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IT WASN'T AN ACCIDENT: THE TRIBAL SOVEREIGN IMMUNITY STORY

WILLIAM WOOD*

*In its latest pronouncement on the subject, the Supreme Court suggested in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies* that tribal sovereign immunity is an accidental doctrine that developed with little analysis or reasoning. The Court, however, overlooked important history, context, and (some of its own) precedent which shows that the doctrine arose quite intentionally through relationships negotiated across centuries between the United States and the Indian nations involved in the foundational tribal immunity cases. Indeed, the doctrine's origins and the principles underlying it date back as far as those for the federal, state, and foreign governments' immunities, and, historically, the reasoning and justifications for these doctrines are the same. Although the *Kiowa* Court upheld tribal immunity, it did so grudgingly and only after disparaging its own precedent, misconstruing the doctrine's origins, questioning whether to perpetuate it, and inviting Congress to abrogate it. In the wake of *Kiowa*, other courts have seized upon the Supreme Court's marginalization of tribal immunity to limit the doctrine's*

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scope in cases where they do the job Kiowa said was for Congress and weigh the competing policy interests at stake. Perhaps unsurprisingly, these courts use Kiowa's discrediting of tribal sovereign immunity's legitimacy to tip the balance against tribal immunity. This article tells the real story of tribal sovereign immunity, providing doctrinal perspective and historical clarity in order to correct the misunderstandings about tribal immunity's origins, development, and purposes.

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INTRODUCTION

This Article tells the story of the tribal sovereign immunity doctrine. Parts of the story have been told elsewhere, but no one has yet told the full account and put tribal sovereign immunity in its proper historical and doctrinal context. Tribal immunity did not develop by accident, as the Supreme Court and others suggest, but was the intentional result of relationships negotiated across centuries

between the United States and the tribal nations¹ involved in the foundational tribal immunity cases: the Cherokee, Chickasaw, Choctaw, and Muscogee (Creek) Nations. Together with the Seminole Nation, these tribal nations comprised the “Five Civilized Tribes.” The Five Tribes² were so described—by both the general public and the courts in the tribal immunity cases—because they all had established constitutional government structures similar to the federal and state governments and, to varying degrees across and within the tribes, adopted Western-looking economic, educational, political, and social institutions. Although the tribal sovereign immunity story is intertwined with these nations’ legal and political histories, courts and scholars have overlooked their role in the tribal immunity doctrine’s development and mistakenly assumed that it came about accidentally.

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,³ the Supreme Court held that tribal sovereign immunity barred a lawsuit against the Kiowa Tribe for breach of contract involving a business located outside of Indian country (i.e., off-reservation).⁴ Though it upheld tribal immunity, the Court said the doctrine arose “almost by accident”⁵ and had been adopted “with little analysis” and “without extensive reasoning” in its earlier cases.⁶ But the *Kiowa* Court

1. This Article uses the terms “tribe” and “nation” (along with “tribal nation”) interchangeably throughout, in part because the courts in the cases discussed use the terms interchangeably to describe the indigenous political entities whose immunity was at issue and because “Indian tribe” is the legally operative term in U.S. common law and most federal legislation.

2. See Stacy L. Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5, 5 n.2 (2007) (using “Five Tribes” to refer to the Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole Nations).

3. 523 U.S. 751 (1998).

4. *Id.* at 753. The *Kiowa* litigation arose after the tribe defaulted on a promissory note for the purchase of stock in an aircraft repair and maintenance business. *Id.* It is unclear whether the note was executed at Carnegie, Oklahoma, on the tribe’s trust lands, or at Oklahoma City, outside of the tribe’s trust lands and where payments were due under the note. *Id.* at 753–54. The beneficiary of the note sued the tribe in Oklahoma state court, where the tribe unsuccessfully moved to dismiss on sovereign immunity grounds. *Id.* at 754. After the Oklahoma Supreme Court declined to review the state appeals court’s holding that tribes could be sued in state court for breaches of contract involving off-reservation commercial conduct, the tribe petitioned the Supreme Court for certiorari. *Id.*

Though “off-reservation” and “on-reservation” are the more common terms (and therefore used in this Article), the more appropriate distinction is between land that is “Indian country” and land that is not. “Indian country” includes reservations, “dependent Indian communities,” and allotments, see 18 U.S.C. § 1151(b) (2006), and whether land is Indian country determines what governments’ laws do and do not apply there. See *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 527 (1998) (“Although [the statute] by its terms relates only to . . . criminal jurisdiction, . . . it also generally applies to questions of civil jurisdiction . . .”).

5. *Kiowa*, 523 U.S. at 756.

6. *Id.* at 753, 757.

ignored some of the foundational tribal sovereign immunity cases, including cases cited in its own precedent, which all involve one of the Five Tribes and make clear that the doctrine did not develop by accident.⁷ These cases, moreover, used the same reasoning and analysis—to the extent there was any—found in early and contemporaneous Supreme Court jurisprudence on federal, state, and foreign sovereign immunity, suggesting that *Kiowa's* critique of tribal immunity for lacking analysis and reasoning was also misplaced.

The early cases for tribes and other governments alike gave two basic reasons for recognizing sovereign immunity: sovereigns have immunity because they are sovereign, and sovereign immunity protects the government treasury.⁸ The *Kiowa* Court, however, stated that the reason for tribal immunity was to protect tribes from state encroachments and safeguard tribal self-governance.⁹ After mischaracterizing the history of and reasons for the doctrine, the Court suggested it should be abrogated.¹⁰ The dissent said that the Court should limit immunity to tribes' on-reservation activities,¹¹ but the majority grudgingly upheld the doctrine and its off-reservation and "commercial" scope.¹² Though the Court deferred to Congress on whether and how to limit tribal immunity, it not so subtly invited Congress to take action.¹³

Why does it matter that the Court in *Kiowa* undermined tribal immunity's legitimacy by discrediting its origins since it upheld the

7. See *infra* notes 417–421 and accompanying text.

8. See *infra* Parts II, III.D.

9. *Kiowa*, 523 U.S. at 758.

10. *Id.*

11. *Id.* at 764 (Stevens, J., dissenting).

12. *Id.* at 760 (majority opinion). "Commercial" is in quotation marks to point out the somewhat artificial and fuzzy line between "governmental" and "commercial" activities, particularly for tribal governments that—largely due to reservation economic conditions and other obstacles to raising tax revenues—are forced to rely on economic enterprises to generate income to fund services for tribal citizens and reservation residents. See *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1107 (Colo. 2010) (en banc) (citing Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004) [hereinafter Fletcher, *Pursuit*]); see also Kristen A. Carpenter & Ray Halbritter, *Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming*, 5 GAMING L. REV. 311, 315–16 (2001) (discussing the construction of "a seductive and false dichotomy between tribes acting traditionally and commercially" in court opinions and legal scholarship). Throughout the remainder of the Article, the words governmental and commercial appear without quotations, though with the aforementioned caveat.

13. *Kiowa*, 523 U.S. at 758–60 (noting Congress's power to abrogate tribal immunity, as well as Congress's affirmations of and rare limitations on the doctrine, and stating that Congress was better positioned to address the policy concerns raised by the Court); see also Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 180 (2000) ("[T]he Court actually entreated Congress to abrogate tribal immunity . . .").

doctrine anyway? In addition to raising questions about the respect accorded to tribes and tribal sovereignty in the federal system, the Court's sowing doubt about tribal immunity's pedigree has allowed lower federal courts and state supreme courts to carve out exceptions to the doctrine by relying on *Kiowa's* mischaracterizations of it.¹⁴ These courts invoke *Kiowa* to make their own policy judgments about whether immunity should apply—and to tip the balance against upholding immunity—even though the *Kiowa* Court said those judgments are for Congress and 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.”¹⁵

Even courts that follow *Kiowa's* “only where” mandate and reluctantly uphold immunity have been asking the Supreme Court to reconsider its deference to Congress and to limit sovereign immunity on its own.¹⁶ The Court seemed to respond to these overtures when it granted certiorari in a tribal sovereign immunity case in 2010, but the case was remanded during briefing and before oral argument.¹⁷ A case involving similar facts and the same issues is currently making its way through the courts,¹⁸ and the Supreme Court in its October 2013 term will hear a case in which Michigan is asking the Court to decide “[w]hether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating [the Indian Gaming Regulatory Act] outside of Indian lands.”¹⁹ And tribal immunity cases are constantly argued in federal and state courts.

Understanding the history of tribal sovereign immunity is important for these courts, and for the Supreme Court and Congress should either take up the issue again. This Article focuses on that history but does not offer a normative defense of sovereign immunity, tribal or otherwise. Tribal immunity is subject to many of the same

14. See cases discussed *infra* Part I.A.

15. *Kiowa*, 523 U.S. at 754 (emphasis added).

16. See *infra* Part I.A.

17. See *infra* notes 99–104 and accompanying text (discussing *Oneida Indian Nation v. Madison Cnty.*, 605 F.3d 149, 157 (2d Cir. 2010), *vacated*, 131 S. Ct. 704 (2011) (per curiam)).

18. *Cayuga Indian Nation v. Seneca Cnty.*, 890 F. Supp. 2d 240 (W.D.N.Y. 2012); Matthew L.M. Fletcher, *Federal Court Holds Cayuga Indian Nation Immune From Seneca County Property Tax Foreclosure Suit*, TURTLE TALK (Aug. 22, 2012), <http://turtletalk.wordpress.com/2012/08/22/federal-court-holds-cayuga-indian-nation-immune-from-seneca-county-property-tax-foreclosure-suit> (noting that the issue in *Cayuga Indian Nation* is the same one that the Supreme Court addressed in *Oneida*).

19. Petition for Writ of Certiorari at i, *Michigan v. Bay Mills Indian Cmty.*, 133 S. Ct. 2850 (2013) (No. 12-515), 2012 WL 5353883. The other question presented is “[w]hether a federal court has jurisdiction to enjoin activity that violates [the Indian Gaming Regulatory Act] but takes place outside of Indian lands. *Id.*”

criticisms as other governmental immunities,²⁰ although the normative defenses for tribal sovereign immunity are arguably stronger than those for other governments.²¹ But tribal immunity should not be limited based on the mistaken assumption that it arose accidentally or without analytical foundation, and thus courts and scholars need to be clear about the doctrine's history. This Article aims to offer that clarity.

This Article begins by examining the *Kiowa* Court's discussion of tribal sovereign immunity and analyzing cases from lower federal courts and state supreme courts that have seized on *Kiowa*'s delegitimization of the doctrine, either to carve out exceptions to it or to call on the Supreme Court or Congress to limit it. Part II provides an overview of the general sovereign immunity doctrine and its development in cases involving foreign, federal, and state sovereign immunity in order to situate the tribal immunity story in the context of other sovereigns' immunities. Part III tells the story of the tribal sovereign immunity doctrine, tracing it back to the pre-constitutional principles the Supreme Court applied in its early federal Indian law cases, then through a series of nineteenth and early-twentieth century cases involving the Cherokee, Choctaw, Creek, and Chickasaw Nations and into the Court's modern era. This Part focuses on the particular legal and political histories of these tribes and the role they played in shaping the tribal immunity doctrine's trajectory. Part IV revisits the *Kiowa* decision, questioning the Court's treatment of tribal sovereign immunity in light of the doctrine's history and the histories of the foreign, federal, and state

20. See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1216–23 (2001) (criticizing the standard justifications for sovereign immunity—safeguarding the treasury, protecting elected officials from unelected bureaucrats, promoting separation of powers, and the lack of constitutional or legal authority for suits against the government—as unpersuasive and inadequate); Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 600 (2010) [hereinafter Florey, *Borders*] (comparing justifications for and criticisms of tribal immunity to those for other sovereigns' immunities).

21. See Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 154 (2004) (observing that the policy justifications for tribal immunity are stronger than those for state sovereign immunity); *id.* at 166 (noting that “[s]tandard policy arguments for sovereign immunity—such as fiscal concerns or governmental ‘dignity’—are more likely” to justify tribal sovereign immunity); see also Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, “Accident,” and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 826 (2008) [hereinafter Florey, *Penumbra*] (suggesting there are “strong and unique policy justifications . . . for a vigorous doctrine of tribal immunity”); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1109 (2007) (noting that tribes historically “have struggled with financial solvency and have long existed on tiny budgets,” and that “Indian nations have relied heavily on the sovereign immunity defense to protect tribal communities”).

immunity doctrines examined in the body of the Article. Part IV also offers some concluding observations regarding the Court's statements on tribal immunity in the context of its broader sovereign immunity and federal Indian law jurisprudence, as well as normative and policy questions that discussions on limiting or abrogating tribal immunity raise.

I. *KIOWA'S* (MIS)CHARACTERIZATION(S) OF TRIBAL SOVEREIGN IMMUNITY

The Court in *Kiowa* held, in an opinion by Justice Kennedy, that Indian tribes “enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or outside a reservation.”²² It deferred to Congress, which the Court noted had restricted tribal immunity in a few specific circumstances but has mostly left it unaltered, on whether to confine immunity to on-reservation or governmental activities or otherwise limit its scope.²³ But the Court—which knew Congress was considering tribal immunity legislation at the time—also signaled its desire that Congress change the doctrine, stating that “[t]here are reasons to doubt the wisdom of perpetuating” it and suggesting “a need to abrogate tribal immunity, at least as an overarching rule.”²⁴

As part of its pitch to Congress, the Court criticized the tribal sovereign immunity doctrine as having “developed almost by accident”²⁵ in *Turner v. United States*²⁶ and been reiterated in subsequent cases “with little analysis”²⁷ and “without extensive reasoning.”²⁸ The *Kiowa* Court described *Turner* as “a slender reed for supporting the principle of tribal sovereign immunity,”²⁹ because the Court there gave alternative grounds for dismissing the case.³⁰ But *Kiowa* misunderstood the history around *Turner* and therefore its importance. Moreover, *Turner* is neither the first tribal sovereign

22. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998).

23. *Id.* at 758–60.

24. *Id.* at 758; see also Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 *TULSA L. REV.* 661, 711 (2002) (noting that Congress was “actively considering changes in the law of tribal immunity” at the time *Kiowa* was decided and the Justices’ awareness of this fact).

25. *Kiowa*, 523 U.S. at 756; see also *id.* at 763 (Stevens, J., dissenting) (concurring with the majority on this point).

26. 248 U.S. 354 (1919).

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

28. *Id.* at 753; see also *id.* at 757 (stating that the *Turner* Court assumed tribal immunity for the sake of argument rather than as a “reasoned statement of doctrine”).

29. *Id.* at 757.

30. *Id.* *Turner* is discussed *infra* in Part III.E, notes 360–362 and accompanying text.

immunity case nor the sole basis for the tribal immunity doctrine, as the *Kiowa* Court suggested.³¹

The Eighth Circuit, relying on principles of the United States' Indian policy that predate the Constitution and the Supreme Court's then-developing state sovereign immunity jurisprudence, had already recognized the immunity of the Creek Nation and its officials in 1908,³² as well as the immunity of the Choctaw Nation and its officials in 1895.³³ The Supreme Court cited these two Eighth Circuit cases in 1940 when it first expressly recognized a tribal sovereign immunity doctrine in *United States v. U.S. Fidelity & Guaranty Co.*³⁴ ("USF&G"), but the *Kiowa* Court conveniently ignored them—even though they are cited alongside *Turner* in (the same footnote of) USF&G for the proposition that "Indian Nations are exempt from suit without Congressional authorization."³⁵ The *Kiowa* Court also ignored an 1850 Supreme Court case that applied sovereign immunity principles to uphold dismissal of a suit against the Principal Chief of the Cherokee Nation,³⁶ as well as several U.S. district court decisions from the late 1800s that recognized the Cherokee Nation's immunity.³⁷

Because it turned a blind eye to these foundational cases, the Court overlooked and failed to appreciate the histories of the tribes involved in them and their roles in shaping the tribal immunity doctrine. Understood in their proper historical and doctrinal context, these cases show that tribal immunity did not come about by accident but was the intentional byproduct of relationships negotiated across centuries between the United States and the Five Tribes and other Indian nations. This context also undermines *Kiowa's* criticism that tribal immunity was adopted "with little

31. See Seielstad, *supra* note 24, at 693–94 (discussing *Kiowa's* treatment of *Turner* and federal court decisions predating *Turner*, and arguing that the federal government "long recognized and respected" tribal sovereign immunity before *Turner*); see also Struve, *supra* note 21, at 154 (noting that the Supreme Court applied tribal sovereign immunity principles in a case seventy years before *Turner*).

32. *Adams v. Murphy*, 165 F. 304, 308–09 (8th Cir. 1908) (citing *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895)); see also *infra* notes 359, 419 and accompanying text.

33. *Thebo*, 66 F. 372 at 374–76.

34. 309 U.S. 506 (1940).

35. *Id.* at 512 n.11 (citing *Turner v. United States*, 248 U.S. 354, 358 (1919); *Adams*, 165 F. at 308; *Thebo*, 66 F. at 372).

36. *Parks v. Ross*, 52 U.S. 362, 374 (1850).

37. See *Chadick v. Duncan*, No. 15,317, slip op. at 77 (App. D.C. Mar. 3, 1894) (copy available at the Nat'l Archives & Records Admin., Record Group No. 376, Case File No. 314); see also Oral Argument for R. Ross Perry as Amici Curiae Supporting Defendants, at 70–71, *Chadick*, No. 15,317 [hereinafter *Perry Argument*] (discussing three district court cases, one from the United States District Court for the Eastern District of Oklahoma and two from the United States District Court for the Western District of Arkansas, upholding the immunity of the Cherokee Nation).

analysis” and “without extensive reasoning,”³⁸ because the foundational Five Tribes immunity cases (which *Kiowa* ignored) used the same reasoning and analysis found in early and contemporaneous Supreme Court cases on federal, state, and foreign immunity to uphold tribal immunity.³⁹

Kiowa's criticism also ignored that the Court's early sovereign immunity jurisprudence generally (i.e., for non-tribal and tribal governments alike) developed with little analysis or reasoning,⁴⁰ and that justifications were offered only after the fact to explain the doctrine's existence.⁴¹ To the extent the Court's early cases gave reasons for sovereign immunity, they were that sovereigns had sovereign immunity because they were sovereign (and it was above a sovereign's dignity to be sued by an individual), and that sovereign immunity protected the government treasury. The early tribal immunity cases give the exact same reasons.⁴² The *Kiowa* Court, however, not only ignored these cases but also suggested for the first time that the reason for tribal immunity was to protect tribes “from encroachment by states” and “safeguard tribal self-governance.”⁴³

Based on this mischaracterization of the justifications for tribal immunity, the claim that the doctrine developed accidentally and without reasoning or analysis, and a concern for persons (particularly

38. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 753, 757 (1998).

39. See *infra* Part II (comparing the reasoning and analysis in the foundational state, federal, and foreign immunity cases with the reasoning and analysis in the early tribal sovereign immunity cases).

40. See, e.g., *United States v. Lee*, 106 U.S. 196, 207 (1882) (noting that federal sovereign immunity is treated as an established doctrine despite having never been discussed or justified); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821) (stating the “universally received opinion” that no suit can be commenced against the United States); see also Florey, *Penumbras*, *supra* note 21, at 768 (questioning the Supreme Court's treatment of state and federal immunity as “an idea that has always been somehow vaguely in the air”).

41. Early scholars attributed the survival of the doctrine in the United States to “the financial instability of the infant American states rather than to the stability of the doctrine's theoretical foundations.” Walter Gellhorn & C. Newton Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 722 (1947); see also 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 New York Court of Claims*, 22 ADMIN. L. REV. 39, 44 (1970) (agreeing with Gellhorn and Schenck that the doctrine was based more in the financial instability of the states following the Revolutionary War than on its theoretical underpinnings). Other justifications came over time. See, e.g., Chemerinsky, *supra* note 20, at 1216–23 (discussing six conventional justifications for sovereign immunity); Florey, *Penumbras*, *supra* note 21, at 784–96 (discussing justifications for sovereign immunity offered by courts and scholars).

