that tribes maintain immunity from suit even from counterclaims and that states cannot condition state court jurisdiction of suits brought by tribes against non-Indians upon a waiver of the tribe of its immunity. The Court explained, "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. . . . [I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty is privileged from diminution by the States."[161]

In perhaps one of its most dramatic interpretations relevant to sovereign immunity yet to date, the Court in 1978 even preserved the doctrine with respect to a claim brought by an individual tribal member against her tribal government for allegedly violating a federal substantive right to equal protection of the law guaranteed by the Indian Civil Rights Act ("ICRA").[162] In 1968, Congress enacted the ICRA, legislation that makes certain substantive rights contained in the United States Bill of Rights and made applicable to states via the Fourteenth Amendment binding on American Indian tribal governments.[163]

Pursuant to ICRA, Julia Martinez, a member of the Santa Clara Pueblo, and her daughter Audrey Martinez, who was not a member of the Pueblo, sought declaratory and injunctive relief in federal court to bar the enforcement of a tribal ordinance that denied tribal membership and its associate rights and benefits to the children of female members of the Pueblo who married outside of the tribe, but not to the children of male members who married outside. Julia Martinez had married a member of the Navajo Nation, and her children were ineligible for membership in the Santa Clara Pueblo even though they were raised in

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lack of subject matter jurisdiction based upon a state statute that barred the tribe from maintaining its suit in state court absent a waiver of sovereign immunity; and both the trial court and the state's supreme court held that dismissal was appropriate. The Supreme Court reversed the decision, however, on the grounds that the federal statute governing state assumption of jurisdiction over Indian country, Public Law 280, was designed to expand state jurisdiction over Indian country and to encourage states to assume such jurisdiction and that no federal provisions had been made for state disclaimers of jurisdiction. *Id.* at 844-45. The Court also held that the jurisdictional scheme imposed by the state unduly interfered with federal and tribal interests in self-government and autonomy and federal interest in ensuring access to the courts. *Id.* at 898-90 ("This result simply cannot be reconciled with Congress's jealous regard for Indian self-governance."). With respect to state statutory provisions that conditioned tribal court access to state court upon a waiver of sovereign immunity, the Court held that Congress—not the states—had the authority to diminish and impose conditions upon "the common law sovereign immunity possessed by the Tribe" and necessary for Indian sovereignty and self-governance. *Id.* at 890.

161. *Id.* at 890-91.

162. *Martinez*, 436 U.S. 49 (holding that although Congress had rendered several enumerated civil rights applicable to tribal governments, it failed to create a cause of action except where it should become necessary to file a petition for writ of habeas corpus). *See generally* Indian Civil Rights Act, 25 U.S.C.A. § 1301 *et seq.* (West 2001).

163. 25 U.S.C.A. § 1301 *et seq.* (West 2001). *See infra* nn. 267-69 and accompanying text.

that community, participated in its life, spoke the Tewa language, and, for all practical purposes, were culturally Santa Claran Indians.[164] Significantly, she filed suit in federal court only after exhausting a number of efforts at challenging and amending the relevant ordinance within the political and governing systems available within the Santa Clara Pueblo. Her suit named the Tribe and its Governor, Lucario Padilla, as defendants.

Following a full trial, the District Court found for the tribal defendants on the merits, indicating that tribal membership rules were squarely within the self-governing powers of the tribe, that the tribe was in the best position to determine whether its membership ordinances were consistent with the equal protection clause of ICRA, and that cultural identity would best be promoted by deferring to the tribes' interpretation of this provision.[165] On appeal, the Tenth Circuit upheld the District Court's determination that the federal courts had jurisdiction[166] but determined that the tribe's interest in the ordinance was not substantial enough to justify its discriminatory intent.[167]

The Supreme Court reversed the judgment of the district court and held that the federal courts lacked subject matter jurisdiction over the Martinez' claim. Enforcement of ICRA, it held, is limited to a petitioner seeking a writ of habeas corpus "to test the legality of his detention by order of an Indian tribe."[168] After *Martinez*, individuals seeking enforcement of substantive rights guaranteed to them by Congress in ICRA in circumstances other than detention must turn to remedies and measures available within the relevant tribal system of government.

In 1991, the Court again pronounced its commitment to tribal sovereign immunity, holding that tribes enjoy immunity from suit in state courts for recovery of state taxes on the off-reservation sale of cigarettes to non-Indians by tribal commercial entities, even where the state may have the substantive right to collect the tax.[169] As in *Three Affiliated Tribes*, the tribe in this case initiated suit against Oklahoma's Tax Commission in state court seeking injunctive relief from the assessment of taxes on cigarette sales made in tribally owned

164. *Martinez*, 436 U.S. 49, 54 n. 5 (citing *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 18 (D.N.M. 1975)).
165. *Id.*
166. *Martinez*, 436 U.S. at 54 (citing *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1042 (10th Cir. 1976)). The Tenth Circuit determined federal jurisdiction based upon Title 28, section 1343(4) of the United States Code, which confers subject matter jurisdiction over "any civil action authorized by law . . . to secure equitable or other relief under any Act of Congress providing for the protection of civil rights." 28 U.S.C.A. § 1343(4) (West 2001)).
167. *Id.* While it recognized that the standards of analysis developed pursuant to the Fourteenth Amendment's Equal Protection Clause were not necessarily controlling in the case, it concluded that the gender-based classification was presumptively discriminatory and could be sustained only if justified by a compelling tribal interest. *Id.* at 1047-48.
168. 25 U.S.C.A. § 1303 (West 2001).
169. *Okla. Tax Commn.*, 498 U.S. 505.

convenience stores located on tribal land. The state counterclaimed for all of the unpaid assessed taxes. Although the Court held that the state did have the right under federal law to collect a state-imposed cigarette tax on cigarette sales to nonmembers, it precluded the state from seeking judicial enforcement against the tribe based upon the doctrine of sovereign immunity.

The opinion, authored by Chief Justice Rehnquist, illustrates once again the Court's deep-seated commitment to preserving tribal sovereign immunity. The Court begins its analysis, for instance, with the following proposition: "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories."[170] Suits against tribes "are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."[171] The logic is direct and simple: all sovereign entities are immune from suit by virtue of their sovereignty; tribes are (and have always been) sovereign entities; therefore, tribes enjoy immunity from suit. Immunity flows naturally and logically from the sovereignty retained by Indian Nations. Aside from the logical elegance of the doctrine, the Court ties its holding also to previous precedent.[172]

Moreover, reasoned the Court, "Congress has consistently reiterated its approval of the immunity doctrine."[173] Although free to dispense with immunity or limit it, Congress has only occasionally authorized limited classes of suits, and never to enforce tax assessments.[174] At the same time, it has consistently reflected a desire to promote Indian self-governance, including tribal self-sufficiency and economic development. "Under these circumstances," the Court announced, "we are not disposed to modify the long-established principle of tribal sovereign immunity."[175] Thus, as a result of tribal immunity, the state of Oklahoma would have to seek collection of the relevant taxes through other means.[176] Seven years later, the Court re-articulated its position on tribal immunity, extending its holding in *Oklahoma Tax Commission* to efforts by private business entities to enforce contracts stemming from

170. *Id.* at 509 (citing *Cherokee Nation*, 30 U.S. 1).

171. *Id.* at 509 (citing *Martinez*, 436 U.S. at 58).

172. *Id.* at 510 ("The doctrine of tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases." *Id.* (citing *Turner*, 248 U.S. at 358 and others).

173. *Id.* at 510.

174. *Id.* (citing Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C.A. § 1451 *et seq.* (West 2001), and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C.A. § 450 *et seq.* (West 2001)).

175. *Okla. Tax Commn.*, 498 U.S. at 510.

176. *Id.* at 514. The remedies suggested by the Court include: (1) suing individual tribal agents or officers, (2) "seizing unstamped cigarettes off the reservation," (3) assessing wholesalers who supplied unstamped cigarettes to the tribal stores, (4) entering into agreements with the tribes for a mutually satisfactory scheme for tax collection, or (5) seeking redress from Congress. *Id.* at 514 (internal citations omitted).

tribal commercial activities engaged in outside of the boundaries of tribal lands.[177]

D. *Current Contours of Federal Common Law Regarding Sovereign Immunity*

1. Summary of Basic Legal Principles Regarding Immunity

In each of its decisions regarding tribal immunity, the Court has consistently upheld the principle that "an Indian tribe is subject to suit only where Congress has authorized suit or the tribe has waived its immunity."[178] It has adhered to that principle whether the claim asserted against a tribal government is brought directly against the tribe or as a cross- or counter-claim to a suit maintained by the tribe in the first instance.[179] It has refused to distinguish for sovereign immunity purposes between tribal activities that take place within reservation boundaries and those that take place elsewhere.[180] Moreover, the doctrine has been upheld whether the challenged tribal activity involved commercial or governmental actions by the tribe.[181] In fact, immunity has been extended to agencies of the tribe[182] as well as, in some circumstances, to tribally-chartered corporations.[183] With the exception of suits brought by the federal government, tribes maintain immunity from suit vis-à-vis all other entities. States must respect tribal immunity, even where they may have waived their own immunity from liability.[184] The doctrine protects tribes from suit in federal court, state

177. *See Kiowa Tribe*, 523 U.S. at 760.

178. *Id.* at 752. *See generally Three Affiliated Tribes*, 476 U.S. 877; *Martinez*, 436 U.S. 49. While this general principle protects tribal immunity from suit vis-à-vis state and private parties, however, lower circuit courts have determined that tribes additionally are not immune from suits by the United States. *See e.g. U.S. v. Red Lake Band of Chippewa Indians*, 827 F.2d 380 (8th Cir. 1987); *U.S. v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986). Consistent with the dependent sovereign status created and recognized by the federal government, the power of tribes to sue the United States has not similarly been recognized, however. *See e.g. Yakima Tribal Court*, 806 F.2d 853.

179. *See e.g. Three Affiliated Tribes*, 476 U.S. 877.

180. *See e.g. Kiowa Tribe*, 523 U.S. at 754.

181. *Id. See Doe v. Oneida Indian Nation of N.Y.*, 756 N.E.2d 78 (N.Y. 2001) (The fact that the plaintiff sustained injury at a commercial establishment, a hotel, outside the reservation was irrelevant because tribes are immune from suits arising from their commercial activities, whether conducted on or off the reservation.).

182. *See e.g. Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986).

183. *See e.g. Ransom v. St. Regis Mohawk Educ. and Community Fund, Inc.*, 658 N.E.2d 989, 994-95 (N.Y. 1995). Corporations operating independently of tribal government, who may not be construed as extensions of the tribe, however, may not qualify for immunity. *See generally Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (1989).

184. *See e.g. Okla. Tax Commn.*, 498 U.S. 505. *See generally Morgan*, 443 P.2d 421. Tribes of course are barred from suing states in federal court without their consent. *Seminole Tribe*, 517 U.S. 44; *Coeur d'Alene Tribe*, 521 U.S. 261. The Ninth Circuit has determined that the inherent sovereignty of the tribes does not abrogate the states' immunity, even where a state has waived its own immunity. *See e.g. Mont. v. Gilham*, 127

court, and tribal court.[185]

In short, the Supreme Court has firmly recognized and established that so long as a tribe is formally recognized by the federal government, it enjoys the protection of the doctrine of tribal immunity.[186] Only where clear and unequivocal waiver may be construed from the actions and agreements of an authorized representative of a tribe[187] or where Congressional legislation unmistakably authorizes a breach in immunity[188] may the doctrine of tribal immunity be abrogated under law established by the federal judiciary. While tribes did not always have the unfettered authority to waive their own immunity, federal law now generally presumes such authority.[189] Some degree of interpretive latitude now exists for courts faced with determining whether certain contractual or statutory terms should be construed as waiving tribal immunity.[190] Aside from these possibilities, the question remains: what

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F.3d 897 (9th Cir. 1997).

185. *See e.g. Pan Am.*, 884 F.2d 416 (state and federal courts).

186. The federal government maintains a Federal Register list of recognized tribes. Since 1994, Congress has required the Secretary of the Interior to annually publish, in the Federal Register, a list of tribes recognized and eligible for federal services by virtue of their Indian status. 25 U.S.C.A. § 479a-1 (West 2001). Inclusion on this list is important for the purposes of sovereign immunity. *See Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997).

187. The *C & L Enterprises* case, for instance, is an example of how a federal court may permit suit against a tribe based upon an arbitration clause or other contractual arrangement in which the tribe waives immunity from suit. *C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001).

188. Not only must Congress express a clear and unmistakable intent to abrogate tribal immunity, but Congress must also provide for a cause of action. *See Martinez*, 436 U.S. 49 (Court determined that no suit under ICRA, other than a petition for a writ of habeas corpus under 25 U.S.C.A. § 1303, could be maintained in federal court even as against tribal officers because no cause of action could be implied from the legislation.).

189. In and prior to 1895, for instance, it appeared that tribes could not agree to be subjected to suit without Congressional approval. *See e.g. Thebo*, 66 F. 372. Later, decisions implied first that tribes might be able to waive immunity without congressional approval, and later, that tribes had unfettered authority to waive immunity. *See e.g. Turner*, 248 U.S. at 358; *Martinez*, 436 U.S. at 58. For a more detailed discussion of this progression in the law as well as of contemporary judicial interpretations of tribal waivers, *see* William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 173-85 (1994).

190. The proceedings culminating in *C & L Enterprises* demonstrate the possible range of interpretive latitude that exists with respect to whether a tribe has voluntarily waived its immunity from suit. While the lower court determined that the arbitration provisions set forth in the contract between the parties was not sufficiently clear to warrant waiver of immunity, the Supreme Court held otherwise. Since the Court's holding is limited to a particular arbitration clause in a particularized set of circumstances, it does not foreclose the ability of other courts—state, federal, or tribal—to reach different conclusions with respect to how to interpret tribal contracts, ordinances, constitutions, or other documents that may indicate an intent to waive sovereign immunity. *See e.g. Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1046 (E.D. Wis. 1999) (General "sue and be sued" clause that authorized tribal housing authority "to agree by contract to waive any immunity from suit which it might otherwise have[,]" may not be construed as a tribal waiver of immunity absent a contract containing express waiver.). *See generally Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581 (8th Cir. 1998) (holding that similar "sue and be sued clause"—required before the tribe can receive HUD assistance—did not

additional interpretive latitude exists post-*Kiowa Tribe* for those who desire to pursue remedies against American Indian nations?

2. Post-*Kiowa Tribe* Interpretive Possibilities

First, claims against particular tribal officers in some circumstances may provide a way for outside entities to influence or circumscribe the exercise of tribal power. The Supreme Court, for instance, has indicated that tribal immunity does not always protect tribal officers.[191] If tribal officers or employees act within the boundaries of their lawful authority, they may be entitled to immunity from suit under the doctrine of tribal immunity.[192] If their official acts lie beyond the boundaries of their own authority, though, or exceed what the tribe has the legal authority to confer, some courts have held that individual officers or employees may be subject to suit.[193] Tribal judges routinely are subjected to suit in federal court in suits challenging the exercise of subject matter jurisdiction by tribal courts.[194] A number of courts have held that tribal immunity bars claims for damages against tribal officials.[195] Variability therefore exists in judicial determinations about

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constitute a voluntary waiver of immunity); *Garcia v. Akwesasne Hous. Auth.*, 105 F. Supp. 2d 12 (N.D.N.Y. 2000) (HUD-mandated "sue and be sued" language contained in tribal ordinance did not constitute a waiver of sovereign immunity in the absence of effectuation by a separate contract).

191. *See Martinez*, 436 U.S. at 59. As *Martinez* indicates, however, suits against individual officers for injunctive relief may not always be permitted, at least under the Indian Civil Rights Act, where subject matter jurisdiction is confined by Congressional legislation to review of petitions for writs of habeas corpus. *Cf. Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991) (holding that the doctrine of tribal immunity bars claims for declaratory and injunctive relief as well as damages); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983) ("tribal immunity extends to tribal officials acting in their representative capacity and within the scope of their authority").

192. *See e.g. Fletcher v. U.S.*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v. White Mt. Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985).

193. Tribal officials may be subject to suit for declaratory and injunctive relief just like state officers, who may be sued pursuant to the Supreme Court's opinion in *Ex Parte Young*, 209 U.S. 123. *See Baker Electric Coop. v. Chaske*, 28 F.3d 1466, 1471-72 (8th Cir. 1994); *Tenneco Oil Co. v. Sac and Fox Tribe*, 725 F.2d 572, 574-75 (10th Cir. 1984). *See generally Comstock Oil & Gas Inc. v. Ala. and Choushatta Indian Tribes of Tex.*, 261 F.3d 567, 574 (5th Cir. 2001) (tribal council members not immune from suit for declaratory and injunctive relief); *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999).

194. The Supreme Court opened the way for challenges to tribal court jurisdiction in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) and *National Farmers Union Inc. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). Since these decisions, the numbers of challenges in federal court to tribal court jurisdiction have blossomed. As the federal courts have accepted such challenges to tribal court jurisdiction pursuant to their powers under federal question or diversity jurisdiction, the immunity of tribes vis-à-vis their judiciaries and judges constructively has been waived in these actions, at least with respect to declaratory and injunctive relief requested by non-Indian defendants sued in tribal court. An exploration of this phenomenon is worthy of further exploration, but lies beyond the scope of this paper.

195. *See e.g. Buchanan*, 40 F. Supp. 2d at 1048; *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991); *Weeks Const.*, 797 F.2d at 670-71; *Hardin*, 779 F.2d at 479.

whether and to what extent the official actions of tribal officers may be subject to suit.

Additionally, interpretive latitude may exist within specific legislative enactments that may provide for suit against tribes. For instance, under the ICRA, as it has been interpreted by the Supreme Court, determinations of whether a person is "in custody" for the purpose of habeas review may provide some opportunity for persons injured by tribal action and deprived of liberty to maintain suit in federal court.[196] Regulatory legislation—like that contained in many environmental statutes—provides another context for examining variation in judicial interpretation over the scope of tribal immunity.[197] Litigation has resulted in divergent rulings over whether other legislative enactments should be construed as abrogating tribal immunity or creating a cause of action against tribes or tribal officers.[198]

Another area ripe for interpretation is whether different tribal business entities or agencies constitute an arm of the tribe for the purpose of sovereign immunity.[199] Whether a tribally-owned or operated

196. Some courts, for instance, have been more proactive in extending the definition of "in custody" under ICRA to include banishment of tribal members, probation, and other situations that do not constitute actual penal confinement. *See e.g. Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996). Others have been more resistant to such expansive interpretations. Differences in the interpretation of other pieces of Congressional legislation may allow for similar latitude in interpretation. *See e.g. In re Natl. Cattle Cong.*, 247 B.R. 259 (Bankr. N.D. Iowa 2000) (for the proposition that Indian tribes' sovereign immunity has not been unequivocally abrogated, under the Bankruptcy Code, by Congress).

197. *See infra* notes 271-76 and accompanying text.

198. *See e.g. Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282 (11th Cir. 2001) (Congress did not waive tribal immunity in enacting Rehabilitation Act, nor did Tribal Chief waive sovereign immunity when he accepted federal funds contingent upon compliance with the Act; therefore, tribal employee could not maintain suit against the tribe for compliance with the Act.); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (citing *Martinez*, 436 U.S. at 59) ("[n]othing on face of [the federal] Copyright Act 'purports to subject tribes to the jurisdiction of the federal courts in civil actions' brought by private parties, . . . and a congressional abrogation . . . cannot be implied"); *Fla. Paraplegic Assn., v. Miccosukee Tribe*, 166 F.3d 1126 (11th Cir. 1999) (holding that the Americans with Disabilities Act does not abrogate tribal immunity, and therefore that private entities may not sue tribes under the Act); *Fla. v. Seminole Tribe of Fla.*, 181 F.3d 1237 (11th Cir. 1999) (The Indian Gaming Regulatory Act did not abrogate tribal immunity from state action to compel compliance with the Act and State had no implied right of action under IGRA for declaratory or injunctive relief against Class III tribal gaming allegedly being unlawfully conducted without a Tribal-State compact.); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 545-46 (2d Cir. 1991) (Seneca Nation immune from suit under 1985 Act regulating the lease of tribal lands because the Act "fails to unambiguously express Congress's intent to subject the Nation to lawsuits . . . ."). In short, every piece of Congressional legislation applied to tribes may be analyzed—often times with different results—to ascertain whether Congress intended to abrogate tribal immunity. As these cases indicate, most post-*Kiowa Tribe* interpretations of Congressional legislation have been protective of tribal immunity, declining to imply waivers or causes of action where none are clearly expressed on the face of the legislation.

199. A number of courts have held that the principle of sovereign immunity applies to tribal entities that are arms of the tribe. *See e.g. Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000) ("We see no reason why the Authority (an arm of the Tribe, not separately incorporated) should be treated any

casino, gaming facility, convenience store, housing authority, or other entity engaged in business with non-tribal entities, may be the subject of litigation and diverse judicial outcome, depends on the circumstances.[200]

Finally, another significant interpretive issue may arise for individuals who may be barred from seeking redress against tribes but may desire to pursue claims against tribal officers or other private entities involved in the underlying basis for the suit: namely, whether the Tribe is an "indispensable party" pursuant to Federal Rules of Civil Procedure 19(b) such that the suit against the remaining parties should be dismissed. Rule 19(b) enumerates a number of factors to guide courts in determining whether a party is indispensable.[201] It also provides for judicial determination of whether "in equity and good conscience the action should proceed among the parties before it."[202] As such, it provides courts with considerable latitude in deciding whether and, in what circumstances, to allow a suit to proceed against other officers when the doctrine of tribal immunity bars a tribal defendant from the proceedings. While some courts have allowed suits to proceed against connected non-tribal defendants notwithstanding tribal immunity, others have been more restrictive.[203] Although holdings under Rule 19 do not affect the doctrine of tribal immunity per se, they do affect whether a party may be able to pursue a judicial remedy against anyone involved in a disputed action where a Tribe would also be

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differently [than the Tribe itself] for jurisdictional purposes."); *Warrall v. Mashantucket Pequot Gaming Enter.*, 131 F. Supp. 2d 328, 331 (D. Conn. 2001) (Tribal law establishes that the Gaming Enterprise is an economic subdivision of the tribe, has never been separately incorporated under federal, state, or tribal law, is subject to supervision by the tribal council, and, hence, "is an agency of the Tribe entitled to benefit from the Tribe's sovereign immunity.").

200. *See generally Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000) (Tribe-operated community college run as a non-profit corporation, whose goal was making post-secondary education available to tribal members on reservation, was governed by board co-consisting of one enrolled member per tribal district. Court held the community college to be "an arm of the tribe and not . . . a mere business [, and therefore was] entitled to tribal immunity" from employee's discrimination claims.); *Bassett*, 204 F.3d at 358 (holding that tribe was not an indispensable party with respect to claims for copyright infringement brought against tribally-administered, non-profit museum, the court stated: "It may be that the district court will conclude . . . that the museum is an agency of the Tribe and, as such, is entitled to benefit from the Tribe's immunity. . . . If so, plaintiff would need to amend its pleading to seek the injunction against the administrators of the Museum, rather than the museum itself.").

201. These include whether the absent party might be prejudiced by a judgment rendered in its absence, whether plaintiff would have an adequate remedy if the action were dismissed, etc. *See* Fed. R. Civ. P. 19(b) (West 2001).

202. *Id.*

203. *See e.g. Bassett*, 204 F.3d at 358-59 (holding that tribe was not indispensable to suit to enjoin museum from showing a tribally-produced film on the grounds that plaintiff's copyrights had been infringed and stating: "But whether the suit to enjoin infringement of the plaintiff's copyright is directed against the Museum or its administrators, we see no reason why the Tribe should be considered indispensable to that claim."). *Cf. Fluent*, 928 U.S. 542 (dismissing action against Seneca Nation and non-tribal defendants associated with the Seneca because the tribe was immune and was found to be an indispensable party under Rule 19(b)).

a party but for its immunity.

Despite the existence of an array of interpretive possibilities, including the potential mechanisms for reviewing or challenging the exercise of tribal power described above, the doctrine of tribal immunity is well-established as a matter of federal common law. It sets forth a general presumptive rule aimed at protecting the treasuries and self-governing powers of tribal governments and derives its existence from the presumed and long-recognized inherent sovereignty of Indian nations. The doctrine is not easily disturbed, and interpretive deviations from the general rule should be cautiously undertaken. As the Second Circuit explained following the Court's decision in *Kiowa Tribe*:

> In a line of cases decided over a period of more than 150 years, the Supreme Court has recognized that Indian tribes 'retain[] their original natural rights' which vested in them, as sovereign entities, long before the genesis of the United States. . . . Although Indian tribes are 'domestic dependent nations' whose sovereignty is not absolute but may be limited by Congress, . . . federal encroachment upon Indian tribes' natural rights is a serious undertaking, and we should not assume lightly that Congress intended to restrict Indian sovereignty through a piece of legislation. This respect for the inherent autonomy Indian tribes enjoy has been particularly enduring where tribal immunity from suit is concerned.[204]

3. The Supreme Court's Willingness to Limit Tribal Sovereignty in Other Areas of the Law: Tribal Civil Adjudicatory Jurisdiction

Another interesting feature of the doctrine of tribal immunity is that it has been preserved and perpetuated by the modern Supreme Court even as other aspects of tribal sovereignty have been altered or even diminished by the Court. While a full analysis of this incongruence in the Court's jurisprudence goes beyond the scope of this Article, the Court's preservation of the doctrine of tribal immunity is noteworthy.[205] In a series of other opinions related to tribal jurisdiction and self-governance, the Court has opted to shift longstanding presumptive rules of interpretation about tribal sovereignty, thereby delimiting tribal authority and demonstrating a striking propensity for judicial activism with respect to defining the boundaries of tribal sovereignty. Recent changes in the Court's jurisprudence have primarily focused on tribal adjudicatory jurisdiction.

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204. *Fla. Paraplegic Assn.*, 166 F.3d at 1130 (internal citations omitted for clarity).

205. The discrepancy, for instance, presents a number of general questions about the consistency in the Court's jurisprudence and analytical methods, the role of politics in judicial decision-making, the impact of the Court's jurisprudence with respect to state immunity upon the doctrine of tribal immunity and vice versa, as well as more particular questions such as the various meanings that may be accorded to the Court's pronouncements. For instance, the cases beg the question: what meaning, if any, can be extrapolated about the Court's intentions or views about tribal sovereignty in *Kiowa Tribe* in light of its decisions in other areas?

In 1997, the Supreme Court took its first step toward altering the status quo with respect to tribal civil adjudicatory jurisdiction over nonmembers. In *Strate v. A-1 Contractors*,[206] the Court held that a tribal court could not exercise jurisdiction over a civil action for negligence brought against a driver and the driver's employer, neither of who were members of the tribe, for injuries sustained in a motor vehicle accident that occurred on a state highway that traversed reservation land. The accident occurred on tribal trust land within reservation boundaries on a public highway maintained by the state pursuant to a federally granted right-of-way.

Expressing no view on where the proper forum would lie where an accident occurs on a tribal road within a reservation, the Court concluded that "tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question."[207] Neither the holding nor the Court's analysis was based upon any Congressional legislation, nor did the Court point to precedent that supported the limiting of tribal sovereignty in the context of adjudicatory jurisdiction.[208] Rather, the

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206. 520 U.S. 438. The original suit was filed in tribal court by Gisela Fredericks, a non-Indian widow of a deceased tribal member, and her five adult children, all tribal members. *Id.* at 443-44. The opinion, delivered by Justice Ginsburg, was unanimous.