42. See *infra* Parts II.D, III.D.

43. *Kiowa*, 523 U.S. at 758 (“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.”).

tort victims) potentially caught off guard by tribal immunity,⁴⁴ the Court questioned “the wisdom of perpetuating the doctrine” and suggested that it should be abrogated, “at least as an overarching rule.”⁴⁵ The majority grudgingly upheld the doctrine, including its off-reservation and commercial scope, and left to Congress the policy decisions of whether and how to limit tribal immunity.⁴⁶ Justice Stevens, Thomas, and Ginsburg dissented. Reiterating the claims that the tribal immunity doctrine arose by accident, developed with little analysis, and is unjust,⁴⁷ they argued that the Court should limit tribal immunity to on-reservation activities with a “meaningful nexus” to a tribe’s “sovereign functions.”⁴⁸

The dissent also argued, based on a three-way comparison with federal, foreign, and state immunity, that the tribal immunity doctrine is “anomalous”: viz-a-viz federal immunity because the federal government has waived its immunity for certain tort claims and claims arising from its commercial activities, viz-a-viz foreign nations’ immunity because they do not have immunity for their extraterritorial commercial activities, and viz-a-viz states because tribes cannot be sued in state courts but sister states can.⁴⁹ But this comparison is a straw man. The federal government waived its own immunity and limited these waivers to its own courts, just as many tribes have done.⁵⁰ It has not abrogated—indeed the Court has questioned whether Congress can abrogate—states’ immunity for their commercial activities.⁵¹ Foreign nations no longer enjoy immunity for their extraterritorial commercial activities because Congress abrogated it in the 1976 Foreign Sovereign Immunities

44. The Court stated that 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, [such] as . . . tort victims.” *Id.* at 758.

45. *Id.*

46. *See id.* at 758–60 (deferring to Congress on whether to make governmental/commercial or on-/off-reservation distinctions for tribal immunity and pointing to Congress’s ability to weigh competing policy concerns and address the issue through comprehensive legislation).

47. *Id.* at 761, 763, 766 (Stevens, J., dissenting) (quoting the majority opinion’s statements that the doctrine “developed almost by accident” and had been applied “with little analysis,” and arguing that the doctrine is unjust, “especially so with respect to tort victims”).

48. *Id.* at 764.

49. *Id.* at 765 (citing Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (2006); Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674; Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(2); *Nevada v. Hall*, 440 U.S. 410 (1979)).

50. *See, e.g.,* Struve, *supra* note 21, at 157–60 (discussing tribal waivers for civil rights, tort, and contract actions in tribal courts).

51. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 684–86 (1999) (declining to limit state sovereign immunity to non-commercial activities and suggesting that Congress lacks authority to do so).

Act.⁵² Congress has limited tribal immunity in a few instances but has not enacted a general abrogation of tribes' commercial immunity.⁵³ And Indian tribes are immune from suit in state courts because they were not parties to the Constitution and did not (impliedly) consent to be sued by (sister) states.⁵⁴

Understanding the common origins of the different sovereigns' immunities in the public international common law sovereign immunity doctrine—and how deviations from its broad extraterritorial and absolute scope resulted in the various immunities' contours that exist today—helps explain that tribal immunity is not as anomalous as the *Kiowa* dissent makes it seem. It also suggests that the dissenters wrongly criticized the majority for extending tribal sovereign immunity to off-reservation activities and, according to Justice Stevens, for creating new law instead of following precedent.⁵⁵ All sovereign immunity doctrines and their contours are judicial creations.⁵⁶ However, they all derive from a (default) common law doctrine that was extraterritorial and absolute in scope⁵⁷ and applied to all types of legal actions, no matter the relief sought.⁵⁸

52. 28 U.S.C. § 1605(a)(2) (2006).

53. See *Kiowa*, 523 U.S. at 758–59 (noting Congressional restrictions on tribal immunity “in limited circumstances” and listing examples, while also pointing to Congress’s general policy of leaving it unaltered). In addition to the more recent examples listed in *Kiowa* (the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(ii), and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450f(c)(3)), some early examples of Congress’s limiting or abrogating tribal immunity include nineteenth legislation authorizing a lawsuit by the Eastern Band of Cherokee Indians against the Cherokee Nation and the United States, see *infra* note 334 and accompanying text, and 1908 legislation authorizing suits against the Creek Nation and other tribes in the Court of Claims. See *infra* note 362 and accompanying text.

54. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) (explaining that Indian tribes and foreign nations, because they were not parties to the Constitution, did not implicitly surrender their immunity from suits by states). The court in *Nevada v. Hall*, which held that states can sue other states because they impliedly agreed to it in the Constitution, also recognized that the states had immunity against each other before the Constitution was ratified. 440 U.S. at 417. Even though tribes did not cede any of their authority in the Constitution, tribal immunity is subject to a general congressional power to abrogate it, but state immunity is not. See *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (holding that Congress generally lacks the power to abrogate state sovereign immunity).

55. See *Kiowa*, 523 U.S. at 764 (Stevens, J., dissenting) (arguing that the Court’s precedent limited tribal sovereign immunity to on-reservation activities and that the majority was performing a legislative function by applying tribal immunity off-reservation). The issue of whether courts are following precedent or making new law when applying immunity to tribes’ and other governments’ extraterritorial and commercial activities is discussed *infra* note 432 and accompanying text.

56. See *Floreys, Penumbra*, *supra* note 21, at 767 (advancing the proposition that the judiciary has continued to reinvent the sovereign immunity doctrine and that courts have failed to acknowledge their role in its creation and development).

57. See *infra* notes 125–127, 135–138 and accompanying text.

58. See *infra* notes 167, 194, 197 and accompanying text.

History and logic suggest this common law doctrine is the baseline against which to measure the scope of tribal immunity.⁵⁹ Before discussing the common law sovereign immunity doctrine and the contexts in which tribal and other governmental immunities developed, the next section examines what has happened in the wake of *Kiowa*.

A. *The Consequences of Kiowa*

One obvious consequence of the *Kiowa* Court's undermining the legitimacy of tribal sovereign immunity is that the Court refused to recognize tribal sovereigns' dignity as a reason for upholding the doctrine, even though dignity was historically and has been revived as a, if not the, principal basis for sovereign immunity—particularly for the states.⁶⁰ The Court's refusal to similarly embrace dignity as a reason for tribal immunity raises questions about the respect accorded to tribal governments in the U.S. federal system and the Court's regard for tribal sovereignty.⁶¹

59. See *Greene v. Mt. Adams Furniture (In re Greene)*, 980 F.2d 590, 594 (9th Cir. 1992) (“Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component.”); *id.* at 595 (“[T]he scope of tribal immunity has to be measured at the common law as it existed at some earlier time, rather than adopting present limits on sovereign immunity accepted by the states for their own purposes.”) (footnote omitted); see also Seielstad, *supra* note 24, at 712 (discussing the federal government's position in *Kiowa* oral argument that “the common law default rule with respect to tribes is also absolute immunity unless Congress articulates a different standard.”).

60. See Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777, 803–04 (2003); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1943 (2003) (discussing the Court's revival of states' dignitary interests as a basis for their sovereign immunity); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 11 (2003) (noting the Court's increased reliance on state dignity in recent decades); see also *infra* note 188–189 and accompanying text (discussing the ascendancy of the dignity rationale in the Court's recent state immunity jurisprudence).

61. See Tweedy, *supra* note 13, at 179 (contrasting the Supreme Court's position that tribal sovereign immunity is a special right with the traditional view that sovereign immunity is a necessary component of governmental status); see also FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 56 (2009) (noting that the “issue of respect and governmental parity harks back to . . . the ability of . . . society to accurately perceive and honor tribal governance and performance”); *id.* at 312 (citing Resnik & Suk, *supra* note 60, at 1923 n.8) (stating that the “‘invigoration’ of state sovereignty has been accompanied by a diminishment of tribal sovereignty”); Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 15–16 (2012) (“Unless the American Constitution is amended dramatically, . . . Indian tribes will be unsuccessful in asserting the ‘dignity’ of a constitutional sovereign before the Supreme Court” (footnote omitted)).

Beyond these questions concerning how the Supreme Court views tribes, its grudging acceptance and attempted delegitimization of the tribal immunity doctrine have prompted lower federal courts and state supreme courts to seize upon *Kiowa* to further undermine the doctrine. Some of these courts have carved out exceptions to the doctrine, making their own policy judgments about whether immunity should apply despite the *Kiowa* Court's statements that those judgments are for Congress and "an Indian tribe is subject to suit *only where* Congress has authorized the suit or the tribe has waived its immunity."⁶² Even courts that follow *Kiowa's* "only where" mandate and uphold the doctrine complain that they are hamstrung and ask the Court to revisit its decision in *Kiowa* and limit tribal immunity.

In *TTEA v. Ysleta del Sur Pueblo*,⁶³ for example, the Fifth Circuit, after noting that *Kiowa* "recogniz[ed] 'reasons to doubt the wisdom of perpetuating the [tribal immunity] doctrine'" and distinguishing *Kiowa* as an action for damages,⁶⁴ found that tribal sovereign immunity did not bar an action seeking declaratory and injunctive relief against the tribe.⁶⁵ Although declaratory and injunctive relief is available in suits against individual government officials, sovereign immunity generally bars actions—regardless of the relief sought—against the government itself.⁶⁶ But the Fifth Circuit, citing a Supreme Court case allowing suits against individual tribal officials (and another involving suits against individual tribal members)⁶⁷ and noting that state immunity does not preclude declaratory or

62. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (emphasis added).

63. 181 F.3d 676 (5th Cir. 1999).

64. *Id.* at 680 (quoting *Kiowa*, 523 U.S. at 758).

65. *Id.* at 680–81. The court ultimately dismissed TTEA's claim against the tribe for failure to state a claim because there was no federal question. *See id.* at 683 (finding that because the tribe could not have sued TTEA for declaratory relief under the statute at issue, which was meant to benefit tribes, TTEA could not sue the tribe).

66. *E.g.*, *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *see also* *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) (prospective relief against federal officials); *Ex parte Young*, 209 U.S. 123, 159–60 (1907) (relief against state officials). Most courts apply this general rule to tribes. *See, e.g.*, *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 514 (1991) (discussing *Ex Parte Young* liability for tribal officials); *Miller v. Wright*, 705 F.3d 919, 928 (9th Cir. 2013) (applying the *Ex Parte Young* rule in the tribal government context); *Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 929 (D.C. Cir. 2012) (noting that the *Ex Parte Young* doctrine applies to Indian tribes).

67. *TTEA*, 181 F.3d at 680 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 171 (1977)). Like citizens of other governments, individual tribal citizens do not share in the tribal government's immunity. *See, e.g.*, *Puyallup*, 433 U.S. at 171–72 (explaining that sovereign immunity does not extend to individual tribal members).

injunctive relief against state officials,⁶⁸ leapt to the conclusion that tribal sovereign immunity did not preclude declaratory or injunctive relief against the tribe itself.⁶⁹ A later Fifth Circuit court relied on *TTEA* to overturn a district court decision upholding tribal immunity against claims for equitable relief.⁷⁰

While other courts have refused to follow the Fifth Circuit,⁷¹ its opinions are noteworthy because they are predicated on a delegitimization of tribal sovereign immunity. Though it does not explicitly invoke *Kiowa's* “almost by accident” language, *TTEA* begins its discussion of immunity by noting that *Kiowa* questioned the wisdom of perpetuating the doctrine.⁷² The Fifth Circuit opinions also assume (and rule based on this assumption) that tribal sovereign immunity does not have the same common law scope as other immunity doctrines.

Other courts have relied more explicitly on *Kiowa's* suggestion that the tribal immunity doctrine is accidental when holding that tribal immunity did not bar lawsuits that otherwise would be dismissed under the common law default immunity rule or under the *Kiowa* Court’s “only where” rule.⁷³ A federal district court in California, for

68. *TTEA*, 181 F.3d at 680.

69. *Id.* at 680–81. The court based this conclusion on the argument that tribal sovereign immunity should not extend beyond the confines of state sovereign immunity, but it failed to acknowledge that state immunity bars injunctive and declaratory actions against states themselves. *See supra* note 66 and accompanying text (discussing state immunity principles). The court also pointed to Justice Stevens’ concurring opinion in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe* “suggest[ing] that tribal sovereign immunity might not extend ‘to claims for prospective equitable relief against a tribe.’” *Id.* (quoting *Okla. Tax Comm’n*, 498 U.S. at 515 (Stevens, J., concurring)). *But see* *Citizen Band Potawatomi Indian Tribe v. Okla. Tax Comm’n*, 969 F.2d 943, 948 n.5 (10th Cir. 1992) (stating that Justice Stevens alone expressed this view, which “was implicitly rejected in the majority opinion”).

70. *Comstock Oil & Gas, Inc. v. Ala. & Coushatta Indian Tribes*, 261 F.3d 567, 571–72 (5th Cir. 2001).

71. *See, e.g., Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 928 (7th Cir. 2008) (“Tribal sovereign immunity . . . extends to suits for injunctive or declaratory relief.”); *Citizen Band Potawatomi Indian Tribe*, 969 F.2d at 948 (holding the tribe immune from injunctive relief action); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (noting that tribal immunity “extends to suits for declaratory and injunctive relief”); *Matheson v. Gregoire*, 161 P.3d 486, 491 (Wash. Ct. App. 2007) (expressly rejecting the Fifth Circuit rule applied in *TTEA* and *Comstock*). *But see* *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 299 n.74 (E.D.N.Y. 2008) (following the Fifth Circuit and distinguishing *Kiowa* by noting that it addressed sovereign immunity from damages actions and not from injunctive relief), *vacated on other grounds*, 686 F.3d 133 (2d Cir. 2012).

72. *TTEA*, 181 F.3d at 680.

73. This Article does not argue that, and it is impossible to know whether, these cases would have come out differently if *Kiowa's* reasoning were different. But it is clear that their use of *Kiowa* helps them arrive at their result: they abrogate immunity based on a balancing of the issues (one of which is tribal immunity’s doctrinal pedigree) at play. The cases certainly would have been dismissed under

example, took *Kiowa* beyond its own language, citing it to claim that the doctrine's "development was *purely accidental* and . . . a creation of the judiciary."⁷⁴ The court relied on *Kiowa* to say that the doctrine has a "weak foundation" and exists only through "systematic reiteration of an accidental doctrine."⁷⁵

Like the Fifth Circuit, the court distinguished *Kiowa* as involving liability for breach of contract damages and found the question of immunity for non-contractual activity to be "left open."⁷⁶ Stating that the *Kiowa* holding's "ambiguous reach" did not "extend the doctrine . . . to all non-contractual off-reservation conduct,"⁷⁷ the court held that tribal immunity did not bar the enforcement of the Americans with Disabilities Act (ADA) against a tribally-owned hotel located outside of the tribe's reservation.⁷⁸ The court did, however, limit its

the "only where" rule, as neither the tribes nor Congress expressly authorized the suits. And a more favorable description of tribal immunity from the Supreme Court—really, just an understanding of its historical and doctrinal context—would complicate these courts' efforts to mask their normative policymaking by marginalizing the doctrine's pedigree.

74. *Hollynn D'Lil v. Cher-Ae Heights Indian Cmty.*, No. 01-1638 TEH, 2002 WL 33942761, at *5 (N.D. Cal. Mar. 11, 2002) (emphasis added). *But see* Florey, *Penumbra*, *supra* note 21, at 767 (stating that all sovereign immunity doctrines are judicially created).

75. *Hollynn D'Lil*, 2002 WL 33942761, at *5 (footnote omitted) (internal quotation marks omitted) (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); Theresa R. Wilson, *Nations Within a Nation: The Evolution of Tribal Immunity*, 24 AM. INDIAN L. REV. 99, 125 (2000)). Though the court cited *Kiowa* to argue that the tribal immunity doctrine arose accidentally and is overly broad in scope, *see Hollynn D'Lil*, 2002 WL 33942761, at *5-6 (citing *Kiowa*, 523 U.S. at 758; Wilson, *supra*, at 125); the court cautioned that the history and scope of tribal immunity

should not be taken as justification[s] for discounting the legitimate interest of the tribes in maintaining their rights to self-determination and self-governance. Any limits placed on tribal sovereign immunity must be grounded in the fundamental nature of the tribes as sovereigns within this nation, and not, for example, as a need-based remedy granted temporarily until a certain level of prosperity is reached.

Id. at *5 n.6.

76. *Id.* at *7.

77. *Id.* at *8. The court found this ambiguity in language in Justice Stevens' dissent, which the court maintained is *Kiowa's* "only explicit reference . . . to non-contractual activity," where he discusses tort victims and states that "*nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationship.*" *Id.* at *6 (quoting *Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting)). The court then queried whether Justice Stevens' statement should "be taken as a definitive interpretation of the majority decision, or should it be seen as a warning call." *Id.*

78. *Id.* This case and others involving the application of the ADA against tribes raise overlapping issues of sovereign immunity, whether federal laws that are silent with respect to tribes apply to them, and whether those statutes grant a private right of action (such that there is a claim against which to assert immunity). *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 69 (1978) (concluding that a private right of action for declaratory or injunctive relief does not exist under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03 (1976)); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 132, 289-90, 636-37 (Nell Jessup Newton ed., 2005) (discussing case law). The

ruling to situations where a federal civil rights statute is directly implicated, and emphasized that it did not address whether tribal immunity applies to off-reservation activity generally.⁷⁹

The California Supreme Court similarly limited its opinion holding that the state's interest in regulating its electoral process justified an exception to the tribal immunity doctrine.⁸⁰ Citing *Kiowa's* claim that tribal immunity "developed 'almost by accident,'"⁸¹ and twice noting that *Kiowa* "doubt[ed] 'the wisdom of perpetuating the . . . doctrine,'"⁸² the court declared that the Supreme Court "has grown increasingly critical of its continued application."⁸³ It relied on these

court found that the ADA applied to the tribe's hotel because it was a commercial establishment open to the public and that the plaintiff could bring a private action to enforce the statute because the hotel was off-reservation. *Hollynn D'Lil*, 2002 WL 33942761, at *5. The Eleventh Circuit, by contrast, held that although the ADA applied to a tribe's restaurant and casino as commercial operations open to the public, the statute did not abrogate tribal immunity and provide for a private right of action against an on-reservation casino. *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1129–30 (11th Cir. 1999). The district court distinguished the Eleventh Circuit case on the basis that the tribal enterprise there was located on the reservation. *Hollynn D'Lil*, 2002 WL 33942761, at *8.

79. *Hollynn D'Lil*, 2002 WL 33942761, at *8 n.19.

80. See *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126, 1140 (Cal. 2006) (stating that its "abrogation of . . . immunity . . . under these facts is narrow and carefully circumscribed" and applied only where California sues a tribe for violations of state fair political practice laws). The court found that this interest was protected under the U.S. Constitution, *id.*, but the dissent disagreed with and criticized the majority's reliance on the Tenth Amendment and Guarantee Clause as the bases for finding a state interest strong enough to trump tribal immunity. See *id.* at 1142–44 (Moreno, J., dissenting) (arguing that neither the Tenth Amendment nor the Guarantee Clause authorized the states to limit tribal sovereign immunity). A California appeals court, distinguishing *Agua Caliente*, recently held that the state's interest in enforcing its consumer protection laws did not justify abrogating tribal immunity. See *Ameriloan v. Superior Court*, 86 Cal. Rptr. 3d 572, 580–83 (Ct. App. 2009) (noting that the *Agua Caliente* court was careful to limit its holding). The lower court, however, had relied on *Agua Caliente* to find that immunity did not bar the action. *Id.* at 580.

81. *Agua Caliente*, 148 P.3d at 1130 ("Tribal sovereign immunity was a concept developed 'almost by accident' in *Turner* . . . [where] the high court made a 'passing reference to immunity' . . . [and] was elevated from dictum to holding in [USF&G] . . ." (quoting *Kiowa*, 523 U.S. at 761)); see also *id.* ("The FPPC contends that the origins and application of the doctrine indicate that we should not extend it to a case involving the state's constitutional authority to regulate its elections or state legislative processes.")

82. *Id.* at 1133 (quoting *Kiowa*, 523 U.S. at 758).

83. *Id.* at 1135 ("[I]n light of *Kiowa* . . . and its progeny, the United States Supreme Court, while consistently affirming the [tribal] sovereign immunity doctrine, has grown increasingly critical of its continued application in light of the changed status of Indian tribes as viable economic and political nations."). It is unclear what progeny of *Kiowa* the court is referencing, as it does not cite any post-*Kiowa* tribal immunity case. It is also unclear whether the court is suggesting that all Indian tribes are economically and politically viable (or what concept of viability it is using). If so, the court is wrong. See, e.g., *Riley*, *supra* note 21, at 1109 (stressing that the vast majority of tribes face financial hardship). The court may also be suggesting that tribal immunity is supposed to disappear once tribes do become economically and/or politically viable. But this suggestion ignores that the doctrine arose in cases

and *Kiowa's* other "observations" about tribal immunity to depart from admittedly well-established doctrine.⁸⁴ The dissent criticized the majority for "carv[ing] out an exception" to and "unjustifiably circumvent[ing]" well-established rules and principles,⁸⁵ arguing that while California's enforcement of its laws was "a highly desirable objective,"⁸⁶ "restrictions on tribal sovereign immunity are the sole province of Congress."⁸⁷

The Oklahoma Supreme Court has carved out an exception to the tribal immunity doctrine for negligence actions brought under state dram shop laws.⁸⁸ After stating that *Kiowa* stripped the Supreme Court's earlier tribal immunity precedents "of their authoritative value" and "discredited [those cases] as authority for the doctrine,"⁸⁹ the court distinguished *Kiowa* as involving a contract action and held that tribal immunity did not bar a negligence action against a tribal casino for dram shop liability.⁹⁰ Whereas the majority felt

involving tribes that were economically and politically viable (perhaps more so than any tribes today), *see infra* Part III.C–E, and that state and foreign governments that are or become economically and politically viable are not thereby deprived of immunity. *See Hollynn D'Li*, 2002 WL 33942761, at *5 n.6 (noting that tribal sovereign immunity is not a "need-based remedy granted temporarily until a certain level of prosperity is reached"); *see also Tweedy*, *supra* note 13, at 179 (arguing that sufficient tax revenue should not serve as a basis for outgrowing sovereign immunity).

84. The other observation the court attributed to *Kiowa* was that "tribal sovereign immunity has historically been applied as a matter of federal law, not constitutional law." *Agua Caliente*, 148 P.3d at 1133 (citing *Kiowa*, 523 U.S. at 756). The court also noted Justice Stevens' statement that he would not apply the doctrine to off-reservation conduct, as well as his calling the tribal immunity doctrine "anomalous" and "unjust and unfair." *Id.* at 1134–35 (citing *Kiowa*, 523 U.S. at 765–66 (Stevens, J., dissenting)).

85. *Id.* at 1140 (Moreno, J., dissenting).

86. *Id.*

87. *Id.* at 1141.

88. *Bittle v. Bahe*, 192 P.3d 810, 827–28 (Okla. 2008).

89. *Id.* at 820.

90. *Id.* at 827. The court said the case before it was different from *Kiowa* and other Supreme Court cases recognizing tribal immunity because it did not involve a contract or interfere with the Tribe's right to self-governance. *Id.* at 821. *But see* *Tribal Smokeshop, Inc. v. Ala.-Coushatta Tribes*, 72 F. Supp. 2d 717, 719 (E.D. Tex. 1999) (citing *Schantz v. White Lightning*, 502 F.2d 67, 68 (8th Cir. 1974); *Elliott v. Capital Int'l Bank & Trust, Ltd.*, 870 F. Supp. 733, 735 (E.D. Tex. 1994)) (stating that "[n]othing in *Kiowa* could be construed to limit sovereign immunity to contractual claims," rejecting the argument that immunity does not preclude torts, and noting other authority applying sovereign immunity to tort claims against tribes). The court's opinion also evidences a misunderstanding of the tribal sovereign immunity doctrine, which it says "tests . . . state action for interference with the right to . . . self-governance." *Bittle*, 192 P.3d at 817 (citation omitted). But the court confuses the "tradition of sovereignty" language in *Rice v. Rehner*, 463 U.S. 713 (1983), a case involving whether state regulation of on-reservation alcohol sales by individual Indians infringed on tribal self-government, with what it calls the "tradition of sovereign immunity," *see Bittle*, 192 P.3d at 816, 827, and states (incorrectly) that "*Rice v. Rehner* concluded that the Indians there had no tribal immunity from state

unconstrained in the absence of Supreme Court authority expressly upholding tribal immunity against dram shop liability,⁹¹ the dissenting judges said current law bound them to uphold immunity.⁹² And they signaled that the law perhaps should be changed, either by Congress or the Supreme Court.⁹³

Even courts that uphold tribal immunity invoke *Kiowa's* delegitimization of the doctrine and “almost by accident” language to suggest not only that Congress should change the law, but also that the Supreme Court should reconsider its deference to Congress. In a recent dram shop case against a tribal casino, the Eleventh Circuit noted *Kiowa's* “accident” language and doubts about continuing the doctrine,⁹⁴ but it twice emphasized what it found to be *Kiowa's* plain language allowing suits against tribes “*only where* Congress has authorized the suit or the tribe has waived immunity.”⁹⁵ The court stated that the doctrine “remains the law of the land until Congress *or the Supreme Court* tells us otherwise.”⁹⁶ The Ninth Circuit, dismissing a negligence case brought against a tribal corporation operating the tribe’s casino, suggested that tribal entities “competing in the economic mainstream” should not enjoy immunity but said that the

alcoholic beverage law.” *Id.* at 819. *Rice v. Rehner*, however, did not involve tribal immunity from suit. See *Furry v. Miccosukee Tribe of Indians*, 685 F.3d 1224, 1230 (11th Cir. 2012) (noting that tribal sovereign immunity was not an issue in *Rehner* because “there was no tradition of tribal self-governance in liquor transactions”). The Indians there were individual tribal citizens who, like citizens of other governments, do not have sovereign immunity. See, e.g., *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 171–72 (1977) (noting that individual tribal members do not have sovereign immunity).

91. See *Bittle*, 192 P.3d at 821 (“[W]e have found no authoritative decision supporting the doctrine of tribal immunity from suit by a nonmember alleging violation of state alcoholic beverage laws.”).

92. *Id.* at 828–29 (Kauger, J., dissenting). The dissent cited other state courts that had refused to take the “great leap of jurisprudence” the majority did. See *id.* at 833–34 (citing *Filer v. Tohono O’Odham Nation Gaming Enter.*, 129 P.3d 78 (Ariz. Ct. App. 2006); *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843 (Tex. App. 1997); *Foxworthy v. Puyallup Tribe of Indians Assoc.*, 169 P.3d 53 (Wash. Ct. App. 2007)).

93. See *Bittle*, 192 P.3d at 829 (Kauger, J., dissenting) (arguing that immunity should not bar dram shop liability as a matter of public policy, but that dram shop actions cannot be brought against tribes “unless Congress or the United States Supreme Court makes a change in current law”).

94. *Furry*, 685 F.3d at 1229.

95. *Id.* at 1236 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)); see also *id.* at 1229 (“[T]he Court could not have been clearer about placing the ball in Congress’s court going forward . . .”).

96. *Id.* at 1237 (emphasis added). The Eleventh Circuit noted in particular the *Kiowa* majority’s finding that there are “reasons to doubt . . . perpetuating the doctrine” and the dissent’s description of tribal immunity as “unjust.” *Id.* at 1229. The court also emphasized that “[t]he doctrine of tribal sovereign immunity may well be anachronistic and overbroad in its application, especially when applied to shield from suit . . . Indian tribes[.] . . . commercial activities . . . that have obvious and substantial impacts on non-tribal parties. But it remains the law of the land until Congress or the Supreme Court tells us otherwise.” *Id.* at 1237.

Supreme Court and Congress maintain otherwise⁹⁷ However, the judge who authored the opinion wrote a separate concurrence expressing his desire that the Supreme Court limit sovereign immunity for tribal gaming operations.⁹⁸

In 2010, the Supreme Court granted certiorari in a case where the Second Circuit upheld tribal immunity while noting *Kiowa's* “almost by accident” language and statement on the “wisdom of perpetuating” the doctrine.⁹⁹ The court said that its result—that immunity barred county foreclosure actions against tribal land for failure to pay taxes that the Supreme Court had previously determined were lawfully due—was reminiscent of a nursery rhyme¹⁰⁰ and suggested that the counties look to Congress for help.¹⁰¹ Judges Cabranes’ and Hall’s concurrence also complained that the “decision defies common sense” and suggested that the Supreme Court should change the doctrine.¹⁰²

A month before the scheduled oral argument, the Supreme Court remanded the case after the tribe enacted a law waiving its immunity against enforcement of the tax liens at issue.¹⁰³ Tribal advocates were relieved that the Court passed on what many thought was “a prime opportunity for the Court to revisit its precedent and to carve out a significant exception to the doctrine of tribal sovereign immunity.”¹⁰⁴

97. See *Cook v. Avi Casino Enters.*, 548 F.3d 718, 725 (9th Cir. 2008) (noting that the petitioner’s arguments against recognizing immunity for tribal business entities “are not without some insight” but were foreclosed by *Kiowa* and other precedent).

98. *Id.* at 728 (Gould, J., concurring). Judge Gould said that, alternatively, he would like Congress to pass legislation limiting the immunity of “tribal entities involved in ubiquitous commercial gaming activities across the United States” or for the tribe to waive its immunity against actions for casino employee negligence. *Id.*

99. *Oneida Indian Nation v. Madison Cnty.*, 605 F.3d 149, 157 (2d Cir. 2010), *vacated*, 131 S. Ct. 704 (2011) (per curiam).

100. See *id.* at 159 (“To be sure the result is reminiscent of words of the nursery rhyme: Mother, may I go out to swim? Yes, my darling daughter; Hang your clothes on a hickory limb, And don’t go near the water.”).

101. See *id.* (“We are left then with the rule stated in *Kiowa*: ‘As 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.’” (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998))); *id.* at 160 (pointing to Congress as the ultimate recourse). The court also noted that unlike the doctrine of sovereign authority over land, the doctrine of tribal immunity from suit has not significantly evolved in the Supreme Court. *Id.* at 159 (citations omitted). But see *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126, 1135 (Cal. 2006) (citing the Supreme Court’s placing limitations on tribal jurisdiction in other contexts as a reason to depart from established tribal sovereign immunity doctrine).

102. *Oneida*, 605 F.3d at 163–64 (Cabranes, J., concurring) (arguing that the Supreme Court should reconsider *Kiowa* because the result in *Oneida* was “so anomalous” and “defie[d] common sense”).

103. *Oneida*, 131 S. Ct. at 704.

104. *Tribal Supreme Court Project Memorandum: Update of Recent Cases*, NATIVE AM. RTS. FUND 1 (Jan. 10, 2010), sct.narf.org/updatememos/2011/01-10-11.pdf; see also *Supreme Court Vacates and Remands Madison County v. Oneida Nation of New York*,

However, a case with similar facts that presents the same issues is currently making its way through the courts,¹⁰⁵ and the Supreme Court, in its October 2013 term, is scheduled to hear a case in which one of the questions presented for review was “[w]hether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating [the Indian Gaming Regulatory Act] outside of Indian lands.”¹⁰⁶ With tribal sovereign immunity cases accounting for a substantial percentage of petitions for certiorari filed in federal Indian law cases every year,¹⁰⁷ and the Court granting cert in a disproportionately high number of those cases (particularly when the petitioners are opposing tribal interests),¹⁰⁸ observers of Indian law and the Supreme Court are closely watching tribal sovereign immunity jurisprudence.¹⁰⁹

B. *The Post-Kiowa Jurisprudential Trend*

Kiowa has been cited as binding authority in over four hundred cases.¹¹⁰ Although most courts follow the Supreme Court’s seemingly

MONT. WYO. TRIBAL LEADERS COUNCIL (Jan. 11, 2010), <http://www.mtwytlc.org/component/content/article/113-indian-organizations/763> (referring to the order vacating the case as “a very positive development”).

105. *Cayuga Indian Nation v. Seneca Cnty.*, 890 F. Supp. 2d 240 (W.D.N.Y. 2012); see Fletcher, *supra* note 18 (noting that the issue in *Cayuga Indian Nation* is the same one that the Supreme Court addressed in *Oneida*).

106. Petition for Writ of Certiorari, *supra* note 19, at i.

107. See, e.g., *Tribal Supreme Court Project Memorandum: Update of Recent Cases*, NATIVE AM. RTS. FUND 1 (Jul. 13, 2012), <http://sct.narf.org/updatememos/2012/07-13-12.pdf> (noting that on average since 2001, the Supreme Court has received twenty-six petitions in Indian law cases each year); *id.* at 2 (noting that five of the twenty-seven Indian law cert petitions filed in the Court’s 2011 term raised the issue of tribal sovereign immunity).

108. See Matthew L.M. Fletcher, *Factbound and Spillless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 935 (2009); see also Matthew L.M. Fletcher, *Tribal Interests Win-Loss Rates in the 21st Century—Trend Downward for Tribal Interests?*, TURTLE TALK (July 26, 2013), <http://turtletalk.wordpress.com/2013/07/26/tribal-interests-win-loss-rates-in-the-21st-century-trend-downward-for-tribal-interests> (comparing data on grants of certiorari for cases where tribal interests prevailed in federal appeals courts with those for cases where tribal interests lost in appeals courts).

109. See *Tribal Supreme Court Project*, *supra* note 107, at 1 (noting that the NARF Supreme Court Project will continue to closely monitor cert petitions that raise the question of tribal sovereign immunity); see also Kiera Flynn, *Petition of the Day: Malaterre v. Amerind Risk Management Corp.*, SCOTUSBLOG (Oct. 17, 2011, 7:05 PM), <http://www.scotusblog.com/2011/10/petition-of-the-day-193/> (discussing *Malaterre v. Amerind Risk Mgmt. Corp.*, 633 F.3d 680 (8th Cir. 2011), *cert denied*, 132 S. Ct. 1094 (2012) (a tribal sovereign immunity case, as the SCOTUSblog petition of the day); Matthew L.M. Fletcher, *A CVSG for Malaterre v. Amerind?*, TURTLE TALK (Jan. 10, 2012), <http://turtletalk.wordpress.com/2012/01/10/a-cvsg-for-malaterre-v-amerind> (noting that tribal immunity-related petitions attract significant interest).

110. This number is calculated from a “Citing References” search of *Kiowa* on Westlaw, counting the number of “Positive Cases” listed in the “Examined,” “Discussed,” and “Cited” categories.

clear directive that Indian tribes are subject to suit “only where Congress has authorized the suit or the tribe has waived its immunity,” many courts have asked the Supreme Court to change the doctrine, and some have created their own exceptions to it. Perhaps the boldest rebuke of tribal sovereign immunity came from a small claims court judge in Iowa who concluded that the tribe was “not a ‘sovereign’ as that word is commonly defined”¹¹¹ and invoked *Dred Scott* to evade Supreme Court precedent on tribal immunity, *stare decisis* notwithstanding.¹¹²

Other courts are not as blatant in their disregard for binding Supreme Court precedent, or as blunt about their dislike of tribal immunity. But some of the same themes in the Iowa judge’s ruling, particularly those about immunity’s unfairness to tort victims and application to tribal casinos, show up in *Kiowa* and the other opinions discussed above.¹¹³ Invoking these themes alongside *Kiowa*’s questioning of the doctrine’s pedigree, three federal circuit courts have suggested that the Supreme Court should reconsider its deference to Congress and limit or abrogate tribal immunity,¹¹⁴ and a federal appeals court, a federal district court, and two state supreme courts have carved out their own exceptions to the doctrine.¹¹⁵

111. *Janss v. Sac & Fox Tribe*, No. SCSC011994, slip op. at 4 (Iowa Dist. Ct. for Tama Cnty., Magis. Div., Apr. 20, 2011), available at <http://westbankmembers.com/news/Iowa%20Court%20Case.pdf>. The judge found that the tribe was not a sovereign because, among other reasons, it did not have “established borders which are strictly controlled[;] . . . coinage or currency of its own; . . . a postal system; . . . [or a] military force to maintain the integrity of its borders.” *Id.* at 3–4. The judge also rejected the tribe’s argument that the plaintiff should have gone through the tribe’s court system, agreeing with the plaintiff that he would not get a fair hearing there. *Id.* at 2.

112. *Id.* at 5.

113. Compare *id.* at 4 (discussing casino patron tort claims and hypotheticals involving off-reservation tort victims), with *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 758 (1998) (discussing tribal casinos and raising concerns about tort victims), *Furry v. Miccosukee Tribe of Indians*, 685 F.3d 1224, 1229, 1237 (11th Cir. 2012) (questioning application of tribal immunity in casino tort claims context), and *Cook v. Avi Casino Enters., Inc.*, 548 F.3d 718, 728 (9th Cir. 2008) (Gould, J., concurring) (same).

114. The Second Circuit did so in *Oneida Indian Nation v. Madison County*, 605 F.3d 149, 163–64 (2d Cir. 2010), discussed *supra* notes 99–102 and accompanying text; the Ninth Circuit in *Cook*, 548 F.3d at 725, discussed *supra* notes 97–98 and accompanying text; and the Eleventh Circuit in *Furry*, 685 F.3d at 1237, discussed *supra* notes 94–96 and accompanying text.

115. See *Comstock*, 261 F.3d at 571–72 (finding that tribal sovereign immunity did not apply against a claim for equitable relief against a tribe); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680–81 (5th Cir. 1999) (holding that tribal immunity did not bar an action for declaratory and injunctive relief against a tribe); *Hollynn D’Lil v. Cher-Ae Heights Indian Cmty.*, No. 01-1638 TEH, 2002 WL 33942761, at *7–8 (N.D. Cal. Mar. 11, 2002) (creating an exception for the enforcement of federal civil rights statutes against off-reservation commercial enterprises); *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126, 1140 (Cal. 2006) (finding

While courts create these exceptions by distinguishing *Kiowa*—based on the type of suit (tort versus contract) or relief sought (prospective versus damages), the activity at issue (commercial versus governmental, or something unique like contributions to state elections), geography (off-reservation versus on-reservation), or a combination of these factors, they also rely on *Kiowa*'s misreading of tribal immunity's history.¹¹⁶ Indeed, their ignorance of this history is what leads (or enables) the courts to create the "exception": they put the burden on the tribe to show that the Supreme Court or Congress has explicitly recognized immunity in that particular context, and then find that immunity does not apply absent such affirmative recognition.¹¹⁷ Such burden-flipping is inconsistent not only with general common law rule, but also with the test used to determine whether the federal, state, and foreign governments have immunity.¹¹⁸ It also contravenes the *Kiowa* Court's instruction that immunity applies absent congressional abrogation or tribal waiver.¹¹⁹

To date, tribes have been hesitant to petition for certiorari in the cases where courts limited their immunity.¹²⁰ This is understandable

exception for the enforcement of state election campaign finance laws); *Bittle v. Bahe*, 192 P.3d 810, 827–28 (Okla. 2008) (carving out an exception for state law dram shop actions against tribal casinos).

116. See *TTEA*, 181 F.3d at 680 (distinguishing between actions seeking damages and prospective relief and suggesting *Kiowa* applies only to the former); *Hollyn D'Lil*, 2002 WL 33942761, at *7–8 (distinguishing *Kiowa* as addressing only immunity for suits on contracts, and drawing a distinction between on-reservation and off-reservation commercial activities); *Agua Caliente*, 148 P.3d at 1135 (finding that *Kiowa*'s holding did not apply to a lawsuit to enforce state election laws); *Bittle*, 192 P.3d at 821 (distinguishing *Kiowa* because the case before it did not involve a contract).

117. See *Agua Caliente*, 148 P.3d at 1138 (abrogating tribal immunity in the absence of Supreme Court authority explicitly holding that tribal sovereign immunity did not bar actions to enforce state campaign finance laws); *Bittle*, 192 P.3d at 821–23 (finding no case law explicitly recognizing tribal immunity from a suit by a nonmember alleging a violation of state alcoholic beverage laws, then holding the tribe lacked immunity); see also *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 155 (2nd Cir. 2012) (concluding that the tribe lacked immunity after finding there was no Supreme Court authority expressly recognizing tribal immunity against a state's suit to enforce its laws against a tribe's off-reservation commercial activities); *id.* at 147 ("There is nothing in the factual record of *Kiowa* that would require the holding be extended to suits by states seeking prospective relief against a tribe.").

118. The general common law rule, based on the public international law doctrine of sovereign immunity, is that a sovereign's immunity is extraterritorial and absolute (i.e., governmental and commercial) in scope. See *infra* notes 135–140 and accompanying text. When federal, state, or foreign sovereign immunity is at issue, courts look at whether the sovereign has waived its immunity (or otherwise consented to suit) or Congress has abrogated it; if not, then sovereign immunity bars the suit. See *infra* Part II.D. This is the same rule *Kiowa* applies for tribal sovereign immunity, but these courts read around *Kiowa*'s language stating that tribes can be sued "only where" the tribe consents or Congress abrogates immunity.

119. *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998).