While *Strate* may have marked the first time the Supreme Court moved to shift the presumptive burdens about tribal sovereignty in the context of adjudicatory jurisdiction, two previous decisions marked a shift in the Court's jurisprudence regarding tribal authority over criminal jurisdiction and regulatory jurisdiction. In *Oliphant v. Suquamish*, 435 U.S. 191 (1978), the Court held that tribes have no general criminal jurisdiction over non-Indians. While the tribe in that case argued that it had inherent, albeit long-unexercised, jurisdiction over non-Indians that had not been diminished by treaty or statute, the Court determined that criminal jurisdiction over non-Indians was not consistent with the status of tribes as dependent sovereigns.

In *Mont. v. U.S.*, 450 U.S. 544 (1981), the Court held that a tribe generally lacks inherent power to regulate hunting and fishing conducted by non-Indians on non-Indian-owned land within a reservation. Others have documented the role of *Oliphant* and *Montana* in divesting tribal sovereignty as well. *See e.g.* Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 Buff. Pub. Int. L.J. 147 (2000) (arguing that the Court has moved increasingly from a territorially-based to a consent-based conception of tribal sovereignty that limits the exercise of tribal sovereignty to tribal members and, to some extent their land, who have agreed to become and remain tribal members and attributing this development in part to the Court's "preoccupation with liberal goals in the decades following the Civil Rights Movement").

207. *Strate*, 520 U.S. at 442 .

208. Prior to *Strate*, distinctions in the federal law describing tribal sovereignty existed depending on whether the matter involved criminal jurisdiction, civil jurisdiction, or taxation or regulatory authority. For instance, William Canby's seminal treatise divides the discussion of American Indian Law into a number of distinct topics, including "Present Division of Criminal Jurisdiction in Indian Country," "Present Division of Civil Jurisdiction in Indian Country," and "Taxation and Regulation in Indian Country." Canby, *supra* n. 8, at 142-69, 173-212, 243-81. After *Oliphant* and a number of Congressional enactments such as the Major Crimes Act, 18 U.S.C.A. § 1153 (West 2001) and the General Crimes Act, 18 U.S.C.A. § 1152 (West 2001), tribal authority over criminal jurisdiction was most restricted. *Montana* imposed some restrictions on regulatory authority, at least with

Court referred to *Oliphant*[209] and *Montana*,[210] two cases that addressed tribal jurisdiction in other, markedly different, contexts; and it made a number of pronouncements that seemed to change important interpretive principles that emerged from previous precedent.[211]

While a few federal courts relied on *Strate* to justify delimiting tribal adjudicatory jurisdiction in other circumstances,[212] many interpreted the opinion more narrowly, with limited applicability to certain rights-of-way[213] or otherwise circumscribing its effect on tribal sovereignty.[214]

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respect to non-members and activities occurring on fee land. No express restrictions, either statutory or pursuant to Supreme Court opinion, existed with respect to the adjudicatory jurisdiction of tribal courts.

209. *Oliphant*, 435 U.S. 191 (holding Indian tribes lack criminal jurisdiction over non-Indians). The Court also referred to its decision in *Duro v. Reina*, 495 U.S. 676, 684-85 (1990) in which it held that Indian tribes also lack criminal jurisdiction over nonmember Indians. *See Strate*, 520 U.S. at 446 n. 5. Congress responded to *Duro* by expressly providing for tribal criminal jurisdiction over nonmember Indians. *See generally* 25 U.S.C.A. § 1301(2) (West 2001).

210. *Montana*, 450 U.S. at 565-66. (holding that the Crow Tribe had authority to regulate hunting and fishing by non-Indians on lands within reservation boundaries owned in fee simple by non-Indians but indicating that tribes may exercise regulatory authority—i.e., through taxation, licensing, or other means—over non-Indians "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or where the conduct of non-Indians "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"). Despite the fact that *Strate* involved neither fee land, nor regulatory jurisdiction, and the underlying facts indicated that the *Strate* defendants had entered into commercial dealings with the tribe toward repair of the road, the Court relied heavily on *Montana* and declined to extend either of its exceptions to the circumstances.

211. The analytical methods and assumptions relied upon by the Court in *Strate* and its progeny before the Supreme Court, although worthy of further discussion, go beyond the scope of this Article and are the subject of a separate work in progress by the author. As an example of how the Court's unsupported pronouncements or characterizations of the law lay the foundation for fundamental change in its jurisprudence, however, consider the following introduction to its analysis in *Strate*: "Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate*, 520 U.S. at 445. There is no citation that follows this sentence in the opinion. Although the Court subsequently refers to *Oliphant* and *Montana*, neither of these cases establishes such a general proposition. In fact, the opposite presumptive rule may actually be more readily derived from prior precedent: namely, pursuant to their inherent sovereign power that pre-existed the formation of the United States of America, tribes retain the power to exercise jurisdiction over people and lands within their reservations unless Congress or treaty takes it away. Indeed, notwithstanding the current Supreme Court's interpretation of the case, *Montana* offers the following statement about this matter: "To be sure, Indian tribes retain inherent civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Mont.*, 450 U.S. at 565.

212. *See e.g. Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999); *County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) (relying extensively on *Strate* in holding tribal court lacked jurisdiction to adjudicate claims against county defendants for assault, batter, false imprisonment and other claims stemming from arrest of member of Nez Perce tribe that took place on fee land within exterior boundaries of reservation); *Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087 (8th Cir. 1998); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (extending holding in *Strate* to civil suit brought by a tribal member against a nonmember arising from an accident on a state highway through the reservation) (emphasis added); *Mont. v. King*, 191 F.3d 1108 (9th Cir. 1999); *Big Horn County Elec. Coop., v. Adams*, 53 F. Supp. 1047 (D. Mont. 1999).

213. Even the Supreme Court initially indicated that *Strate* should be narrowly confined to the facts of that case. In *El Paso Nat. Gas Co. v. Netzsosie*, 119 S. Ct. 1430 (1999),

Whatever interpretive leeway *Strate* once left with respect to tribal adjudicatory—or even regulatory—jurisdiction, however, was narrowed in two subsequent opinions.

In *Atkinson Trading Company v. Shirley*,[215] the Court extended the interpretive framework it established in *Strate* and *Montana* to the power of tribes over taxation. It held that the Navajo Nation lacked authority to impose a tax on nonmember guests of a hotel located near the Grand Canyon on non-Indian fee land within the reservation. In doing so, it rejected argument based on other precedent that the power of taxation is unique, rooted in precedent separate from the *Montana-Strate* line of reasoning, and critical to the power of a sovereign to generate revenue and control economic activity within its jurisdiction.[216] Instead, the Court elected to "apply *Montana* straight up."[217] The Court concluded that "[b]ecause Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute, and because the incidence of the tax falls upon nonmembers on non-Indian fee land, it is incumbent upon the Navajo Nation to establish the existence of one of *Montana's* exceptions."[218] It declined in the end, however, to find that either of *Montana*'s exceptions applied to the tax at issue in *Atkinson*.[219] Thus, it

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Justice Souter makes the following response in rejecting a challenge to tribal court subject matter jurisdiction raised by defendant in a nuclear tort action: "But Strate dealt with claims against nonmembers arising on state highways, and 'express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.' By contrast, the events in question here occurred in tribal lands." *Id.* at 1436 n. 4.

214. *See e.g. Nev. v. Hicks*, 196 F.3d 1020, *rev'd*, 121 S. Ct. 2304, (2001) (declined to extend the holding in *Strate* to a civil rights and tort action brought by tribal member against state officials in response to their seizure of big-horn sheep head trophies on Indian-owned allotted land within a reservation).

215. 121 S. Ct. 1825 (2001). The opinion was authored by Chief Justice Rehnquist. Justice Souter filed a concurring opinion in which Justices Kennedy and Thomas joined.

216. Respondents relied on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), a case decided one year after *Montana* that upheld a severance tax imposed by the Jicarilla Apache Tribe upon non-Indian lessees authorized to extract oil and gas from tribal land. The Court in *Atkinson*, however, distinguished *Merrion*—or, by another interpretation rather, dismissed it without careful reasoning—and pronounced: "An Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land." *Atkinson*, 121 S. Ct. at 1832. Furthermore, announced the Court, rather coy in its choice of words: "We therefore do not read *Merrion* to exempt taxation from *Montana's* general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land. Accordingly, as in *Strate*, we apply *Montana* straight up." *Id.*

217. *Atkinson*, 121 S. Ct. at 1832.

218. *Id.*

219. *Id.* With respect to the first exception, the Navajo Nation presented a number of factors suggesting that Cameron Trading Post had established a "consensual relationship" with the Nation. These included the fact that the Navajo Tribal Police, Tribal Emergency Medical Services, and Fire Department responded to emergencies and otherwise provided services to the hotel owner and its guests. The Trading Post also had long conducted business with the Navajo Nation and its members such that it was required to obtain a license to transact business pursuant to regulatory rules promulgated by the United States Indian Affairs Commissioner and set forth at 25 C.F.R. pt. 141 (2000). *Id.* at 1832-33. The Court in *Atkinson*, however, determined that "*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the

concluded that the Navajo Nation's imposition of a tax upon nonmembers on non-Indian fee land is "presumptively invalid," and because it found also that the Nation failed to established grounds to satisfy either *Montana* exception, it reversed the Tenth Circuit's decision to uphold the tax.[220]

As in *Atkinson*, the Supreme Court in *Hicks* narrowed tribal adjudicatory jurisdiction over non-Indians one step further. In *Hicks*, the Court, reversing decisions by both lower courts, held that the Fallon Tribal Court lacked jurisdiction over a tribal member's civil rights and tort claims arising from a search and seizure by state game wardens that took place on Indian land within the reservation.[221] The claims considered by the Supreme Court involved the state defendants in their individual capacities, as the Tribal Court granted plaintiff's motion to voluntarily dismiss the state defendants in their official capacities.[222]

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consensual relationship itself . . . . A nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another—it is not 'in for a penny, in for a Pound.'" *Id.* at 1833-34 (citing E. Ravenscroft, *The Canterbury Guests; Or a Bargain Broken*, act v, sc. 1.) Focusing, instead on the tribe's relationship with the nonmember guests, the Court concluded that the Trading Post "cannot be said to have consented to such a tax by virtue of its status as an 'Indian trader.'" *Id.* at 1834.

The Court similarly declined to extend *Montana*'s second exception to the hotel occupancy tax even in light of evidence demonstrating, in addition to that set forth above, that the Cameron Trading Post employs nearly 100 members of the Navajo Nation, derives business from tourists visiting the vast reservation lands which surround the Trading Post's isolated property, and that the Cameron Chapter of the Navajo Nation possesses an "'overwhelming Indian character.'" *Id.* (citing Brief for Respondents 13-14). "[W]e fail to see how petitioner's operation of a hotel on non-Indian fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* (citing *Mont.*, 450 U.S. at 566).

The Court further distinguished *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 440 (1989) in which the Court held that the Yakima Nation had the power to zone a small, non-Indian parcel located in the heart of over 8000,000 acres of tribal land. "[W]e think it plain that the judgment in *Brendale* turned on both the closed nature of the non-Indian fee land and the fact that its development would place the entire area 'in jeopardy.'" *Atkinson*, 121 S. Ct. at 1834-35 (citing Brendale, 492 U.S. at 443). Whatever the percentage of non-Indian fee land or the effect operation of the Cameron Trading Post might have had on surrounding Navajo land, according to the Court, "it does not endanger the Navajo Nation's political integrity." *Id.* at 1835.

220. *Id.* In his concurring opinion, Justice Souter, joined by Justices Kennedy and Thomas, indicated that the presumptive rules set forth in *Montana* should be applied to all issues regarding tribal jurisdiction over non-members regardless of the status of the underlying land. *Atkinson*, 121 S. Ct. at 1835 (Souter, J., joined by Kennedy and Thomas, JJ., concurring).

221. *Hicks*, 121 S. Ct. 2304. The opinion was delivered by Justice Scalia. The complaints that precipitated the litigation alleged a variety of federal and tribal law claims, including wrongful civil proceedings, unreasonable search and seizure, trespass to land, trespass to chattels, abuse of process, infliction of emotional distress, and violations of the Indian Civil Rights Act and other federal civil rights. According to the decision of the federal district court, the parties proceeded as if the federal civil rights claim alleged was a Section 1983 claim for a fourth amendment violation, and the district court assumed such a claim was included for the purposes of its analysis. *See Hicks*, 944 F. Supp. 1455.

222. Initially, Hicks, a member of the Fallon-Paiute Shoshone tribe, filed suit in Fallon Tribal Court against the State of Nevada, the Tribal Judge who approved a state search warrant, the tribal officers who assisted in executing the warrant, and the state officers in their official and individual capacities. *Hicks*, 121 S. Ct. at 2306. The State of Nevada,

The Court extended its holdings set forth in *Montana* and *Strate* to the circumstances set forth in *Hicks*.[223] Avoiding the question as to whether the nature and scope of tribes' adjudicative jurisdiction are equivalent to tribes' legislative jurisdiction, the Court determined that the Fallon Tribal Court lacked even legislative jurisdiction under the circumstances set forth in *Hicks*.[224] Although *Montana* involved regulation of non-Indian activity on non-Indian-owned land and *Strate* involved activity on a public right-of-way held by the state, the Court in *Hicks* concluded: "[T]he existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers."[225] Moreover, continued the Court, the tribal court's exercise of jurisdiction over the state game wardens was neither necessary to protect tribal self-governance or internal relations, nor conferred by Congress.[226] Instead, the opinion elevated the interests of the State in investigating and enforcing its own laws over and above any interests that Mr. Hicks, a tribal member, or the Fallon-Paiute Tribe might have in protecting themselves from intrusions into tribal lands and homes due to wrongful searches and seizures by state officials.[227] In doing so, the Supreme Court effectively

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administrator for the State Division of Wildlife, and state game wardens subsequently sought a declaration in federal court that the Fallon Tribal Court lacked jurisdiction over Hicks' claims against the State of Nevada and its officers and employees, whether in their official or individual capacities. *Id.* The latter action formed the basis of review by the Supreme Court in *Hicks*.

223. The Court observed upfront that "[t]he principle of Indian law central to this aspect of the case is our holding in Strate . . . . That formulation leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction." *Hicks*, 121 S. Ct. at 2309. However, it addressed first whether the tribe would even have legislative authority over the state wardens executing a search warrant for evidence of an off-reservation crime.

224. *Id.* The Court cited *Strate* for the proposition that "'a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.'" *Id.* (citing *Strate*, 520 U.S. at 453). It declined, however, to resolve whether the two types of jurisdiction would be equal.

225. *Hicks*, 121 S. Ct. at 2310. The Court cited no authority in support of this proposition. Indeed, it acknowledged that according to previous precedent, including *Montana*, the ownership status of the underlying land was a factor—albeit "only one factor"—in determining whether regulation of the activities of nonmembers was necessary to protect tribal self-government or internal relations. *Id.*

226. The opinion interestingly did not address the first *Montana* exception that applied when a non-member entered into a consensual relationship with the Tribe; nor did it contain analysis explaining in what ways the regulation of state wardens (or other police officers) who enter tribal lands for the purposes of investigating or arresting tribal members would fail to implicate tribal self-government and internal relations. Rather, the Court simply announced that "Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation." *Hicks*, 121 S. Ct. at 2311. It proceeded thereafter to discuss state sovereignty, emphasizing that "[s]tate sovereignty does not end at the reservation's border." *Id.* This discussion of state sovereignty departs from the analysis consistently applied by the Court in its precedent regarding tribal sovereignty, including its decision in *Montana*.

227. Instead of following the traditional analysis for determining questions of tribal sovereignty, the Court in *Hicks* injects a discussion of the state's interests in entering the reservation to pursue investigation and enforcement of state laws against tribal members. The state's interests, then, override the tribal interests in self-governance, including the regulation of internal relations, even though the Court itself concedes that "it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to

completed reversal of a longstanding presumption previously recognized in its precedent: namely, that tribes possess inherent sovereign authority unless and until such presumption can be rebutted by evidence of express divestiture by Congress.[228] After *Hicks* and in view of *Strate* and *Atkinson*, the presumptive interpretive rule articulated by the current Supreme Court now seems to be that tribes lack regulatory and adjudicatory authority over nonmembers regardless of where the activity occurs unless Congress expressly bestows such authority upon them or one of the *Montana* exceptions applies.[229] This is more consistent with a consent-based conception of tribal sovereignty in which tribes may exercise power over members, and to some extent their lands, but are limited in their ability to do so absent Congressional delegation with respect to non-members.[230] In four years, then, the Court has powerfully divested the tribes of much sovereign authority with respect to a significant manifestation of tribal sovereignty.[231]

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enter a reservation (including Indian fee lands) for enforcement purposes. . . ." *Hicks*, 121 S. Ct. at 2312. The Court elevates the interests of the State in this case even in the face of Hicks' argument that such impact was minimal because the case involved a suit against state officials in their individual capacities. *Id.* at 2313. "We think . . . the distinction between individual and official capacity suits is irrelevant." *Id.* Moreover, the Court refers *sui generis* to the "States' inherent jurisdiction" that can "be stripped by Congress" but had not happened with respect to execution of state warrants. *Id.*

228. This presumption was articulated, for instance, in cases such as *Williams v. Lee*, 358 U.S. 217, 223 (1959) (recognizing authority of tribal courts over reservation affairs involving non-Indians) and *U.S. v. Wheeler*, 435 U.S. 313 (1978) (affirming that tribes possess attributes of sovereignty not withdrawn by treaty, statute, or by implication from their status as domestic dependent sovereign nations). The federal district court in *Hicks* acknowledged the longstanding and traditional presumption set forth in *Williams* and *Wheeler*, concluding that *Montana* "seemed to inexplicably reverse the traditional presumption" set forth in those cases. *Hicks*, 944 F. Supp. at 1464. The Supreme Court, however, declined to follow its reasoning in *Williams* or *Wheeler*.

229. In light of *Hicks*, the presumption clearly appears to be the rule where a state or one of its law enforcement officers is a defendant in a tribal court or the subject of tribal regulation or legislation. It is unclear, however, how lower courts or the Supreme Court itself in future opinions will apply the presumption with respect to other types of nonmember defendants, particularly since the Court in *Strate* took such pains to emphasize the non-Indian character of the status of the land involved. It is also unclear what will become of the *Montana* exceptions in view of the fact that (1) the Court in *Hicks* failed to do an analysis of the "consensual relations" exception, and (2) the Court in the trilogy of cases discussed above consistently determined that the exceptions did not apply.

230. For a more detailed discussion of this aspect of the Court's evolution, *see generally* Tweedy, *supra* n. 206.

231. Aside from limiting the tribes' adjudicatory and legislative authority in these cases, the Court in *Hicks* also held that tribal courts—unlike state courts—are not courts of general jurisdiction and, hence, absent Congressional legislation to the contrary, may not entertain federal Section 1983 suits against nonmembers. *Hicks*, 121 S. Ct. at 2314 ("Tribal courts, it should be clear, cannot be courts of general jurisdiction . . . , for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction."). Furthermore, the Court held that the State defendant-petitioners were not required to exhaust their jurisdictional claims in tribal court before bringing them in federal district court because "'no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule,' so the exhaustion requirement 'would serve no purpose other than delay.'" *Id.* at 2315 (citing *Strate*, 520 U.S. at 459-60 n. 14). The case, then, is devastating to tribal sovereignty while beneficial to the sovereignty of states.

4. Reflections on the Supreme Court's Consistent Preservation of the Doctrine of Tribal Immunity

In light of the Court's recent inclination to divest tribes of certain aspects of their sovereignty, the Court's decision to uphold the doctrine of tribal immunity in *Kiowa Tribe* is noteworthy. Considerable conjecture would be necessary to understand why the Court preserved immunity while limiting sovereignty in other areas. Nonetheless, the question arises: why would the Supreme Court preserve sovereign immunity, deferring to Congressional discretion to resolve the debate over whether to maintain tribal immunity, at the same time it has exhibited a willingness to be proactive in divesting tribes of other aspects of their sovereignty? Is there a legitimate basis for distinguishing immunity from legislative or adjudicative jurisdiction?

One possible explanation is that the members of the Court knew that Congress was actively considering changes in the law of tribal immunity—may even have been confident that the legislation would pass—and elected to postpone making a change in its precedent until it could see what Congress would ultimately do. Congress was actively debating legislation that would effectively eliminate tribal sovereign immunity,[232] and the Court was aware of this fact when it rendered its decision.[233] Members of the Court may even have predicted that their decision could have been instrumental in moving Congress toward making changes in the federal policy toward tribal immunity. All nine justices express in *Kiowa Tribe* displeasure with the doctrine of tribal immunity. The majority is clear, moreover, in advising Congress to

232. *See infra* Part IV.C.3.

233. During the oral argument, the following colloquy took place between one of the justices and Edward Dumont, the Assistant to the United States Solicitor General:

> QUESTION: Well, let's talk about the practical importance a minute. With increasing commercial activity between tribes and nontribal members off the reservation there may be, indeed, a need for some waiver of sovereign immunity to make it possible for tribes to have–enter into business dealings with people off the reservation. Is Congress considering legislation about this right now, do you know, Mr. DuMont?
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> MR. DUMONT: They are actively considering it. Hearings, extensive hearings were held in 1996. There was a bill which passed the Senate which would have waived immunity in certain circumstances in '97. That provision was removed on the premise, publicly stated, that hearings would be held by April 30th of 1998, and those hearings have been tentatively scheduled by the Committee on Indian Affairs of the Senate.
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> QUESTION: But Congress is debating the desirability, or lack thereof, of certain waivers of sovereign immunity.
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> MR. DUMONT: That's absolutely correct. . . . Congress has thought about this and has addressed it in the past, and they're preparing to think about it again.

Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 1998 WL 15116 at **14-15 (Jan. 12, 1998) (Oral Argument of Edward Dumont, Assistant to the United States Solicitor General, as *Amicus Curiae* in support of the petitioner).

reconsider the doctrine in light of contemporary circumstances. The Court's decision to communicate its concerns over the ongoing viability of tribal immunity directly with Congress, rather than reverse longstanding precedents, might therefore indicate the Court's sense that it could adhere to some consistency in its precedent while accomplishing in the end the public policy objectives with which it agreed. Under the circumstances of the case, after all, at least two fundamental and deeply-rooted doctrines of federal common law were at stake: namely, the plenary power doctrine and the doctrine of tribal immunity. Depriving Congress of the right to exercise its plenary power over Indian affairs might have been particularly objectionable in light of Congress's active deliberations in the area.

Another possibility is that the general principle that immunity is a natural corollary of sovereignty is so firmly engrained in Anglo-American jurisprudence that the Court was unwilling to change the default rules about sovereign immunity, even as it has changed rules in other contexts. This theory is consistent with views expressed in another exchange during oral argument between the Court and the United States Assistant to the Solicitor General over the default rule that would apply with respect to foreign nations. In that exchange, the Court asked Mr. Dumont whether it could by judicial decision have adopted "as part of our domestic law of foreign sovereign immunity" the commercial acts exception later recognized by Congress in the Foreign Sovereign Immunities Act.[234] Mr. Dumont responded unequivocally that the Court could not have done that, even if circumstances in contemporary society had changed, because its original common law and relevant precedent thereafter "had made clear consistently that the default rule was going to be absolute immunity, and it was then up to Congress to vary that."[235]

Although he conceded that the tribes are different from foreign nations, Dumont demonstrated also that the common law default rule with respect to tribes is also absolute immunity unless Congress articulates a different standard. He responded to the Court's suggestion that his argument rested upon a "rule of prudence, self-administered by this Court"[236] and is inconsistent with the many new roles tribes play in

234. *Id.* at *17.

235. *Id.* at **17-18. In response to a question about the State Department's involvement in changing the course of federal policy with respect to the doctrine of sovereign immunity, Dumont emphasizes that the State Department is a political branch with some constitutional authority over foreign affairs and while the Court may have had the power to recognize changes in the common law suggested by the State Department, it had not done so. *Id.* "The Court said we have always applied a rule of absolute immunity. We see no reason to make an exception for commercial property just because it's owned by a sovereign. That's going to be a rule. Now, of course, in situations where the political branches which are responsible under the Constitution for foreign affairs tell us to do something different, then we will do something different, but the default rule is going to be immunity. . . ." *Id.* at *19.

236. *Kiowa Tribe*, 1998 WL 15116 at *22.

contemporary society,

> I think that because the Court has recognized the tribes are sovereigns, and because immunity from suit is such a central part of the inherent background of the rule of sovereignty—and we see this in cases like Coeur d'Alene, we see it in cases under the Eleventh Amendment before the States, we see it in cases involving the United States. Those principles of sovereign immunity aren't written down somewhere. They are simply part, a constitutive part of our law . . . ."[237]

The Court, firmly aware of its precedent and freshly reminded of the default rules it had consistently applied with respect to sovereignty and immunity, clearly affirms this notion of sovereign immunity in the *Kiowa Tribe* decision.[238]

Whatever the answers to these questions may be, the Court's persistence in preserving the doctrine of tribal immunity in *Kiowa Tribe* easily may be interpreted as further proof of the immutable strength of the doctrine as a matter of federal law. The decisions of the federal judiciary post-*Kiowa Tribe* demonstrate the strength of the doctrine as an interpretive backdrop.[239] It is possible, of course, that the Court could do to tribal immunity what it has done in the area of legislative and adjudicatory jurisdiction, eliminating the doctrine and changing the presumptive rules of interpretation with a sleight of its hand. However, in light of the historical development of the doctrine, including the consistent way in which it has been integrated into the federal common law and the context in which the court rendered its opinion in *Kiowa*

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237. *Id.* at *23.

238. Aside from these possibilities, other factors may have influenced the Supreme Court's decision as well. For instance, the quality of the lawyering might have played a role, as might have the fact that the case involved a contractual matter in which the issue of immunity could have been addressed through negotiation and drafting. In particular, the Court may have been influenced by the fact that a contract was at the crux of the *Kiowa* case and the lawyers for Manufacturing Technologies, Inc. had failed to adequately negotiate for terms—including a potential waiver of sovereign immunity that would have protected them in the case of a dispute. In the appellate proceedings before the Supreme Court, counsel for the United States entered appearances that supported the tribe's position, and counsel for the manufacturing attorneys appears to have been less effective in his advocacy. For instance, in the midst of oral arguments, when challenged about why the company had not insisted on a tribal waiver as a matter of contract law before accepting a promissory note, the attorney reads the relevant contractual language from the contract and the following colloquy takes place:

> MR. PATTERSON: If I might, Justice O'Connor, reading from the record at page 14, the language is, nothing in this note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma, and we don't have any argument with that language. I'm not sure what it means, but it's based on a premise—
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> QUESTION: Well, it's a little like buyer beware. I mean, if in fact the law is, as this Court seems to have recognized in the past, that the tribe enjoys sovereign immunity from private suits, then someone dealing with the tribe should protect himself in the contractual arrangements that he makes.

Kiowa Tribe, 1998 WL 15116 at **31-32 (Oral Argument of John E. Patterson, Jr., on behalf of the Respondent).

239. *Supra* nn. 190-203 and accompanying text.

Tribe, it is reasonable to conclude that the doctrine is an intrinsic part of the jurisprudence of tribal sovereignty and likely to resist dramatic change in the hands of the federal judiciary. *Kiowa Tribe* and its predecessors reflect the federal government's long-time recognition of tribal sovereignty and its inherent attributes and are enduring proof of the strength and durability of tribal sovereignty.

IV. CONGRESSIONAL ACTION AND INTERPRETATION OF TRIBAL IMMUNITY

A. Congressional Plenary Power Over Tribal Relations

As the Supreme Court recognized in *Kiowa Tribe*, any federal restrictions on tribal sovereign immunity must be implemented by Congress, not the federal judiciary. This power, often referred to as "congressional plenary power," is another fundamental principle of federal Indian law.[240] While treaties originally constituted the primary means of structuring relationships with Indian tribes, Congress unilaterally asserted its power to legislate tribal affairs in 1871.[241]

In *Lone Wolf v. Hitchcock*,[242] the Supreme Court formally recognized the plenary power of Congress over Indian tribes and tribal relations. Specifically, it declared that Congress even had the authority to abrogate

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240. The Constitution, which authorizes Congress to regulate commerce with Indian tribes, has been recognized as the source for this doctrine. U.S. Const. art. I, § 8, cl. 3. Despite its primacy, though, the plenary power doctrine is not universally accepted as legitimate, particularly by Indian people and particularly as it gets interpreted to justify imposing federal limits on tribal sovereignty and self-determination. As one American Indian advocate has articulated:

> Many Indian people do not like the notion of the plenary power of Congress on the subject of Indian affairs, in large part because they have been misled as to the meaning of that legal doctrine. The 'Plenary Power of Congress' does not mean that Congress can do anything it wants to Indians. It merely means that when the subject of legislative consideration legitimately falls within the aegis of 'Indian affairs', Congress has the power to legislate without relying on one of the enumerated Constitutional powers. It does not mean that there is no limit on the powers of Congress.

Testimony of Philip S. Deloria, *infra* note 367 (Senate Indian Affairs, 1998 WL 396895 (July 15, 1998)). As another scholar of tribal jurisprudence and federal Indian has explained: "The Indian Commerce Clause by its own terms acknowledges Indian tribes as sovereigns, sovereigns other than states for which the federal government needs delegated authority to regulate. Broad as the authority conferred in the Indian Commerce Clause might be, it cannot include the right to annul or otherwise unfairly limit the right of tribes to exist and to exercise reasonable authority within their borders." Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* 121 (U. Cal. Press 1995). *See* Richard B. Collins, *Indian Consent to American Government*, 31 Ariz. L. Rev. 365 (1989). *See generally McClanahan v. Ariz. Tax Commn.*, 411 U.S. 164, 172 n. 7 (1973); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055 (1995). A comprehensive analysis of the debate over the plenary power doctrine, though, goes beyond the scope of this piece.

241. The Act of March 3, 1871, 16 Stat. 565 (1871) (codified as amended at 25 U.S.C.A. § 71 (West 2001)). *See Antoine v. Wash.*, 420 U.S. 194, 201-02 (1975) (describing circumstances that contributed to the adoption of the 1871 Act). The Act also prohibited the Executive Branch from entering into treaties with the tribes.

242. 187 U.S. 553 (1903).

treaties with Indian nations. The Court stated:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. . . . The power exists to abrogate the provisions of an Indian treaty.[243]

Congress first tested the limits of its plenary power by enacting the Major Crimes Act in 1885, bestowing federal courts with power to exercise jurisdiction over certain enumerated and serious offenses committed by or inflicted upon reservation Indians.[244] In response to a state challenge to the Act on that theory that punishing such crimes was properly a state function, the Supreme Court upheld the validity of the Act. The Court held that tribes were separate sovereign entities with no allegiance to the states that enjoyed a special relationship with the federal government that stemmed from their location with national borders and their status as dependent sovereign nations.[245] Since then, Congress has exercised its power to enact legislation in a few specific areas, regulating a diverse range of matters affecting Indian people and their nations but leaving many aspects of tribal government unregulated.

B. Limits on Congressional Plenary Power: Comity, Trust & Political Will

The power of Congress to regulate Indian tribes and tribal relations is not absolute.[246] A number of other principles limit Congress's power to intrude on tribal sovereignty. First, principles of comity and deference to the indigenous, inherent sovereignty of Indian nations that preceded the peopling of North America by European nations, circumscribe the power of Congress to limit tribal authority vis-à-vis other interests. The established principle that tribes, by virtue of their original sovereignty, enjoy a substantial measure of inherent sovereignty over their territory, their members, and, in some circumstances, others who enter upon their lands, cannot be easily overcome.

The federal trust doctrine further limits the action Congress may take with respect to Indian nations, at least as to action that diminished or interfered with tribal sovereignty.[247] It defines a fiduciary relationship

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243. *Id.* at 553-66.

244. The Act of March 3, 1885, § 9, 23 Stat. 362 (1885) (codified, as amended, at 18 U.S.C. § 1153 (1964)).

245. *Kagama*, 118 U.S. 375.

246. *Poodry*, 85 F.3d at 881 n. 8. *See generally Shoshone Tribe v. U.S.*, 299 U.S. 476, 497 (1937).

247. *See U.S. v. Sioux Nation*, 448 U.S. 371, 415-16 (1980); *Morton v. Mancari*, 417 U.S. 535, 555 (1979); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977). Chief Justice John Marshall's characterization of tribes as "domestic dependent nations" in *Cherokee Nation*, 30 U.S. at 17, provided the conceptual basis for the evolution of the federal trust doctrine. As Marshall further clarified about the tribes: "[T]hey are in a state of pupilage[;] their relation to the United States resembles that of a ward to his guardian." *Id.*

in which the United States acts as trustee, and the tribes as beneficiaries.[248] Pursuant to the doctrine, the United States is expected to protect the lands, natural resources, and funds of Indian nations[249] and, in some circumstances, to preserve the Native American's right to occupancy, self-determination, and welfare.[250]

The primary responsibility for exercising the federal government's trust obligation lies with the Executive Branch, through the Department of Interior's Bureau of Indian Affairs.[251] The trust relationship has been recognized with respect to the congressional plenary power doctrine as well.[252] In fact, Congress is entitled to establish the contours of the trust responsibility through statute.[253] Legislation must be rationally connected to Congress's trust obligation to the welfare of Indian nations.[254] The political will of the American people and the ability of

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248. *See e.g. Dept. of Interior v. Klamath Water Users Assn.*, 121 S. Ct. 1060 (2001); *U.S. v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987); *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation v. U.S.*, 316 U.S. 286, 296-97 (1942). *See generally infra* Part IV.B.

249. These items comprise the "trust corpus." In determining the federal government's role in managing forest resources on Indian allotments, for instance, the Court stated: "[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." *Mitchell*, 463 U.S. at 225. A number of other decisions have defined the federal government's role in managing tribal lands and natural resources. *See id.* Some lower courts have held that the trust responsibility requires the federal government to undertake litigation to protect tribal lands or resources. *See e.g. Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *U.S. v. Oneida Nation of N.Y.*, 576 F.2d 870 (Ct. Cl. 1978); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979).

250. While the federal judiciary has been somewhat resistant to expanding the trust responsibility beyond protection of tribal lands and resources, the trust doctrine has influenced the decisions of cases brought on grounds other than land and resources. Canby, *supra* n. 8, at 45 (citing *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987)). For a general discussion of the judiciary's development of the trust doctrine, *see* Reid Payton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213 (1975).

251. Canby, *supra* n. 8, at 46-47 ("At one time the Bureau represented virtually the entire governing authority in Indian country, particularly during those times when assimilation was the goal of federal Indian policy and tribal self-government was discouraged. Today the activities of the Bureau are more narrowly directed toward the fulfillment of the federal trust responsibility to the tribes, although its overall influence on tribal affairs remains great."). Consistent with its trust responsibility, the Bureau provides education and assists with the management of tribal resources and lands, among other administrative duties. *Id.* It also has assisted with the establishment of tribal justice systems, constitutions, and ordinances. *Id.* at 53. Other agencies that play a significant role in tribal development include the Departments of Health and Human Services, Education, Housing and Urban Development, and the Legal Services Corporation. *Id.* at 52.

252. *See Lone Wolf*, 187 U.S. 553, 564 (To uphold claims by tribal members that the statute in question contradicted a prior treaty "would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians . . . .").

253. Canby, *supra* n. 8, at 44 (citing *U.S. v. Wilson*, 881 F.2d 596, 600 (9th Cir. 1989)).

254. *Poodry*, 85 F.3d at 881 n. 8. Many years earlier, in upholding the Major Crimes Act, which defined as crimes certain offenses committed by Indians on reservations, the Court articulated the following:

> These Indian tribes *are* the wards of the nation. They are communities *dependent*

Indian nations to access and influence national and local politics have also contributed to limits on Congressional plenary power.[255]

C. Congressional Legislation

Historically, Congress has exercised its plenary power in regulating tribal sovereign immunity conservatively, expressly abrogating tribal immunity in a few specific contexts. In many circumstances in which Congress has deemed it necessary to provide remedies for those injured by tribes, Congress bestowed the federal government with responsibility for facilitating or making redress on behalf of tribes.

1. Historical Legislation—Indian Depredation Statutes & Railroad Indemnity

In 1891, in the face of increasing conflict between Indians and non-Indian settlers, agents, or speculators who entered Indian territory, Congress enacted the Indian Depredation Act.[256] Building upon procedures developed in the context of redressing violations of "wrongs and depredations" clauses in treaties with Indian tribes,[257] the Act

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> on the United States—dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.

Kagama, 118 U.S. at 383-84 (emphasis in original).

255. For instance, the conglomerate organization, the National Congress of American Indians, and a significant number of representations of tribal interests testified at the Congressional hearings over tribal immunity. *See infra* Part IV.C. Senator Ben Nighthorse Campbell, a Native American, in turn, sponsored legislation that was more favorable to tribal interests than the legislation sponsored originally by then-Senator Slade Gorton, *see infra* Part IV.C. Others have noted the impact Native Americans have had in the political processes of this country in recent times. For instance, the Director of the Bureau of Indian Affairs, recently recognized that "[Indian people] fare better in Congress than a lot of people recognize . . ." Kevin Gover, *"There is Hope": A Few Thoughts on Indian Law*, 24 Am. Indian L. Rev. 219, 222 (2000). He conceded however, that Congress is "not a place to look for a lot of aggressive, progressive movement in the field of Indian law." *Id.* Still, to the extent they have been instrumental in reminding Congress of its trust responsibility and preserving a status quo that acknowledges the basic tenets of tribal sovereignty, self-determination, and economic self-sufficiency, Native Americans have enjoyed success in the legislative process.

256. Indian Depredation Act of March 3, 1891, 26 Stat. 851-854 (1891). For a detailed summary of the Act, *see U.S. v. Gorham*, 165 U.S. 316 (1897).

257. Such treaty provisions generally provided that claims for damages caused by "bad men among the Indians" could be filed with and passed upon by the Commissioner of Indian Affairs and reimbursed from moneys due or to become due to the tribes under any treaties with the United States. *See e.g.* Treaty with the Navajo, June 1, 1868, art. 1, 15 Stat. 667, 667-68 (1868) (cited in relevant part in *Tsosie v. U.S.*, 825 F.2d 393 (Fed. Cir. 1987)). Claims and criminal prosecutions also could be filed in response to wrongs committed by "bad men among the whites, or among other people subject to the authority of the United States." For further discussion of claims for damages stemming from Indian

provided a mechanism for victims of "wrongs" committed by Indians to obtain compensation for their injuries.[258] Its title indicated that it was "[a]n act to provide for the adjudication and payment of claims arising from Indian depredations."[259] It authorized citizens of the United States to file claims with the United States Court of Claims for property "taken or destroyed by Indians belonging to any band or tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for (sic)."[260] The Attorney General of the United States was responsible for appearing and defending the interests of the government and of the Indians in each claim filed. The Court of Claims was bestowed with the responsibility for assessing the value of the property taken or destroyed, determining which person or tribe committed the damage, and rendering judgment.

Where the identity and tribal affiliation of the Indians committing proven violations of the Act could be ascertained, the Act provided a mechanism for recovering judgments rendered by the Court of Claims from the tribe whose members or governing agents were responsible for the depredation. Any judgments attributed to specific tribes or bands were to be paid in the following manner: (1) first, from annuities due such tribe from the United States, (2) if no such annuities were available, from any other funds due the tribe from the United States (e.g., arising from the sale of their land), and (3) in the event neither of the preceding sources of funds were available, from any federal appropriations designated for the benefit of the tribe, other than appropriations for their current and necessary support, subsistence, and education.[261] In the event no such annuity, fund, or appropriation was due or available or where the identity of the Indian deemed responsible for the depredation was unknown, the United States was responsible for paying the judgment.[262]

Thus, while the Act set forth some circumstances in which tribes could be made to pay for damages incurred by the actions of their representatives or members, it dramatically limited the scope of potential tribal liability. Specifically, it bestowed the United States with primary responsibility for satisfying judgments incurred by individuals injured by

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depredation under both treaty and federal statute, *see* Joranko, *infra* n. 263.

258. *Gorham*, 165 U.S. at 317.

259. *See Cohen*, *supra* n. 101; *Gorham*, 165 U.S. at 317.

260. *Gorham*, 165 U.S. at 317-18.

261. *Id.* at 319.

262. *Id.* The Act also limited claims to those accrued on or after July 1, 1865, unless such claims previously had been presented to Congress or any other officer (*e.g.*, Commissioner of Indian Affairs) authorized to acquire into such claims. *Thurston v. U.S.*, 232 U.S. 469, 476-77 (1914) (citing § 2, 26 Stat. 851 (1891)). According to the Supreme Court, there were a number of other statutory and treaty provisions regulating the manner of presenting claims for Indian depredations as well. *See Thurston*, 232 U.S. at 477 (citations omitted).

depredations committed by Indians who were affiliated with tribes, bands or nations in amity with the United States. Under principles of international law, those that were at war with the United States could not be held liable to compensate the victims of their actions.[263] Indeed, some decisions held that amity with the United States was a jurisdictional prerequisite such that the claimant had the burden of establishing that such a relationship existed.[264] Moreover, amity referred to "condition[s] of peace and friendship," not mere treaty relations.[265]

In addition, the Act conditioned direct payment by tribes upon the economic viability of tribes. More specifically, it provided that tribes need be responsible for making payment of judgments rendered under the Act only to the extent that federal annuities, payments, or appropriations may be available and, significantly, only to the extent such federal moneys may exceed amounts necessary for subsistence, education, or other support. Tribal lands or resources or indigenous economic enterprises could not be attached or otherwise compromised to satisfy such judgments. Even those tribes that were at peace with the United States were not expected to offer payment from their own treasuries. Rather, the federal government remained ultimately liable for their payment; where moneys were due and owing to tribes, judgments could be satisfied through the federal government's directing such moneys to injured parties rather than the tribes. The Act's structure and collection mechanisms, therefore, although piercing the veil of complete immunity, nonetheless preserved the governing structures, land and resource base, and economic systems of tribal entities.

2. Twentieth Century Legislation (1968–1999)

Congress has enacted legislation limiting tribal immunity from suit in a few context-specific areas of regulation. One of the first and most dramatic encroachments on the doctrine occurred with the enactment of the Indian Civil Rights Act ("ICRA") in 1968. This Act imposes on tribal entities a number of civil rights applicable to states and the federal government under the Bill of Rights and authorizes federal court review of petitions for writs of habeas corpus filed to test the legality of any term of detention authorized by an Indian tribe.[266] The statute, however, also limits the circumstances in which judicial remedy may be sought to those where an individual has been detained pursuant to tribal authority

263. Timothy W. Joranko, *Tribal Self-Determination Unfettered: Toward a Rule of Absolute Tribal Official Immunity From Damages in Federal Court*, 26 Ariz. St. L.J. 987, 998 (1994) (citing *Montoya v. U.S.*, 32 Ct. Cl. 349, 355, 362 (1897)).

264. *Montoya*, 32 Ct. Cl. at 355, 362; *Leighton v. U.S.*, 29 Ct. Cl. 288 (1894).

265. *Leighton*, 29 Ct. Cl. 288.

266. 25 U.S.C. § 1303 (1983). For a detailed discussion of the legislative history of the Act, *see generally* Student Author, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343 (1969).

and a petition for writ of habeas corpus need be filed.[267] In *Martinez*, the Supreme Court definitively held that Congress did not intend the Act to abrogate tribal immunity from suit in cases involving alleged violations of its substantive provisions where no detention or deprivation of liberty warranted petitioning for a writ of habeas corpus.[268] Considerable deference therefore remains with the tribes to interpret and craft remedies for individuals whose rights under ICRA may have been violated by a tribe.

Besides ICRA, the Indian Gaming Regulatory Act provides for a waiver of tribal sovereign immunity for suits by states brought to enforce the terms of a compact entered into by a tribe under the Act.[269] A number of environmental statutes, including the Clean Water Act,[270] the Safe Drinking Water Act,[271] and the Resources Conservation and Recovery Act,[272] have been construed by federal courts as waiving tribal sovereign immunity for suits brought by citizens, although there is disagreement over whether in those statutes Congress evidenced clear and unmistakable intent to abrogate tribal immunity.[273] The Eighth

267. ICRA provides that a petition for writ of habeas corpus may be maintained in federal court by any person unlawfully deprived of liberty by any one of the federally recognized tribes. 25 U.S.C.A. §1303 (West 2001).

268. *Martnez*, 436 U.S. at 58-59. For a discussion of the *Martinez* case, *see supra* notes 163-69 and accompanying text.

269. 25 U.S.C.A. § 2710(d)(7)(ii) (West 2001)). *See Maxam v. Lower Sioux Indian Community of Minn.*, 829 F. Supp. 277 (D. Minn. 1993); *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (D.S.D. 1992).

270. 33 U.S.C.A. § 1365 (West 2001).

271. 42 U.S.C.A. § 300j-9(i)(1)(C) (West 2001).

272. 42 U.S.C.A. § 6972 (West 2001).

273. *See e.g. Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (citizen-suit provisions of RCRA that authorizes compliance suits against "person[s]"—defined to include "municipalities," whose definition in turn includes "Indian tribes"—expressly waive the sovereign immunity of tribes); *A. States Leg. Found. v. Salt River Pima Maricopa Indian Community*, 827 F. Supp. 608 (D. Ariz. 1993) (citizens suit provisions of RCRA and Clean Water Act waive tribal immunity); *Osage Tribal Council v. U.S. Dept. of Lab.*, 187 F.3d 1174 (10th Cir. 1999) (employee permitted to file suit against tribe under whistle blower protection provisions of the SDWA, which defines "persons" against whom complaints may be filed to include "an Indian tribe").

Notwithstanding these cases, at least one commentator has set forth the argument that none of the citizens' suits provisions of federal environmental statutes analyzed in the above-referenced cases actually demonstrate clear and unmistakable congressional intent to abrogate tribal immunity. *See* Michael P. O'Connell, *Citizen Suits Against Tribal Governments and Tribal Officials Under Federal Environmental Laws*, 36 Tulsa L.J. 335, 347 (2000) [hereinafter O'Connell, *Citizen Suits*] ("None of the cases considering the issue have pointed to any clear and unambiguous congressional intent that the limited resources of tribal governments and tribal taxpayers be obligated to pay fees to private attorneys in citizen suit litigation. Lacking evidence of clear and unmistakable congressional intent to waive tribal sovereign immunity to citizen suits under federal environmental laws, federal courts lack jurisdiction over citizen suits against tribal governments.").

Another commentator has discussed the absence of clear waiver of sovereign immunity in the context of the Clean Air Act. *See* O. Wes. J. Layton, *The Thorny Gift: Analysis of EPA's Intent to Empower Indian Tribal Governments with Clean Air Act Regulatory Authority over Non-Tribal Lands and Immunize Tribal Governments from CAA Citizen Suits*, 7 Envtl. Law 225, 280-81 (2001) [hereinafter Layton, *The Thorny Gift*]. EPA regulations similarly exclude tribal governments from the CAA's citizens suit provisions.

Circuit determined that the Hazardous Materials Transportation Act[274] also waived tribal sovereign immunity.[275] There is a waiver of tribal immunity for the purposes of adjudicating water rights.[276] Congress expressly waived sovereign immunity of tribal governments in the Federal Debt Collection Procedure Act as well.[277]

With respect to tribal corporations established under Section 17 of the Indian Reorganization Act,[278] the presence of "sue and be sued" clauses in tribal charters have been construed as waivers of sovereign immunity.[279] Similarly, the Indian Self-Determination Act ("ISDA")[280] applies the federal tort claims procedures to claims against Indian tribes or tribal organizations that assume responsibility for certain contracts covered under the Act.[281] The ISDA also authorizes the Secretaries of Interior and Health and Human Services to provide insurance for Indian tribes, tribal organizations and tribal contractors who enter into contracts under the Act, provided the carrier agrees to waive certain rights it may have to claim immunity from suit on behalf of the tribe for claims brought within the limits of the insurance policy.[282]

While Congress has acted in some circumstances to limit tribal sovereign immunity, it has expressly refused to extend waivers in other circumstances. For instance, with respect to claims brought under the insurance waiver contained in the ISDA, Congress has provided that no insurance carrier shall have the right to waive sovereign immunity over

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See Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7253 (Feb. 12, 1998) (codified at 40 C.F.R. §§ 9, 49, 50, 81 (2000), discussed in Layton, *The Thorny Gift* at 280-97. Citizen suits, however, may be brought against tribal officials in their individual capacities, and suits to compel enforcement of environmental statutes may be brought by the United States. O'Connell, *Citizen Suits* at 347.

274. 49 U.S.C.A. § 1801 *et seq.* (West 2001).

275. *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993). *See generally Public Serv. Co. v. Shoshone-Bannock Tribes*, 30 F.3d 1203 (9th Cir. 1994).

276. 43 U.S.C.A. § 666 (West 2001). *See Metropolitan Water Dist. of S. Cal. v. U.S.*, 830 F.2d 139 (9th Cir. 1987).

277. 28 U.S.C.A. §§ 3001-3308 (West 2001) (person, for the purposes of the Act, includes "an Indian tribe"). *See U.S. v. Weddell*, 12 F. Supp. 2d 999 (D.S.D. 1998).

278. 25 U.S.C.A. § 477 (West 2001). *See Boe v. St. Belknap Indian Community of the Ft. Belknap Reservation*, 455 F. Supp. 462, 463 (D. Mont. 1978).

279. *See e.g. Boe*, 455 F. Supp. at 463.

280. 25 U.S.C.A. § 450 *et seq.* (West 2001).

281. 25 U.S.C.A. § 450f(d) (West 2001). Provisions and procedures related to tribal immunity under the Federal Tort Claims Act are set forth more fully below. *See infra* Part IV.C.

282. 25 U.S.C.A. § 450f(c)(3)(A) (West 2001) (Insurance policies obtained or provided by the Secretary pursuant to self-determination contracts awarded under the Act shall contain provisions in which insurance carrier agrees to "waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit[;]" however, no waiver shall be authorized to limit tribes' sovereign immunity outside of the coverage of the policy.). Additionally, no waiver shall apply to punitive damages, interest prior to judgment, or with respect to any other limits on liability imposed by the state in which the alleged injury occurs. 25 U.S.C.A. § 450f(c)(3)(B) (West 2001).

and beyond whatever may be covered by the policy.[283] The ISDA explicitly provides, moreover, that it should not be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe."[284] The ISDA also precludes the availability of waiver for any potential tribal liability for pre-judgment interest, punitive damages, or "for any other limitation on liability imposed by the law of the State in which the alleged injury occurs."[285] The Indian Financing Act[286] imposes similar restrictions on the waiver of tribal sovereign immunity. The federal judiciary has been active in determining whether Congress has intended to abrogate tribal immunity in a wide array of legislative contexts, contributing to variations in the law regarding abrogation.[287]

3. Legislation for the New Millennium

On March 14, 2000, Congress enacted legislation that explicitly addresses the issue of tribal sovereign immunity. Provisions narrowly modifying the immunity of Indian tribes were set forth in the Indian Tribal Economic Development and Contracts Encouragement Act of 2000[288] and the Tribal Tort Claims and Risk Management Act of 2000.[289] Both pieces of legislation represented a compromise between tribal interests in maintaining internal control over sovereign immunity, on the one hand, and the interests of individual and commercial entities, primarily non-Indian in identity, in abrogating such immunity, on the other hand. The context in which the legislation was enacted and its legislative history indicate Congress's intent to preserve tribal immunity in recognition of the inherent sovereignty of tribes. Both pieces of legislation were sponsored by Senator Ben Nighthorse Campbell of Colorado.[290]

a. The Indian Tribal Economic Development and Contract Encouragement Act

The Indian Tribal Economic Development and Contract Encouragement Act ("ITEDCA") amends a piece of Congressional legislation, 25 U.S.C. § 81, first enacted in 1872 and amended in 1958.[291] Prior to the 2000 Amendments, the 25 U.S.C. § 81 provided a

283. 25 U.S.C.A. § 450f(c)(3)(A) (West 2001).
284. 25 U.S.C.A. §450n(1) (West 2001).
285. 25 U.S.C.A. § 450f(c)(3)(B) (West 2001).
286. 25 U.S.C.A. § 1451 *et seq.* (West 2001).
287. *See supra* nn. 270-77.
288. Pub. L. No. 106-179, 114 Stat. 46 (2000) (amending 25 U.S.C. § 81 (Mar. 14, 2000) (to be codified at 25 U.S.C. § 81)).
289. Pub. L. No. 105-277, § 101(e), 112 Stat. 2681-335 to 2681-337 (1998).
290. S. 2097, 105th Cong. (1998); S. 613, 105th Cong. (1998).
291. The ITEDCA was enacted in furtherance of paternalistic goals derived from the

number of technical drafting requirements on the parties, and required endorsement by the Secretary of the Interior.[292] The Act provided also that contracts made in violation of its terms shall be null and void and authorized the United States to bring suit to recover any money or "other thing of value" paid.[293]

The 2000 amendments apply to contracts and agreements with Indian tribes that "encumber Indian lands for 7 or more years."[294] Covered agreements must be endorsed by the Secretary of the Interior.[295] Additionally, the Secretary must refuse to approve any agreement that violates federal law[296] or fails to include a provision that:

> (A) provides for remedies in the case of a breach of the agreement or contract;
>
> (B) references a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe; or
>
> (C) includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be

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federal government's trust responsibility and set forth requirements for regulating contracts between tribal and non-tribal parties that involved Indian lands. *See* Act of Aug. 27, 1958, Pub. L. No. 85-770, 72 Stat. 927 (1958) (codified at 25 U.S.C.A. § 81 (West 2001)). It "is intended to protect Indians from improvident contracts and is concerned primarily with federal control over contracts between Indian tribes or individual Indians and non-Indians." H.R. 50, 106th Cong. (1999).