120. See, e.g., *California Tribe Drops Campaign Contribution Lawsuit*, INDIANZ.COM,

given tribal interests' record before the Supreme Court in recent decades.¹²¹ But there is always the possibility that a tribe that loses an immunity case could petition the Court for review, or that the Court could grant certiorari where a party who could not sue because of tribal immunity asks the Court to revisit the doctrine.

As noted above, a case almost identical to the one in which the Court granted certiorari in 2010 (but never decided) is currently making its way through the courts.¹²² Some have speculated that the next "perfect storm" case¹²³ to reach the Court might be one of the several cases in state courts involving tribally-owned online lending operations' assertions of immunity against state agencies trying to enforce their consumer protection laws.¹²⁴

We can't know if or when the Court may hear another tribal immunity case, just as we can't know why some lower court judges limit immunity but others do not. Certainly *Kiowa's* discrediting of the doctrine makes it easier for these judges to do so. But *Kiowa* and the courts that have followed it got things wrong.

The history of the tribal immunity doctrine shows that its development was not accidental. This history also highlights three related points: that the reasoning and analysis used for tribal

(Jul. 16, 2007), <http://www.indianz.com/News/2007/003920.asp> (suggesting that a negative Supreme Court ruling could impact other tribes). The only case in which the tribe petitioned for certiorari was *Comstock*, where the Supreme Court denied certiorari and thus passed on the opportunity to review the Fifth Circuit's ruling that tribal immunity does not preclude actions for equitable relief. *Comstock*, 261 F.3d at 580 (5th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002).

121. See, e.g., Dave Palermo, *Patchak Is the Latest in a Troublesome Trend*, PECHANGA.NET (Aug. 19, 2012), <http://www.pechanga.net/content/patchak-latest-troublesome-trend> ("Generally our advice is, 'Don't go there. We'll lose.' We have no other choice but to attempt to resolve issues either through legislation or administration action." (quoting John Echo-Hawk, the Executive Director of the Native American Rights Fund, a leading legal advocacy organization representing tribes)).

122. See Fletcher, *supra* note 18 (referring to *Cayuga Indian Nation v. Seneca Cnty.*, 890 F. Supp. 2d 240 (W.D.N.Y. 2012)).

123. See generally Carol McCrehan Parker, *The Perfect Storm, the Perfect Culprit: How a Metaphor of Fate Figures in Judicial Opinions*, 43 MCGEORGE L. REV. 323 (2012) (discussing the use of the "perfect storm" metaphor in today's culture and its role in judicial opinions).

124. See Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 778–84 (2012) (discussing various state court cases involving state enforcement actions against tribal lending operations); see also Richard P. Eckman et al., *Update on Tribal Loans to State Residents*, 68 BUS. LAW. 677, 677–685 (2013), available at http://www.pepperlaw.com/pdfs/TBL_68-2_19_Eckman.pdf (surveying state and federal enforcement actions against tribal lenders); David Lazarus, *Tribes' Payday Loans Under Scrutiny*, L.A. TIMES, (Apr. 29, 2013), <http://www.latimes.com/business/la-fi-lazarus-20130430,0,3504446.full.column> (noting that states are stepping up their attempts to regulate tribal lending operations).

immunity closely parallels that found in the Supreme Court's seminal federal, state, and foreign sovereign immunity cases; that the historic scope of all of these doctrines at common law was absolute and extraterritorial; and that the doctrines' present scope assumes these contours except where it has been limited by Congress or the sovereign's consent. Normative considerations might call for limiting immunity in some of these cases, or for eliminating governmental immunity generally. Before reaching the normative, however, we need to be clear about history. Understanding the history of the doctrine requires putting the doctrine in its proper context, which in turn requires understanding not only the path along which tribal immunity developed but also the doctrinal context in which it arose.

II. A GENERAL AND COMPARATIVE OVERVIEW OF SOVEREIGN IMMUNITY

At the risk of rehashing the substantial literature on the state, federal, and foreign sovereign immunity doctrines, this section briefly examines their histories and contours. This examination illustrates three fundamental similarities across the doctrines: They all originate in the international public law doctrine of nation-state sovereign immunity (which, historically, is extraterritorial and commercial in scope); the foundational cases adopting those doctrines are thin on analysis; and any limitations on these immunities' scope have come from Congress or the sovereigns themselves, not the courts. This background helps us understand the general sovereign immunity doctrine in which tribal immunity is rooted,¹²⁵ as well as the early tribal immunity cases' reliance on these precedents.

The origins of the common law sovereign immunity doctrine are two-fold.¹²⁶ On the one hand, English common law dating back to at least the Fourteenth century recognized the King's immunity from suit in his own courts.¹²⁷ As this monarchical immunity doctrine

125. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.").

126. See Florey, *Penumbra*, *supra* note 21, at 771 (asserting that the various sovereign immunity doctrines that have developed throughout the years are all based on two basic principles, and noting the Supreme Court stated that "[t]he doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign" (footnote omitted)).

127. See Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963) (discussing the King's sovereign immunity in English common law). This immunity was not absolute, however, as there were still remedies

evolved, the notion of foreign sovereign immunity—the concept that a sovereign should enjoy protections in other nations' courts similar to those it receives at home—began to develop.¹²⁸

The origin of this foreign sovereign immunity is, however, not entirely clear.¹²⁹ It arose in the post-Westphalian era and is rooted in principles of sovereign independence, equality and dignity reflected in classical international law scholarship.¹³⁰ Legal scholars of the time, including Emmerich de Vattel, wrote about these ideas of sovereign independence and equality, but they did not address nation-state immunity from courts of other states and instead focused solely on the personal immunities of foreign leaders and ambassadors.¹³¹

By the time the United States was founded, sovereign immunity was, in the oft-quoted words of Alexander Hamilton, seen as something “inherent in the nature of sovereignty” that was recognized by the “general sense, and the general practice of mankind.”¹³² The states that formed the new republic understood both themselves and their newly-formed national government to have sovereign immunity.¹³³ Foreign nations, of course, were already in the group of entities recognized as having immunity.

As an inherent attribute of sovereignty, immunity also extended to tribal nations, whom the federal government and European powers included among the family of sovereigns.¹³⁴ Although cases involving

for individuals who had claims against the Crown. *Id.*

128. Florey, *Borders*, *supra* note 20, at 616.

129. Julian Yap, *State Sovereign Immunity and the Law of Nations: Incorporating a Commercial Act Exception into Eleventh Amendment Sovereign Immunity*, 78 U. CIN. L. REV. 81, 93 (2009).

130. *Id.* at 94 (noting that the theory of foreign sovereign immunity is based on the “ideas of sovereign independence, equality, and dignity” found in classical scholars’ writings). The first application of immunity principles in the tribal government context was in a lawsuit against Principal Chief John Ross, the chief executive of the Cherokee Nation, where the Supreme Court invoked this principle of personal immunity for Principal Chief Ross as a public officer of the Cherokee Nation. *Parks v. Ross*, 52 U.S. (11 How.) 362, 374 (1850) (discussed *infra*, Part III.D.1); *see also* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (relying on Vattel’s international law writings to describe the Cherokee Nation and other Indian tribes as entities that did not lose their sovereignty by coming under the protection of a more powerful sovereign), *abrogation recognized by* *Nevada v. Hicks*, 533 U.S. 353 (2001).

131. Yap, *supra* note 129, at 94.

132. THE FEDERALIST NO. 81, at 446 (Alexander Hamilton) (E.H. Scott ed., 1898).

133. *See* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821) (emphasizing that the sovereign immunity of the United States is a “universally received opinion”); Chemerinsky, *supra* note 20, at 1201, 1203 (explaining how the people and courts have consistently acted as though sovereign immunity has always been a principle in the United States).

134. *See* POMMERSHEIM, *supra* note 61, at 38, 61 (noting that tribes, like foreign nations, were recognized as sovereigns in the Constitution although they were not

tribes and tribal officials' immunity from suit were quite rare until the late twentieth century, the courts in the tribal immunity cases (including the Supreme Court) applied the same principles and reasoning that contemporaneous courts applied to foreign, the federal, and the state governments and officials. The following section examines those principles and reasons.

A. *Foreign Sovereign Immunity*

The origin and trajectory of nation-state immunity are "difficult to trace,"¹³⁵ but the concept long predates the United States. The Supreme Court's early foreign immunity jurisprudence applied the general common law principles of nation-state sovereign immunity discussed above, and adopted them without much analysis or reasoning. Chief Justice Marshall basically accepted the doctrine at face value when the Supreme Court first recognized it in 1812, in *The Schooner Exchange v. McFaddon*.¹³⁶ Relying on principles of immunity for foreign diplomats and national dignity to dismiss a U.S. citizen's action asserting title to a French vessel docked in Philadelphia, Marshall stated that "the whole civilized world concurred" in these principles.¹³⁷ But he offered no explanation for these principles beyond the "perfect equality and absolute independence of sovereigns" and a "common interest impelling them to mutual intercourse."¹³⁸

Schooner Exchange was understood to mean that foreign sovereigns enjoyed absolute immunity—i.e., immunity for both their governmental and commercial acts—in U.S. courts.¹³⁹ The Supreme Court confirmed this absolute immunity rule in 1926 when it upheld immunity in a case involving an Italian merchant ship.¹⁴⁰ In the

involved in its drafting or ratification); see also *Worcester*, 31 U.S. (6 Pet.) at 559–60 ("The very term 'nation,' . . . applied to [Indigenous polities], means 'a people distinct from others'" and that "treaty" and "nation" were applied to Indian nations and "to the other nations of the earth . . . all in the same sense.").

135. Yap, *supra* note 129, at 93.

136. 11 U.S. (7 Cranch) 116 (1812).

137. *Id.* at 137–38; see also *id.* at 138 (discussing immunity extended to foreign ministers and stating "[w]hatever may be the principle on which this immunity is established").

138. *Id.* at 137.

139. See, e.g., *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126, 1134 (Cal. 2006) ("[W]hile the holding [in *Schooner*] was narrow, the opinion was regarded as standing for the proposition that foreign sovereigns had absolute immunity from United States jurisdiction." (internal quotation marks omitted)).

140. See *Berizzi Bros. Co. v. Pesaro*, 271 U.S. 562, 569–70, 574 (1926) (holding that the decision in *Schooner Exchange* "cannot be taken as excluding merchant ships held and used by a government"). But see Yap, *supra* note 129, at 96, 99 (arguing that the

following decades, the Court began to defer to the State Department's determinations regarding which defendants enjoyed immunity.¹⁴¹ The Court sometimes gave reasons for deferring to the Executive (or to Congress), but not for the doctrine itself.

After this practice proved unworkable, Congress adopted the Foreign Sovereign Immunities Act (FSIA) in 1976.¹⁴² It carves out exceptions to the common law doctrine of nation-state immunity, including an exception for foreign nations' commercial activities in the United States.¹⁴³ This exception was created in part due to Cold War politics and a concern that absolute immunity gave foreign nations an unfair competitive advantage in business transactions.¹⁴⁴ Outside of the exceptions in the FSIA, however, foreign nations enjoy immunity in federal and state courts.

B. Federal Sovereign Immunity

Like foreign nations' sovereign immunity, the federal government's immunity was simply taken as a given, or as a "universally received opinion."¹⁴⁵ To the extent there was any, the reasoning for the Supreme Court's holdings varied.¹⁴⁶ In 1882, the Court stated in *United States v. Lee* that "[t]he principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."¹⁴⁷ It cited Chief Justice Marshall's 1821 opinion in *Cohens v. Virginia* as "[t]he first recognition of the general doctrine,"¹⁴⁸ but *Cohens* (like *Lee*) gave no reason for it.¹⁴⁹

absolute doctrine was not adopted by U.S. courts until *Berizzi Bros.*, and that *Schooner Exchange* is incorrectly cited as the source for the doctrine).

141. This move coincided with a general trend in international law away from recognizing absolute immunity in the mid-twentieth century. See Yap, *supra* note 129, at 93.

142. See *Agua Caliente*, 148 P.3d at 1134 (explaining that Congress passed the FSIA to create more predictable rules for foreign sovereign immunity (citing *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 759 (1998))).

143. 15 U.S.C. § 1605(a) (2) (2006).

144. Seielstad, *supra* note 24, at 676; see also Yap, *supra* note 129, at 99–100 ("[T]he absolute theory of immunity began to be perceived as undermining U.S. business interests.").

145. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411 (1821).

146. See, e.g., Gellhorn & Schenck, *supra* note 41, at 722 (noting that the Supreme Court's stated reasons for upholding the federal government's immunity varied and that the courts "so consistently and insistently held that 'the [federal] government is not liable to be sued, except with its own consent, given by law,' that citation of supporting authorities soon became unnecessary" (citations omitted)).

147. 106 U.S. 196, 207 (1882).

148. *Id.* (citing *Cohens*, 19 U.S. (6 Wheat.) at 412); see also Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 523 n.5 (calling *Cohens* the Supreme Court's "first clear reference to the sovereign immunity of the United States" but noting an "earlier but more ambiguous reference" in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 335–36

Nor did the Supreme Court identify a reason or source for the doctrine in 1846 when it first held that the United States can be sued only under legislation waiving its immunity.¹⁵⁰ That is still the rule today, but over the past century and a half Congress has limited the federal government's immunity in the Tucker Act, the Federal Tort Claims Act, the Administrative Procedure Act, and other legislation, including for some of its commercial activities.¹⁵¹ The federal government's immunity bars actions not covered by one of these congressional waivers.

C. State Sovereign Immunity

State sovereign immunity's origin is also unclear,¹⁵² but the doctrine derives from states' existence as independent sovereigns before the Constitution.¹⁵³ The big debate in the state immunity jurisprudence and scholarship is the degree to which states gave up, or gave Congress the authority to abrogate, this immunity in the Constitution.¹⁵⁴ The focus of this Article, however, is on how the doctrine was justified—and the reasoning used to support it—as it

(1816)).

149. See *Lee*, 106 U.S. at 207 (acknowledging that Marshall's opinion in *Cohens* gave no force or reason for recognizing foreign sovereign immunity as a general doctrine).

150. See Jackson, *supra* note 148, at 523 n.5 (discussing *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846)); see also David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 149 n.3 (noting that *McLemore* did not identify the source for federal sovereign immunity).

151. See, e.g., 28 U.S.C. § 1346(b) (2006) (imposing government liable for the negligent or wrongful acts or omissions of its employees made while acting within the scope of their official duties); *id.* § 1491(a)-(b)(1) (waiving sovereign immunity for contract claims and for noncontractual claims where a plaintiff seeks the return of money paid to, or asserts that she is entitled to payment from, the government).

152. See Seielstad, *supra* note 24, at 671 (“The source and justification for the [state sovereign immunity] doctrine is the subject of much debate.”); Yap, *supra* note 129, at 101 (“[T]he [state sovereign immunity] doctrine’s source remains unclear.”); see also Jackson, *supra* note 148, at 528 (discussing confusion and uncertainty in early U.S. law and explaining that “[t]he nature of the sovereignty created under the 1789 Constitution was something new and uncertain—it took the people and the institutions time to work out their relationships”).

153. See *Alden v. Maine*, 527 U.S. 706, 713 (1999) (explaining that the states’ immunity from suit does not derive from the Eleventh Amendment, but instead was something they enjoyed before the Eleventh Amendment was adopted); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 124–25 (1996) (Souter, J., dissenting) (arguing that state immunity is based on a “pre-existing principle of sovereign immunity, broader than the Eleventh Amendment itself”); Katherine H. Ku, Comment, *Reimagining the Eleventh Amendment*, 50 UCLA L. REV. 1031, 1038–39 (2003) (noting that a majority of the Rehnquist Court agreed that state sovereign immunity does not come from the text of the Constitution, but rather is an immunity they enjoy under the U.S. system of “dual sovereignty”).

154. See, e.g., Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1825–35 (2010) (examining the different arguments and theories in scholarly literature and the Court’s more recent state immunity cases).

developed in U.S. law. A survey of the Supreme Court's foundational state immunity cases yields three basic justifications for state immunity: sovereign immunity was recognized in the common law, sovereign immunity protected the states' treasuries, and it was above states' dignity to be sued by private parties.

The first state sovereign immunity case was decided under the Articles of Confederation, when the Pennsylvania Supreme Court quashed a writ of attachment issued by a lower court against goods belonging to Virginia in satisfaction of a debt Virginia allegedly owed.¹⁵⁵ The Pennsylvania court apparently did not issue a written decision, but the Pennsylvania attorney general argued for dismissal on grounds that the writ was "void" and "a mere nullity" because "the court had no jurisdiction."¹⁵⁶ Commentators believed that the court's decision was based "[o]n the General principle of a suit ag[ain]t a Sovereign State."¹⁵⁷ The Supreme Court would invoke and adopt this general principle, with little analysis, in its post-constitutional state immunity jurisprudence.

The Justices in *Chisholm v. Georgia*,¹⁵⁸ the Supreme Court's first state immunity case and the case that led to the Eleventh Amendment, simply cited English common law as the reason for the states' immunity.¹⁵⁹ In *Cohens v. Virginia*, one of the Supreme Court's early post-Eleventh Amendment opinions, Chief Justice Marshall cited the "general proposition" that "a sovereign independent State is not suable, except by its own consent."¹⁶⁰ He also suggested that the

155. *Nathan v. Virginia*, as reprinted in *M'Carty v. Nixon*, 1 U.S. (1 Dall.) 77, 77 n.* (Pa. C.P., Phila. Cnty. 1781); see Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1579 n.94 (2002) (discussing *Nathan*).

156. *Nathan*, 1 U.S. (1 Dall.) at 79.

157. Nelson, *supra* note 155, at 1579 (quoting a letter from Edmund Pendleton to Nathaniel Pendleton); see also *id.* ("[T]he principle of this adjudication[] met with the approbation of all the judges' of the state's supreme court, although it did not reach them in a judicial capacity." (quoting Alexander Dallas, the court reporter)).

158. 2 U.S. (2 Dal.) 419 (1793).

159. See *id.* at 460 (opinion of Wilson, J.) (discussing English common law); see also *id.* at 449 (opinion of Iredell, J.) ("[T]here are no principles of the old law, to which, we must have recourse, that in any manner authorise the present suit, either by precedent or by analogy."). The *Chisolm* Court found that the states had waived their immunity, to a large degree, in ratifying the Constitution. The Justices wrote their opinions seriatim at the time, and four of the five agreed that Georgia, by ratifying the Constitution, ceded any sovereign immunity it may have had against suits in United States federal court. Justice Iredell, the most senior Justice whose dissenting opinion is often cited for the proposition that states did not broadly give up their immunity against suit in federal courts, actually did not rule on this issue; his opinion was premised on the wording of the 1789 Judiciary Act. See *id.* at 449 ("My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose . . .").

160. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380 (1821) (holding, further, that the states consented to suits in federal court on appeals from state courts).

reason for states' immunity was to protect their treasuries, and that the Eleventh Amendment was adopted in response to their concerns about liabilities for their debts—not to protect “the dignity of a State.”¹⁶¹

By the middle of the nineteenth century, the principle that states and other sovereigns were not suable was well-established. In 1857, Chief Justice Taney drew on customary international law sovereign immunity principles, but did not cite any authority, when he stated in *Beers v. Arkansas* that “[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.”¹⁶² In 1883, the Court in *Louisiana v. Jumel*¹⁶³ ruled, without giving any explanation or authority, that a state could not be sued “in its capacity as an organized political community.”¹⁶⁴ Four years later, the Court in *In re Ayers*¹⁶⁵ cited *Jumel* and—for the first time—invoked dignity in the state immunity context, claiming that the Eleventh Amendment was adopted to avoid the “indignity” of subjecting states to judicial processes at the request of private parties.¹⁶⁶ The *Ayers* Court further opined that immunity bars not just contract damages

161. See *id.* at 406 (“[A]t the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument.”); *id.* (explaining that the motive for the Eleventh Amendment “was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal,” or to protect States from being sued by other States or foreign States; it was to protect states from being sued by individuals looking to collect debts from them).

162. 61 (20 How.) U.S. 527, 529 (1857); see also Yap, *supra* note 129, at 107 (saying Justice Taney “went out of his way” to rely on international law). The *Beers* Court held that Arkansas was free to change or withdraw entirely its immunity waiver made in connection with a bond issuance, explaining that the state’s exercise of this power would “violate[] no contract with the parties . . . [but would] merely regulate[] the proceedings in its own courts, and limit[] jurisdiction it had before conferred in suits when the state consented.” *Beers*, 61 U.S. (20 How.) at 530.

163. 107 U.S. 711 (1883).