It applied to agreements made by non-tribal individuals with tribes or individual Indians "for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States . . . or in any way connected with or due from the United States." *Id.* For a more detailed discussion of the history of its enactment and of its amendments, *see* Anna-Emily C. Gaupp, *The Indian Tribal Economic Development and Contracts Encouragement Act of 2000: Smoke Signals of A New Era in Federal Indian Policy*, 33 Conn. L. Rev. 667, 668-71 (2001).

292. 25 U.S.C.A. § 81 (West 2001). For instance, all contracts had to be in writing and were required to contain identifying information about the parties and their authority for entering into the contract. *Id.* The Act also required contracts covered under the Act to "state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth." *Id.* Expressly stated time limits on the duration of the contract were also required. *Id.*

293. *Id.* Although the language of the Act emphasized suits brought to protect Indian tribes, it also was interpreted to authorize suit by the United States against tribes. *See e.g. U.S. v. D & J*, 1993 WL 767689 (W.D. Wis. 1993).

294. Pub. L. No. 106-179, § 2, 114 Stat. 46, 47 (2000) (codified at 25 U.S.C.A. § 81(b) (West 2001)).

295. *Id.*

296. 25 U.S.C.A. § 81(d)(1) (West 2001).

provided or the jurisdiction of a court with respect to such action).[297]

These provisions represent a narrow capitulation to more restrictive measures considered by Congress.[298] As specified in the House Report, the legislation also serves to eliminate a major portion of federal control over tribal contracts previously required under federal law.[299] The Senate Report confirms this interpretation of the Act.[300] Thus, while it provides for the disclosure of Indian tribal sovereign immunity in certain contracts involving Indian tribes, the legislation also enhances the tribes' power of self-governance with respect to other issues and types of contracts, previously subjected to federal control.

To the extent it forces tribes to waive their sovereign immunity in order to engage in contracts with non-tribal parties under the circumstances set forth in the act, however, the ITEDCA does pose restrictions on tribal sovereignty and self-determination. It also replaces goals set forth in the original Act (e.g. of protecting tribal sovereignty,

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297. 25 U.S.C.A. § 81(2)(d)(2) (West 2001).

298. Senator Slade Gorton authored several pieces of legislation that would eviscerate tribal sovereign immunity in virtually all areas of potential authority. *See infra* Part IV.C.4.g.

299. H.R. Rpt. 106-501 (Feb. 29, 2000). One way the Act serves to reduce federal control is by limiting federal oversight and approval of tribal contracts under Section 81 of Title 25 of the United States Code to those with a life of seven or more years. It also amended Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, by eliminating the requirement that the Secretary of the Interior approve the choice of counsel and the fixing of fees by the Tribe in tribal contracts subject to federal oversight.

300. S. Rpt. 106-150 (Sep. 8, 1999). The Senate Report documents in more detail than its House counterpart the statutory evolution of the federal government's self-assumed role as legal trustee for Indian lands. The report states: "Enacted in 1872, Section 81 reflects Congressional concerns that Indians, either individually or collectively, were incapable of protecting themselves from fraud in the conduct of their economic affairs." (citing *In re U.S. ex rel. Hall*, 825 F. Supp. 1422, 1431-32 (D. Minn. 1993), *aff'd*, 27 F.3d 572 (8th Cir. 1994)). As such, Section 81 is inherently paternalistic in nature. It contravenes other legislation enacted subsequently, such as the Indian Reorganization Act of 1934, that emphasizes tribal self-determination, autonomy, and economic development.

The Senate Report describes the tension between these two pieces of Congressional legislation, emphasizing how federal policy has increasingly favored tribal self-determination. "As federal policy increasingly emphasized tribal self-determination by reducing or eliminating federal review of tribal decisions, Congress has both directly and indirectly addressed concerns about Section 81." *Id.* For example, states the Report, Congress in 1958 removed a provision from Section 81 that required that a judge witness the execution of these agreements. In further support of its proposition that Congress has increasingly favored self-determination and tribal economic development over federal oversight and control, the Report refers to a number of other legislative amendments and enactments in which Congress has attempted to empower Indian tribes to "engage in business transactions without needing to conform to requirements that were intended to shield them from 'their own improvidence and the spoliation of others.'" *Id.* The Report concludes that the legislation's provisions limiting federal oversight were consistent with this trend in increasing federal support of tribal self-determination and economic development.

As discussed more fully below, the Report's discussion of the legislation's provisions regarding sovereign immunity indicates that they are borne out of a mutual recognition—as an economic and policy matter—that Indian tribes and those with whom they contract "are generally best served if questions of immunity are addressed, resolved, or at least disclosed when a contract is executed." *Id.*

self-determination, and economic development) with ones that appear to be more protective of non-Indian interests and, hence, may be interpreted as contradicting the federal government's role as trustee in protecting tribal interests.[301] While this may be the case when considered in light of the Act in its entirety, including the way in which it leaves a vast area of tribal contracts unregulated, the 2000 amendments' intrusion on tribal sovereignty, while significant, is relatively minimal.[302]

b. The Indian Tort Claims and Risk Management Act

In comparison with its legislative companion, The Indian Tort Claims and Risk Management Act is even more narrow in its encroachment upon tribal sovereignty. It is devoid of substantive impact on tribal immunity or self-governance; its purpose is to "provide for a study to facilitate relief for a person who is injured as a result of an official action of a tribal government."[303] Toward this end, it directs the Secretary of the Interior to conduct a comprehensive survey of "the degree, type, and adequacy of liability insurance coverage of Indian tribes . . . ."[304] Under its provisions, the Secretary is required to submit a report to Congress that contains legislative recommendations deemed by the Secretary to "(1) be appropriate to improve the provision of insurance coverage to Indian tribes; or (2) otherwise achieve the purpose of providing relief to persons who are injured as a result of an official action of tribal government."[305]

Although the legislation does represent a Congressional intent to evaluate and, in a very limited set of circumstances, restrict tribal sovereign immunity, what is most significant about it is that it leaves the power of tribes to control their susceptibility to lawsuits largely intact. The degree to which it signals an ongoing intent by Congress to preserve

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301. *See* Gaupp, *supra* n. 291, at 686-87:

> The 2000 Section 81 does violence to existing rights of the Tribal Party's sovereignty, and can not be justified as a measure moving away from paternalism and promoting the self-governance and economic self-determination of Tribal Parties. . . . [T]he congressional solution to the problem of perceived sovereign-immunity-induced lawlessness in contracting with Non-Tribal Parties reflected in the 2000 Section 81 is directly at odds with the stated purpose of promoting economic self-determination. Despite the fact that the 2000 Section 81 seems to suggest that the bargaining positions of the Tribal and Non-Tribal Parties have transposed, the Tribal Party is being treated as if it must be lead (sic) through the mysterious labyrinth of the 'white man's' market yet again.

Id.

302. This is particularly so when one considers the legislation in the broader context of congressional policy, including legislative bills proposing to impose broader restrictions on tribal immunity and Congress's history in protecting tribal sovereignty. *See infra* Parts III.C.4-5 and III.D.

303. Pub. L. No. 105-277, § 702(b), 112 Stat. 2681-336 (1998).

304. *Id.*

305. *Id.*

tribal sovereignty, including tribal immunity, may be illuminated when considered in light of the congressional hearings and debate that preceded the enactment.

3. Proposed Legislation by Slade Gorton

At the time the Supreme Court rendered its opinion in *Kiowa*, Congress was actively considering a number of pieces of legislation that would markedly restrict tribal immunity. Senate Bill 1691, introduced by Senator Slade Gorton of Washington on February 27, 1998 and dubiously titled the "American Indian Equal Justice Act," was the most far-reaching of the proposals.[306] It provided for original federal jurisdiction over "any civil action or claim against an Indian tribe" that might present a federal question or present a claim for damages for "cases not sounding in tort that involve any contract made by the governing body of the Indian tribe or on behalf of an Indian tribe."[307] Recommending also an expanded tort claims procedure for Tribes,[308] Senate Bill 1691 expanded federal jurisdiction over claims for injury or loss of property, personal injury or death caused by the negligent or wrongful act or omission of an Indian tribe, "if a private individual or corporation would be liable to the claimant in accordance with the law of the State where the act or omission occurred."[309] Moreover, the legislation proposed, "to the extent necessary to enforce this section, the tribal immunity . . . of the Indian tribe . . . involved is waived."

In addition to restricting immunity with respect to torts, contracts, and federal claims in the context of federal courts, Senate Bill 1691 also authorized suits against tribes in state courts of general jurisdiction for claims:

> arising within a state, including [those] arising on an Indian reservation or Indian country, in any case in which the cause of action—

306. S. 1691, 105th Cong. (1998).
307. *Id.* at § 4(a).
308. These procedures expand the definition of "Indian tribe" beyond those governmental entities recognized by the Department of the Interior to include officer or employees of an Indian tribe; any person acting on behalf of a tribe in an official capacity, temporarily or permanently and with or without compensation; and anyone who is employed by a tribe to carry out a self-determination contract under the Indian Self-Determination and Education Assistance Act, 25 U.S.C.A. § 450b(j) (West 2001). Liability relating to tort claims brought in federal court against any of these tribal entities, according to Senator Gorton's proposal, would be "in the same manner and to the same extent as a private individual or corporation under like circumstances." S. 1691, 105th at § 5(a). The only exceptions to this latter principle included (1) an exemption for Tribes from pre-judgment interest or punitive damages, and (2) in wrongful death cases, a provision that Tribes be liable for actual or compensatory damages, not punitive damages. *Id.* Cases "relating to a controversy relating to membership in an Indian tribe" were also excluded. *Id.* The measure authorized tribes or their designees to arbitrate, compromise, or settle any claims cognizable under the Act. *Id.*
309. S. 1691, 105th Cong. at § 4(d).

(1) arises under Federal law or the law of a State; and

(2) relates to—

(A) tort claims; or

(B) claims for cases not sounding in tort that involve any contract made by the governing body of an Indian tribe or on behalf of an Indian tribe.[310]

Significantly, the legislation also proposed to expand remedies under the ICRA, providing for federal court jurisdiction and waiver of tribal immunity "in any civil rights action alleging a failure to comply with rights secured by the requirements under [ICRA]."[311] Altogether, then, Senate Bill 1691 was a sweeping piece of legislation that had the potential to significantly restrict the power of tribes to determine the nature and scope of their liability to suit. The findings upon which it was premised, moreover, embody an erroneous description of a fundamental principle of the law with respect to tribal sovereign immunity.[312] They suggest also that concern for non-Indian residents of Indian reservations were a primary driving force behind the proposed legislation.[313]

4. Legislative Response by Senator Ben Nighthorse Campbell

In the wake of Senate Bill 1691, Senator Ben Nighthorse Campbell of Colorado introduced Senate Bill 2097, referred to as the "Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act." Unlike its predecessor, Senator Campbell's bill recognized the importance and unique nature of tribal sovereignty and immunity. It found, for instance, that "Indian tribal sovereignty predates the formation of the United

310. *Id.* at § 6(a). As with claims brought in federal court, the bill provided that Indian tribes were to be liable "to the same extent as a private individual or corporation under like circumstances, but shall not be liable for interest prior to judgment on punitive damages. Id. at § 6(b). Additionally, actions brought in state court were not removable under 28 U.S.C. § 1441. *Id.* at § 6(d).

311. S. 1691, 105th Cong. at § 7.

312. One finding, for instance, represents that "the only remaining governments in the United States that maintain and assert the full scope of immunity from lawsuits are Indian tribal governments." S. 1691, 105th Cong. at § 1(b)(5). In contrast, "the Government of the United States and the States have dramatically scaled back the doctrine of sovereign immunity without impairing their dignity, sovereignty, or ability to conduct valid government policies." *Id.* at § 1(b)(4). As discussed more fully below, these statements simply and unequivocally are not true. Many tribal governments provide for waivers of their sovereign immunity and other remedies, judicial and otherwise, for persons aggrieved by official action of the tribe or one of its agents or employees. *See infra* Part IV.D.2.f. Conversely, neither the federal government nor every one of the states provide for judicial remedy and waiver of immunity in all circumstances. *See supra* Parts II.A.1-2. The states vary in the degree to which they waive their immunity and the areas in which they agree to such waivers. *See e.g. supra* n. *93.*

313. "[A]ccording to the 1990 decennial census conducted by the Bureau of the Census, nearly half of the individuals residing on Indian reservations are non-Indian." S. 1691, 105th Cong. at § 1(b)(5).

States and the United States Constitution" and that "through treaties, statutes, Executive orders, and course of dealing, the United States has recognized tribal sovereignty and the unique relationship that the United States has with Indian tribes."[314] It recognized the value of harmonious intergovernmental relationships and alternative dispute resolution in resolving disputes that may arise. It noted that "Indian tribes have made significant achievements toward developing a foundation for economic self-sufficiency and self-determination, and that economic self-sufficiency and self-determination have increased opportunities for the Indian tribes and other entities and persons to interact more frequently in commerce and intergovernmental relationships."[315] Finally, the bill underscored the need to improve the availability of adequate liability insurance coverage in order to "allow[ ] the economy of Indian tribes to grow and provide[ ] compensation to persons that may suffer personal injury or loss of property."[316]

The bill focused on two primary areas of concern: (1) intergovernmental agreements between states and tribes, and (2) tort liability insurance. It proposed the formation of an intergovernmental alternative dispute resolution panel that would assist in resolving disputes between government entities. Compacts entered into by governmental entities under the Act would have to specify their consent to litigation to enforce the agreement, if necessary, "and to the extent necessary to enforce that agreement, each party waives any defense of sovereign immunity."[317] With respect to tort liability, Senate Bill 2097 proposed to require the Secretary of Interior to secure adequate tort liability insurance or equivalent coverage for each tribe that receives a priority allocation from the federal government.[318] In addition, each policy must contain a provision waiving any right to raise sovereign immunity as a defense to claims for damages that would arise within the limits of the policy.[319]

Thus, Senator Campbell's bill attempted to address Senator Gorton's concern about unfettered tribal sovereign immunity in a more holistic fashion. Not only did it emphasize improved intergovernmental negotiation and dispute resolution between states and tribes as critical to resolving many issues, it recognized the federal government's trust responsibility to the tribes. The legislation attempted to foster both tribal accountability and continued tribal economic and governmental development.

Just after the introduction of Senator Gorton and Senator

314. S. 2097, 105th Cong. at § 2(a)(1), (3).
315. *Id.* at § 2(a)(10).
316. *Id.* at § 2(a)(13).
317. *Id.* at § 104(a)(2).
318. *Id.* at § 201(B)(1).
319. *Id.* at § 201(C).

Campbell's bills, the Supreme Court issued its decision in *Kiowa*. This caused Senator Gorton to introduce additional legislation that directly incorporated the court's views on immunity into its findings.[320] This legislation focused on the need to waive tribal immunity in commercial dealings and contractual matters. Senate Bill 2300 provided for the collection of certain state taxes from non-Indians buying goods and services from tribal entities.[321] Senate Bill 2302, which referenced the *Kiowa* decision, provided for tort liability insurance and mandatory waivers of immunity up to the limits of each policy.[322] Senate Bill 2298 provided for expanded civil rights enforcement under the Indian Civil Rights Act.[323] Senator Campbell subsequently introduced Senate Bill 613, which was designed to encourage Indian economic development and provide for disclosure and waiver of tribal sovereign immunity in contracts involving Indian tribes that require approval by the Secretary of the Interior.[324]

In the end, and after considering much testimony, the Congress passed into law Senator Campbell's Senate Bill 613 and Senate Bill 2097, as amended. As discussed above, both were signed by the President on March 14, 2000, thereby ending the debate on tribal sovereign immunity for the time being.

D. The New Legislation in Context

1. Testimony in Favor of Gorton's Proposal to Eviscerate Tribal Immunity

Between 1996 and 1998, Congress held a number of hearings on the topic of tribal sovereign immunity.[325] Representatives of tribal governments and broader tribal conglomerates testified at the hearings.[326] Non-governmental Indian and non-Indian persons and

320. *American Indian Contract Enforcement Act*, S. 2299, 105th Cong. § 1(a)(1)-(2) (1998) ("the only remaining governmental entities that maintain and assert the full scope of immunity from lawsuits in the United States are Indian tribal governments; . . . in a recent decision, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, . . . the Supreme Court recognized several reasons why tribal immunity should not be perpetuated . . . .").

321. S. 2300, 105th Cong. (1998).

322. S. 2302, 105th Cong. (1998).

323. S. 2298, 105th Cong. (1998).

324. S. 613, 105th Cong. (1998).

325. Unless otherwise noted in Parts IV.D.1.a-h, the following testimony is based on information on file with the author. The Senate Committee on Indian Affairs conducted hearings on September 24, 1996 (tribal rights in private property cases), March 11, 1998 (sovereign immunity with respect to contracts and collection of state taxes), April 7, 1998 (field hearing in Seattle on sovereign immunity with respect to property rights and individual civil rights), May 6, 1998 (tribal sovereign immunity and revisions to Indian legal systems), and July 15, 1998 (tribal reconciliation and tribal sovereign immunity as set forth in Senator Campbell's S. 2097), and May 19, 1999 (sovereign immunity and contracts for development of Indian lands as amended in S. 613).

326. For instance, W. Ron Allen, chairman of the National Congress of American Indians

entities, and representatives of various states and the United States government also submitted testimony. The hearings fostered debate over tribal sovereign immunity in the context of private property, civil rights, contractual disputes, torts, and collection of state taxes. While the views expressed were predominantly protective of the doctrine of tribal sovereign immunity, Congress did receive and consider significant testimony in support of Senator Gorton's proposed legislation to eliminate the doctrine.

a. Property and Land Use

Testimony that supported federal restrictions on tribal immunity raised a variety of themes. Some focused on the perceived impact of tribal immunity on the interests of non-Indian private property owners forced to interact with tribes by virtue of tribes' successful assertion of treaty rights or of the location of private fee land within the boundaries of Indian reservations.[327] For instance, off-reservation property owners who believed they may have someday been obliged under a recent Ninth Circuit ruling to permit tribal members to enter or cross upon their waterfront property to collect shellfish imagined unrecoverable property damage and injuries to personal and civil rights.[328] The inability, in the face of tribal immunity, of "fee land" owners within reservation boundaries to protect themselves against, and seek judicial remedies to compensate for, damages sustained from tribal interference with the unfettered use of their property (e.g. by shutting off water supplies, blocking access to roads, taxing and regulating fee lands, etc.) was also emphasized.[329]

A grass-roots community action group, Citizens for Safety and Environment, concerned about the development of a large-scale amphitheater project by the Muckleshoot Indian Tribe in partnership with a private enterprise, argued that tribal immunity prohibits citizens of an area affected by major tribally-sponsored business development projects from "compel[ing] . . . compliance with land use, zoning, and regulatory requirements normally associated with a project of this scale

testified on several occasions and a number of attorneys from firms that specialize in the representation of tribal governments and business entities provided general testimony as well. *See e.g.* Testimonies of Eric D. Eberhard, Esq., attorney with Williams & Janov, P.C., Albuquerque, N.M., S. Comm. on Indian Affairs 1998 WL 278315 (F.D.C.H.) (Apr. 7, 1998); Douglas B. L. Endreson, Esq., attorney with Sonosky, Chambers, Sachse & Endreson, Attorneys at Law, Washington, D.C., S. Comm. on Indian Affairs (Sept. 24, 1998); and Susan Williams, Esq., attorney with Williams & Janov, P.C., Albuquerque, N.M., S. Comm. on Indian Affairs, 1998 WL 278315 (F.D.C.H.) (Apr. 7, 1998).

327. *See e.g.* Testimony of Alan Montgomery, Chairman of United Property Owners of Washington, S. Comm. on Indian Affairs (Apr. 7, 1998).

328. *Id.*

329. *Id.*

and impact."[330] Furthermore, testified the organization, the doctrine of sovereign immunity, when combined with federal joinder rules, often may preclude suit even against non-Indian partners and contractors on the basis that the tribe is a "necessary and indispensable party" to such legal action.[331] At the very least, challenges to the environmental and land use impact of major development projects may generate volumes of litigation, resulting in massive and expensive costs to citizens affected by such development; waiving tribal immunity could eliminate critical barriers to the relief available to private and public interest groups like Citizens for Safety and Environment.

b. Protection of individuals: Personal Injuries and Civil Rights

In addition to public and private property advocates, individuals also provided testimony to Congress indicating that waiving tribal immunity would enhance protections available to individuals injured by official tribal action. Some provided examples of personal injuries caused by agents of American Indian governments that could not be redressed through ordinary judicial remedies on account of tribal immunity.[332] Others argued that immunity allows tribes and tribal

330. Testimony of Jill Jensen, Citizens for Safety and Environment, S. Comm. on Indian Affairs (Apr. 7, 1998).

331. *Id.* ("The result is that the courts then dismiss the suits on the basis that tribes are assumed to be immune from law suit.").

332. *See e.g.* testimony of Bernard J. Gamache, Resident of Wapato Washington, S. Comm. on Indian Affairs (May 6, 1998). Mr. Gamache is the parent of a child who was killed on his way home from school in a vehicular accident caused by a Yakama Nation tribal police officer who was enroute to a robbery scene. Although the family was able to recover damages from the United States, who owned the vehicle and provided funding for the tribal police department, Mr. Gamache maintained that he was unable to seek redress against the tribe itself. He referred also to another case in which a child was struck and killed by a tribal police officer and a lawsuit filed by his family was thwarted by a sovereign immunity defense. He did, however, concede that he never tried to bring suit in tribal court based upon the law of the Yakama Nation. His testimony, although ill-informed, is passionate, angry, and hostile in its discussion of the Yakama Nation and its residents.

A number of attorneys testified to other examples of individuals being injured in tribal facilities or by tribal agents. *See e.g.* Testimony of Gregory Abbott, Esq., S. Comm. on Indian Affairs (May, 6 1998) (describing the case of an 83-year-old client who sustained a broken hip falling from a chair while visiting a tribal casino and was unable to recover damages in state court because the state courts of Minnesota upheld dismissal of the suit on the grounds of tribal sovereign immunity); Dennis A. Ferndon, Esq., S. Comm. on Indian Affairs (May 6, 1998) (describing two cases: one involving a client injured while working on a construction project sponsored by a tribe, and another involving a client who slipped and fell on ice and snow in the parking lot of the tribal gaming establishment where he was employed, suffering serious back injury and restricting his ability to work for many months, and recovering only workers' compensation benefits from his employer). In the latter case, tribal ordinances had provided for waiver of immunity with respect to the client's claim of injuries, but the attorney elected not to file in tribal court because the legislation limited the amount of damages that could be recovered (to $132,000 by the attorney's calculations) and provided for trial in civil cases by judge not jury. His client would then have been required to reimburse the workers' compensation bureau for benefits paid to him. *Id.*

One attorney claimed to have received calls from prospective Indian and non-Indian clients with regard to "every imaginable type of civil case against tribes and tribally owned

officials to engage unchecked in abusive, corrupt, and illegal actions that violate the civil rights of their members.[333] The result, in some circumstances, is that tribal courts sometimes participate in the oppression of their own people. As one tribal member described:

> [M]any tribal governments have become corrupt with unchecked power and money; tribal government themselves, in some cases, are keeping their people in the bondage of poverty and oppression. . . . The Indian Civil Rights Act mandates that no Indian tribe in exercising its powers of self-government shall violate various basic civil rights. However, when there is no separation of powers within tribal governments and tribal sovereign immunity protects tribal government from civil rights claims, tribal members are left without recourse.[334]

As a result, testified some tribal members, cronyism, nepotism, and ballot-box rigging is pervasive in some of their communities.[335] There are no guarantees that civil rights, including age or gender discrimination, will be honored, no guarantee of freedom of press or of speech, no assurance that one will be provided with due process before being deprived of employment, housing, liberty, or other essential life needs.[336] In short, testified another American Indian lawyer and owner and publisher of the Native American Press/Ojibwe News,

> where one tribal government may extend some rights to its citizens, the next regime may not be so kind and can instantly reverse or ignore any

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business." Testimony of Craig D. Greenberg, Esq., S. Comm. on Indian Affairs, 1998 WL 278315 (F.D.C.H.) (Apr. 7, 1998). The list included: sexual harassment, retaliatory termination, age discrimination, disability or medical condition discrimination, racial discrimination (including discrimination between Native Americans based upon tribal affiliation), gender discrimination, sexual preference discrimination, defamation, whistle-blower terminations, assault and battery, car accidents and numerous personal injury cases, dram shop cases, wrongful death cases, including one arising out of murder, false imprisonment, breach of contract, tribal membership issues, reservation property disputes, theft, labor law violations (e.g., retaliation for unionization efforts), denial to individual tribal members information about their own tribes' operations, and denial of due process and other "constitutional (sic) guaranteed rights." *Id.* The attorney concluded:

> The vast number and variety of calls to my office, together with the abnormally severe and egregious nature of many of these cases, have lead me to an unavoidable conclusion. There is a severe systemic problem with tribal sovereign immunity. Abuse and corruption occur at an alarming rate because tribal sovereign immunity, and the associated sense of being 'above the law,' creates a 'petri dish' habitat for numerous legal wrongs against tribal members, employees and patrons of tribal business. This is not the fault of Indian people, it is the fault of a governmental system which gives total immunity.

Id. The testimony does not substantiate any of these allegations; nor does it discuss the remedies that are available to individuals under tribal law. As such it is rash and ill-informed. Nevertheless, it was received into evidence and considered by Congress in its deliberations over tribal immunity.

333. *See e.g.* Testimonies of William J. Lawrence, S. Comm. on Indian Affairs and Roland Morris, Sr., Board Member, Citizens Equal Rights Alliance, S. Comm. on Indian Affairs, 1998 WL 278315 (F.D.C.H.) (Apr. 7, 1998).

334. Morris, *supra* n. 333.

335. *Id.*

336. *Id.*

> tribal law or tribal constitutional protection they want, in the name of self-determination, and with the defense of sovereign immunity. . . . Tribal sovereign immunity gives Indian people less rights and more poverty, discord, government corruption and abuse of power.[337]

Another participant concluded that the ability of Indian people to transition from a state of wardship to full and effective citizenship and self-determination would actually be promoted by restricting tribal immunity.[338]

c. *Business and Gaming Implications*

The Supreme Court in its decision in *Kiowa* emphasized the commercial effects of tribal immunity, suggesting that the doctrine was "inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities."[339] Some of the Congressional testimony emphasized similar concerns about the doctrine as it relates to the growth of tribal business enterprises in national and local economies. As one private attorney opined:

> [W]hen Congress first established the doctrine, over one hundred and fifty years ago, Indian tribes were not gloriously successful entrepreneurs. It was not foreseeable then by Congress that Indian tribes today would be operating major casinos where thousands and thousands of people come to play and work each day. The law must change with the times. In this day and age, when Indian tribes are reaping the rewards of their commercial success, they must also fulfill their responsibilities as property owners.[340]

Others also attributed the need for limiting tribal sovereign immunity to recent growth in Indian gaming, arguing that tribes should not be permitted to use their governmental status for commercial gain.[341] One

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337. Lawrence, *supra* n. 333; testimony of Colonel Caleb H. Johnson, Hopi Tribal Council Member, S. Comm. on Indian Affairs, 1998 WL 272446 (F.D.H.C.) (Apr. 7, 1998) (testifying as "an individual citizen of the United States whose rights of 'due process' have been violated by the Hopi Tribal Court").