164. *Id.* at 720.

165. 123 U.S. 443 (1887).

166. *Id.* at 505. According to *Ayers*:

It was thought to be neither becoming nor convenient that the several states . . . , invested with . . . sovereignty which had not been delegated to the United States, should be summoned as defendants to answer to complaints of private persons, . . . and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals, without their consent, and in favor of individual interests.

Id. The *Ayers* Court thus put forth an explanation for state immunity, which reflects not only that it was beneath states’ dignity to be haled into court by private parties, but also that allowing these suits would represent judicial interference with the states’ public policy and public affairs administration—in other words, their self-government.

claims but also “*all other actions and suits . . .*, whether at law or in equity.”¹⁶⁷

Beers, *Jumel*, and *Ayers* are important not only because they were the leading state sovereign immunity cases of their time,¹⁶⁸ but also because they were cited in the early tribal immunity cases decided in the following decades that similarly barred suits on contracts or sought injunctive relief based on a contract.¹⁶⁹ Up until this point, the Supreme Court’s jurisprudence simply relied on the general principle that immunity inheres in the sovereign. And its more specific reasoning was inconsistent: Chief Justice Marshall said in *Cohens* that state immunity existed to protect states’ finances, and that state dignity had nothing to do with the Eleventh Amendment;¹⁷⁰ but the Court in *Ayers* said the amendment’s “very object and purpose” was to protect state dignity.¹⁷¹

By the last decade of the nineteenth century, when the first published immunity cases involving tribes were decided, state immunity—according to the Court in *Hans v. Louisiana*¹⁷²—had been recognized so often that it was no longer necessary to formally assert its existence.¹⁷³ *Hans*, which over time has become perhaps the Supreme Court’s most-cited state immunity case, cites *Jumel* and *Ayers* and quotes *Beers*’ language about sovereign immunity being an “established principle” of United States and international law.¹⁷⁴ The

167. *Id.* at 502 (emphasis added).

168. See Currie, *supra* note 150, at 152–53 (discussing *Beers*, *Jumel*, *Ayers* and other contemporaneous sovereign immunity cases).

169. Compare *Ayers*, 123 U.S. 443 (suit for injunctive relief against Virginia officials who threatened to seize property in satisfaction of taxes that taxpayers had paid with bonds which Virginia later revoked), *Louisiana v. Jumel*, 107 U.S. 711 (1883) (lawsuit by bondholders to force collection of taxes after Louisiana changed its law and breached its obligation to collect the taxes), and *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1857) (breach of contract action brought under the Contracts Clause), with *Adams v. Murphy*, 165 F. 304, 308–09 (8th Cir. 1908) (suit alleging breach of contract by Creek Nation and seeking to compel performance under contract where court cited *Ayers* and *Jumel*), *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895) (suit alleging breach of and seeking to enforce contract between attorney and Choctaw Nation where court cited *Beers*), and *Chadick v. Duncan*, No. 15,317, slip op. at 77 (App. D.C. Mar. 3, 1894) (copy available at the Nat’l Archives & Records Admin., Record Group No. 376, Case File No. 314) (suit alleging breach of and seeking to enforce contract with Cherokee Nation for purchase of government bonds where court cited *Beers* and *Ayers*).

170. *Cohens v. Virginia*, 19 U.S. (20 How.) 264, 406 (1821).

171. *Ayers*, 123 U.S. at 505.

172. 134 U.S. 1 (1890).

173. *Id.* at 16 (“The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.”).

174. *Id.* at 10, 17 (citing *Jumel*, 107 U.S. 711; *Ayers*, 123 U.S. 443); see also *id.* at 17 (“It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and

Hans Court also quotes Hamilton's statement in *The Federalist No. 81* that immunity is "inherent in the nature of sovereignty"¹⁷⁵ and several other founders' statements about the indignity of states being haled into court by individuals.¹⁷⁶ But *Hans* offers no justification for state immunity beyond these vague pronouncements.¹⁷⁷

The Supreme Court continued to rely on generic reasoning to uphold state immunity up through the early twentieth century, when it first formally recognized the tribal sovereign immunity doctrine.¹⁷⁸ In 1921, the Court in *In re New York* called state sovereign immunity "a fundamental rule of jurisprudence" that "ha[d] become established by repeated decisions of this court"¹⁷⁹ when it held that federal courts lack jurisdiction over suits against states in admiralty.¹⁸⁰ When it applied state immunity against a foreign nation in 1934, the Supreme Court in *Monaco v. Mississippi*¹⁸¹ relied on the principles and "postulates" reflected in *Hans*—namely the assertion that states are immune from suit except to the extent they surrendered that immunity in the "plan of the [Constitutional] convention."¹⁸² Like *Hans*, *Monaco* cited only *The Federalist, No. 81* and select statements from the Virginia ratification debates as reasons to uphold the doctrine.¹⁸³

The Supreme Court's reasoning is not the only unsophisticated and inconsistent aspect of its sovereign immunity jurisprudence up

permission." (quoting *Beers*, 61 U.S. (20 How.) at 529).

175. *Id.* at 12–13 (quoting THE FEDERALIST NO. 81, *supra* note 132 (Alexander Hamilton)).

176. *See id.* at 14 (citing statements of George Mason, Patrick Henry, James Madison, and John Marshall at the Virginia ratification convention).

177. Though a concern about protecting the states' treasuries arguably influenced *Hans*, *Jumel*, *Ayers*, and the Supreme Court's other Reconstruction-era immunity decisions (all involving the debts of former Confederate states), the politics surrounding them may have kept the Supreme Court from invoking this justification to uphold immunity. *See, e.g.*, Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 1946–47 (2003) (discussing *Hans* and other state immunity cases in the context of post-Reconstruction politics).

178. After its 1850 decision in *Parks v. Ross*, 52 U.S. (11 How.) 362, 374 (1850), recognizing the immunity of the Cherokee Nation's chief executive official, the Supreme Court decided its first case involving the immunity of an Indian tribe (and not just tribal officials) in 1919 and its next tribal immunity case in 1940. *See* *USF&G*, 309 U.S. 506 (1940) (upholding the immunity of the Choctaw Nation and Chickasaw Nation); *Turner v. United States*, 248 U.S. 354 (1919) (recognizing the immunity of the Muscogee (Creek) Nation).

179. 256 U.S. 490, 497 (1921) (citing *Hans v. Louisiana*, 134 U.S. 1, 10–17 (1890); *Beers*, 61 U.S. (20 How.) at 529).

180. *Id.* at 497.

181. 292 U.S. 313 (1934).

182. *Id.* at 323 (internal quotation marks omitted).

183. *Id.* at 322–25 (citing statements of James Madison and John Marshall and quoting THE FEDERALIST NO. 81, *supra* note 132 (Alexander Hamilton)).

through this time. The Court's nomenclature was still developing too. Before 1934, when it decided *Monaco*, the Court had used the words "sovereign immunity" in only nine cases, seven of which were in the preceding decade.¹⁸⁴

As the Court began using the phrase "sovereign immunity" more consistently, it also articulated a (slightly) clearer justification for state immunity—which shifted back to protecting states' treasuries. In 1933, for example, the Court relied on Chief Justice Marshall's opinion in *Cohens* to claim that the motive for the Eleventh Amendment was to protect states against debt prosecutions in federal courts.¹⁸⁵ Justice Douglas explained in 1959 that the amendment was designed to protect both the treasuries and dignities of states.¹⁸⁶ The need to protect states' treasuries generally, and early states' concerns over Revolutionary War debts particularly, remained the predominant justification for state immunity up through the 1980s.¹⁸⁷

In the 1990s, the Supreme Court returned to the dignity rationale for state immunity, focusing on the states' "sovereign dignity" within the federal system and not just the indignity of private suits.¹⁸⁸ The Court entered the twenty-first century calling the protection of this sovereign dignity the "preeminent purpose" and primary function of

184. These results are based on a search for "sovereign immunity" in Westlaw's "sct" database.

185. *Missouri v. Fiske*, 290 U.S. 18, 26–27 (1933) (citing *Cohens* for the proposition that "the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with respect to the prosecution of state debts in the federal courts").

186. See *Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275, 276 n.1 (1959) (explaining that although Congress passed the Eleventh Amendment in response to *Chisholm v. Georgia* and the perceived affront to states' dignity, more than just the states' dignity was at stake because many of them had defaulted on their debts and were experiencing financial difficulties (citing MARIAN D. IRISH & JAMES W. PROTHO, *THE POLITICS OF AMERICAN DEMOCRACY* 123 (1959 ed.)).

187. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 151 (1984) (Stevens, J., dissenting) (noting the general agreement that the Eleventh Amendment was adopted because the states were concerned they would become financially ruined if the courts forced them to repay their Revolutionary War debts (citing *Petty*, 359 U.S. at 276 n.1; *Fiske*, 290 U.S. at 27; *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406–07 (1821))).

188. See, e.g., *Alden v. Maine*, 527 U.S. 706, 748–49 (1999) ("The founding generation thought it 'neither becoming nor convenient that the several States . . . should be summoned as defendants to answer the complaints of private persons.' The principle of sovereign immunity preserved by constitutional design 'thus accords the States the respect owed them as members of the federation.'" (citing *In re Ayers*, 123 U.S. 443, 505 (1887))); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993); see also *Ku*, *supra* note 153, at 1042 ("Articulated more precisely then, the driving purpose of state sovereign immunity is not protecting the dignity of states but rather protecting the *sovereign* dignity of states.").

state immunity.¹⁸⁹ Protecting states' treasuries remains a secondary justification.¹⁹⁰

Whichever justification is used, it does not change the reality that little analysis undergirds the state immunity doctrine. Even today, the Court is citing and relying on the same principles found in *Ayers*, *Jumel*, and *Hans*, cases that are short on reasoning and offer after-the-fact justifications for the doctrine.

Invoking the sovereign dignity concept, the Court in the 1990s restricted Congress's power to abrogate state immunity, most notably in *Seminole Tribe v. Florida*.¹⁹¹ Congress can now abrogate state immunity only under the Reconstruction Amendments and certain provisions of the Bankruptcy Code.¹⁹²

189. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760, (2002); *see also id.* at 765 (stating that the "central purpose" of state immunity is to "accord the respect owed them as joint sovereigns" (internal quotation marks omitted)).

190. *See id.* at 769 (arguing that sovereign immunity's primary purpose is to protect states' respect and dignity, not their treasuries); *Del Campo v. Kennedy*, 517 F.3d 1070, 1075 (9th Cir. 2008) (noting that, in addition to protecting states' respect and dignity, sovereign immunity also protects states' treasuries). The Supreme Court also suggests a self-governance justification for state sovereign immunity that links the sovereign dignity and fiscal protection justifications. For example, the Court in *Alden* stated:

Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

527 U.S. at 751; *see also Fed. Mar. Comm'n*, 535 U.S. at 765 (noting that state immunity shields their treasuries "and thus preserv[es] the States' ability to govern in accordance with the will of their citizens") (internal quotation marks omitted); *Ayers*, 123 U.S. at 505 (arguing that allowing suits would be judicial interference with states' public policy and public affairs administration).

191. 517 U.S. 44 (1996). The elevation of the state dignity rationale in the 1990s is part (and parcel) of the Supreme Court's constitutionalization of state sovereign immunity. *See id.* at 128 (Souter, J., dissenting) (criticizing "post-*Hans* dicta indicating that this immunity is constitutional"); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999) (referencing "the now-constitutionalized doctrine of state sovereign immunity"); Vicki Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 953 (2000) (noting that the Court's decisions have transformed the status of state sovereign immunity into that of a first order constitutional principle).

192. *See Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) (holding that Congress has power under the Bankruptcy Clause to abrogate state immunity in some instances); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (recognizing Congress's power to abrogate state immunity under the Fourteenth Amendment and the other Reconstruction Amendments); *Seminole*, 517 U.S. at 59, 66, 72 (holding that Congress lacks power to abrogate state immunity under the Interstate Commerce Clause and

Except where Congress has or the states themselves have limited their immunity (including through waivers implied in the constitutional structure and under their own laws for suits in their own courts),¹⁹³ states enjoy the same common law nation-state immunity they had before they joined the Union. The Court recently reaffirmed the rule stated in *Ayers* that this immunity bars all suits, no matter the relief sought, and is not just a defense against liability.¹⁹⁴ It also clarified that states' immunity extends to their commercial activities as well.¹⁹⁵

D. *The Reasons for and Scope of Other Immunity Doctrines*

The reasons given for sovereign immunity have changed over time,¹⁹⁶ but its ubiquity has been constant. Basically, the Supreme Court unquestioningly applied the sovereign immunity doctrine to foreign, the federal, and the state governments based on already established and commonly understood principles. To the extent the Court's opinions employ analysis and reasoning, it is some combination of the following: sovereign immunity inheres in the

overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which a plurality of the Court held that Congress did have this power).

193. Under current Supreme Court doctrine, states can sue each other in federal court or in state court, and be sued by the federal government in federal court, based on the theory that the states impliedly waived immunity against these suits in the Constitution. See *Nevada v. Hall*, 440 U.S. 410, 426 (1979) (holding that states impliedly consented, in the Constitution, to suits in other states' courts); see also *North Dakota v. Minnesota*, 263 U.S. 365, 373 (1923) (holding that states impliedly consented to suits by other states in federal courts). States likewise do not enjoy immunity against suits brought under the Fourteenth Amendment and quasi in rem Bankruptcy Clause actions, on the theory that they waived immunity from these actions in the Constitution. See *Hood*, 541 U.S. at 445 (holding that the states "ceded their immunity from private suits in bankruptcy in . . . the Bankruptcy clause"); *Fitzpatrick*, 427 U.S. at 453–56 (describing the Fourteenth Amendment as a restriction on state power which allows for private suits against states).

194. See *Fed. Mar. Comm'n*, 535 U.S. at 765–66 ("[S]overeign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit."); *Ayers*, 123 U.S. at 502 ("[I]mmunity includes . . . all . . . actions and suits . . . , whether at law or in equity.").

195. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685–86 (1999) (holding that state immunity applies to states' commercial and noncommercial activities); see also *Yap*, *supra* note 129, at 84 (highlighting the Court's refusal to apply a commercial act exception for state sovereign immunity, thus granting states sovereign immunity "even though they . . . engage[] in commercial activities otherwise indistinguishable from a private enterprise").

196. See *Florey*, *Penumbra*, *supra* note 21, at 765 (explaining how the doctrine "has come to serve new purposes" over time and especially in recent years); see also Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1060–61 (1946) (noting the various reasons offered over time to justify sovereign immunity).

sovereign and was recognized in the common law; suits are offensive to a sovereign's or state's dignity; and/or sovereign immunity protects the states' treasuries (consistent with the idea that the Eleventh Amendment was adopted because of states' fears about Revolutionary War debts). Though this reasoning is less than lucid, we can draw from it something about the reality of governance that brings home immunity. Having governance responsibilities justifies immunity, as does having assets (which belong to the citizenry or community) to protect.

The first courts to decide tribal sovereign immunity cases invoked the same "well-established principle" of sovereign immunity—and reasoning to support it—found in contemporaneous cases involving other sovereigns, and states in particular. The courts in the tribal immunity cases also borrowed the contours of these other sovereigns' immunity doctrines, really of the general sovereign immunity doctrine. Consistent with this broad common law doctrine, they held that tribal immunity applied to all types of suits—not just for contract damages, but also for prospective relief and all other causes of action.¹⁹⁷ Also consistent with the common law doctrine applied to other sovereigns, the courts in the tribal cases upheld immunity except where it had been expressly abrogated by Congress or waived by the tribes themselves. The following part discusses these cases and their historical context.

III. THE TRIBAL SOVEREIGN IMMUNITY STORY

The tribal sovereign immunity doctrine's origins lie in the general common law sovereign immunity doctrine and in principles underlying U.S. relations with Indian nations that are reflected in the Constitution and the Supreme Court's earliest federal Indian law opinions.¹⁹⁸ But the story of exactly how the tribal immunity doctrine evolved from these principles in a series of eighteenth and early

197. See *Adams v. Murphy*, 164 F. 304, 308–09 (8th Cir. 1908) (explaining that immunity bars claims for damages, claims for injunctive relief, and all other types of actions); *Thebo v. Choctaw Tribe*, 66 F. 372, 376 (8th Cir. 1895) (same); *Chadick v. Duncan*, No. 15,317, slip op. at 90–91 (App. D.C. March 3, 1894) (copy available at the Nat'l Archives & Records Admin., Record Group No. 376, Case File No. 314) (same); cf. *Fed. Mar. Comm'n*, 535 U.S. at 765 (noting that "sovereign immunity applies regardless of whether a" plaintiff seeks monetary damages or another type of relief); *Ayers*, 123 U.S. at 502 (recognizing that immunity bars all types of actions, not just contract claims).

198. See generally Seielstad, *supra* note 24, at 683–86 (locating the doctrinal foundation for tribal immunity in early colonial-tribal and federal-tribal relationships and Supreme Court jurisprudence recognizing tribal sovereignty); Struve, *supra* note 21, at 138–42 (same).

twentieth century cases involving the Cherokee, Choctaw, Chickasaw, and Muscogee (Creek) Nations—and how these tribes' legal and political histories figured into those cases—has not been fully told.¹⁹⁹ It shows that tribal immunity shares a common doctrinal origin with other governments' immunity, that the tribal immunity doctrine did not arise by accident, and that courts and others are wrong to suggest or assume otherwise.

A. *Fundamental (Federal Indian Law) Principles and Early U.S. Indian Policy*

Early relations between Indigenous Peoples in North America and Europeans were based primarily in trade and diplomacy.²⁰⁰ England and other European nations recognized Indian tribes as independent sovereigns existing within the boundaries of the various territories claimed by the European crowns, and they entered into numerous treaties with tribes. Of particular interest here are treaties negotiated

199. Others have discussed aspects of the tribal immunity doctrine's historical development, but no one has yet synthesized the various cases and parts of the story. See Florey, *Borders*, *supra* note 20, at 619–21 (examining the evolution of the tribal sovereign immunity doctrine in twentieth century Supreme Court cases'); Martin & Schwartz, *supra* note 124, at 770–73 (discussing the tribal sovereign immunity doctrine in twentieth century Supreme Court jurisprudence); Seielstad, *supra* note 24, at 682–99 (tracing the historical underpinnings of tribal sovereign immunity through early colonial contact and U.S. Indian policy, the Supreme Court's early federal Indian law jurisprudence, turn-of-the-twentieth century federal circuit court cases, and early twentieth century Supreme Court tribal immunity cases); Struve, *supra* note 21, at 138–52 (tracing the development of the tribal immunity doctrine through early federal Indian policy and nineteenth and early twentieth century Supreme Court decisions); Wilson, *supra* note 75, at 111–28 (providing an overview of twentieth century Supreme Court tribal sovereign immunity cases). Although some scholars perhaps resist the notion that tribal immunity's development was accidental, they do not take the claim head on. See Florey, *Borders*, *supra* note 20, at 619 (noting the *Kiowa* Court's "almost by accident" statement but referring to "the murkiness of tribal sovereign immunity's origins"); Martin & Schwartz, *supra* note 124, at 770–71 (stating that "the U.S. Supreme Court claims that the doctrine developed 'almost by accident'" and seemingly accepting the claim at face value) (internal citation omitted); Seielstad, *supra* note 24, at 679–80 (stating that the Court's decision in *Kiowa Tribe* is "solid in its endorsement of tribal immunity," but ignoring *Kiowa's* statement about the doctrine's "accidental" development).

These accounts also devalue the significance of the Five Tribes' histories in the doctrine's evolution. See Florey, *Borders*, *supra* note 20, at 619 (dedicating only two sentences to the Five Tribes cases and not mentioning the particular tribes involved); Seielstad, *supra* note 24, at 686–94 (discussing Five Tribes cases but not the tribes' histories); Alvin J. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 29–33 (1975) (discussing some of the Five Tribes cases and their relation to the Supreme Court's later jurisprudence, though not the histories of the tribes involved).

200. See, e.g., POMMERSHEIM, *supra* note 61, at 9 ("[E]arly Indian-colonial encounters were largely related to four separate but overlapping streams of engagement: trade and land acquisition, diplomacy and war, governance, and cultural attitudes.").

between England, France, and Spain—who were competing to control the trade in the Southeast—and the tribal polities developing among the Cherokee, Choctaw, Chickasaw, and Muscogee peoples, who were undergoing societal changes as they grew more involved in the expanding fur trade and global political economy.²⁰¹ It is these polities whose sovereign immunity the courts would recognize years later in the first tribal immunity cases.