338. Testimony of Lana Marcusson, S. Comm. on Indian Affairs (Sept. 24, 1996). Ms. Marcusson's argument seems to be that by reducing greed and corruption amongst tribal officials and establishing civil rights enforceability, legislation limiting sovereign immunity would stave the backlash of public opinion against tribal interests that has been generated with tribal success in gaming and business development. This would enable Indian people to promote healthy business development and better implement self-determination policies.

339. *Kiowa*, 523 U.S. at 757.

340. Ferndon, *supra* n. 332. Although his facts are not accurate, the attorney's views reflect a popular justification for limiting tribal sovereignty, including immunity.

341. *See e.g.* Abbott, *supra* n. 332 ("The advent of Indian gaming in the last 10 years has radically changed the context in which tribal sovereign immunity is exercised. Indian tribes now invite members of the general public by the thousands each day onto their land, in order to conduct business with them. When tribes act as businesses, and not as governments, they should not be able to use their status as a government body for commercial gain."); Greenberg, *supra* n. 332 (concluding from purported conversation with Native American friends that the exponential growth in Indian gaming since 1991 has

attorney even suggested that the application of tribal immunity to commercial activities creates "a profound constitutional problem" insofar as it creates benefits for one race that are not available to members of other races, thereby contributing to a "red apartheid."[342] Another, describing a pending copyright case between a film producer and the Mashantucket Pequot Tribe,[343] argued that all entities, including tribes, should be accountable to federal laws regulating fair competition and protection of intellectual and property rights upon entering into the interstate free enterprise system.[344]

Not only do these testimonials demonstrate their authors' failure to understand basic principles of federal Indian law, few accurately describe the existing state of the law. They appeal to a belief that it is somehow unfair to allow tribes to enjoy protections guaranteed to other sovereign entities within the United States, especially when such tribes engage in successful economic development and become competitive in national and international markets. Concern over the perceived unfair competitive advantage enjoyed by tribes and tribal businesses vis-à-vis other commercial and governmental business entities may in part underlie the views expressed by these attorneys. There is also a sense in their remarks, however, that there is an element of racism behind their positions: namely, that there is something anomalous, even wrong, about Indian nations and people successfully engaging in the free enterprise system upon which the United States and world markets are based.

d. Collection of State Taxes

Both early and late in its discussions of tribal immunity, Congress considered the problem of tribal immunity as it relates to the states' ability to collect state taxes on the sale of goods by tribal enterprises to non-Indians. As clarified by the Supreme Court in *Citizens Band of*

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caused non-Indians to experience the same injuries and intrusion on their "constitutional" rights that tribal members have long encountered from their own tribal governments).

342. Abbott, *supra* n. 332. Abbott's "constitutional" argument is patently specious and ill-informed. It is neither well-researched nor does it cite to authorities, other than by reference to a dissenting Minnesota Supreme Court Justice's use of the word "red apartheid" in an unnamed opinion. It is well-established as a matter of federal law that Indian nations and their members have been classified as political, not racial, entities. Sovereignty bestows benefits on tribal members and non-Indians alike, especially in the gaming industry where tribes engage in contractual relationships with non-Indian business entities and employees.

343. *Bassett*, 204 F.3d 343.

344. Testimony of Richard A. Goren, Esq. (May 6, 1998). Goren suggests also that federal abrogation of tribal immunity is in the best interests of tribal economic development because "[w]ithout the reciprocity of equal protection other businesses simply will not deal with tribal operated enterprises." *Id.* He does not, however, address why the tribe's best interests could not better be determined pursuant to tribal law under the current state of the federal law of tribal immunity.

Potawatomi,[345] while the states retain the power to collect such taxes, they may not maintain an action in federal or state court to require the tribal government to reimburse them for the taxes or assist in their collection. A number of business entities presented testimony about the problem before the House of Representatives' Resources Committee. In particular, the Committee heard testimony about the impact of immunity on petroleum marketers, who argued that the doctrine promoted unfair competition between tribal and non-tribal fuel retailers and denied the state funds critical for road construction or other public works projects.[346] Congress also considered the impact of tribal immunity on tobacco retailers and other retail markets such as truck stops and convenience stores.[347] Congressman Ernest J. Istook presented testimony that emphasized the impact of tribal immunity upon state roads, schools, and public health and safety due to uncollected taxes.[348]

2. Opposition to Restricting Tribal Immunity

While testimony in support of restricting tribal immunity relied predominantly on anecdotal accounts of injuries and abuses that the doctrine purportedly perpetuated, proponents of tribal immunity emphasized broader themes and legal arguments, drawing from longstanding principles of federal Indian law as well as the laws of selected American Indian nations. Representatives of numerous Native American tribes offered testimony[349] as did representatives from national

345. 498 U.S. 505 (1991).

346. *See e.g.* Testimonies of J. Burton Black on behalf of the Petroleum Marketers Association of America, H.R. Comm. on Resources (Oct. 12, 1999) and Paul D. Reid, President, Reid Petroleum Corporation, representing the Society of Independent Gasoline Marketers of America, H.R. Comm. on Resources (Oct. 12, 1999).

347. *See e.g.* Testimony of John M. MacDougall, President, Nice N Easy Grocery Shoppes, on behalf of the National Association of Convenience Stores and the Society of Independent Gasoline Marketers of America, H.R. Resources Comm. (June 24, 1998). Mr. MacDougall testified from personal experience that he was forced to close a store "because of unfair competition from a retail tobacco and gasoline outlet owned and operated by the Oneida tribe." *Id.* Furthermore, he explained, "[t]his tribal truck stop is able, through evasion of state excise taxes, to sell gasoline at retail at a price that is below my wholesale gasoline cost. For tobacco, this smokeshop is undercutting my store's price on a carton of cigarettes by $3.00—far below the cost that my store pays to its tobacco wholesaler." *Id.* He purported that many other "non-Native American, taxpaying" convenience stores had been similarly closed because of competition by the Oneidas, and that the Oneidas had purchased an additional 5,000 acres of land upon, placed it in trust with the federal government, and had begun building a large-scale truck stop that would compete with other retail stores.

348. Testimony of Congressman Ernest J. Istook, Jr., H.R. Comm. on Resources, 1998 WL 350256 (F.D.C.H.) (June 24, 1998) ("The threat is greater to the tax bases than to business, because some businesses are protecting themselves by making agreements with the tribes.").

349. Tribal entities represented in the testimony included the following: the Chickasaw Nation of Oklahoma; the Confederated Salish & Kootenai Tribes of the Flathead Nation; the Lummi Business Council and the Lummi Nation; the Mashantucket Pequot Nation; the Mescalero Apache Tribe; the Menominee Tribe of Indians of Wisconsin; the Navajo Nation;

coalitions of tribal interests such as the Native American Indian Congress and a variety of major law firms that specialize in Indian affairs.[350] The United States, through its Solicitor of Indian Affairs, Department of Interior, advocated for the preservation of the doctrine of tribal immunity as well.

a. Historical Basis for Tribal Sovereignty and Immunity

Much of the testimony described the development of tribal sovereignty as a matter of federal law, emphasizing that such sovereignty is inherent and has long and consistently been recognized by the United States. Pursuant to this line of reasoning, tribal immunity exists by virtue of the sovereign status of Indian nations because, for all governments, "sovereign immunity . . . is a vital part of the right of self-government."[351] It protects governments' right to determine how (e.g. through legislation, judicial action, mediation, or other methods) conflicts that inevitably arise in the exercise of their sovereign authority may be resolved.[352] As such, it has long been recognized in the United States as an essential feature of any sovereign authority.

Testimony submitted by the United States recalled the historical roots of the doctrine of tribal immunity. The Associate Solicitor stated, "[F]rom the first days of our Republic, the United States has recognized Indian tribes as governments."[353] Over 500 tribes are presently recognized by the federal government, varying in size of membership and territory as well as type of organizational structure.[354] Continued the representative of the United States,

> Despite this variety, one thing they all have in common is the sovereignty that is inherent to government. . . . A corollary to these sovereign powers of regulatory and judicial authority is the common law doctrine of sovereign immunity. Since a sovereign can mandate laws and create courts to interpret and apply these laws, it follows that a sovereign cannot be sued absent its consent.[355]

As a matter of federal law, then, and from the perspective of the Executive Branch, tribes are and have always been sovereign nations that possess all the powers of government, including the power to

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the Standing Rock Sioux Tribe; and the Tulalip Tribes. There were also some individual members of Native American tribes that presented testimony on their own behalf. *See e.g.* Johnson, *supra* n. 337.

350. For attorney testimony, *see e.g.* Eberhard, supra n. 326.

351. *Id.* Mr. Endreson's law firm, Sanosky, Chambers, Sachse & Endreson represents Indian tribes, Alaskan Native entities, and Indian and Native people throughout the United States.

352. *Id.*

353. Testimony of Robert T. Anderson, Associate Solicitor, Division of Indian Affairs, United States Department of the Interior, S. Comm. on Indian Affairs (Sept. 24, 1996).

354. *Id.*

355. *Id.* (citing *Martinez*, 436 U.S. at 58).

determine immunity from suit, "except those which have been expressly extinguished by Congress or . . . are inconsistent with overriding national concerns."[356]

Representatives from tribal governments emphasized the historical foundation of the doctrine as well. The Chickasaw Nation described a "mandate" of "government-to-government" dealings between itself and the United State that is contained within every treaty entered into between the two nations since 1787, the year of the first treaties between the United States and tribal governments.[357] The tenuous condition of the fledgling United States of America forced it to seek and obtain tribes as allies, and "tribal governments were accorded the same significance and respect as any foreign nation."[358] Although the United States, through Congress, later sought to alter its relationship with the tribes and circumscribe the resulting sovereign authority of Indian nations, tribes like the Chickasaw survived threats to their existence, retaining and regenerating their sovereign authority. Immunity from suit arises from and is essential to that authority.

b. Federal Trust Obligation & Duty to Honor Treaty Obligations

Related to the proposition that tribal immunity is historically rooted and essential to the exercise of sovereign authority is the argument that the federal government has a trust obligation to protect and nurture tribal sovereignty and that protection of tribal immunity extends naturally from that obligation.[359] A number of commentators raised this point in their testimony. In advocating for negotiated guidelines for the establishment of insurance coverage with respect to tribal governmental action, for instance, a representative of the United States Department of Justice indicated that the federal trust responsibility required consultation and consensus with tribal governments.[360] The governor of the Chickasaw Nation in his defense of tribal immunity took a similar view. The governor stated:

> As the trustee for the tribal nations, it should be the responsibility of the federal government to make sure that the sovereign powers and

356. *Id. See* Testimony of Thomas L. LeClaire, Director, Office of Tribal Justice, (July 15, 1998) ("In our work with Indian tribes, the Department of Justice is guided by fundamental principles that have governed the relations between the United States and Indian tribes for over two hundred years.").

357. Testimony of Bill Anoatubby, Governor of the Chickasaw Nation (Sept. 24, 1996).

358. *Id.*

359. A summary of the legal basis for the federal trust obligation is set forth above. *See supra* n. 127.

360. LeClaire, *supra* n. 356 ("Congress has recognized that 'the United States has a trust responsibility to [Indian tribes] that includes the protection of the sovereignty of each tribal government.' 25 U.S.C.A. §3601(2) (West 2001). Under the Federal trust responsibility to Indian tribes, the United States exercises the highest standard of care in matters of tribal self-government.").

> authorities of the tribes are not only protected, but expanded to at least those of other governments insofar as regulatory powers within the tribe itself are concerned.[361]

The Chairman of the Menominee Indian Tribe of Wisconsin emphasized that preserving tribal immunity was critical to the federal government's policy of self-determination, including strengthening self-government and economic development.[362]

Beyond this common law trust obligation, the federal government's duty to honor its treaties with certain tribes was also cited as grounds to reject Senator Gorton's legislation.[363] For instance, the Lummi Nation argued that one-sided Congressional legislation, not the mutual contracts between the United States and sovereign Indian nations like the Lummi Nation, could be blamed for the problems cited by Gorton as grounds for enacting legislation.[364] Based upon "mutual consent and respect between the Lummi nation and the United States government," the Treaty preserved the land and cultural integrity of the Lummi people, who had "worked, played, and celebrated life on the shores and waters of Puget Sound for uncounted generations" prior to European settlement and statehood by the State of Washington.[365]

c. Policy and morality arguments

A number of commentators responded to policy and economic arguments raised by proponents of Slade Gorton's bill. With respect to whether legislation piercing tribal immunity was necessary to protect ill-informed business entities in their commercial transactions with tribes, several participants in the Congressional hearing process emphasized that the matter should be left to the realm of private contract

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361. Anoatubby, *supra* n. 357.

362. Wendell Askenette, Statement of Apesanahkwat, Chairman, Menominee Indian Tribe of Wisconsin on S. 1691, 1998 WL 236824 (F.D.C.H.) (May 6, 1998). The Chairman also testified as to the devastating effects previous termination policies had had on his tribe and advocated for alternative legislation, similar to but even more far-reaching than the bill ultimately proposed by Senator Campbell: namely, a compulsory tribal insurance program and waiver as to tort liability. He expressed particular opposition to then-Senator Gorton's suggestion that the principle of tribal sovereignty was an anachronism, saying

> The reality . . . is that tribal sovereignty was recognized by the government of the Senator's great-great-grandparents, and is no more an anachronism than the sovereignty the United States achieved as a result of its separation from the British Empire. . . . As I have already stated, the Menominee have had experience with termination already and are facing a new onslaught in Senator Gorton's Bill and in others that threaten the core existence of Indian tribes. Once again the tribes face a deadly new attack, led by people who may have laudable goals, but are using means that would destroy Indian people.

Id.

363. *See e.g.* Testimony of Henry M. Cagey, Chairman of the Lummi Nation, S. Comm. on Indian Affairs, 1998 WL 278324 (F.D.C.H.) (Apr. 7, 1998).

364. *Id.*

365. *Id.*

negotiations rather than government regulation. Some pointed to contracting processes that already incorporated consideration of tribal immunity in anticipating methods of resolving future disputes between tribes and other contracting parties. A representative of the Chickasaw Nation, for instance, reported in the context of Senate Bill 613 that the entities with whom that tribe regularly contracts were fully aware of the doctrine of tribal immunity and that each agreement involving the Nation squarely addresses tribal immunity, clarifying the remedies available to both parties in the event of a breach.[366]

Others who testified infused these concerns with moral and ethical considerations. Philip Deloria, another tribal member and director of the American Indian Law Center in Albuquerque, New Mexico, urged Congress to defer to the natural processes of the marketplace, which would put economic and political pressure on tribes to limit their reliance on sovereign immunity rather than on federal regulation.[367] This representative also questioned the fairness of subjecting tribal governments to limitations not imposed upon states and local governments, questioning the motives and integrity of Republicans in Congress who routinely rejected "Washington-dictated solution[s]" to problems that might better be resolved privately and locally by the people who know the situation best.[368] Mr. Deloria stated that "[t]he power of Congress over Indian tribes is not morally justified if it is more often used to hamper them competitively and to force them to give advantages to non-Indians than it is to protect them from the overreaching by their neighbors which history amply demonstrates."[369]

Consistent with Mr. Deloria's point of view, commentators argued also that preserving tribal immunity was further justified because the doctrine protects tribes' often weak economic foundations from erosion by eliminating costs associated with defending lawsuits; it is therefore critical to the development of strong tribal economics and other tribal and federal interests. This theme was repeated in Congressional hearings and is reflected in key federal precedent as well.[370] Senator Campbell, the legislation's sponsor, emphasized the importance of

366. Testimony of David Tovey, Tribal Executive Director, Confederated Tribes of the Umatilla Indian Reservation, S. Comm. on Indian Affairs, 1999 WL 321617 (F.D.C.H.) (May 19, 1999). A representative for the United States Department of the Interior similarly argued that the law of tribal immunity, as articulated by the courts, serves as adequate notice for anyone seeking to do business with Indian tribes to protect their own interests through the negotiation of waivers of sovereign immunity. Anderson, *supra* n. 353.

367. Testimony of Philip S. Deloria, Dir. of Am. Indian Law Center, Albuquerque, N.M., S. Comm. on Indian Affairs, 1998 WL 396895 (F.D.C.H.) (July 15, 1998).

368. *Id.*

369. *Id.*

370. *See e.g. id.*; *Fidelity & Guar. Co.*, 309 U.S. at 512. A number of legal scholars have articulated this justification as well. *See e.g.* Student Author, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1072-73 (1982); Bruce A. Wagman, *Advancing Tribal Sovereign Immunity as a Pathway to Power*, 27 U.S.F. L. Rev. 419, 423 (1993).

revitalizing tribal economies and criticized Senator Gorton's proposal to waive tribal immunity because such a waiver would have a devastating impact on tribes.[371] Senator Campbell stated:

> By removing tribal discretion and decision-making regarding waivers of immunity, Sen. 1691 would step in and force tribes to accept what states and the federal government have done voluntarily. . . . Think what this could mean in an era when plaintiffs' lawyers can simply threaten to file a lawsuit and force a lucrative settlement. I am against such tactics whether aimed at small 'Mom and Pop' business or Indian tribes, and I very much fear that they would be employed to bankrupt tribes in cases that may be weak. . . . Just when we ought to be encouraging the development of tribal economies and governments, Sen. 1691 would step in and I believe cripple them.[372]

Other tribal representatives referred more expressly to Congress's absence of moral authority to limit tribal immunity and, hence, self-governance. As Stanley Crooks, Chairman of the Shakopee Mdwakanton Sioux Community, proclaimed:

> Despite the ancient roots of tribal sovereign immunity, Congress has the raw power to abrogate that immunity. But raw power does not translate into moral authority, and Congress has no moral right to interfere with Indian tribes and their governments in this way. Stripping tribes of their immunity would contravene the very essence of self-government, and would treat tribes in a radically manner than states. If Congress is committee to Indian self-governance, as it claims to be, then let us govern. The days of paternalism are supposedly over; show us that that is true. We will continue to develop our governments, our courts, and our economies. When mistakes are made, we will learn from them, just as any other government within the United States' borders learns from its errors. In the final analysis, sovereignty is not and never has been a matter of convenience; it is essential to governance. And so we repeat, let us

371. Statement of Ben Nighthorse Campbell, Chairman, S. Comm. on Indian Affairs, 1998 WL 223905 (F.D.C.H.) (May 6, 1998). Senator Campbell also points out the inequities that would exist if tribes were forced to accept blanket waivers to their immunity and be subjected to state and federal judicial forums while states and the federal government would maintain the power to determine when and under what circumstances to waive immunity.

372. *Id.* Other testimony confirms this point. *See e.g.* Testimony of Stanley M. Crooks, Chairman, Shakopee Mdwakanton Sioux (Dakota) Community, S. Comm. on Indian Affairs (May 6, 1998) ("The unfettered authority that would be conferred on state and federal courts to hear any suits by virtually any person with any kind of complaint against a tribal government would bankrupt most tribal governments"); Testimony of Wendell Chino, President, Mescalero Apache Tribe, S. Comm. on Indian Affairs, 1998 WL 233919 (F.D.C.H.) (May 6, 1998) ("I find it amazing that during a time when many believe that the litigation explosion has gotten out of control, Senator Gorton is looking for a way to increase the number of lawsuits in our all ready (sic) overworked legal system. Right now, many people see Indian Tribes as having deep pockets because of the misperception that Tribes are getting rich off Indian Gaming. If you couple this public perception with this new ability to sue Tribes with impunity, the consequence is going to be thousands of people suing Indian Tribes in order to make a 'quick buck.'").

govern.[373]

d. Enhancing Tribal-State Cooperative Agreements

Some who testified before Congress demonstrated how deference to, and encouragement of, tribal control over the development of governmental processes could lead to creative, cooperative, and responsible collaborations between tribes, federal, state, and county governments, and other non-Indian interests.[374] Those who testified on this point provided examples of ways in which cooperative arrangements had benefited tribal economic development and self-determination initiatives while creating positive solutions and remedies for non-Indians living within reservation boundaries. As the Chairman of the Lummi Nation stated:

> Unilateral US government legislation pending before the US Congress threatens to overturn more than two centuries of developing government to government relations between the United States, Indian Nations and with state governments. This would mean financial devastation and the end of tribal governments. If S. 1691 is enacted it is the future of our children that you will be jeopardizing.[375]

Others demonstrated the ways in which tribes—sometimes in collaboration with the federal government—already were protecting the interests of non-Indians and non-members on reservations.[376]

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373. Crooks, *supra* n. 372. As Mr. Chino stated:

> This bill is MORALLY WRONG. When the Tribes of North America entered into treaties with the United States they did so with the understanding that the Tribes would retain their sovereignty. The United States entered into various treaties with the same understanding. Simply put, the United States is going back on its word to the Indian Tribes of North America if this Bill passes. However you classify it, morally, legally, or economically, the sponsor's position is WRONG. The Indian Tribes of North American (sic) have kept their end of the bargain, and we expect the United States to do the same.

Chino, *supra* n. 372. *See* Testimony of Daniel Evans, representative of Lummi Nation, S. Comm. on Indian Affairs, 1998 WL 272448 (F.D.C.H.) (Apr. 7, 1998) ("S. 1691 is a blunt instrument whose effect would be to ravage tribal independence at a time when finally after more than a century, tribes have been given the opportunity to create modern independent governments, including responsible court systems"); Williams, *supra* n. 326:

> Morally, passage of this legislation would be a reprehensible act by the United States in breaking its solemn promises to protect tribal governments' authority in their territories and would set in motion the destruction of American Indian culture and Indian self-government. Such a loss would be profoundly sad for American culture.

Id.

374. Evans, *supra* n. 373; Testimony of Michael T. Pablo, Chairman, Salish and Kootenai Tribes of the Flathead Nation, S. Comm. on Indian Affairs, 1998 WL 278313 (F.D.C.H.) (Apr. 7, 1998). Examples included water/sewer agreements that provided for participation and membership by non-Indian property owners, water agreement that guaranteed water for all reservation property owners, thereby enhancing their property values, and other transportation and shore reconstruction projects.

375. Evans, *supra* n. 373.

376. Williams, *supra* n. 326.

Ultimately, many who rendered statements before Congress concluded that protection of tribal immunity was essential to the development of strong tribal economies and was mutually beneficial to America and its people.

e. Comparisons with State and Federal Sovereign Immunity

All of the indigenous governments of American Indian nations are subject to a monolithic federal policy, comprised of judicial precedent, executive orders, and legislative regulations that apply equally to each tribal entity regardless of differences that exist between them.[377] This often means that efforts to amend or reform the entire federal law regarding Indian nations and their relationship with states and the federal government are driven by a very few examples—often the most extreme or dysfunctional among them—drawn from a very small sampling of tribal governments. At the same time, tribes are often singled out from their federal and state counterparts as the only type of entity that is susceptible of abusing power or otherwise violating the rights of individuals. With respect to sovereign immunity, for instance, those who advocated for the elimination of tribal immunity attempted to justify the need for such reform by reporting to Congress presumed flaws or injustices in a variety of tribal systems without contrasting those tribal contexts with their federal and state counterparts.[378]

Some participants in the hearings on Senator Gorton's Senate Bill 1691 and Campbell's Senate Bill 2097 demonstrated the fallacy in restricting tribal immunity while simultaneously preserving the right of states and the federal government to determine when and under what circumstances to waive their immunity. As one tribal representative testified:

> Sen. 1691 purports to restore fairness, equity, and due process to citizens, both tribal and non-tribal members, by stripping Indian tribes of their sovereign immunity. But the bill focuses only on the immunity of tribal governments, and does so by setting up false comparisons with the immunity retained by the states and the United States relating to personal injury and other tort claims.[379]

Such testimony demonstrated to Congress the myriad circumstances in which a person injured by a state or local government could be denied redress because the respective entities' voluntary waiver of immunity

377. Indian nations differ in language, culture, history, treaty, and other diplomatic relationships with the United States, governmental structure, laws, justice systems, and many other respects. With respect to sovereign immunity, for instance, some tribes uphold the principle completely or provide for no waivers of such immunity, while many others allow for individuals to bring suit or otherwise seek redress from tribal governments through a variety of means and pursuant to a variety of legal constructs.

378. *See e.g. supra* n. 333.

379. Crooks, *supra* n. 372.

had a loophole, limit, or other barrier to a person's ability to file suit.[380] In fact, "most states and the United States retain their sovereign immunity from lawsuits and only allow for limited waivers of that immunity in suits by persons who are wronged by those governments or their employees."[381] Numerous examples were cited where persons hurt by state or local governments were unable to recover for their injuries because of sovereign immunity retained by or granted to state and local entities.[382] Indeed, during Congress's deliberations on this matter, the Supreme Court affirmed its support for absolute immunity of the acts of government legislatures, including state, regional, and local legislative branches,[383] and Congress was reminded of this fact during its hearings on Senate Bill 1691.[384]

f. Discussions of Tribal Remedies and Law of Sovereign Immunity

> Sovereign immunity is an inherent attribute of the Navajo Nation as a sovereign nation and is neither judicially created by any court, including the Courts of the Navajo Nation, nor derived from nor bestowed upon the Navajo Nation by any other nation or government.[385]

One assumption underlying the legislative proposals to eviscerate tribal immunity was that a federal waiver of immunity was necessary to protect individuals from the negligent or wrongful actions of tribal entities because tribes as a general rule were lagging behind states and

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380. *Id.*

381. *Id.*

382. *Id.* While local governments may not enjoy under federal law the type of inherent immunity recognized in states, foreign nations, tribes, and the federal government, they may nonetheless be entitled to immunity in certain circumstances (i.e., as a matter of state law or when deemed to be acting as an arm of the state). *See supra* n. 26. For examples cited in the testimony, *see e.g. Jones v. Kearns*, 462 S.E.2d 245 (N.C. App. 1995); *White v. City of Newport*, 933 S.W.2d 800 (Ark. 1996) (suit alleging negligence for failure to administer CPR filed by wife of deceased man who died on his way to the hospital in an ambulance owned and operated by the city was dismissed based upon sovereign immunity); *Heaney v. New Castle County*, 672 A.2d 11 (Del. 1995) (case involving man killed when a tree fell on his car, following a county forestry employee's inspection of the area and observation of dead wood dismissed because Delaware had only waived immunity in three "narrowly construed' areas, none of which applied to "discretionary" acts); *Swieckowski v. City of Fort Collins*, 934 P.2d 1380 (Colo. 1997) (family of boy who became a quadriplegic when the lane in which he was riding his bike abruptly ended sending him headfirst into a ditch unable to maintain negligence suit because a state statue waives immunity for negligence regarding "dangerous conditions" of roadways, but not "inadequate design"). Aside from these bars to personal injury actions, the testimony provided numerous other examples of the areas in which states and local governments may maintain sovereign immunity.

383. *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998).

384. *See* Eberhard, *supra* n. 326 ("Suffice it to say here that virtually every state has retained its immunity from a wide variety of suits. Indeed, the United States Supreme Court recently lent added credence to the immunity of state and local governments in *Bogan v. Scott-Harris*.").