After the United States declared its independence from Great Britain, it followed England's and other European nations' established policy of recognizing tribal sovereignty and associating with tribes through treaties.²⁰² Organized under the Articles of Confederation, the United States signed their first treaty in 1778, with the Delaware Nation. It invited the Delawares (separately or as part of an Indian confederacy) to join the new republic.²⁰³ Another early treaty with the Cherokee Nation, the 1785 Treaty of Hopewell, recognized the Cherokees' right to send a delegate to the U.S. Congress.²⁰⁴

201. See DUANE CHAMPAGNE, SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEE, THE CHOCTAW, THE CHICKASAW, AND THE CREEK 50 (1992) [hereinafter CHAMPAGNE, CHANGE] (noting the demands placed on the Southeastern tribes by “[i]ncorporation into the expanding fur trade and competitive geopolitical relations”); ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC 27–36 (2d ed. 1967) [hereinafter DEBO, CHOCTAW] (discussing diplomatic relations and treaties between England, France, and Spain and the Choctaws, Chickasaws, Creeks, and Cherokees); ARRELL M. GIBSON, THE CHICKASAWS 32–77 (1971) (examining Chickasaw and Choctaw relations and treaties with the Spanish, French, and English); MICHAEL D. GREEN, THE POLITICS OF INDIAN REMOVAL: CREEK GOVERNMENT AND SOCIETY IN CRISIS 18–24, 30 (1982) (describing Creek relationships and trade with the Spanish, French, and English, as well as trade conferences and treaties between the British and Creeks and Cherokees). Diplomatic and political relationships were in constant flux not only between the European powers and tribes, but also among the tribes themselves. See CHAMPAGNE, CHANGE, *supra*, at 56–67 (discussing intratribal and intertribal geopolitical relations); J. LEITCH WRIGHT, JR., CREEKS & SEMINOLES: THE DESTRUCTION AND REGENERATION OF THE MUSCOGULGE PEOPLE 1–6 (1986) (examining changes within the Muscogee confederacy and the origins of the Creek Nation and Seminole Nation); see also GREEN, *supra*, at 12–14 (noting changes in the Muscogee confederacy from the sixteenth to eighteenth centuries).

202. See Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 175–76 (2008) [hereinafter Fletcher, *Political Status*] (noting that the Framers, Congress, and the Supreme Court all recognized the political status of Indian tribes, “albeit in a manner limited by the Doctrine of Discovery and through consent in various treaties”).

203. See Fletcher, *Political Status*, *supra* note 202, at 172 (discussing the Treaty of Fort Pitt); Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TULANE L. REV. 509, 546–47 (2007) [hereinafter Fletcher, *Preconstitutional*] (same).

204. Anne H. Abel, *Proposals for an Indian State, 1778–1878*, reprinted in ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 87, 89 (1907) (citing the Treaty of Hopewell). This right was reaffirmed in the 1835 Treaty of New Echota between the Cherokee Nation and the United States. Treaty with the Cherokee, 1835, U.S.-Cherokee, Dec. 29, 1835, 7 Stat. 478; see also POMMERSHEIM, *supra* note 61, at 82–83

The states found the Articles of Confederation to be lacking, in large part because of unresolved questions about relations among tribes, states, and the federal government.²⁰⁵ So they adopted the Constitution, which centralized Indian affairs at the federal level and gave Congress the authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁰⁶ The framers thus recognized tribes among the family of sovereigns and gave the President the power to make treaties with them.²⁰⁷

During its first century, Congress exercised this Indian Commerce Clause power only to regulate the states’ and United States citizens’ interactions with tribes, most notably in the Indian Trade and Nonintercourse Acts.²⁰⁸ First passed in 1790, these laws (like laws passed under the Articles of Confederation) refer to Indian “nations” and “tribes.”²⁰⁹ Congress’s early involvement in Indian affairs was mostly limited to ratifying and appropriating funds to pay for obligations assumed in treaties, which were the “primary form of legal interaction” between tribes and the federal government until 1871 when treaty-making ended.²¹⁰

Many of the United States’ early treaties, including those first negotiated after the Constitution, were with one or more of the tribal nations in the Southeast—the Cherokee, Chickasaw, Choctaw, Creek, and Seminole—who also continued diplomatic relations with the British, French, and Spanish.²¹¹ As these other countries’ influence

(citing Treaty of New Echota provision, along with provision in Treaty of Fort Pitt with Delawares, as “example[s] of unique political configurations contemplated by treaties”); Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 B.U. PUB. INT. L.J. 91, 91 (2005) (discussing Treaty of New Echota provision).

205. See Fletcher, *Preconstitutional*, *supra* note 203, at 523–24 (“History shows with certainty that one of the greater weakness of the national government under the Articles of Confederation was the nonexclusive character of the Indian Affairs Power.”).

206. U.S. CONST., art. I, § 8, cl. 3.

207. *Id.* art. II, § 2, cl. 2; see *supra* note 202 and accompanying text.

208. Pub. L. No. 1-33, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. § 177 (2006)).

209. *Id.*; see also Fletcher, *Political Status*, *supra* note 202, at 167 (discussing laws passed by the Continental Congress that referred to Indian “nations” and “tribes”).

210. POMMERSHEIM, *supra* note 61, at 63; Fletcher, *Political Status*, *supra* note 202, at 170–73; see also *id.* at 172 (noting that “[f]ederal-tribal relations all but exclusively took the form of treaties during the first century of American history” (footnote omitted)).

211. See, e.g., ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 88–89 (1st ed. 1970) [hereinafter DEBO, HISTORY] (noting 1785 and 1786 treaties between the United States and the Cherokees, Choctaws, and Chickasaws); DEBO, CHOCTAW, *supra* note 201, at 32–34 (discussing a 1784 Spanish treaty with the Choctaws, Chickasaws, and Creeks; a 1792 Spanish treaty with the Choctaws, Chickasaws, Creeks, and Cherokees; and early 1800s U.S.-Choctaw treaties); GIBSON, *supra* note 201, at 81, 99–105 (discussing early 1800s Chickasaw-U.S. treaties); WRIGHT, *supra*

in the region waned, the United States extended its presence geographically and otherwise. By the end of the Nineteenth Century's second decade, the United States had established itself as *the* colonial power in the Southeast.²¹² It adopted a "civilization" policy towards the Southeastern tribes,²¹³ also reflected in its treaties with them,²¹⁴ which encouraged the tribes' integration into the growing Southern agricultural economy.

As plantation agriculture expanded, the tribes' economies changed along with those around them. Tribal landholdings decreased through successive treaty cessions, the fur trade declined, and the tribes grew more reliant on agriculture.²¹⁵ The majority of tribal citizens practiced subsistence farming,²¹⁶ but there was also plantation-style agriculture among the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles, particularly among the mixed-blood families who constituted a majority of the emerging merchant and planter classes and began to play more prominent roles in tribal politics, at least externally.²¹⁷ To different degrees across and within the tribes, the Five Tribes began to allow missionaries into and establish schools in their nations, and to send their children to be educated at outside schools.²¹⁸

note 201, at 137–38, 141 (discussing late eighteenth century Creek-U.S. treaties, including the United States' first Indian treaty signed after the Constitution).

212. See WRIGHT, *supra* note 201, at 101–27, 131 (examining the relationship between trade and diplomacy among the Indians, British, French, and Spanish, concluding in the "development of . . . first American colonial system" in the Southeast).

213. See GREEN, *supra* note 201, at 47–48 (describing the 1819 Civilization Fund Act and civilization program); WRIGHT, *supra* note 201, at 133, 143–46 (examining U.S. civilization policy towards the Creeks); Duane Champagne, *Renewing Tribal Governments: Uniting Political Theory and Sacred Communities*, 1 INDIGENOUS PEOPLES' J.L. CULTURE & RESIST. 24, 25 (2004) [hereinafter Champagne, *Renewing*] (dating the origins of civilization policy to 1790 legislation allocating funds "to promote farming and American living patterns among the Indians").

214. See, e.g., RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 206 (1975) [hereinafter STRICKLAND, FIRE AND SPIRITS] (listing examples of treaties and policies enacted during 1786–1828 that reflected the United States' civilization goals).

215. See CHAMPAGNE, CHANGE, *supra* note 201, at 89–92, 127–28 (discussing the decline of the fur trade and the transition to agricultural economies in the Cherokee, Choctaw, and Creek Nations).

216. See *id.* at 92, 128 (comparing subsistence farmers and plantation owners).

217. See *id.* at 127 (discussing the role of planters and merchants in Cherokee, Chickasaw, and Creek politics); GIBSON, *supra* note 201, at 64–65 (describing Chickasaw mixed bloods "tak[ing] over the management of . . . tribal affairs"); STRICKLAND, FIRE AND SPIRITS, *supra* note 214, at 50 (noting the "ascendancy of mixed-blood leadership" in the Cherokee Nation).

218. See CHAMPAGNE, CHANGE, *supra* note 201, at 149, 166 (noting the different positions regarding missions and schools in Choctaw, Creek, Cherokee, and Chickasaw societies). The role of and reactions to missionaries and schools in the Choctaw, Chickasaw, Creek, and Cherokee Nations are discussed, respectively, in

The tribes also responded to their changing economic, diplomatic, and political realities by adapting their governmental structures and legal institutions.²¹⁹ In the early nineteenth century, the Cherokees formed a more centralized government with a national council, passed their first written law in 1808, and established a national judiciary in 1820.²²⁰ In 1827, the Cherokee government adopted a written constitution that established a tripartite government with executive, legislative, and judicial branches.²²¹

The centralized Creek national council passed its first written laws in the early 1800s and compiled and published the Laws of the Creek Nation in 1818.²²² The Choctaws passed their first written laws in the 1820's and adopted a constitution in 1826.²²³ The Chickasaw national

DEBO, CHOCTAW, *supra* note 201, at 41–42, 45; GIBSON, *supra* note 201, at 106–21; GREEN, *supra* note 201, at 63–65; and Cullen Joe Holland, *The Cherokee Indians Newspapers, 1828–1906: The Tribal Voice of a People in Transition* 17–21 (1956), (unpublished Ph.D thesis, University of Minnesota) (microfilm available at the University of California Los Angeles Library, Record I.D. No. 1758160).

219. This adaptation served two purposes: it made it easier for the tribes to protect their lands against cessions or sales by unauthorized persons, *see* STRICKLAND, FIRE AND SPIRITS, *supra* note 214, at 77 (pointing to the “[d]esire to retain tribal lands as a motivating force behind the adoption of new [Cherokee] laws”); Champagne, *Renewing*, *supra* note 213, at 47 (noting that the Cherokees’ adapted government structure “strengthened their ability to resist U.S. land demands and treaty enticements”), and it provided protection and security for the property interests of the growing merchant/planter classes. *See* GIBSON, *supra* note 201, at 137 (noting that the code of laws passed by the Chickasaws in 1829 “improved law and order enforcement and gave special protection to private property, a concern of the nation’s business community”); STRICKLAND, FIRE AND SPIRITS, *supra* note 214, at 73 (describing the body of Cherokee law adopted in the early nineteenth century as “an instrument designed to serve the needs of the small group of wealthy mixed-blood Cherokees”). The tribes had already undergone governance, institutional, and social change in previous decades, but these changes accelerated in the early nineteenth century. *See* CHAMPAGNE, CHANGE, *supra* note 201, at 56–67 (outlining developments in Cherokee, Chickasaw, Choctaw, and Creek societies in the eighteenth century).

220. *See* STRICKLAND, FIRE AND SPIRITS, *supra* note 214, at 56–64 (discussing the centralization of the Cherokee government, the formation of a national council, and the establishment of the judiciary); *see also* THOMAS LEE BALLENGER, *THE DEVELOPMENT OF LAW AND LEGAL INSTITUTIONS AMONG THE CHEROKEES* 27–34 (2010) (reprinting Ballenger’s doctoral dissertation submitted to the University of Oklahoma in 1937).

221. *See* CHAMPAGNE, CHANGE, *supra* note 201, at 134–40 (describing the formation of the Cherokee constitutional government); STRICKLAND, FIRE AND SPIRITS, *supra* note 214, at 65–66 (discussing the Cherokee constitution and government structure).

222. *See* CHAMPAGNE, CHANGE, *supra* note 201, at 113–17 (discussing Creek government centralization in the late eighteenth and early nineteenth centuries); GREEN, *supra* note 201, at 37, 69–72, 150–51 (examining the Creek government’s centralization and adoption of written laws).

223. *See* CLARA SUE KIDWELL, *THE CHOCTAWS IN OKLAHOMA: FROM TRIBE TO NATION, 1855–1970*, at xv (noting the promulgation of written laws and the establishment of the Choctaw national council which adopted the constitution); *see also* CHAMPAGNE, CHANGE, *supra* note 201, at 149, 151–52 (discussing the Choctaws’ adoption of a written law code and constitution); DEBO, CHOCTAW, *supra* note 201, at 48–49 (same).

council adopted a code of written laws in 1829, after redistricting the nation to “accommodate an emerging public judicial system and to improve administration.”²²⁴ These institutional and other changes were made with the goal of protecting the tribes’ land from alienation and maintaining their cultural, social, and political integrity.²²⁵ But they also had the effect of raising even greater consternation among those advocating for the removal of the Southeastern tribes from their lands.²²⁶

Acting on this desire for Indian lands, the southern states passed laws purporting to assert their jurisdiction within the Indian nations’ boundaries and forbid the tribes’ governments to function.²²⁷ In 1830, Congress passed the Indian Removal Act.²²⁸ Following the tribes’ unsuccessful attempts to protect their national boundaries, the U.S. government forcibly removed the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles from their Southeastern homelands along the infamous Trails of Tears. After removal, the Five Tribes reestablished their nations in the Indian Territory (what is now Oklahoma).²²⁹

224. GIBSON, *supra* note 201, at 137. The four districts were established in 1824. *Id.*

225. See KIDWELL, *supra* note 223, at 6 (describing the Choctaw constitutional government as “both a sign of civilization to U.S. officials and a measure of their adaptation to the political forces that surrounded them”); Julia Coates, *Foreword*, in BALLENGER, *supra* note 220, at i, vii–viii (stating that “the transition to and elaboration of law more similar to that of the Americans probably was not, on the part of the Cherokees, an attempt to assimilate” and describing the development of the Cherokee legal and judicial systems as “a nationalistic response to US colonization”).

226. See CHAMPAGNE, CHANGE, *supra* note 201, at 126 (noting the southern states’ desire for land and describing the Cherokee Nation’s adoption of a constitutional government in 1827 as “a direct counterthreat to the southern states . . . that . . . raised the possibility of permanent and quasi-independent Indian nations within the chartered limits of the states, and . . . precipitated more direct and coercive action on the part of Georgia, Alabama, and Tennessee to pressure the southeastern Indians to remove”); ANGIE DEBO, AND STILL THE WATERS RUN 4 (1972) [hereinafter DEBO, WATERS RUN] (pointing out that the Cherokees’ “advancement in civilization served only to provoke the frontiersmen to increased hostility”).

227. See, e.g., CHAMPAGNE, CHANGE, *supra* note 201, at 143–44 (noting actions by Georgia, Tennessee, North Carolina, and Alabama to extend their laws over the Cherokee Nation); *id.* at 169 (noting the extension of Alabama laws over the Creek Nation); DEBO, CHOCTAW, *supra* note 201, at 51 (discussing Mississippi legislation extending state law over the Choctaw and Chickasaw Nations and purporting to abolish their tribal governments); GIBSON, *supra* note 201, at 140, 154 (describing Mississippi and Alabama laws abolishing the Chickasaw government and asserting state jurisdiction over tribal lands).

228. Ch. 148, 4 Stat. 411 (1830).

229. See DEBO, HISTORY, *supra* note 211, at 117–26 (discussing the removal of the Choctaws, Creeks, Cherokees, Chickasaws, and Seminoles to the Indian Territory).

B. *The Cherokee Cases*

The first cases addressing the political status of Indian nations arose from the Cherokees' resistance to Georgia's attempt to assert its jurisdiction within the Cherokee Nation's boundaries and against the Cherokee government and its citizens. *Cherokee Nation v. Georgia*²³⁰ and *Worcester v. Georgia*,²³¹ both decided in the early 1830s, are part of a trilogy of cases (known as the Marshall Trilogy because they were authored by Chief Justice John Marshall) which laid much of the jurisprudential foundation for federal Indian law.²³² Chief Justice Marshall skirted the issue of Georgia's authority the first time around in *Cherokee Nation*, by ruling that the Cherokee Nation did not qualify as a "foreign state" and therefore lacked standing to sue under Article III.²³³ A year later, the Court held that Georgia had no jurisdiction to enforce its laws within the Cherokee Nation after Samuel Worcester, a Vermont citizen imprisoned by Georgia for residing in the Cherokee Nation, challenged his arrest.²³⁴

The Court's decisions in the Cherokee cases set forth several of the most often-cited propositions in federal Indian law, including that states lack jurisdiction in Indian country,²³⁵ that tribes are "domestic dependent nations" to whom the United States owes a fiduciary obligation,²³⁶ and that Indian affairs are the exclusive province of the federal government.²³⁷ More important for purposes of this Article, however, are the principles the Court invoked and the language it used in setting forth these propositions. Although Chief Justice Marshall held that the Cherokee Nation was not a foreign state under Article III,²³⁸ he described the Cherokee Nation "as a state, as a

230. 30 U.S. (5 Pet.) 1 (1831).

231. 31 U.S. (6 Pet.) 515 (1832), *abrogation recognized by Nevada v. Hicks*, 533 U.S. 353 (2001).

232. See POMMERSHEIM, *supra* note 61, at 112–13 (listing the foundational Indian law principles set forth in the Marshall Trilogy). The other case in the trilogy is *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), in which the Supreme Court adopted the Doctrine of Discovery in a case involving the relationship among tribes, the European sovereigns (and their successors), property rights, and sovereignty. *Id.* at 604–05.

233. *Cherokee Nation*, 30 U.S. (5 Pet.) at 20 ("[A]n Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.").

234. *Worcester*, 31 U.S. (6 Pet.) at 561–62. Mr. Worcester, a missionary, resided in the Cherokee Nation at the invitation of the Cherokee government and with approval of the United States. *Id.* at 515.

235. See *id.*

236. See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

237. See *Worcester*, 31 U.S. (6 Pet.) at 561.

238. See *Cherokee Nation*, 30 U.S. (5 Pet.) at 20. The flip side of the Supreme Court's holding, presumably, is that an action could not be maintained against an Indian tribe or nation, as it would similarly fall outside of the scope of judicial power

distinct political society," and noted that "[t]he acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts."²³⁹

Also interesting is the Justices' debate over where exactly they would place the Cherokee Nation in the family of nations. They all seemed to think that the Cherokee Nation was more qualified for membership than other tribes,²⁴⁰ and the majority was clear in concluding that the Cherokee Nation was a "state," just not a "foreign" one.²⁴¹ By the time the Cherokee cases were decided, the Cherokees had adopted a tripartite constitutional government and a body of written laws.²⁴² The Cherokee government included a bicameral legislature, a judicial system with various judicial districts and appeals courts, and a national police force.²⁴³ The Cherokees had also developed a written language based on Sequoyah's syllabary, achieved a literacy rate above that in surrounding states, and been publishing a national newspaper in both Cherokee and English that was read throughout the United States and in Europe.²⁴⁴

Chief Justice Marshall reaffirmed the statehood of the Cherokee Nation in *Worcester*, where he again referred to the Cherokees as a "distinct community"²⁴⁵ and emphasized the tribe's political status in

set forth in Article III, Section 2 of the Constitution.

239. *Id.* at 16.

240. *See id.* at 21 (Johnson, J., concurring) ("[T]here are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are. I would not here be understood as speaking of the Cherokees under their present form of government; which certainly must be classed among the most approved forms of civil government. Whether it can be yet said to have received the consistency which entitles that people to admission into the family of nations is . . . yet to be determined by the executive of these states."); *id.* at 52-53 (Thompson, J., dissenting) ("The terms *state* and *nation* . . . imply a body of men, united together, to procure their mutual safety and advantage by means of their union Testing the character and condition of the Cherokee Indians by these rules, it is not . . . possible to escape the conclusion, that they form a sovereign state."); *see also* POMMERSHEIM, *supra* note 61, at 107-08, 264-65 (discussing differences among the Justices regarding Cherokee Nation's status). *But see Cherokee Nation*, 30 U.S. (5 Pet.) at 49 (Baldwin, J., concurring) ("[T]he judicial power cannot divest the states of rights of sovereignty, and transfer them to the Indians, by decreeing them to be a nation, or foreign state, pre-existing and with rightful jurisdiction and sovereignty over the territory they occupy.").

241. *Cherokee Nation*, 30 U.S. (5 Pet.) at 54 (Thompson, J., dissenting) ("I do not understand it is denied by a majority of the court, that the Cherokee Indians form a sovereign state according to the doctrine of the law of nations; but that, although a sovereign state, they are not considered a foreign state within the meaning of the constitution.").

242. *See supra* notes 219-221 and accompanying text.

243. *See supra* note 221 and accompanying text.

244. GRANT FOREMAN, *THE FIVE CIVILIZED TRIBES* 371 (2d prtg. 1966) [hereinafter FOREMAN, *FIVE TRIBES*] (discussing Cherokee syllabary, literacy, and newspaper); Holland, *supra* note 218, at 1 (same).

245. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), *abrogation recognized by*

no uncertain terms. Discussing the United States' relationship with the Cherokee Nation and other Indian tribes, Marshall wrote that "[t]he very term 'nation,' so generally applied to them, means 'a people distinct from others,'"²⁴⁶ and that the words "treaty" and "nation" applied to Indian nations and "to the other nations of the earth . . . all in the same sense."²⁴⁷ He further noted that the Cherokee Nation and other tribes were "capable of making treaties."²⁴⁸ And he asserted that the law of nations did not require small states to forego their independence when seeking the protection of a stronger state.²⁴⁹ Under this theory, a protectorate nation would not surrender or lose its sovereign immunity by associating with a stronger state.²⁵⁰ The courts recognized this principle in the first tribal immunity cases, which involved the immunity of the Cherokee Nation and the other Five Tribes.

These early tribal sovereign immunity cases were decided in the late-nineteenth and early-twentieth centuries, after the Cherokee Nation and the rest of the Five Tribes had reestablished themselves in the west. Before discussing these cases, a brief survey of the Five Tribes' history in Indian Territory is necessary. One cannot understand the cases without it. Following this history, the Article examines the earliest tribal sovereign immunity cases involving the Cherokee Nation—one from the Supreme Court in 1850, the other from a federal district court in 1894—and two Eighth Circuit cases from 1895 and 1908 involving, respectively, the Choctaw and Creek Nations. This piece then assesses the Supreme Court's reliance on these cases in its early-twentieth century tribal immunity jurisprudence, which also involves the Five Tribes.

C. *The "Five Civilized Tribes" in Indian Territory*

Before leaving their homelands in the Southeast, the Five Tribes negotiated treaties that recognized their fee ownership of their new lands in the Indian Territory.²⁵¹ This arrangement was something

Nevada v. Hicks, 533 U.S. 353 (2001).

246. *Id.* at 559 (noting that the "Indian nations had always been considered as distinct, independent political communities").

247. *Id.* at 559–60.

248. *Id.* at 559.

249. *Id.* at 561 (quoting Emmerich de Vattel to assert that "[t]ributary and feudatory states . . . do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state").

250. *See* USF&G, 309 U.S. 506, 512 (1940) (holding that sovereign immunity "exempted the dependent as well as the dominant sovereignties from suit without consent" (footnote omitted)).

251. *See* L. SUSAN WORK, *THE SEMINOLE NATION OF OKLAHOMA: A LEGAL HISTORY* 4

unique to these tribes.²⁵² The treaties also included unique provisions that expressly recognized and protected the tribal governments' powers and authority.²⁵³ After arriving in the west, the Five Tribes exercised these powers: the Chickasaws, Creeks, and Seminoles by establishing constitutional governments; the Cherokees and Choctaws by amending their pre-existing constitutions.²⁵⁴

Because of their republican governments and other institutions (including schools, dress, use of English, and embrace of Christianity to varying degrees), and relative economic prosperity,²⁵⁵ the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles in Indian Territory were grouped together—by the U.S. government and the general public—as “[t]he Five Civilized Tribes.”²⁵⁶

(2010).

252. *See id.*

253. *Id.* at 10; *see also* GRANT FOREMAN, *THE FIVE CIVILIZED TRIBES: A BRIEF HISTORY AND A CENTURY OF PROGRESS* 7 (1966) [hereinafter FOREMAN, HISTORY] (discussing the treaty provisions).

254. *See* CHAMPAGNE, CHANGE, *supra* note 201, at 241–54 (noting the adoption and amendment of the Chickasaw, Creek, Cherokee, and Choctaw constitutions); *see also* WORK, *supra* note 251, at 9 (“Unlike the other four nations, the Seminole Nation did not have a written document identified as a constitution, although it may have operated under written bylaws adopted in 1856 defining the general governmental structure.”).

255. *See, e.g.,* Harjo v. Kleppe, 420 F. Supp. 1110, 1120 (D.D.C. 1976) (noting the Creek Nation’s economic prosperity during the late nineteenth century), *aff’d sub nom.*, Harjo v. Andrus, 581 F.2d 949, 953 (D.C. Cir. 1978). *See generally* H. CRAIG MINER, *THE CORPORATION AND THE INDIAN: TRIBAL SOVEREIGNTY AND INDUSTRIAL CIVILIZATION IN INDIAN TERRITORY, 1865–1907* (1976) (discussing the Five Tribes’ economies). The Five Tribes’ economies were based primarily on agriculture (including ranching), but mining became increasingly important in the late 1800s, especially for the Choctaw and Chickasaw. *See, e.g.,* DEBO, CHOCTAW, *supra* note 201, at 128–31; FOREMAN, FIVE TRIBES, *supra* note 244, at 91; R.W. MCADAM, *CHICKASAWS AND CHOCTAWS: A PAMPHLET OF INFORMATION CONCERNING THEIR HISTORY, TREATIES, GOVERNMENT, COUNTRY, LAWS, POLITICS, AND AFFAIRS* 27 (1975 ed.).

256. *See* Harjo, 420 F. Supp. at 1119 (explaining that the Five Civilized Tribes were so named due to their perceived cultural and political sophistication relative to Plains Indians); DEBO, WATERS RUN, *supra* note 226, at 5 (“As soon as they were settled in their new homes these Indians made such remarkable social and political progress that they soon became known as the Five Civilized Tribes to distinguish them from their wild neighbors of the plains.”); WORK, *supra* note 251, at 7, 18–19 (noting that the United States viewed the Five Tribes “as a unique group of ‘civilized’ Indians” and distinguished between them and “reservation or wild Indians”); *see also* DEBO, WATERS RUN, *supra* note 226, at ix (stating that the Five Tribes “ruled themselves and controlled th[eir] tribal property under constitutional governments of their own choosing[] and . . . attained a degree of civilization that made them at once the boast of the Indian Office and living examples of the benefits of travelling in the white man’s road”); FOREMAN, FIVE TRIBES, *supra* note 244, at preface (explaining that “[b]ecause of their progress and achievements they became known as the Five Civilized Tribes”); STRICKLAND, FIRE AND SPIRITS, *supra* note 214, at 209 (noting that “[i]n recognition of tribal achievements, missionaries propose[d] to use the Cherokees and the Choctaws to ‘educate and civilize’ plains Indian tribes”); RENNARD STRICKLAND, *THE INDIANS IN OKLAHOMA* 11–15 (1980) [hereinafter STRICKLAND, INDIANS] (discussing the Five Tribes’ early history in Oklahoma and contemporary accounts from the 1830s and 1840s).

A brief overview of the histories of these Indian republics²⁵⁷ serves two purposes. On the one hand, it helps explain how the American public, including the judges who decided the early tribal immunity cases, viewed the Five Tribes.²⁵⁸ It also highlights how the Five Tribes' legal, political, and social institutions shaped the tribal sovereign immunity doctrine.

The author of an early twentieth century history of Cherokee laws and legal institutions, for example, wrote that "this Indian group, practically within the course of one century, or two at most, attained a standard of perfection in legal organization and judicial procedure equal to that of the average state of the American Union."²⁵⁹ In 1839, the Cherokees adopted a new constitution that was patterned on the U.S. Constitution, state constitutions, and tribal traditions.²⁶⁰ The Cherokees also reestablished their judicial system, which included district courts, appeals courts, a supreme court, a national solicitor general, and prosecuting attorneys.²⁶¹ The Cherokee courts operated under established rules of procedure and provided for trial by jury and arbitration of civil cases.²⁶² The Cherokee government collected

257. See Chad Smith, *Introduction to BALLENGER, supra note 220*, at iii ("[T]he Cherokee Nation was a true republic in Indian Territory."); John R. Swanton, *Introductory Note, in FOREMAN, FIVE TRIBES, supra note 244* (describing "red republics" in Indian Territory); Steve Russell, *The Context and Content of Sovereignty*, INDIAN COUNTRY TODAY (July 24, 2012), http://indiancountrytodaymedianetwork.com/ict_sbc/the-context-and-content-of-sovereignty (describing the Cherokee Nation as a "constitutional republic").

258. The use of the word "civilized" to describe the Five Tribes and distinguish them from other Indian tribes of course, like other language used in judicial opinions and the public discourse in the late nineteenth and early twentieth centuries, reflects ideas about cultural and racial hierarchies that are contrary to modern values and not generally espoused in public or from the bench. See, e.g., Carpenter & Halbritter, *supra* note 12, at 315 n.36 (noting descriptions of Indian tribes in late nineteenth and early twentieth century Supreme Court jurisprudence and the modern Court's continued reliance on these opinions). Others have commented upon how such thinking continues to permeate federal Indian law, see, e.g., ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA*, at xix–xxv, 97–122, 135–60 (2005) (examining the Supreme Court's continued reliance on racist language and stereotypes of Indian savagery and lawlessness found in its older Indian law opinions), but what is important for purposes of this Article is how this thinking is reflected in the sovereign immunity cases involving the Five Tribes.

259. BALLENGER, *supra* note 220, at 138.

260. See *id.* at 139. The Cherokee constitution declared that "[t]he Cherokee people have existed as a distinct national community, in the possession and exercise of the appropriate and essential attributes of sovereignty, for a period extending into antiquity beyond the dates and records and memory of man." *Id.* at 8 (quoting the Cherokee constitution).

261. *Id.* at 53, 112–13, 124–25.

262. See *id.* at 52–53, 58–59, 113, 123, 125 (providing details of the judicial system, including the organization of judicial districts, rules for partial punishment and pardon, arbitration options, qualifications for jury service, and the role of the Supreme Court).

taxes, operated a national police force, and administered a school system that included the first school for women west of the Mississippi.²⁶³ The Cherokees also resumed printing their newspaper with the purpose, in part, of educating outside readers “about the Civilized Nations of the [Indian] Territory.”²⁶⁴

Angie Debo, one of the most well-regarded historians of the Five Tribes, wrote in 1934 that the generation of Choctaws between 1833 and 1861 experienced an “almost unprecedented” level of development²⁶⁵ and that “[w]hite visitors were invariably impressed” by the Choctaws’ governance practices.²⁶⁶ Contemporaneous accounts are in accord. A traveler in 1858, for example, reported that many Choctaws were “quite wealthy.”²⁶⁷ An observer writing in the late 1800s described the Choctaw educational system, which employed teachers from Ivy League and Little Ivy colleges and helped the Choctaw Nation achieve a literacy rate higher than in surrounding states, as “excellent.”²⁶⁸

The Choctaw government, which functioned under a constitution modeled after the Mississippi state constitution, included an executive branch, bicameral legislature with committees, and an independent judiciary.²⁶⁹ Political parties competed for control of the government, and lobbyists worked the nation’s capital.²⁷⁰ The Choctaw government structure included a police force²⁷¹ and a

263. *Id.* at 59; FOREMAN, FIVE TRIBES, *supra* note 244, at 408–11; FOREMAN, HISTORY, *supra* note 253, at 31, 45.

264. Holland, *supra* note 218, at 397–98 (quoting the newspaper); *see also* FOREMAN, FIVE TRIBES, *supra* note 244, at 367–68.

265. DEBO, CHOCTAW, *supra* note 201, at 78.

266. *Id.* at 158.

267. KIDWELL, *supra* note 223, at 7 (internal quotation marks omitted).

268. MCADAM, *supra* note 255, at 24 (“The educational system of the [Choctaw and Chickasaw] nations . . . should be surpassed by that of no people on earth, and indeed it is excellent.”); DEBO, CHOCTAW, *supra* note 201, at 242 (“As a result of its excellent public-school system the Choctaw Nation had a much higher proportion of educated people than any of the neighboring states . . .”); FOREMAN, FIVE TRIBES, *supra* note 244, at 85 (noting that the teachers in the Choctaw Nation included graduates of Mount Holyoke, Dartmouth, and Williams); KIDWELL, *supra* note 223, at 9 (discussing the Choctaw Nation’s “elaborate system of schools”).

269. *See* CHAMPAGNE, CHANGE, *supra* note 201, at 185–87 (describing the national legislative council, judiciary, and executive established under the 1834 constitution, and noting that a bicameral legislature established under the 1842 constitution); DEBO, CHOCTAW, *supra* note 201, at 74–76 (discussing the 1838, 1843, and 1860 amendments to the Choctaw constitution); KIDWELL, *supra* note 223, at 42–44, 55–56 (same).

270. *See* CHAMPAGNE, CHANGE, *supra* note 201, at 220–23 (describing the formation of and competition between conservative and progressive political parties); DEBO, CHOCTAW, *supra* note 201, at 158 (noting that the Choctaw capital “swarmed with lobbyists”).

271. *See* CHAMPAGNE, CHANGE, *supra* note 201, at 185.

medical board that oversaw the nation's healthcare.²⁷² The government collected taxes, regulated grazing and land use, administered an assistance program for Choctaw citizens, and maintained a system of permits for non-citizens living and working in the nation.²⁷³ The Choctaw Nation also published various newspapers and counted many Christians among its citizens.²⁷⁴

Like the Choctaws, the Chickasaws earned praise for their school system,²⁷⁵ and "Chickasaw society had many of the characteristics of Anglo frontier settlers."²⁷⁶ Initially citizens of the Choctaw Nation when they arrived in the west under the terms of an 1837 treaty, the Chickasaws reestablished their own nation in 1855 after signing a treaty with the Choctaws and United States recognizing Chickasaw independence.²⁷⁷ Like the Cherokees and Choctaws, the Chickasaws adopted a tripartite constitutional government with a bicameral legislature,²⁷⁸ and political parties vied for control of the government.²⁷⁹ The Chickasaws published a newspaper as well.²⁸⁰

Less was written about the Creeks and Seminoles, who were apparently perceived by some as being overall more traditional and "behind" the Cherokees, Chickasaws, and Choctaws in terms of

272. See *id.* at 185; DEBO, CHOCTAW, *supra* note 201, at 233.

273. See DEBO, CHOCTAW, *supra* note 201, at 112–13, 144–45 (discussing government-administered assistance programs following crop failures, land use and grazing laws, taxes, and the permit system); see also KIDWELL, *supra* note 223, at 110 (noting that the U.S. Attorney General recognized the Choctaw government's authority to pass the permit laws and impose taxes and fees on non-citizens).

274. See DEBO, CHOCTAW, *supra* note 201, at 59, 168, (noting the different newspapers published in the Choctaw Nation); *id.* at 65, 231 (commenting on the number of Choctaw citizens and officials who were Christians); KIDWELL, *supra* note 223, at 14 (noting the increase in church membership and the number of churches in the 1850s and 1860s). Christians numbered such that the Choctaw Nation described itself as a "Christian nation" in an 1875 memorial to Congress. KIDWELL, *supra*, at 223 (quoting memorial).

275. See MCADAM, *supra* note 255, at 24, 26 (praising the educational system). *But see* GIBSON, *supra* note 201, at 199 (suggesting that the Chickasaw school system lagged behind those of other tribes).

276. GIBSON, *supra* note 201, at 198; see also *id.* (citing a Chickasaw Nation visitor account noting that "many of [the Chickasaws] are indistinguishable, except in color, language, and to some degree in costume, from the poorer classes of their white neighbors. Even in dress and language the more civilized are fast conforming to the latter.").

277. DEBO, CHOCTAW, *supra* note 201, at 71; GIBSON, *supra* note 201, at 208–16, 222–26; KIDWELL, *supra* note 223, at 19.

278. See Champagne, *Renewing*, *supra* note 213, at 48 (discussing the 1855 constitution and noting that "[m]arket enterprise was encouraged, and market relations were supported by the constitution"); see also CHAMPAGNE, CHANGE, *supra* note 201, at 193, 195, 197–98; GIBSON, *supra* note 201, at 216–17; MCADAM, *supra* note 255, at 25–26.

279. See CHAMPAGNE, CHANGE, *supra* note 201, at 223–28 (tracing the development of political parties).

280. See FOREMAN, FIVE TRIBES, *supra* note 244, at 144 (noting various publications).

education and other accouterments of "civilization."²⁸¹ The Creek and Seminole government structures reflected this traditionalism. The 1867 Creek constitution preserved the nation's confederate organization by providing a role for traditional villages in the central government, which included a bicameral legislature and national court system.²⁸² Political parties competed for control over the central government,²⁸³ which administered the nation's laws, including its tax regime, and managed market relations.²⁸⁴ The Seminole government similarly preserved a significant degree of village autonomy, with each village sending representatives to a central governing body that exercised authority over national affairs.²⁸⁵

The U.S. Civil War had a major human, social, and economic impact on the Five Tribes,²⁸⁶ who sided and entered into treaties with the Confederacy.²⁸⁷ After the war, the Five Tribes signed treaties with

281. See ANGIE DEBO, *THE ROAD TO DISAPPEARANCE*, at ix (1941) [hereinafter DEBO, *DISAPPEARANCE*] (explaining that agents and journalists of the time, as well as historians since, largely ignored the history of the Creeks after the Civil War and focused instead on "the more 'progressive' Indians"); FOREMAN, *FIVE TRIBES*, *supra* note 244, at 169 (stating that the Creeks "were regarded as far behind" the Cherokees and Choctaws in education); *id.* at 267 (describing Seminoles as being, in the 1850s, "far behind the other . . . [Five] [T]ribes in the scale of progress"). *But see* WRIGHT, *supra* note 201, at 309, 311 (discussing "white culture" and "civilization" among the Creeks and Seminoles in Oklahoma); *see also* FOREMAN, *FIVE TRIBES*, *supra* note 244, at 185–86 (discussing differences between Creek Lower Towns and Upper Towns, including regarding the use of English).

282. Champagne, *Renewing*, *supra* note 213, at 51–52 (stating also that this constitution was "to a large extent imposed by U.S. demands at the end of the U.S. Civil War"). The central government also managed market relations and collected taxes. *Id.* at 52; CHAMPAGNE, *CHANGE*, *supra* note 201, at 202.

283. See CHAMPAGNE, *CHANGE*, *supra* note 201, at 230–37 (describing various political contests).

284. *Id.* at 201, 230; FOREMAN, *FIVE TRIBES*, *supra* note 244, at 213–16; FOREMAN, *HISTORY*, *supra* note 253, at 45; Champagne, *Renewing*, *supra* note 213, at 52.

285. Champagne, *Renewing*, *supra* note 213, at 52.

286. See, e.g., BALLENGER, *supra* note 220, at 73 (noting that "[t]he war 'broke' the Cherokee Nation"); DEBO, *HISTORY*, *supra* note 211, at 169 (noting that the Creek Nation lost one fourth of its population during the war); DEBO, *CHOCTAW*, *supra* note 201, at 82 (describing the food shortage in the Choctaw Nation following the war); GIBSON, *supra* note 201, at 239 (explaining that the war "disturbed most aspects of Chickasaw national life"). Internal tribal divisions and armed conflicts between tribal factions exacerbated these impacts. See, e.g., CHAMPAGNE, *CHANGE*, *supra* note 201, at 183, 203 (discussing divisions within the Cherokee and Creek Nations).