385. The Navajo Sovereign Immunity Act, 1 Navajo Nation Code § 553(B) (1995).

the federal government in providing remedies. A number of commentators refuted this assumption by providing concrete evidence of tribal laws that waived immunity and provided for individual relief in case of injury or violations to rights in a number of circumstances. For instance, the Chairman of the Shakopee Mdewakanton Sioux (Dakota) Community presented information about its Tort Claims Ordinance.[386] Congress also received information regarding a variety of other tribal tort claims ordinances,[387] and tribal-state gaming compacts that assure protection of casino guests.[388]

Tribes across the United States long have grappled with how to provide individuals with redress for injuries sustained by tribal governments and their officials. At the time Congress deliberated over what the appropriate scope of tribal immunity should be as a matter of federal law, in fact, a myriad of mechanisms had been created by tribal governments to waive immunity in certain circumstances, thereby providing for redress by aggrieved individuals. Like state waivers, tribal waivers of immunity typically embrace suit or other form of redress[389] in limited sets of circumstances. In some instances, the constitution, bylaws, or charter of the tribal government provide express waivers of immunity and authorize civil suits.[390]

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386. Crooks, *supra* n. 372. The ordinance provides a broad waiver of the Community's immunity to ensure redress for persons, including organizations that do business with or are guests of the Community and those who are members, injured by the Community or its employees or agents. It caps recovery at $250,000 per claim, up to $1 million for a single event or occurrence. Stated the Chairman, "[The Ordinance] does guarantee justice for all through a voluntary waiver of sovereign immunity, and it does so in a manner which strengthens the Community's sovereignty." *Id.*

387. *See e.g. id.* (citing Mashantucket Pequot Tribe's Sovereign Immunity Waiver Ordinance, M.P.T.O. 011092-01 (providing waiver in specified circumstances, including "injuries proximately caused by the negligent acts or omissions of the Gaming Enterprise")), and *Pasienza v. Mashantucket Pequot Gaming Enterprise*, 24 Ind. L. Rptr. 6219 (Mash. Tr. Ct. 1996); Testimony of Pedro Johnson, Council Member of Mashantucket Pequot Tribe, S. Comm. on Indian Affairs, 1998 WL 236821 (F.D.C.H.) (May 6, 1998).

388. Crooks, *supra* n. 372. A common model is for tribes, without expressly waiving their immunity, to agree to obtain liability insurance to cover injuries to visitors and to prevent insurers from asserting the tribe's immunity. Congressional testimony highlighted the compacts involving a number of tribal and state entities, including compacts between the Ak-Chin Indian Community and the State of Arizona, the Lac Courte Oreilles Tribe and the State of Wisconsin, the Sac and Fox Nation of Missouri and the State of Kansas, and the Cow Creek Tribe and the State of Oregon. *Id.*

389. These might include administrative remedies, Peacemaker Court and other traditional forums, and other forms of dispute resolution. For selected examples of indigenous peacemaking systems, *see infra* n. 401.

390. *See e.g. Cleveland, Sr. v. Blackhawk*, 24 Ind. L. Rept. 6051 (Winn. Tr. Ct. 1996) (analyzing the sovereign immunity waiver contained in the Winnebago Constitution). *See Long v. Mohegan Tribal Gaming Authority*, 25 Ind. L. Rptr. 6111, 6116 (Mohegan Gaming Disputes Tr. Ct. 1997). (Employee challenged termination of employment with gaming authority, alleging breach of contract and discrimination, among other claims. Gaming Authority moved to dismiss contractual claims on grounds of sovereign immunity, and discrimination claim on grounds of lack of standing—tribal employment discrimination ordinance does not give standing to managerial staff or others with access to administrative grievance procedures. Court agreed with Authority. Contractual, quasi-contractual, and collateral estoppel claims were neither waived by contract nor did they fit

More typically, waivers of immunity are set forth in ordinances or other forms of legislation. The legislative council for the Navajo Nation, for instance, has enacted a Navajo Sovereign Immunity Act.[391] In it the Navajo Nation expressly recognizes that "[s]overeign immunity is an inherent attribute of the Navajo Nation as a sovereign nation and is neither judicially created by any court, including the Courts of the Navajo Nation, nor derived from nor bestowed upon the Navajo Nation by any other nation or government."[392] In addition, the Navajo Nation Council has enacted the Navajo Nation Bill of Rights in recognition of the interests and rights of its people.[393] The Navajo Sovereign Immunity Act balances the interests of individual parties in obtaining "benefits and just redress to which they are entitled under law in accordance with orderly process of the Navajo government" with the public interest in securing public funds and assets and ensuring the ability of the government to function for "the general welfare and the greatest good of all people."[394]

Consistent with these objectives, the Act authorizes suit for prospective injunctive relief or declaratory judgment in the courts of the Navajo Nation against an officer, employee, or agent of the Navajo Nation under certain circumstances in order to compel performance of their responsibilities under the laws of the United States and the Navajo Nation, including the latter's Bill of Rights.[395] Other provisions authorize

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within limited waiver of sovereign immunity provided for by Mohegan Constitution. That Constitution gives authority to Gaming Authority to grant limited waivers of sovereign immunity as to gaming matters and provides that no provision of tribal law should limit the right that "any person may otherwise have to bring an action in a court of competent jurisdiction to protect a right or seek a remedy otherwise available pursuant to the Indian Civil Rights Act . . . . Mohegan Constitution, Art. XIII." Since plaintiff did not contract for limited waiver of sovereign immunity nor did he bring a claim under the ICRA, the court found that no waiver of sovereign immunity applied and, hence, that it did not have jurisdiction over any claims.)

391. 1 Navajo Nation Code § 551 *et seq.* (1995). The legislation was enacted in 1980 and amended a number of times, most recently in 1992. *See Raymond v. Navajo Agric. Prod. Indus.*, 22 Ind. L. Rptr. § 6100 (Nav. S. Ct. 1995) (recognizing the codification of the nation's inherent immunity from suit and waiver in four circumstances).

392. 1 Navajo Nation Code § 553(B) (1995).

393. 1 Navajo Nation Code § 1 *et seq.* (1995). Like the Indian Civil Rights Act ("ICRA"), 25 U.S.C.A. § 1301 *et seq.* (West 2001), and the United States Bill of Rights, the Navajo Nation Bill of Rights provides for protection of civil liberties from incursions by the Navajo Nation or its agents. Its protections largely mirror the United States Bill of Rights, although discrimination based upon gender is expressly prohibited. 1 Navajo Nation Code § 3 (1995) ("Equality of rights shall not be denied or abridged by the Navajo Nation on account of sex nor shall any person within its jurisdiction be denied equal protection in accordance with the laws of the Navajo Nation, nor be deprived of life, liberty or property, without due process of law."). It provides for a number of protections not available under the Indian Civil Rights Act. For instance, unlike ICRA, it prohibits the establishment of religion, provides for the right to counsel for indigent defendants, requires just compensation for a taking of private property by the Navajo Nation, and provides for the right to keep and bear arms. 1 Navajo Nation Code §§ 4, 6, 7, and 8 (1995). *Cf.* 25 U.S.C.A. §1302 (West 2001).

394. 1 Navajo Nation Code § 554(A) (1995).

395. *Id.* at § 554(G).

recovery of monetary damages for injuries and amounts that lie within the coverage of applicable liability insurance retained by the Nation.[396] The Act establishes certain procedures, such as the need for claimants to file notice of suit with administrative offices of the President and Attorney General of the Navajo Nation, as jurisdictional prerequisites to maintaining suit against the Navajo Nation.[397]

Aside from the Navajo Nation, the laws and precedent of many other tribes acknowledge the inherent immunity of tribal governments while recognizing the interests of individuals in obtaining redress or protection from the actions of a tribal government or its officers or agents. Some tribes, like the Navajo Nation, provide for limited waivers of immunity in order to guarantee protection and enforcement of individual liberties and other rights guaranteed under their constitutions or charter documents or, in some instances, even the Indian Civil Rights Act.[398] Yet others have laws that acknowledge express and implied waivers of tribal immunity in a variety of other circumstances, including personal injury or property damage claims, employment claims, and suits based upon

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396. *Id.* at § 554(F). Section 554(F) states:

> The Navajo Nation may be sued only in the Courts of the Navajo Nation with respect to any claim which is within the express coverage and not excluded by either commercial liability insurance carried by the Navajo Nation or an established Navajo Nation self-insured and/or other claims program of the Navajo Nation government, approved and adopted pursuant to the laws of the Navajo Nation and further, subject to [certain enumerated] provisions and limitation[.]. Recovery is excluded in a number of circumstances. For instance, certain kinds of claims are exempt from the provisions of the Act (e.g., false arrest, false imprisonment, malicious prosecution, or claims demonstrating gross negligence in probation, parole, furlough or release from confinement of a prisoner or detainee). *Id.* Punitive or exemplary damages against the Navajo Nation or its officers, employees or agents acting within the course and scope of the authority of their office also are precluded.

Id.

For a discussion of the Act by the Navajo Nation Supreme Court, *see Raymond v. Navajo Agric. Prod. Indus.*, 22 Ind. L. Rptr. 6100 (Nav. S. Ct. 1995). In that case, a tribal member sued a Navajo Nation agricultural business entity for sexual harassment, breach of employment contract, and wrongful termination. The Court held that the claims were barred under the Navajo Sovereign Immunities Act. The decision was based upon the Court's conclusion that the suit did not fall within any of the authorized categories under the Act. According to the Court, the Act codifies the nation's inherent immunity from suit, allowing for suit in only four circumstances: (1) when explicitly authorized by federal law, (2) when explicitly authorized by council resolution, (3) for claims within the express coverage and not excluded by the commercial liability insurance carried by the nation, and (4) when brought against an officer, employee or agent of the Navajo Nation to compel him or her to perform his/her responsibilities under the laws of the U.S. and the Navajo Nation, including the Bill of Rights of the Navajo Nation. None applied to plaintiff. Although the Act requires commercial liability policies established by the Navajo Nation to cover personal injury and property damages established as a direct and proximate cause of a violation of the wrongful deprivation or impairment of civil rights under the Navajo Nation Bill of Rights, NAPI's insurance policy did not cover these types of claims and no civil rights violations were presented. *See* 1 Navajo Nation Code at § 554(F).

397. 1 Navajo Nation Code at § 555.

398. 25 U.S.C.A. §1301 *et seq.* (West 2001).

contractual arrangements.[399] In addition, a number of tribes expressly acknowledge and set forth parameters for voluntary contractual waivers of sovereign immunity by tribal governments.[400] Additionally, tribes may

399. For a discussion of some of the different legal constructs, *see e.g. Chatterson v. Confederated Tribes of Siletz Indians of Or.*, 24 Ind. L. Rptr. 6231 (Siletz Ct. App. 1997) (describes limited waiver of sovereign immunity and holds that tribal statute of limitations for purposes of actions against tribal officials does not violate the equal protections guarantees of the tribal constitution or ICRA); *Cloud v. Smith*, 25 Ind. L. Rptr. 6030 (Ho-Chunk S. Ct. 1998) (acknowledges tribal resolution providing for limited waiver of sovereign immunity in employment context but holds that trial court lacked jurisdiction because employee failed to exhaust administrative remedies prior to coming to court); *Galardi v. Mashantucket Pequot Gaming Enter.*, 24 Ind. L. Rptr. 6191 (Mash. Peq. Tr. Ct. 1996) (discusses Mashantucket Pequot's Sovereign Immunity Waiver Ordinance in context of "slip and fall" in accident in tribal gaming enterprise facility, held to be an arm of the Tribe, and concludes that Ordinance expressly excludes from immunity waiver awards for loss of consortium: "The Gaming Enterprise shares the common law immunity from suit traditionally enjoyed by sovereign powers. The . . . Ordinance waives the sovereign immunity of the Tribe and Gaming Enterprise to permit certain causes of action, but except to the extent that such sovereign immunity is clearly and unequivocally waived, the sovereign immunity of the Gaming Enterprise continues. The court cannot expand the scope of the Tribe's limited waiver of sovereign immunity beyond that which was intended by the Tribe. It has no jurisdiction to award damages based on loss of consortium."); *Martin v. Hopi Tribe*, 25 Ind. L. Rptr. 6185, 6187 (Hopi Tribe App. Ct. 1996) (determining whether tribal members could maintain in tribal court claims for wrongful termination of employment, Court finds that under Hopi Constitution and Bylaws Hopi Tribal Council has authority to waive Hopi sovereign immunity and that Tribal Council clearly and unequivocally waived immunity in Personnel Policies and Procedures Manual: "The Hopi Tribe does enjoy sovereign immunity and it may assert or waive the doctrine in its own courts. The Hopi Tribe may waive sovereign immunity through a clear and unequivocal statement of waiver, which will be determined by looking at the intent of the Tribal Council and the plain statement."); *Pazienza v. Mashantucket Pequot Gaming Enter.*, 24 Ind. L. Rptr. 6219 (Mash. Peq. Tr. Ct. 1996) (Analyzes Mashantucket Pequot's Sovereign Immunity Waiver Ordinance with respect to common law invasion of privacy claim and strict liability claim and concludes that waiver of immunity does not extend to strict liability but does extend to tort action); *Wells v. Fort Berthold Community College*, 24 Ind. L. Rptr. 6157 (Ft. Berthold Tr. Ct. 1997) (In denying tribally chartered corporation's motion to dismiss on sovereign immunity grounds an unjust enrichment employment action, the Court held that tribal charter's provision that the Corporation has the power "to sue and be sued, complain and defend, in its corporate name in the Fort Berthold Tribal Court" constitutes an express waiver of immunity. The fact that there was no written contract or waiver did not matter. The court did, however, express its concern about the unlimited nature of the waiver, advising the College to have counsel or the Tribes' legal experts consider appropriate limitations.).

400. The Ho-Chunk Nation, for instance, through its Tribal Court has expressly grappled with this issue. *See e.g. C & B Inv. v. Ho-Chunk Dept. of Health*, 24 Ind. L. Rptr. 6114 (Ho-Chunk Tr. Ct. 1996) (Tribal health department entered into commercial lease for use of office building, then vacated the premises. Following unsuccessful effort to maintain suit in the trial and appellate courts of Wisconsin, C & B commenced action in tribal court. Tribe raised defenses of sovereign immunity and res judicata. Ho-Chunk court agreed with state court's finding that sovereign immunity bars enforcement of action by plaintiff. Neither the governing documents of the Business Committee, nor by-laws of the Health Board, nor lease agreement contained 'sue or be sued' language. The court said: "Nothing short of an express waiver in a case between a non-government individual or entity and the Ho-Chunk Nation or sub-entity satisfied the *Martinez* standard. The Ho-Chunk nation did not expressly waive its sovereign immunity in agreeing to the general contract language used here. The plaintiffs in this case were free to request a waiver of sovereign immunity before executing the lease agreement. . . . Indian tribes have structured their many commercial dealings upon the justified expectations that absent an express waiver their sovereign immunity stood fast." Dismissal was also supported by principles of res judicata.).

provide redress to individuals against intrusive government action by creating administrative remedies, peacemaker courts, and other non-adjudicatory methods of dispute resolution.[401]

While the absence of mechanisms for universally reporting tribal judicial decisions and laws does not currently permit accurate statistical assessment of the status of sovereign immunity in all tribes and no such statistical data was provided to Congress, the numerous examples that readily can be documented clearly refute the assumption that no, or even few, tribes have voluntarily chosen to waive immunity. From this fact, together with the reality that states and the federal government were and continue to be permitted to shape their own waivers of sovereign immunity, a number of tribal representatives argued that it would be unfair for Congress to deny tribes the opportunity to similarly develop their legal systems and laws regarding sovereign immunity. In this regard, then, the facts about tribal immunity support moral claims against Congressional intervention with tribal sovereignty. As Chairman Crooks explains:

> [I]t is unfair to compare governments that have had a century or more to build their institutions and their financial security to tribal governments that are still striving to reach the same ends. Indian tribes—Indian governments—must be accorded the same rights and respect as their non-Indian counterparts. . . . [T]ribal waivers of immunity are increasingly common. As tribal governments interact more with non-Indians and as they become more stable financially, there is every reason to believe that the trend will continue.[402]

g. Testimony Regarding Research on Tribal Liability Insurance Coverage and the Federal Tort Claims Act

Congress also received testimony regarding the need to examine tribal liability insurance coverage and its intersection with coverage provided by the federal government. Specifically, it took testimony regarding the importance of heightening tribal awareness about existing tort claim coverage under the Federal Tort Claims Act ("FTCA").[403]

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401. For published descriptions of indigenous peacemaking systems, *see* Robert B. Porter, *Strengthening Tribal Sovereignty through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 Colum. Hum. Rights L. Rev. 235 (1997) (describing an over 500-year tradition of peacemaking in Seneca society); Robert Yazzie, *Life Comes from It: Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994); James W. Zion, *The Navajo Justice and Harmony Ceremony*, 10 Mediation Q. 327 (1993).

402. Crooks, *supra* n. 372.

403. *See* Testimony of Phyllis C. Borgi, J.D., M.A., Center for Health Policy Research, George Washington University Medical Center, S. Comm. on Indian Affairs, 1998 WL 552152 (F.D.C.H.) (July 15, 1998). The Center reported on a study completed in 1998 entitled "Accessment (sic) of Access to Private Liability Insurance for Tribes and Tribal Organizations with Self-Determination Contracts/Compacts." The United States Department of Health and Human Services in conjunction with the Departments of Interior and Justice commissioned the study and requested the Center to assess tribal access to

Testimony also emphasized the need for the federal government, through its trust responsibility, to (1) conduct further assessments of tribal liability insurance, and (2) assist tribes and tribal organizations in accessing accurate information about federal coverage and appropriate and reasonably priced supplemental insurance.[404]

In an effort to encourage tribes and tribal organizations to assume management responsibility over certain programs historically maintained and operated by the federal government (e.g. health clinics and social services programs), Congress extended the protections of the FTCA to tribal entities carrying out such programs.[405] The FTCA provides immunity from common law tort claims against tribal entities and individuals whose acts or omissions are within the scope of self-determination contracts and within the scope of employment (as a matter of state law). If a claim is covered under the FTCA, thereby satisfying all of the requirements specified under the Act, the United States "steps into the shoes of the tribal defendant(s) and assumes liability for the claim."[406] As a result, tribal entities need not provide for private liability insurance to protect against claims covered by the FTCA.

Notwithstanding this fact, however, testimony drawn from a study completed on tribal liability insurance access and coverage[407] indicated that a significant percentage of tribes nonetheless paid inordinately high premiums for coverage that was supposed to be merely supplemental and otherwise experienced difficulties obtaining private insurance.[408] Some were not even aware of the alternative coverage provided for under the FTCA, nor were the brokers with whom they contracted.[409] Inconsistencies in federal determinations about coverage under the FTCA further contributed to uncertainty about what claims might be covered under the Act and in what circumstances private liability insurance might be necessary or duplicative.[410] Emphasizing the benefit

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commercial liability insurance and recommend strategies to assist tribes in locating affordable insurance to supplement the coverage available to tribes under the Federal Tort Claims Act. *Id.*

404. *Id.*

405. Congress extended the provisions of the FTCA to tribes and personnel when they are carrying out self-determination contracts pursuant to Pub. L. No. 101-512, § 314, codified as amended at 25 U.S.C.A. § 450(f) (West 2001). It expanded the coverage for other activities in other legislative amendments. *See e.g.* 25 U.S.C.A. §§ 2802-04 (West 2001) (provision of law enforcement services in Indian country through contracts with the Secretary of the Interior acting through the Bureau of Indian Affairs); Pub. L. No. 100-466 as amended and codified at 25 U.S.C.A. §450(g) (West 2001)). For additional information about the historical development of FTCA coverage *see* Testimony by LeClaire, *supra* n. 356.

406. *Id.*

407. *See supra* n. 395.

408. *Id.*

409. *Id.*

410. *Id.* Other problems identified in the report included (1) poor communication between tribal entities and federal agencies involved in FTCA decision-making, and (2) a high rate of

of FTCA coverage and access to accurate supplemental insurance to tribal self-determination efforts, the testimony provided a number of recommendations, most of which focused on ways in which Congress could assist in facilitating the dissemination and exchange of accurate information about FTCA coverage and private liability insurance.[411]

Finally, the testimony endorsed the proposed legislation's goals to further study and report to Congress on the status of tribal immunity and insurance coverage. Importantly, it emphasized also how difficult gathering and analyzing relevant data would be, offering a list of suggestions drawn from sixteen months of research experience that failed to "yield any concrete statistics in these critical areas."[412] Despite these warnings about the difficulty of gathering data about insurance, though, Congress opted to adhere to Senator Campbell's plan to make an examination into tribal liability insurance coverage the salient purpose of the legislation.

h. Foreign Sovereign Immunities Act & the Commercial-Governmental Distinction

In 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA"), expressly circumscribing the contours of foreign sovereign immunity.[413] Its refusal to extend similar limits to tribal sovereign immunity indicates a clear intent on the part of Congress to accord American Indian nations and their sovereign authority greater deference than foreign nations, at least with respect to authority over the doctrine of sovereign immunity.

Congress received and considered recommendations in favor of extending the limits imposed upon foreign nations in FSIA to Indian nations, particularly with respect to the commercial-governmental distinction set forth in FSIA. For instance, in advising Congress to abrogate tribal sovereign immunity in its *Kiowa* decision, the Supreme Court "[found] instructive the problems of sovereign immunity for foreign countries."[414] This decision was rendered as Congress was deliberating legislation proposed by Senators Gorton and Campbell. Senator Gorton's proposed legislation, in fact, directly incorporated the Supreme

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unfamiliarity with the FTCA on the part of insurance companies and a general reluctance to accurately take into account the FTCA when determining private liability coverage.

411. *Id.*

412. *Id.* Concluded the testimony: "Determining the adequacy of tribal private liability coverage is at best difficult; at worst, it may be impossible."

413. 28 U.S.C.A. §§ 1602-1611 (West 2001). For a more detailed discussion of the FSIA and the historical context in which it was enacted, *see supra* Parts II.A.3. and IV.

414. *Kiowa Tribe*, 523 U.S. at 759. Tracing the historical development of the common law regarding foreign sovereign immunity, the Court described how '[d]ifficulties in implementing the principle led Congress in 1976 to enact the Foreign Sovereign Immunities Act, resulting in more predictable and precise rules." *Id.*

Court's decision into its findings.[415] The fact that Congress did not extend FSIA's provisions to tribal immunity, therefore, indicates the strength of Congress's resolve to (a) treat Indian nations as unique sovereign entities separate from any other type of sovereign entity, and (b) continue its historical legacy of protecting tribal sovereign immunity from unwarranted incursions, thereby fulfilling its trust responsibility to the tribes.

E. The Enduring Protectionist Policies of Congress

For several years prior to the enactment of the year 2000 sovereign-immunity-related enactments, Congress considered several pieces of proposed legislation that sought to essentially eviscerate tribal sovereign immunity.[416] In the wake of Congressional debate on the matter, moreover, the United States Supreme Court encouraged Congress to enact legislation that would limit the ability of tribes to claim immunity, particularly with respect to commercial activities.[417] The Court explained:

> There are reasons to doubt the wisdom of perpetuating the doctrine. . . . In our interdependent and mobile society . . . tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and the sale of cigarettes to non-Indians. . . . In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims. These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule.[418]

The Court referred to the role of Congress in reforming tribal immunity repeatedly, invoking Congress at least once in each of the six concluding paragraphs of the majority opinion.[419] Finding flaw in both the rationale behind the policy and the strength of the judicial precedent, the Court

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415. *See supra* Part IV.C.5.

416. *See supra* Part IV.C.

417. The Court stated that the doctrine, although perhaps once necessary to promote economic development and self-sufficiency in fledgling tribal governments, may now be challenged as "inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional customs and activities." *Kiowa Tribe*, 523 U.S. at 758.

418. *Id.*

419. For example, the Court makes the following references to Congress: (1) "we defer to the role Congress may wish to exercise in this important judgment;" (2) "[I]n considering Congress's role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries;"(3) "although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation;" (4) "Congress . . . 'has always been at liberty to dispense with such tribal immunity or to limit it;'" and (5) "In light of these concerns, we decline to revisit our case law and choose to defer to Congress." *Id.* at 758-60 (citing *Okla. Tax Commn.*, 498 U.S. 510).

strenuously urged Congress to limit the scope of tribal immunity. The legislative record is replete, moreover, with testimony and argument in favor of limiting tribal immunity.

Nevertheless, Congress declined to adopt the Court's recommendations. After years of deliberation and consideration of a wide array of perspectives presented in legislative hearings, federal, state, and tribal courts, and even the media, members of Congress implemented only minor revisions to tribal immunity. They did so after listening to multiple representatives of American Indian nations, as well as representatives of other interests openly in favor of derogating tribal immunity. In enacting provisions that would require gathering data on tribal insurance policies and other matters related to tribal immunity, Congress in March 2000 opted instead to defer its decision over the matter until a later date and, therefore, largely maintained the status quo. Moreover, its amendments to 25 U.S.C. § 81, although significant, were narrow in scope.[420]

The fact that Congress declined to enact legislation more limiting of tribal immunity is consistent with a Congressional tradition—indicated by the paucity of exceptions to the general rule of tribal immunity—that is generally protective of tribal sovereignty and its inherent attributes. In only a few narrowly prescribed circumstances has Congress limited tribal sovereignty.[421] Significantly, Congress did not abrogate tribal immunity when enacting the Indian Gaming Regulatory Act, a piece of legislation that provided for state-tribal compacting process and imposed some additional limitations on the tribes' sovereign prerogative to conduct gaming. It narrowly abrogated immunity with respect to the Indian Civil Rights Act. Other circumstances have been limited to particularized regulatory scenarios and have been the subject judicial interpretation.

While the new Section 81 Amendments require certain contracts (e.g. those that are "relative to Indian lands" and require the approval of the Secretary of Interior) to contain express waivers of tribal immunity, there is interpretive latitude with respect to their scope as well. At least one court has declined to extend the Amendments' coverage to contracts in which an Indian tribe rented equipment from a gaming corporation for use in a casino on tribal land.[422] Thus, the 2000 Amendments are limited in scope and reaffirm Congress's ongoing commitment to preserving tribal immunity.

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420. *See supra* Part IV.C.
421. *Id.*
422. *U.S. ex rel. Steele v. Turn Key Gaming, Inc.*, 260 F.3d 971 (8th Cir. 2001).

poor and Indian children.[428]

Consistent with these goals, President Clinton issued an Executive Order on the same day he met with tribal leaders that confirmed his administration's commitment to fostering a government-to-government relationship with Native American tribal governments in recognition of their inherent sovereignty.[429] Specifically, it directed the head of each executive department and agency to implement the government-to-government relationship as well as to consult with federally recognized tribal governments and attempt to work cooperatively with them in matters that affect them.[430]

Besides issuing these statements committing the Executive Branch to respecting the sovereignty of Indian nations, the Clinton administration supported indigenous self-determination in other ways as well. For instance, representatives from the Administration testified at Congressional hearings directly related to sovereign immunity, announcing the administration's unequivocal support of tribal immunity.[431] Legal representatives from the Clinton Administration also consistently advocated for strong sovereignty positions in litigation before the United States Supreme Court and other judicial proceedings.[432]

President Clinton was not the first contemporary President to uphold and further the inherent sovereignty of tribes. President Lyndon Johnson initiated the post-termination-era commitment to self-determination on the part of the Executive Branch.[433] President Richard Nixon forcefully advocated for self-determination, including self-governance, of Indian people, denouncing previous federal policies of forced termination and excessive paternalism and setting forth specific recommendations for action.[434] Emphasizing the strength, endurance, and creativity of American Indian people, again often in the face of tremendous obstacles, President Nixon acknowledged the enormous contributions American Indians had made to the United States.[435] In

428. *Id.* at 345.

429. William Jefferson Clinton, *Presidential Memorandum for the Heads of Executive Departments and Agencies*, (Apr. 2, 1994), in Francis Paul Prucha, *Documents of United States Indian Policy* at 346 (3d ed., U. Neb. Press 2000).

430. *Id.*

431. *See supra* nn. 345-48 and accompanying text.

432. See e.g. supra nn. 231-35 and accompanying text.

433. *See supra* n. 423.

434. Richard M. Nixon, Speech, *Special Message to Congress* (U.S. Capitol, Washington, D.C., July 8, 1970), in Francis Paul Prucha, *Documents of United States Indian Policy* at 256-58. (3d ed., U. Neb. Press 2000).

435. *Id.* at 57 ("But the story of the Indian in America is something more than the record of the white man's frequent aggression, broken agreements, intermittent remorse and prolonged failure. It is a record also of endurance, of survival, of adaptation and creativity in the face of overwhelming obstacles. It is a record of enormous contribution to this country—to its art and culture, to its strength and spirit, to its sense of history and its sense of purpose.").

V. EXECUTIVE POLICY WITH RESPECT TO SOVEREIGN IMMUNITY

The federal government, through its Executive Branch, has been committed to promoting tribal self-government and self-determination, mirroring the other branches of government's commitment to those policies as well. Since 1968, virtually every presidential administration, regardless of political affiliation, has confirmed its commitment to tribal sovereignty, including the development of tribal economies and means of self-governance.[423] In addition and consistent with its trust responsibility with respect to the tribes, the Executive Branch has supported tribal self-governance and economic development in testimony before Congress and in case pending before the Supreme Court.

On April 29, 1994, President Clinton invited leaders of 547 federally recognized tribes to a meeting in the White House to discuss his views on Indian policy and receive comments about their goals and priorities.[424] He made tribute to the unique and indomitable spirit of American Indian people that has enabled them to retain their identity, dignity and faith in the face of "often immeasurable obstacles."[425] He acknowledged the fact that their cultures and societies predated the Constitution.[426] He pledged the federal government's support to its nation-to-nation relationship with the various tribes as well as to the self-determination of American Indian peoples and continued efforts at strengthening tribal economic development.[427] Unlike other Presidents, he emphasized also the importance of enhancing the health needs of tribal communities and their families and children through an enhanced Indian Health Service budget as well as in improving the education for

423. In 1968, in a "Special Message to Congress on the Problems of the American Indian: 'The Forgotten American,'" President Lyndon B. Johnson articulated a bold statement advocating the end of "old debate(s)" about termination and paternalism in favor of a federal commitment to self-determination and self-help. Lyndon B. Johnson, Speech, *Special Message to Congress on the Problems of the American Indian: "The Forgotten American,"* (U.S. Capitol, Washington, D.C., Mar. 6, 1968), in Francis Paul Prucha, *Documents of United States Indian Policy* 1, 249-50. (3d ed., U. Neb. Press 2000). President Johnson also requested a ten percent funding increase or one-half a billion dollars for programs aimed at the American Indian. President Johnson stated: "I propose, in short, a policy of maximum choice for the American Indian: a policy expressed in programs of self-help, self-development, self-determination. . . . The greatest hope for Indian progress likes in the emergence of Indian leadership and initiative in solving Indian problems. Indians must have a voice in making the plans and decisions in programs which are important to their daily life." Acknowledging the federal government's responsibility to the Indian people, he recommended a relationship based upon "partnership—not paternalism" between the federal government and the Indian nations. *Id.*

424. William Jefferson Clinton, Speech, *Remarks to Native American and Alaska Native Tribal Leaders* (White House, Washington, D.C., Apr. 29, 1994), in Francis Paul Prucha, *Documents of United States Indian Policy* at 343-45 (3d ed., U. Neb. Press 2000).

425. *Id.* at 344.

426. *Id.* at 343. ("So much of who we are today comes from who you have been for a long time. Long before others came to these shores there were powerful and sophisticated cultures and societies here: yours. Because of your ancestors, democracy existed here long before the Constitution was drafted and ratified.").

427. *Id.* at 344-45.

light of these contributions and "as a matter of justice and . . . enlightened social policy," he advocated that the federal government promote and encourage self-determination of indigenous people. Although his rhetoric focused more on the Indian people rather than their status as sovereign nations, his condemnation of termination-era policies aimed at separating American Indians from their communities and culture indicates a commitment to the collective sovereignty of American Indian tribes.

Following President Nixon's lead, President Reagan, while cutting federal aid during his administration in ways that exerted a deleterious effect on Indian communities, also advocated for placing greater responsibility with Indian people and enhancing the self-governing powers of tribal governments.[436] President Reagan stated: "This administration believes that responsibilities and resources should be restored to the governments which are closest to the people. This philosophy applies to State and local governments but also to federally recognized American Indian tribes."[437] Recounting the United States' history in entering into treaties with the tribes, President Reagan reiterated the enduring government-to-government relationship between the federal government and each of the federally recognized tribes.

> Throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this administration pledges to uphold. . . . Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.[438]

Drawing from President Nixon's policy of self-determination, President Reagan advocated for tribes to strengthen their institutions and processes of self-government according to each tribes' unique priorities, goals, and values.[439] Development of reservation economies also featured prominently in his statement of federal Indian policy.[440]

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436. Ronald Reagan, *Statement by the President: Indian Policy* (Jan. 24, 1983), in Francis Paul Prucha, *Documents of United States Indian Policy* at 302-04 (3d ed., U. Neb. Press 2000).

437. *Id.* at 302.

438. *Id.* at 303.

439. *Id.* ("This administration will take a flexible approach which recognizes the diversity among tribes and the right of each tribe to set its own priorities and goals. . . . Development will be charted by the tribes, not the Federal Government.").

440. *Id.* at 304. The statement emphasizes ways of stimulating private investment in Indian communities, including devising investment strategies that are consistent with the federal government's trust relationship, removing legal barriers to contracting with tribes, reducing regulations which hamper economic growth, enhancing tribal infrastructure, and

Moreover, President Reagan issued Executive Order 12401, establishing a commission to study economic development on Indian reservations and report on barriers to investment and economic growth in Indian country.[441]

President George Bush followed the policy of the Reagan administration, of which he had been a part, reaffirming his administration's commitment to a government-to-government relationship between the federal government and federally recognized tribes and acknowledging the sovereignty of such tribes.[442] President Bush stated:

> This government-to-government relationship is the result of sovereign and independent tribal governments being incorporated into the fabric of our nation, of Indian tribes becoming what our courts have come to refer to as quasi-sovereign domestic dependent nations. Over the years the relationship has flourished, grown, and evolved into a vibrant partnership in which over 500 tribal governments stand shoulder to shoulder with the other governmental units that form our Republic.[443]

Like President Reagan, he encouraged tribal governments to assume responsibility for the administration of a number of programs previously administered by the federal government.[444] He established also an Office of American Indian Trust in the Department of the Interior to oversee the trust responsibility for the federal government and a senior staff member to act as the President's liaison with the Indian tribes.[445]

Beginning with President Johnson, the Executive Branch, through its presidential administrations, has articulated a policy with respect to Indian nations that acknowledges their enduring sovereignty and promotes self-determination and economic growth. Each administration has maintained a government-to-government relationship with tribes. While none of the policy declarations articulate specific correlates of sovereignty, such as the right of immunity from suit, their endorsement of the principle of tribal sovereignty and tribal self-governance is nonetheless consistent with the conclusion that tribes should maintain the right to determine when and under what circumstances they may be subject to suit or liability. It is the Executive Branch, through its

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improving the regulatory, adjudicatory, and enforcement mechanisms critical to recruiting and maintaining private contracting and participation in economic development. *Id.*

441. Presidential Commission on Indian Reservation Economies, *Executive Order 12401* (Jan. 14, 1983), in Francis Paul Prucha, *Documents of United States Indian Policy* at 302 (3d. ed., U. Neb. Press 2000).

442. George Bush, *Statement on Indian Policy* (June 14, 1991), in Francis Paul Prucha, *Documents of United States Indian Policy* 335-36 (3d. ed., U. Neb. Press 2000). It is too early to tell what the current administration of George W. Bush will do with respect to American Indians and tribal sovereignty.

443. *Id.* at 335.

444. *Id.*

445. *Id.* at 335-36.

Department of Interior's Bureau of Indian Affairs and other federal agencies, that supports and maintains tribal programs important to self-governance, sovereignty, and the proper exercise of sovereign immunity. Other federal agencies have upheld the doctrine of tribal immunity in promulgating regulations that implement and interpret Congressional legislation.[446]

VI. SYNTHESIZING THE FEDERAL STRANDS

A. *Reflections on the Current Lay of the Land*

From recent Supreme Court decisions and Congressional enactments have emerged a dialogue regarding the appropriate scope of tribal immunity in contemporary American society. In articulating and reconsidering the scope of tribal immunity, each has drawn from a rich and firmly-rooted tradition of judicial precedent and legislative action, that has recognized and been generally protective of tribal immunity. Their dialogue may be situated against a backdrop of executive policy and action that in recent administrations has also generally lent support to tribal self-governance and economic development. A number of other federal and state judicial opinions have informed the discussion as well,[447] as has previous dialogue over other related matters, such as the appropriate scope of the sovereign immunity of foreign nations as well as states.[448] While the primary participants in the federal discourse over tribal immunity have been the Supreme Court and Congress, all three branches have demonstrated their long-term commitment to tribal self-determination and to continued recognition and preservation of tribal immunity and tribal sovereignty.

It is too early to tell how the Supreme Court may yet respond to the political branches' resistance to making wide-scale substantive changes to the doctrine of tribal immunity. In its most recent opinion, *C & L Enterprises*, decided in April 2001, the Court limited itself to consideration of an issue that lies within the scope of one of the standard exceptions to immunity: namely, whether contractual language regarding an arbitration clause proffered and entered into by the Citizens Band of Potawatomi could be construed as a waiver of the tribe's immunity.[449] While the *C & L Enterprises* opinion may indicate the Rehnquist Court's willingness to broadly construe contractual waivers in which tribes appear to have abrogated tribal immunity, the

446. For instance, the Environmental Protection Agency has determined that tribes remain immune from suit under the citizens' suits provisions of the Clean Air Act. 63 Fed. Reg. 7253, 7260-62 (Feb. 12, 1998), *supra* n. 277.

447. *See e.g. supra* Parts III.C.3 and III.D.1; *supra* nn. 177-85.

448. *See e.g. Kennecott*, 327 U.S. 573 (federal); *Alden*, 527 U.S. 706 (state).

449. *See supra* n. 94.

basic interpretive rules regarding tribal immunity remain intact. In the absence of Congressional abrogation of tribal immunity, the Court has acknowledged that immunity presumptively flows from tribal sovereignty where such sovereignty has been recognized by the federal government. Where Congress has acted, moreover, as it did in enacting the ICRA, the Court has exercised restraint in implying limitations on tribal immunity when called upon to interpret such legislation.[450] Thus, while it has been more active in limiting tribal exercise of authority in other areas, the Court has consistently declined to change its course with respect to the doctrine of immunity.

An analysis of the dialogue between different branches of the federal government as well as the results of each branch's separate deliberations leads to a number of interesting observations and conclusions. In addition to demonstrating the strength and durability of tribal sovereignty as a matter of federal Indian law, the body of law generated by these federal entities provides insight into the pervasiveness of the doctrine of immunity as a more general principle of Anglo-American sovereignty jurisprudence. As with states, the federal government, and foreign nations,[451] tribal immunity emerges as a natural corollary of sovereignty. It flows inherently from federal recognition of tribal sovereignty, and is perpetuated through judicial precedent, Congressional action, Executive policy-making and action, and the collaborative decision-making of each. Even where an express Constitutional provision, namely the Eleventh Amendment, may be identified with respect to the sovereign immunity of states, the federal judiciary's sovereign immunity jurisprudence consistently hearkens back to pre-Constitutional, or at least extra-Constitutional principles of common law or natural law when defining the boundaries of sovereign immunity.

The dialogue between the branches also provides a venue for testing hypotheses regarding constitutional interpretation and, more particularly, the development of federal common law. Specifically, the evolution of the law of tribal immunity may illustrate how structural rules of interpretation and decision-making may develop between the judicial and political branches of government. Examining the evolution of tribal immunity helps illuminate the way in which fundamental jurisprudential values may emerge and be perpetuated, such as those that underlie and define the appropriate the balance and distribution of power between different sovereign entities that interact and share territory within the United States.

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450. *See Martinez*, 436 U.S. 49. In *Martinez*, the Court declined to imply federal jurisdiction over claims brought under ICRA except in the case of petitions for habeas corpus, where Congress had expressly provided for a federal cause of action.

451. *See supra* Parts II.A-C. and accompanying notes.

Traditional notions of constitutional interpretation recognize the role of the judiciary in defining and interpreting constitutional rights and fundamental values: namely, the federal judiciary exercises its powers of judicial review, independent of the political processes reserved for the other branches, and articulates rules designed to protect fundamental constitutional rights and values.[452] As such, many theories of constitutional interpretation describe a one-sided approach to constitutional interpretation in which the political branches may propose rules and policies, but where the judiciary maintains the power to strike them down on constitutional grounds.[453]

A growing number of scholars, however, describe a more interactive interpretive process between the branches with respect to the development of fundamental principles of constitutional law. Justice Ruth Bader Ginsberg, for instance, summarizes this more interactive view of the role of the federal judiciary in the following statement: "[J]udges play an interdependent part in our democracy. They do not alone shape legal doctrine but . . . they participate in a dialogue with other organs of government, and with the people as well."[454] A number of others have described ways in which constitutional values may be protected and clarified through structural rules of "interbranch dialogue."[455] While theories of inter-branch dialogue have predominantly focused upon the context of constitutional interpretation, they are relevant also to the development of federal common law in other areas of the law such as where fundamental values (e.g. of sovereignty and corollaries inherent in sovereignty) may be involved.

The underlying premise of theories that identify and implicate the concept of inter-branch collaboration is that the federal judiciary does

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452. The power of judicial review was first set forth in *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is . . . ."). Building upon *Marbury*, the Court has declared that it is the "ultimate interpreter" of constitutional protections. *See Powell v. McCormack*, 395 U.S. 486, 549 (1969). It has emphasized the finality of its decisions. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). And it has declared its decision-making to be supreme. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). As one scholar describes: "According to this view, the Court stands apart from the other branches—independent, even aloof—in executing the 'solemn function' of judicial review. The political branches adopt rules; the Court evaluates the constitutionality of those rules; the Court declares those rules valid or invalid—and that's that." Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 Wm. & Mary L. Rev. 1575, 1578-79 (2001).

453. Coenen, *supra* n. 452.

454. Ruth Bader Ginsberg, *Speaking in A Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1198 (1992).

455. *See e.g.* Coenen, *supra* n. 452 (providing comprehensive analysis of ways in which the Supreme Court has protected certain fundamental constitutional values with structural rules that deflect constitutional decision-making to Congress); Louis Fisher & Neal Devins, *Political Dynamics of Constitutional Law* 1 (West 1992) (challenging traditional notions that the courts are the dominant interpreters of the Constitution and describing the role of interactions between the courts and the political branches in making constitutional law); Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton 1988).

more than engage in one-sided interpretation of constitutional principles; it engages the other political officials in constitutional decision-making as well.[456] These officials may independently deliberate over constitutional interpretations or they may respond to rules established by the judiciary.[457] Where the political branches engage in constitutional decision-making, the federal courts in turn may respond by reshaping or overturning rules established by the political branches. As Professor Dan Coenen describes:

> Often the Court directly engages nonjudicial officials in a shared elaboration of constitutional rights. It does so through the use of doctrines that focus on whether nonjudicial actors have taken an appropriately close and sensitive look at policy judgments that threaten important constitutional values. In many of these cases, the Court in effect 'remands' constitutionally controversial programs to the political branches—inviting a more studied consideration of the program than attended its initial adoption, and leaving open the possibility that the readopted program will be upheld against constitutional attack.[458]

Through such interaction between the different branches of government, structural doctrines have been generated to govern constitutional interpretation.[459]

While many structural rules have been recognized as acting upon interpretation of the Constitution, structural rules have been identified with respect to the development of common law in other fields as well.[460] They arise in conjunction with fundamental values. For instance, Professor Coenen describes a category of rules through which substantive values may be preserved "in a structural way" through the judiciary's empowerment of Congress to reverse longstanding

456. *See e.g.* Coenen, *supra* n. 452.

457. *Id.*

458. *Id.* at 1582.

459. *Id.* According to Coenen, these structural rules "are not required so much as inspired by the Constitution" and, therefore, are reversible and conducive to facilitating inter-branch dialogue. *Id.* at 1735-36. They encompass a process through which substantive constitutional values may be safeguarded through judicial remand to non-judicial governmental policymakers who may effectively "reverse" principles dictated by the federal judiciary provided such policymakers adhere to certain judicially-mandated mandates. *Id.* at 1587-88. Such mandates include: "(1) rules of clarity; (2) form-based deliberation rules; (3) proper-findings-and-study requirements; (4) representation-reinforcing structural rules; (5) time-driven second-look doctrines; (6) thoughtful-treatment-of-the-area rules; (7) constitutional common law and common-law-like rules; (8) proper-purpose requirements; and (9) constitutional 'who' rules." *Id.* at 1587. Other scholars have emphasized the interactive interpretive process between the federal judiciary and the executive branch. *See e.g.* William N. Eskridge, Jr., & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992) (describing judicial rules and cannons, for instance, deferring to agency interpretations, creating presumptions against derogation of the President's traditional powers, etc.).

460. *See e.g.* Coenen, *supra* n. 452, at 1740-41.

principles.[461] He classifies the Supreme Court's holding in *Kiowa* as such a "reversible rule."[462] In short, the "rule"—namely, tribal immunity is an inherent feature of tribal sovereignty that has consistently been recognized as a matter of federal common law—is preserved as a matter of judicial decision-making but is deemed to be reversible by Congress. Another structural rule—namely, a presumption in favor of Congressional plenary power over tribal affairs—may also be at work, a rule that similarly preserves a doctrine rooted in the inherent nature of tribal sovereignty and longstanding judicial precedent.[463] Moreover, where Congress has acted, rules restrict judicial derogation of tribal immunity to circumstances in which Congress has a articulated a "super-strong clear statement."[464]

While rules like those created by the Supreme Court in *Kiowa* may be reversible, thereby authorizing the political branches of government to change longstanding substantive values articulated by the Court, other structural principles and realities may protect fundamental values from significant change by any of the branches of government. For instance, institutional norms and processes—inherent in the bureaucracies, customs, and procedures of the political branches of government—may perpetuate a status quo that resists dramatic change. Longstanding doctrines like the federal trust doctrine may also contribute to a particular conservatism with respect to acting in ways that encroach upon on American Indian sovereignty.[465] Additionally, it is possible that the political branches may be influenced by their own type of executive or legislative "precedent" that reinforces certain norms and values, including those associated with preserving tribal sovereignty and self-determination.

Indeed, in some circumstances, inter-branch legacies, created through generations of dialogue and decision-making by and between each of the three branches of government, may create barriers to change over and above those created merely by the separate actions and

461. *Id.* at 1735-1742. These so-called "reversible rules" are "judicially deployed devices that both protect identifiable constitutional values and are subject to reversal by legislative authorities without the need for a constitutional amendment. All of these rules—whether or not properly characterized as 'constitutional common law'—are accordingly structural in nature." *Id.* at 1742.

462. *Id.* at 1741. Other examples of reversible rules include the Court's supervisory authority and dormant commerce clause cases. *Id.* at 1741-42.

463. This rule is not identified by Coenen, although others have identified structural rules that apply to fundamental values protecting tribal sovereignty and American Indian people in other contexts. *See e.g.* Eskridge & Frickey, *supra* n. 459, at 602, 622, 628 (describing, for instance, interpretive presumptions favoring group interests of Native Americans and "longstanding canons favoring broad interpretation of federal statutes benefiting Indian tribes" but demonstrating how other interpretive rules—such as those perpetuating federalism—may be leading toward the demise of interpretive canons disfavoring state regulation in Indian country).

464. *Id.* at 594.

465. For a discussion of the federal government's trust responsibility, *see supra* Part IV.B.

interpretations of each of the branches of government. The evolution of the federal doctrine of tribal immunity, for instance, appears to exemplify the way in which inter-branch dialogue may reinforce certain principles of law, enhancing their resistance to change and elevating their supremacy with respect to other values and principles. Even where the Court conveys its reluctance to perpetuate tribal immunity in contemporary society, it is compelled to uphold principles that are firmly rooted in the historical and jurisprudential fabric of this nation. Thus, as *Kiowa* indicates, the Court is bound by its own precedent regarding tribal immunity as well as by the Congressional plenary power doctrine. It is perhaps encouraged by its knowledge that Congress is actively reconsidering the scope and breadth of the doctrine, since it defers the ultimate decision to Congress. However, it is urged also to uphold the doctrine of tribal immunity by a representative from the Executive Branch.[466]

Similar deference to structural and legal principles may take place in the political branches as well. For example, Congress, is informed by its own history of Congressional enactments as well as the legacy set forth by the Court. Consistent with the federal trust relationship, its year 2000 enactments replace proposals that would have significantly derogated tribal immunity. In enacting the most recent legislation regarding tribal immunity, Congress considers judicial precedent as well as testimony and materials submitted by representatives of the Executive Branch that weigh in favor of preserving the doctrine and refer to a variety of tribal perspectives regarding the doctrine. The Executive Branch, in its presentation, refers to both Congressional legislation and judicial precedent. Therefore, by relying and referring to each other's precedents and by deferring to the power of each to resolve certain issues related to tribal sovereignty and recognition of the doctrine of immunity, the branches in concert largely preserve and perpetuate the status quo with respect to tribal immunity. In such a manner, the combined effect of inter-branch decision-making may act as a further measure of protection for certain fundamental principles of federal law, protecting and reinforcing a status quo developed over time and firmly rooted in each branch.[467]

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466. The United States Solicitor General, for instance, presented oral argument in support of the tribes' position in *Kiowa*. *See supra* nn. 231-34 and accompanying text; *supra* nn. 345-48.

467. To truly understand the role of interbranch dialogue on the development of federal Indian law, however, would require a much more in-depth consideration of the development between the branches of other principles of law (e.g., tribal adjudicatory jurisdiction) in which the Supreme Court has been much more activist in changing interpretive presumptions and rules without deference to Congress. *See supra* Part III.D.3. Additionally, it would be necessary to analyze the circumstances in which both Congress and the Supreme Court have been more active in altering each other's interpretation of fundamental principles of federal Indian law. For example, it would be instructive to

To truly verify whether and, if so, to what extent structural rules and institutional factors existing within and between the three branches of government have an impact on any doctrine's resistance to change would require further examination, analysis, and comparison of the development of the law of tribal immunity with the evolution of other legal principles.[468] In the absence of definitive support for such a theory of the impact of inter-branch dialogue with respect to tribal immunity, the fact that the tradition of sovereign immunity is rooted in inherent notions of sovereignty rather than in the text of a statute or the Constitution may provide a better explanation for its resilience. That tribal immunity has emerged and been perpetuated as an intrinsic feature of tribal sovereignty, just as immunity has been recognized as arising naturally from the sovereignty of the United States, states, and foreign nations, lends further support to the theory that immunity is an inherent and natural corollary of sovereignty. Time will tell how resilient these principles are and whether the Court, or either of the political branches of government, will take steps to alter time-honored principles.

B. Normative Policy Considerations

Determining the appropriate scope of tribal sovereign immunity raises complex normative questions. These include questions about the ways in which tribal independence, economic viability, and self-determination should be balanced against the need for greater accountability of tribal governments. Accountability is of particular importance to individuals or entities who have been harmed by tribal governments or whose rights or other interests have been—and, absent intervention, may continue to be—unlawfully denied or abridged. Questions about the extent to which tribal sovereignty should be afforded protection from the exercise of federal and state power also arise, as do questions about the proper balance of power and rules of interaction between tribes, states, and the federal government. Who should be responsible for allocating the distribution of power, defining intergovernmental relationships and for determining whether to waive tribal immunity also remains at the heart of the normative debate.

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compare with the development of the law of tribal immunity with the process involved between the branches in determining whether tribes could exercise criminal jurisdiction over nonmember Indians. In 1990, the Supreme Court held that the inherent sovereignty of Indian tribes did not include criminal jurisdiction over nonmember Indians despite a longstanding practice by Congress of authorizing tribes to exercise criminal jurisdiction over all Indians, not just their own members. *Duro v. Reina*, 495 U.S. 676 (1990). Shortly thereafter, Congress overruled the Court, affirming "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." 25 U.S.C.A. § 1301(2) (West 2001). While a full analysis and comparison of this interbranch discordance lies beyond the scope of this paper, it does indicate that federal Indian law presents an interesting yet complicated context for exploring theories of interbranch dialogue and the development of structural and legal rules of interpretation in federal law.

468. *See supra* n. 459.

1. Contexts for Analysis of Normative Issues

In exploring the normative issues regarding the proper scope of tribal immunity, it is useful to consider some possible circumstances with respect to which judicial redress may be contemplated. For instance, there are tort victims who have suffered bodily injury, including death, or injury to property due to the negligent or intentional acts of tribes, their officers or employees.[469] There are those who have been unlawfully or unjustly terminated from employment with tribal governments or who have been subjected to harassment or discrimination in the workplace.[470] There are others whose fundamental civil rights under the ICRA or tribal law or custom have been violated by tribal agents, sometimes resulting in serious consequences (e.g. causing prolonged incarceration without due process, suppression of freedom of expression with very serious consequences, harassment, discrimination, and even brutality committed by tribal officers, etc.).[471] Intellectual property rights may also be at stake.[472]

While some persons injured by tribal action may suffer injury while voluntarily traveling through or visiting Indian country or while enjoying the temporary benefits of employment, others may be lifelong members and residents, whose family and cultural roots are firmly tied to the land and to the tribe. In thinking through normative dimensions associated with the debate over tribal immunity, therefore, it is important to keep in mind that, as with virtually every other type of sovereign entity, egregious injuries and civil and human rights violations may be committed by tribal governments and their agents even against their own members and their families. Victims may be tribal members or non-members, Indians or non-Indians. Injuries and rights deprivations may be isolated or widespread, affecting whole groups of persons as well as greater societal interests.

The need for redress by individual and business entities, including non-Indian entities, may also arise with respect to commercial transactions involving tribes.[473] For instance, tribes acting directly or through tribally-owned corporations may infringe upon the legal rights or interests of other entities where tribes enter into, then default or

469. A number of examples of personal injuries inflicted by tribal officers were presented in Congressional testimony. *See supra* n. 325 and accompanying text. The dissent in *Kiowa* also addresses potential injustice to tort victims. *See supra* n. 88.

470. *See id.*

471. *See Martinez*, 436 U.S. 49; *Sanderlin*, 243 F.3d 1282.

472. *See e.g. Bassett*, 204 F.3d 343 (Film producer barred under doctrine of tribal immunity from bringing suit against tribe for copyright infringement, breach of contract, and various torts arising out of a dispute over a film about the Pequot War of 1635-38 that the tribe produced but that the producer claimed she had written and submitted to the tribe for review pursuant to an agreement with the tribe.).

473. This is the situation underlying the dispute in *Kiowa Tribe*, *see supra* n. 76.

otherwise intervene with, commercial contracts.[474] Entities providing services as vital as medical care, education, law enforcement, and the construction of roads, schools and other infrastructure may be affected by breaches of contract or other business disputes with tribes, for which legal redress in a court of law may be desired. In addition, states, or other governmental entities, may desire to seek legal redress for breach of contract, resolution of disputes over taxation, gaming, regulation of natural resources, provision of law enforcement and emergency response services over mutually exclusive territories and other matters.[475] Where contracting documents lack clear waivers of tribal immunity, many of these private and governmental entities who engage in business with tribes do not have access to judicial means of resolving disputes and other problems arising from commercial dealings and other interactions with tribes.

2. Balancing Normative Principles in Light of Tribal Sovereignty

In light of all of the various interests and scenarios that might be imagined with respect to tribal immunity, it might be asked: as a normative or policy matter what should the appropriate balance be between tribal immunity and the interests of others? Should any of the entities having potential interest in seeking redress from tribal governments be entitled to seek judicial recourse for their injuries or to resolve disputes? If so, to what extent and under what circumstances? If not, need there be some other kind of remedy available to injured persons and what form might other remedies take? These are questions that might be asked of the sovereign immunity of any entity, but are relevant as well to discussions of tribal immunity.

Depending on one's vantage point, resolving questions regarding the proper balance between tribal interests in suit immunity and others' interests in redress or government accountability might be more straightforward in some contexts than in others. It might be argued, for instance, that government or business entities who voluntarily enter into contractual arrangements with tribes should be entitled to less protection under federal law than those whose relationship with the tribe may be less voluntary and whose interests may be more fully entwined with the tribe.[476] After all, under current law, wherein tribes are empowered to waive their immunity, principles of contract law grant the

474. *Id.*

475. *Okla. Tax Commn.*, 498 U.S. 505, provides an example of state efforts to compel tribes to respect and enforce regulatory laws like those related to the collection of state sales taxes. Congress also took testimony regarding collection of state taxes. *See supra* nn. 339-41 and accompanying text; *Seminole Tribe*, 181 F.3d 1237.

476. This argument, in fact, was considered by the Supreme Court in *Kiowa* and in Congressional hearings over tribal immunity. *See e.g. supra* n. 236 (Supreme Court oral argument); *supra* Part IV.D.2.c. (Congressional testimony).

freedom to choose between negotiating for the inclusion of immunity waivers in tribal contracts or electing to do business elsewhere.[477]

Resolving the balancing issues in other contexts, however, may be more complicated. For instance, while tribal membership and residence within reservation boundaries are themselves parameters that arguably can be embraced or rejected by individuals, cultural and familial connections stemming from tribal affiliation and place of origin are likely to have significance that mere contractual dealings made in the course of business lack.[478] Moreover, the preservation of collective social and cultural identities of indigenous peoples, which is undermined as people leave their cultural roots and relinquish membership, arguably has greater moral imperative than protecting businesses from poor choices in contracting. Consequently, the existence of culturally appropriate remedies for personal injuries or deprivation of rights by tribal government may be especially important for tribal members.

Normative issues are implicated also where states, or other governmental entities seek enforcement of their own laws within tribal geographical boundaries that coincide with those of the state. For instance, should states be permitted to bring suit against tribes to compel collection of taxes legitimately owed to the states or to compel compliance with state gaming regulations, environmental laws, natural resources regulations, or other issues affecting the public health and safety of state residents? Such issues are complicated by the fact that they are entwined with issues of federalism and a legal history in which structural limits have been placed on states' ability to encroach on tribal sovereignty. The federal government, including the Supreme Court, has thus far resolved these issues in favor of preserving tribal immunity from state encroachment, requiring states to enter into compacts with tribes and otherwise negotiate resolution to disputes over regulation of resources and taxation.[479] Given the fact that tribes enjoy a type of

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477. Justice O'Connor in *Kiowa* likened the circumstances of contracting with tribes to "buyer beware" and suggested through her questioning that "someone dealing with the tribe should protect himself in the contractual arrangements that he makes." Oral Argument, Supreme Court Transcript at 31, *Kiowa Tribe*, 523 U.S. 751. *See supra* n. 236. The federal law with respect to tribal authority to waive immunity has evolved from a time when tribes appeared to have lacked such authority unless Congress granted it, to one in which their power to waive was unrestricted. William V. Vetter, *Doing Business With Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169 (1994).

478. Native Americans and those who have interacted closely with Native Americans have documented the importance to indigenous people of remaining connected to their culture, tribe and even reservations. *See e.g.* Pommersheim, *Braid of Feathers*, *supra* n. 240 at 125 ("Because Indian people are federal and state citizens, assimilation often seems benevolent, merely a means of escaping poverty and discrimination. Yet these pressures are ultimately lethal for people whose primary identity is with a group or culture that forces of assimilation seek to dismantle. As a good friend, Elizabeth Little Elk, once said to me: 'I cannot live without the reservation. It is like oxygen to me.'") (citing Frank Pommersheim, *When it Comes to Indians, the West Is Ignorant*, High Country News 15 (May 21, 1990)).

479. *See e.g. Okla. Tax Commn.*, 498 U.S. 505; *Seminole Tribe*, 181 F.3d 1237 (holding

separate sovereignty that predated the formation of the constitutional system of government adopted and ratified by the states, according their sovereignty greater strength through imposing limits on states' ability to file nonconsensual suit against tribes is reasonable.[480]

From the perspective of civil liberties and human rights, the doctrine of immunity generally may be criticized across all categories of sovereignty, including that of tribes, to the extent it renders governments exempt from accountability to individuals that may be harmed by the exercise of governmental power, thereby allowing discriminatory and injurious conduct to go unchecked and denying remuneration to those injured. A compelling argument might be made based upon fundamental or natural law principles of human rights that torture and other forms of cruel and unusual punishment, deprivations of life or liberty without due process of law, discriminatory and abusive police practices, and other forms of human brutality and discrimination should never be tolerated, no matter who the offending entity. Furthermore, it might be argued, as a matter of national policy, that the United States ought not allow any sovereign entity, regardless of its status, to legitimize and perpetuate inhumane or abusive acts. Consistent with this position, the argument might be made that courts should be available to resolve disputes pursuant to law, rather than coercion or power, especially when civil and human rights are involved. As one scholar has articulated:

> Sovereign immunity often produces an uncivilized result, because what counts—what determines who gets the property, for instance—is not reason but force, not law but power, not orderly adjudication but physical taking by the stronger party, not refinements the sum of which we call civilization but crudities that are sometimes characteristic of primitive men.[481]

Notwithstanding these criticisms, sovereign immunity may serve a number of legitimate purposes that justify its protection and perpetuation in the law. Common rationales behind the immunity

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state has no implied cause of action under the Indian Gaming Regulatory Act—that set forth a complex scheme for compacting between states and tribes—to compel tribe engaged in tribal gaming to comply with IGRA).

480. The moral imperative for preserving tribal immunity is especially great so long as the federal law defining the scope of state sovereign immunity continues to bar suits brought against states by tribes. *See Seminole Tribe*, 517 U.S. 44; *Blatchford*, 501 U.S. 775.

481. Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 Admin. L. Rev. 383, 392 (1970) (italics removed). Professor Davis offers other justifications for eliminating sovereign immunity as well. Specifically, he argues that sovereign immunity (1) can cause serious substantive injustice, (2) results in final determinations that lack protections essential for procedural justice, and (3) "causes gross inefficiency in the allocation of functions between officers and agencies, by preventing courts from resolving controversies they are especially qualified to resolve." *Id.* at 383. He argues that only "historical accident, habit, a natural tendency to favor the familiar, and inertia" explain the resilience of the doctrine in American jurisprudence. *Id.*

doctrine, particularly as the doctrine relates to minority cultures and/or indigenous peoples, are that it protects the nation-state from (1) the financial impact of suit, and (2) incursions on its right to self-determination that would be imposed on the sovereign entity, should the sovereign be compelled to defend itself against legal action.[482] The argument in favor of sovereign immunity has been accorded particular weight in reference to fledgling or developing states or tribal governments whose treasuries and self-governing capacities might be disproportionately affected by the burdens of defending legal proceedings and satisfying judgments.[483] As the Eighth Circuit Court of Appeals has articulated: "Indian tribes enjoy immunity because they are sovereigns predating the Constitution, . . . and because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy."[484]

Ensuring protection of the democratic processes that sustain a sovereign entity from distraction or derailment by a single individual or small group of citizens is another justification for tribal immunity. For instance, the doctrine may protect a governing entity, responsible for governing and protecting the interests of an entire community of people, from being diverted from that role by a single plaintiff, who may in fact present a disputed question of law or fact. As the Supreme Court has articulated: "The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."[485] In the dissenting opinion of an earlier decision, Justice Gray articulated this concern in light of other essential responsibilities of the executive branch of the government:

> [I]t is essential to the common defense and general welfare that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion; of customs-houses and revenue cutters, employed in the collection of the revenue; or of light-houses and light-ships, established for the security of commerce with foreign nations and among the different parts of the

482. *See e.g.* Layton, *The Thorny Gift*, *supra* n. 273, at 286 ("The small population of the average Indian reservation makes it difficult, if not impossible, to support the same sophisticated legal defense system employed by state or local governments. If forced to defend itself against Section 304 [CAA] lawsuits, a tribal government would not only have to finance its legal defense but also face the threat of being forced to pay the plaintiff's legal fees.").

483. A number of commentators have emphasized these rationales. *See e.g.* Wagman, *supra* n. 370. They were discussed as well in some of the early federal cases describing the need for tribal immunity. *See e.g. supra* nn. 134, 139 and accompanying text.

484. *Am. Indian Agric. Credit*, 780 F.2d at 1378 (citations omitted).

485. *Larson v. Dom. & For. Corp.*, 337 U.S. 682, 704 (1949).

country.[486]

One scholar has argued in the context of the federal government that immunity "is not so much a barrier to individual rights as it is a structural protection for democratic rule."[487] To a large extent the arguments in favor of sovereign immunity as a general proposition focus on allocation of power and conceptions of legitimacy between the different branches of a government. Proponents of federal sovereign immunity conclude that the legislature is better suited for resolving issues of government policymaking and that the courts should not be permitted to intrude in this process.

While these and other normative and practical considerations may be applicable to federal and state governmental immunity as well as tribal immunity, additional considerations are relevant to defining the proper scope of tribal immunity. For instance, observers of tribal immunity have defended the doctrine in light of the democratic process on slightly different grounds than criticisms made with respect to other sovereign entities. Specifically, they argue that the size and administrative organization of many tribal governments allows them to be more responsible to the individual citizens, thereby reducing the circumstances in which suit would be warranted. As one commentator describes:

> [F]or most tribal governments there is a diminished need to provide a judicial check to the administrative government. With the exception of the Navajo and Cherokee Nations, most Indian tribes have a population of less than 50,000 and a correspondingly small governing body. The small size of most tribal reservations makes them more comparable to townships, which usually have more simplistic government structures than do states or even large cities. In a small governing system each citizen represents a greater proportion of the electorate, and the electorate has closer proximity to its elected officials. These factors should make the governing organization more responsive to the individual citizen.[488]

3. An Ordering of Sovereign Interests: Comparisons of Tribal Immunity with the Other Forms of Sovereignty

Within the United States (where local, state, federal, and American

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486. *Lee*, 106 U.S. at 226. Critics of sovereign immunity, such as Kenneth Culp Davis, find arguments like these to be unpersuasive. According to Professor Davis: "What is needed is a much better balance between the public interest in the effectiveness of governmental programs and private interests. The present law, a mixture of medieval history and modern casuistry, does not even aim at creating such a balance . . . ." *Davis, supra* n. 481, at 395.

487. Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529, 1531 (1992). He argues in favor of protecting government policymaking and deferring determinations to Congress over the proper balance to be afforded to the different branches of government.

488. Layton, *The Thorny Gift*, *supra* n. 273, at 286.

Indian governments share overlapping boundaries and jurisdictional power), debates over the scope of each sovereign's entitlement to immunity also often are related to principles of federalism and protection of the integrity of one sovereign's jurisdictional power from incursions by another. Another fundamental normative question with respect to tribal immunity, therefore, is whether tribes are entitled to any more or less immunity from suit than any other sovereign entity. There are a number of reasons tribes should be afforded immunity from suit, independent from any immunity also afforded to states and the federal government. First and foremost, tribal immunity protects the fundamental and inherent sovereign right to continuing self-determination of American Indian people and tribes, whose culture and traditions preceded the United States republic. Critically, the doctrine enables tribes to determine whether and, if so, under what circumstances, to provide judicial remedies for challenges to the exercise of their sovereign powers. It protects relatively small and developing tribal economies from potentially devastating costs and impact of defending lawsuits. It protects tribal executive officers, judges, and policymakers from becoming sidetracked or sandbagged by unwanted litigation.

Second, preserving tribal immunity assists tribes in continuing to strengthen and develop their legal systems, re-infusing them where appropriate with traditional norms and processes that may have been eliminated through the federal government's colonization of tribal justice systems.[489] Specifically, preserving tribal suit immunity fosters opportunities for developing and sustaining alternative methods of resolving disputes, including mechanisms that may differ from Anglo-American systems wherein the lawsuit is the traditional method of seeking redress for personal injury, breach of contract, or deprivation of civil liberties and the judiciary is deemed vital to the enforcement of constitutional and civil liberties. Peacemaker courts, whose objectives

489. With the exception of a very few tribes (*e.g.*, the Osage, the Pueblos, the Eastern Cherokee, the Indians of New York, and the Five Civilized Tribes), most Indian tribes operate judicial systems that are based upon written codes, rules of procedure, and adversarial methods of dispute resolution imposed upon them originally by the federal government. Consequently, many contemporary tribes are engaged in the process of reclaiming and re-integrating custom and tradition into their legal systems. I have discussed the history of tribal courts, including some ways in which custom and tradition have been integrated into contemporary judicial systems, in a previous publication. Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 Clin. L. Rev. 127, 138-143 (1999). Others have described the importance of recapturing and integrating into tribal jurisprudence traditional values and norms as well. *See e.g.* Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 Ariz. L. Rev. 225 (1989); Pommersheim, *Braid of Feathers*, *supra* n. 240 at 110 ("Narrative and stories in tribal court jurisprudence are valuable not only as an omega of resistance set against the dominant narrative but also as an alpha of aspiration to connect the past with the future. . . . Indeed, without stories the collective memory of culture will be severely impoverished, if not eradicated. In turn, the culture will become increasingly susceptible to being swallowed whole by the great American maw of assimilation and uniformity.").

are to restore harmony between members of a community, are an example of the type of alternative dispute resolution method that could be fostered by maintaining tribal immunity from suit.[490]

Other strategies are potentially fostered within Indian nations by preserving tribal control over suit immunity as well. These might include (1) increased reliance on negotiation and enhancement of negotiation skills and strategies, (2) lobbying and dialogue with elected tribal officials or participation in electoral politics, (3) reliance on insurance policies maintained on behalf of the tribe, (4) collaborative problem-solving with executive officers, including police, social services personnel, and others in a position to change internal operating procedures and policies , and (5) creation of internal grievance procedures for obtaining redress and otherwise resolving problems involving tribal entities or agents. Indeed, tribal immunity (and the absence of opportunities for judicial redress in the form of a lawsuit) presents many opportunities for crafting creative agreements and solutions to problems in the face of disputes with tribes. At the same time, other tribal systems or governmental branches may be strengthened in the process, and the judicial role and judicial expertise may be defined and exercised for very particular sorts of things. Because of the unique cultural heritage retained by many tribes, there is the potential for great variation and innovation in methods and solutions.[491] That variability is potentially beneficial for the development of the law in non-tribal justice systems as well.[492]

In light of these possibilities, it may be argued that tribal sovereign immunity, including the ability to decide under what circumstances an entity wishes to subject itself to suit, should be at least as strong as that enjoyed by states and the federal government.[493] Arguably, tribal

490. Chief Justice Robert Yazzie of the Navajo Nation Supreme Court, Justice Raymond Austin, also of the Navajo Supreme Court, and past-Solicitor of the Navajo Nation, James Zion, have described a traditional peacemaker court developed and revived from past custom and tradition. *See* Robert B. Porter, *Strengthening Tribal Sovereignty through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 Colum. Hum. Rights L. Rev. 235 (1997) (describing a tradition of peacemaking originating in Seneca Society over 500 years ago).

491. For a discussion of the unique and innovative role tribal courts may play, *see* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. Rev. 225 (1994); Douglas B. L. Endreson, *The Challenges Facing Tribal Courts Today*, 79 Judicature 142 (1995). *See* Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 70 Judicature 126 (1995); Christine Zuni, *Strengthening What Remains*, 7 Kan. J. L. Pub. Pol'y 17 (1997).

492. Justice Sandra Day O'Connor, for instance, has described some of the benefits. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L. J. 1 (1997).

493. Tribal immunity should be stronger also than the protections currently afforded under federal law to foreign nations. Tribes, by virtue of their aboriginal occupancy within the territory now occupied by the United States, enjoy a status different from foreign nations who choose to enter into trade or government-to-government relations with the United States. Early colonists and representatives of the federal government engaged in

immunity should be afforded more protection as a matter of federal law than that of the states. It arises from the inherent sovereignty of tribes that predated the Constitution that is different from that of the states, who ratified the Constitution and agreed to be part of the federal union. Unlike the states, the tribes did not agree to be part of the union or its constitutional structure and, rather, had a long history of dialogue and treaty-making with the federal government. The doctrine of tribal immunity is rooted in the recognition of tribes as independent sovereigns for early cross-cultural trade, communication, and treaty-making with colonizing powers.

VII. CONCLUSION

For the time being at least, the doctrine of tribal immunity is alive and well. Its legal and historical foundations are deeply rooted in American jurisprudence and policy. Contemporary normative and political considerations supportive of indigenous self-determination and development of tribal economic and governance systems support the doctrine as well.

The fact that tribal immunity is also rooted in pervasive Anglo-American notions about immunity in general—namely, that it flows naturally from sovereignty and is fundamental to the exercise of sovereignty—further underscores the likelihood that it will remain intact. Were any branch of the federal government, or the three acting in concert, to take steps to eviscerate tribal immunity in the future, Indian nations and those supportive of indigenous sovereignty would likely wage a joint political movement against the proposal as they did in response to Slade Gorton's proposed legislation. In the event future challenges to tribal immunity are proposed, however, they will have to be considered in light of the longstanding inter-branch jurisprudential legacy set forth in this paper that has consistently endorsed a federal policy and jurisprudence protective of tribal immunity, an consistently recognizing tribal sovereignty and the right to indigenous self-determination and governance. Moreover, state and federal courts faced with challenges to tribal immunity—including those based upon claims that tribes have voluntarily waived their immunity—should be compelled in light of this legacy to strictly construe those challenges and the legal authority upon which they purportedly rely, applying interpretations that are most protective of tribal immunity.

Notwithstanding the strength of the legal and historical record,

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commercial trading and treaty-making with the tribes. There is therefore no legitimate basis for distinguishing the commercial activities of tribes from their role as government actors. Furthermore, there are natural economic incentives for tribes to agree to limited waivers of immunity or other remedies in order to attract investment and collaboration with outside commercial entities.

however, it would be imprudent to assume that no branch of the federal government will ever pursue implementing more dramatic restrictions on tribes' ability to determine when and under what circumstances they wish to be amenable to suit. It is not unprecedented for the Court to reverse itself, and members of the Rehnquist Court have demonstrated a willingness to do so with respect to a number of its precedents.[494] Moreover, the Court has demonstrated that it is capable of reversing well-established principles of tribal sovereignty in other contexts, thereby limiting the ability of tribes to fully exercise all of the powers of self-governance.[495] It might be argued that the distinctive nature of Congressional plenary power with respect to tribal sovereignty and federal-tribal-state relations may warrant greater judicial adherence to common law principles protective of tribal sovereignty, including the judiciary's longstanding recognition of tribal immunity.[496] However, it

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494. For instance, in *Seminole Tribe*, 517 U.S. 44, the Court reversed its precedent regarding Congressional abrogation of state sovereign immunity. Specifically, it reversed its decision set forth just seven years earlier in *Pa. v. Union Gas Co.*, 491 U.S. 1 (1989), that held that Congress had the authority pursuant to the Interstate Commerce Clause to abrogate state sovereign immunity.

Although the Court in *Seminole Tribe* considers the scope of Congress's power to waive state sovereign immunity under the Indian Commerce Clause, it holds that

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

Seminole Tribe, 517 U.S. at 62. The Court rejects instead its holding in *Union Gas*. *Id.* at 66. The Court explains:

> Reconsidering the decision in Union Gas, we conclude that none of the policies underlying stare decisis require our continuing adherence to its holding. The decision has, since its issuance, been of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality. . . . The case involved the interpretation of the Constitution and therefore may be altered only by constitutional amendment or revision by this Court. Finally, . . . [the case] depart[s] from our established understanding of the Eleventh Amendment and undermine[s] the accepted function of Article III. We feel bound to conclude that Union Gas was wrongly decided and that it should be, and now is, overruled."

Id. In other cases, the Supreme Court has articulated limits on the *stare decisis* effect of its precedents as well. For instance, the Court has held that *stare decisis* is a "principle of policy," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), not an "inexorable command," *Payne v. Tenn.*, 501 U.S. 808, 828 (1991). *See Nichols v. U.S.*, 511 U.S. 738, 746 (1994) (the "degree of confusion following a splintered decision . . . is itself a reason for examining that decision"); *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

495. For instance, it has altered its jurisprudence regarding tribal civil adjudicatory jurisdiction. *See supra* Part III.D.3.

496. In creating exceptions to the *stare decisis* effect of its own decisions, the Supreme Court has emphasized that its willingness to reconsider earlier decisions has been "particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Payne*, 501 U.S. at 828 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)). *See Seminole Tribe*, 517 U.S. at 64. The doctrine of immunity is rooted in a long tradition of federal common law, not principles of constitutional interpretation. Moreover, the Court itself recognizes the distinctive power of Congress, bestowed in the Indian Commerce Clause, to

would be imprudent to assume that the Court will never alter its jurisprudence regarding tribal immunity.[497]

With respect to the potential for change among the political branches, Congress has on many occasions passed legislation, albeit of a more limited nature, limiting tribal sovereign immunity.[498] Moreover, in enacting the Tribal Tort Claims and Risk Management Act of 2000,[499] Congress appears merely to have postponed substantive consideration of tribal immunity until more information about the availability of remedies and insurance coverage can be more fully developed. In doing so, future legislative encroachment upon tribal immunity is not foreclosed by Congress. Similarly, the Executive Branch, although committed in recent years to supporting tribal self-determination and economic development, has a historical record of reversing its policies with respect to Tribes.[500] There is no guarantee, therefore, that tribal immunity will remain free from federal diminution in the future.

In light of the ever-present potential for change, it is imperative that tribes take advantage of this window of opportunity to reflect on what balance they wish to maintain between the need for immunity, on the one hand, and the need for government accountability and the ability of citizens and others who interact with tribes to seek enforcement of rights and redress for their injuries, on the other hand. By doing so, tribes will strengthen the rules and institutions important to sustaining their powers of self-governance and prepare for future attacks aimed at the integrity and fairness of their justice systems.

That is not to say that tribes should adopt exact replicas of Anglo-American conceptions of immunity, passing for instance legislation providing for limited waivers of suit immunity; nor is it to say that tribes need to provide exclusively judicial remedies for commonly recognized

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regulate tribal affairs. *See e.g. id.*

497. The Court's expression of disagreement with the underlying rationale and precedential basis for tribal immunity in *Kiowa* may signal the potential for reversal in future cases. *See Kiowa Tribe*, 523 U.S. 751.

498. For a discussion of the circumstances in which Congress has delimited tribal sovereign immunity, *see supra* Part IV.C.

499. *See supra* Part IV.E.

500. For instance, while recent administrations have supported tribal self-determination and economic development, *see supra* Part V, previous ones have adopted policies aimed at assimilating American Indians into American society and diminishing the land base reserved through treaties in reservations. For instance, between 1871 and 1928, the federal government engaged in a policy of Allotments and Assimilation in which land held in trust for tribes and their members was divided in allotments and distributed to individual households in an effort to encourage Native Americans to assimilate into American society. The years 1945-1961 marked The Termination Period, during which time the federal government attempted to end the status of Indians as wards of the government and integrate them as separate individuals into American society. The Era of Self-Determination, which repudiated previous policies and has carried forward to the present, originated in 1971 in the Nixon Administration in response to Termination. For a discussion of the history of shifting federal policy, *see* David H. Getches *et al.*, *Cases and Materials on Federal Indian Law* 41-257 (4th ed., West 1998).

injuries like torts, violations of civil rights, or breach of contract.

At the same time, tribes are not necessarily well-served either by rejecting altogether opportunities for judicial redress. In fact, grave harm to the long-term sustainability of tribal sovereignty can be inflicted by tribes whose policies and officers may perpetuate abusive and discriminatory practices and where no remedies may be available at law to address these practices. Tribes who have not elected to provide some form of judicial remedy to ensure compliance with important civil and human rights, or who do not yet provide opportunities for redress to persons injured by their policies and officers, would do well to implement some form of process and checks on tribal exercise of power. Those who have provided some form of redress should take the opportunity to re-examine their systems and laws, including those related to coordinating services and insurance coverage with the federal government. Failure to develop and refine some type of working means through which people may seek redress from and demand accountability from tribal governments may contribute to the disenfranchisement of members necessary to the long-term sustainability of tribal sovereignty. It may cause them to seek homes and livelihoods in other places, thereby contributing to the exodus of members, their assimilation in other places, and the eventual weakening of tribal culture. It may cause the legitimacy of tribal justice systems to be compromised, undermining people's respect for, participation in, and reliance upon their own justice systems. Finally, it might also discourage outside entities from contracting with the tribe for critical services or business opportunities, or it may hinder tribes' ability to recruit and retain skilled and ethical employees and officers.

In implementing and revising appropriate systems and remedies, tribes have an obligation—morally as well as for the sake of sustaining their powers of self-governance and their economic viability—to restore harmony or otherwise make remedies available to people injured by the exercise of tribes' sovereign authority. Remedies might include monetary damages or other culturally appropriate means of restoring those who have been unjustly or unlawfully injured by tribes. Additionally, they should include some mechanism for enjoining government policies or activities likely to inflict future harm and for replacing harmful practices with newer, fairer governmental policies and systems. Tribes, however, by virtue of their separate sovereignty and diverse cultural heritages, are uniquely situated to develop innovative approaches to resolving disputes and enhancing government accountability and effectiveness. Whatever the solutions that they generate, one would hope that they would encourage business and economic development in Indian nations while contributing to the development of legal systems, rules, and jurisprudential norms that nurture sovereignty and preserve the dignity,

health, and safety of tribal members. The federal government—by virtue of its trust relationship with American Indian tribes and their members—should support tribes in that endeavor.