287. CHAMPAGNE, *CHANGE*, *supra* note 201, at 183, 203; GIBSON, *supra* note 201, at 232; KIDWELL, *supra* note 223, at 60–61. In joining with the Confederacy and surrendering after the war, however, the Five Tribes continued to assert their sovereignty and nationhood. The Chickasaw Nation, for example, issued a declaration of independence before siding with the Confederacy, stating that it was absolved of its allegiance to the United States as a result of the "dissolution of the Federal Union" and the United States' withdrawal of federal troops from the Chickasaw Nation in contravention of its treaty obligation to protect the Chickasaw people. See GIBSON, *supra* note 201, at 231–32 (quoting declaration). The Choctaw

the United States in 1866 that included anti-tribe provisions designed to punish them for allying with the confederate states.²⁸⁸ Like the surrounding states, the Five Tribes began to rebuild their infrastructures and economies.²⁸⁹ But the tribes did so within an environment of increasing pressure to break up their lands and replace their governments with a U.S. territorial or state government.²⁹⁰

A particular threat to the Five Tribes' autonomy came from the railroads, as the 1866 treaties included provisions for railroad rights-of-way in the Indian Territory.²⁹¹ Relying on these treaty provisions, Congress passed a series of laws in the 1880s and 1890s that authorized railroad construction in Indian Territory.²⁹² Congress also

Nation objected to the Confederacy's attempt to include it and the other four tribes in the Confederacy's terms of surrender, and the Choctaw delegate to post-war treaty negotiations with the United States explained that the Choctaw Nation entered into its treaty with the Confederacy to "preserve [Choctaw] 'independence and national identity' and 'considered itself 'a separate political organization.'" KIDWELL, *supra* note 223, at 77 (quoting delegate's statement). This delegate also said that the Choctaw Nation allied with the Confederacy in order "to establish what we believed to be the great cardinal principle of republican liberty—the right of self-government" and because the Confederacy offered the Choctaws "the protection that the United States . . . failed to give us." *Id.* at 78.

288. *E.g.*, GIBSON, *supra* note 201, at 243–44; KIDWELL, *supra* note 223, at 79–82; WORK, *supra* note 251, at 11; WRIGHT, *supra* note 201, at 307–08. Some of the tribes adopted new constitutions in the wake of, or (in the case of the Creek Nation) in compliance with, their 1866 treaties. CHAMPAGNE, CHANGE, *supra* note 201, at 204–05, 223. Among these treaties' provisions were those requiring the tribes to agree to "such legislation as Congress and the President . . . may deem necessary." KIDWELL, *supra* note 223, at 81.

289. *See* BALLENGER, *supra* note 220, at 78; CHAMPAGNE, CHANGE, *supra* note 201, at 215; DEBO, HISTORY, *supra* note 211, at 169; GIBSON, *supra* note 201, at 255–56.

290. *See* MICHAEL W. LOVEGROVE, A NATION IN TRANSITION: DOUGLAS HENRY JOHNSTON AND THE CHICKASAWS, 1898–1939 4 (2009) ("After the Civil War, several bills were introduced in Congress requiring the Five . . . Tribes . . . to abandon their tribal governments and accept individual allotments of their land. Although these bills failed to become law, Congress never forgot the idea of allotment.").

291. *See* WORK, *supra* note 251, at 14 (noting that the treaties signed by each of the Five Tribes included language providing for railroad rights-of-way); *see also* DEBO, CHOCTAW, *supra* note 201, at 117–18 (discussing the 1866 treaties and the building of railroads across the Cherokee, Choctaw, and Creek Nations in the following decades).

292. *See, e.g.*, WORK, *supra* note 251, at 15 (discussing laws). Although these laws have been (wrongly) cited as possibly abrogating the tribes' sovereign immunity, *see, e.g.*, *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 373–74 n.1 (8th Cir. 1895) (citing various statutes as examples of acts authorizing "suits to be brought by or against these Indian Nations . . . to settle controversies between them and the United States and between themselves"), they do not expressly abrogate tribal sovereign immunity. *See C&L Enters. v. Citizen Band Potawatomi Tribe*, 532 U.S. 411, 418 (2001); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 509 (1991) (both requiring that "Congress must 'unequivocally' express" its intent to abrogate tribal immunity). Although these statutes authorized suits *by* the Five Tribes (and their citizens), they say nothing about suits against tribes. The bills established procedures for disinterested referees appointed by the U.S. President to decide on the amount of compensation for the nations and/or their citizens, with right of

enacted in the 1880s and 1890s other “special federal laws . . . that . . . appli[ed] to the Five Tribes as a group . . . to place increasing pressure on them to deed their communal lands to tribal members—a prelude to ‘legitimizing’ the presence of thousands of non-Indians who were pouring into Indian Territory.”²⁹³

Perhaps the most nefarious of these was the 1898 Curtis Act,²⁹⁴ which followed other congressional legislation designed to break up the Five Tribes’ lands and usurp their governments. Land allotment agreements ratified under the Curtis Act and subsequent legislation contemplated March 4, 1906 as the date by which the Five Tribes’ governments would cease to exist.²⁹⁵ Despite the pressures on the

appeal to the U.S. courts, *e.g.*, Act of July 4, 1884, ch. 179, §§ 3, 5, 23 Stat. 73, 73–75, and provided (in language which is identical for relevant purposes)

[t]hat the United States circuit and district courts . . . and such other courts as may be authorized by Congress, shall have . . . con-current [sic] jurisdiction over all controversies arising between said . . . [r]ailway [c]ompany, and the nations and tribes through whose territory said railway shall be constructed . . . [and] over all controversies arising between the inhabitants of said nations or tribes and said railway company; and the civil jurisdiction of said courts is hereby extended within the limits of said Indian Territory, without distinction as to citizenship of the parties, so far as may be necessary to carry out the provisions of this act.

§ 8, 23 Stat. at 75. To the extent these statutes could be treated as annulments of the tribes’ immunity, they would also be an early recognition of tribal sovereign immunity by Congress, since there would be no need to abrogate immunity that did not exist.

293. WORK, *supra* note 251, at 4–5.

294. Ch. 517, 30 Stat. 495.

295. The Curtis Act set December 1, 1898, as the deadline for the Choctaw, Chickasaw, and Muscogee (Creek) Nations to approve their allotment agreements, *see* §§ 29–30, 30 Stat. at 495; LOVEGROVE, *supra* note 290, at 19 (discussing Curtis Act and ratification of Choctaw and Chickasaw allotment agreements); *see also* KIDWELL, *supra* note 223, at 149–50 (same), but did not set deadlines for the Cherokee Nation (which refused to enter into negotiations for an allotment agreement) or the Seminole Nation (which already had approved an allotment agreement with no mention of the continuance or dissolution of the Seminole government). *See* WORK, *supra* note 251, at 36, 40 (discussing Seminole allotment agreement’s approval before passage of the Curtis Act and Congress’s ratification of the agreement). The Cherokee and Creek allotment agreements subsequently ratified by those two nations and Congress provided that their governments would “not continue longer than” March 4, 1906. Act of July 1, 1902, ch. 1375, § 63, 32 Stat. 716, 725 (1902) (Cherokee allotment agreement); Act of March 1, 1901, ch. 676, § 46, 31 Stat. 861, 872 (1901) (Creek allotment agreement).

Allotment had begun elsewhere in 1887, but implementation of the policy against the Five Tribes was delayed, in part because of their unique fee ownership of their lands. In 1893, the President appointed three commissioners (known as the Dawes Commission) to negotiate the allotment of the Five Tribes’ lands. *See* WORK, *supra* note 251, at 29–31. The United States Geological Service began surveying the tribes’ lands in 1895, LOVEGROVE, *supra* note 290, at 4–7, 10, and in 1896, Congress authorized the commission to create rolls of the Five Tribes’ citizens. LOVEGROVE, *supra* note 290, at 14. Negotiations between the Five Tribes and the Dawes Commission ensued.

The Five Tribes allotment legislation was related to other legislation from the 1880s and 1890s establishing federal courts and extending their jurisdiction in the

Five Tribes' governments and efforts in Congress to abolish them, they continued to function.²⁹⁶

Meanwhile, Congress received numerous statehood proposals and debated whether the Indian Territory should enter the Union as a single state or two states, and the possibility of an Indian state.²⁹⁷ On June 6, 1906, President Roosevelt signed the Oklahoma Enabling Act, authorizing the establishment of a single state that included the Oklahoma and Indian Territories.²⁹⁸ In 1907, Oklahoma ratified its constitution and joined the Union as the forty-seventh state.²⁹⁹

After realizing the impossibility of concluding the Five Tribes' affairs by the March 4, 1906 date set forth in their respective allotment agreements, Congress passed a joint resolution on March 2 to temporarily extend the Five Tribes' governments.³⁰⁰ Congress then amended the Curtis Act by passing the Five Tribes Act on April 26, 1906.³⁰¹ This law extended the existence of the Five Tribes' governments indefinitely.³⁰² Their governments continued to function (albeit in a limited capacity) up through the late twentieth

Indian Territory. See WORK, *supra* note 251, at 21–28 (discussing federal courts legislation); *id.*, at 33–36 (suggesting laws, including the Curtis Act, were designed to pressure the Five Tribes to sign allotment agreements). After Henry Dawes, the head of the commission established to negotiate allotment agreements with the Five Tribes, grew frustrated with the tribes' opposition, he suggested that Congress extend a territorial government and legal jurisdiction over the Indian territory immediately. See KIDWELL, *supra* note 223, at 145; see also LOVEGROVE, *supra* note 290, at 11 (discussing proposed legislation in Congress in 1895 and 1896 to create a new territory).

296. See, e.g., WORK, *supra* note 251, at 48 (noting that the Seminole Council continued to meet despite the threat of allotment).

297. See KIDWELL, *supra* note 223, at 188 (discussing several proposed options for statehood); LOVEGROVE, *supra* note 290, at 93–94 (discussing the various statehood proposals). For a discussion of the Indian statehood movement, which can be traced back to the General Council of the Indian Territory that convened after the Civil War and gained significant momentum in the early 1900s, see DEBO, CHOCTAW, *supra* note 201, at 214–15; FOREMAN, HISTORY, *supra* note 253, at 58; GIBSON, *supra* note 201, at 263–64; LOVEGROVE, *supra* note 290, at 94, 113–14; KIDWELL, *supra* note 223, at 83, 85, 186–88; WORK, *supra* note 251, at 12; Leeds, *supra* note 2, at 5–9.

298. LOVEGROVE, *supra* note 290, at 114; see also WORK, *supra* note 251, at 55–56 (discussing the merging of the Oklahoma and Indian Territories into a single state).

299. GIBSON, *supra* note 201, at 277; LOVEGROVE, *supra* note 290, at 122.

300. LOVEGROVE, *supra* note 290, at 120; WORK, *supra* note 251, at 49–50.

301. WORK, *supra* note 251, at 50.

302. See, e.g., *Harjo v. Kleppe*, 420 F. Supp. 1110, 1118 (D.D.C. 1976) (“[D]espite the general intentions of the Congress . . . to ultimately terminate the tribal government of the Creeks, and . . . an elaborate statutory scheme . . . toward that end, the final dissolution of the . . . government . . . was never statutorily accomplished, and that government was instead explicitly perpetuated.”), *aff'd sub nom.*, *Harjo v. Andrus*, 581 F.2d 949, 953 (D.C. Cir. 1978); Leeds, *supra* note 2, at 9 (discussing the Five Tribes Act); see also WORK, *supra* note 251, at 5, 50–51 (discussing twentieth century treatment of the Five Tribes and misinterpretations of the Five Tribes Act that were cleared up in the 1970s by *Harjo* and other litigation).

century, when they reorganized under their present constitutions.³⁰³ Having at least a rudimentary understanding of the histories of the Five Tribes, it is now appropriate to analyze the early sovereign immunity cases involving them.

D. *The Five Tribes Immunity Cases*

Decided in the second-half of the nineteenth century by the U.S. Supreme Court and three different federal district courts, the first tribal immunity cases involved the Cherokee Nation. They were followed by two turn-of-the-twentieth century Eighth Circuit cases involving the Choctaw Nation and Creek Nation, respectively. The Eighth Circuit, like the courts in the Cherokee cases, cited and followed the Supreme Court's leading sovereign immunity jurisprudence on states and foreign nations. In the early twentieth century, the Supreme Court cited these Eighth Circuit cases and the principles in the Cherokee cases to uphold the immunity of the Muscogee (Creek) Nation, and later, the Choctaw and Chickasaw Nations. Taken as a whole, these cases comprise a body of Five Tribes immunity jurisprudence and adopt a tribal immunity doctrine that bars suits on contracts, suits for injunctive relief, and all other types of actions except for those authorized by Congress or agreed to by the tribes themselves. In this fundamental regard, tribal immunity is no different than federal, state, or foreign sovereign immunity.

1. *The Cherokee sovereign immunity cases*

The Supreme Court decided the first case of record involving tribal immunity, *Parks v. Ross*,³⁰⁴ in 1850.³⁰⁵ Mr. Parks, the executor of a Cherokee citizen's estate, sued John Ross, the Principal Chief of the Cherokee Nation, for debts allegedly owed in conjunction with the Cherokee removal in the late 1830s.³⁰⁶ Parks complained that the lower court erred when it treated Ross like the head of an independent nation and thus found he could not be held personally liable.³⁰⁷ Although the Supreme Court "could have relied solely on

303. See Leeds, *supra* note 2, at 12 (noting the reorganization of the Five Tribes' governments in the modern era).

304. 52 U.S. (11 How.) 362 (1850).

305. See Struve, *supra* note 21, at 148 ("Although judicial acknowledgment of tribal sovereignty dates back at least to the Marshall Trilogy, commentators (and the Court itself) have assumed that the Supreme Court did not specifically recognize tribal sovereign immunity until 1919 at the earliest. However, the Court's 1850 decision in *Parks v. Ross* displays reasoning strikingly similar to that found in sovereign immunity doctrine." (footnotes omitted)).

306. *Parks*, 52 U.S. (11 How.) at 374.

307. *Id.* at 368-69.

principles of agency law [to dismiss the case], . . . it chose to invoke broader concepts of governmental obligations as well,”³⁰⁸ stating that “an agent who contracts in the name of his principal is not liable to a suit on such contract; much less a public officer, acting for his government.”³⁰⁹ This reasoning is similar to that used in sovereign immunity jurisprudence and is consistent with David Currie’s synthesis of Nineteenth Century Supreme Court case law involving suits against state and federal officials.³¹⁰

The Court concluded its opinion by emphasizing, as it had in *Cherokee Nation v. Georgia* and *Worcester v. Georgia* less than twenty years earlier, that “[t]he Cherokees are in many respects a foreign and independent nation.”³¹¹ Invoking a concept of tribal official diplomatic immunity, it said that U.S. courts lacked the “power . . . to arrest the public representatives or agents of Indians nations . . . [or] compel them to pay the debts of their nation.”³¹² This reference to the courts’ “lack of ‘power . . . to arrest the public representatives or agents of Indian nations’ suggests a lack of jurisdiction, and it echoes language traditionally used to describe state sovereign immunity.”³¹³ It also comports with principles applied to foreign sovereigns’ diplomats in the 1789 Judiciary Act, which prohibited federal court jurisdiction over foreign diplomats even though this jurisdiction seemingly exists under Article III of the Constitution.³¹⁴

In 1894, the Supreme Court of the District of Columbia, which then served as the federal district court for the District of Columbia, recognized the sovereign immunity of the Cherokee Nation in *Chadick v. Duncan*.³¹⁵ Although it is apparently the first case of record

308. Struve, *supra* note 21, at 149–50.

309. *Id.* at 149 (quoting *Parks*, 52 U.S. (11 How.) at 374).

310. *Id.* at 150, 150 n.85 (citing Currie, *supra* note 150, at 153) (discussing *Louisiana v. Jumel*, 107 U.S. 711 (1883); *In re Ayers*, 123 U.S. 443 (1887)), and remarking that “federal government liability in the early nineteenth century and noting that “[c]ontracts claims were generally subject to the rule that an agent who signed for a disclosed principal had not liability to perform the contract” (quoting *Jackson*, *Swing*, *supra* note 148, at 525–26)).

311. *Parks*, 52 U.S. (11 How.) at 374.

312. *Id.*

313. Struve, *supra* note 21, at 150 n.84 (citing Nelson, *supra* note 155, at 1568).

314. U.S. CONST., art. III, § 2, cl. 1 (“The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls . . .”); see also Nelson, *supra* note 155, at 1590 (explaining that although the Constitution gave the Supreme Court original jurisdiction over lawsuits against foreign diplomats, Congress restricted it in the Judiciary Act).

315. No. 15,317, slip op. at 77 (App. D.C. Mar. 3, 1894) (copy available at the Nat’l Archives & Records Admin., Record Group No. 376, Case File No. 314); see *History of the Federal Judiciary: Federal Courts of the District of Columbia*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/courts_special_dc.html (last visited Aug. 22, 2013) (explaining that Congress established the Supreme Court for the District

to formally recognize the tribal immunity doctrine,³¹⁶ *Chadick* is not discussed in any of the prior tribal immunity literature. But its facts, reasoning, and holding make it a significant chapter in the tribal sovereign immunity doctrine's story.

Chadick v. Duncan arose out of the Cherokee Nation's issuance of government bonds, secured by payments from the United States, for lands the Cherokees sold to the U.S. following the Civil War.³¹⁷ Mr. Chadick alleged that the Cherokee Nation entered into a contract with him to sell the bonds but then negotiated a deal with other parties.³¹⁸ He sought an injunction to compel the Cherokee Nation, its Principal Chief and Treasurer, and its delegates in Washington, D.C., to deliver him these bonds.³¹⁹

After the federal district court dismissed his lawsuit based on the Cherokee Nation's immunity, Chadick appealed to the Court of Appeals for the District of Columbia, which functioned as the federal appeals court.³²⁰ A few days later, legislation to abrogate the Cherokee Nation's immunity was introduced in the House of Representatives.³²¹ This legislation never became law, however, and Chadick's appeal was dismissed on procedural grounds for failure to

of Columbia in 1863, the Supreme Court in 1927 and 1933 "declared that the Court of Appeals [created in 1893] and the Supreme Court of the District of Columbia were comparable to the U.S. circuit courts and . . . district courts, respectively," and that Congress changed the name of the Supreme Court of the District of Columbia to the District Court for the District of Columbia in 1936, and then to the U.S. District Court for the District of Columbia in 1948). Congress established the Supreme Court for the District of Columbia in 1863. *Id.* (citing 12 Stat. 762). Congress changed the name of the Supreme Court of the District of Columbia to the District Court for the District of Columbia in 1936, and then to the U.S. District Court for the District of Columbia in 1948. *Id.* (citing 49 Stat. 1921).

316. The oral argument before Justice Cox in *Chadick* references three prior, unreported federal district court cases that recognize the Cherokee Nation's sovereign immunity: one from the U.S. district court in Muscogee, Oklahoma, and two from the U.S. district court in Fort Smith, Arkansas. See Perry Argument, *supra* note 37, at 70-71.

317. *Chadick*, No. 15,317, slip op. at 73-74. The lands were in the Cherokee Strip, along what is now the northern border of Oklahoma. BALLENGER, *supra* note 220, at 15.

318. *Chadick*, No. 15,317, slip op. at 73-74.

319. *Id.* at 73-74.

320. See Mandate, *Chadick*, No. 15,317 (mandate dated Oct. 10, 1894) (copy available at the Nat'l Archives & Records Admin., Record Group No. 376, Case File No. 314); see also *supra* note 315 (discussing the court's history).

321. 26 Cong. Rec. 2662 (March 6, 1894). It reads:

By Mr. HOLMAN: A joint resolution (H. Res. 134) authorizing the Court of Claims to determine the rights of Edwin D. Chadick and R.T. Wilson & Co. in the loan of \$6,640,000 loaned by the Cherokee Nation to the United States under the provision of the act of March 3, 1893, in relation to the Cherokee Outlet—to the Committee on the Judiciary.

Id.

print the transcript of records.³²² But the case garnered a good deal of media attention, with the *Washington Post* writing about it at least four times in February and March of 1894 and describing the decision as being “of considerable interest outside of the case itself on account of the legal rights of Indian tribes . . . involved.”³²³

Like in *Parks v. Ross* and the Supreme Court’s earlier Cherokee cases, the D.C. court’s recognition of the Cherokees’ national character figures prominently in its opinion. The D.C. court, however, is much clearer in relying on the Supreme Court’s state (and foreign) sovereign immunity jurisprudence, which had developed substantially in the years following *Parks v. Ross*.³²⁴ These cases hold that sovereign immunity applies to claims for injunctive relief as well as those seeking damages, and *Chadick* cites and quotes them at length in denying the request for an injunction based on tribal sovereign immunity.

The *Chadick* court began by noting the United States’ various treaties with the Cherokees and that all of them “described [the Cherokees] as the Cherokee Nation.”³²⁵ The court then cited the Supreme Court’s language in *Cherokee Nation v. Georgia*, explaining that these treaties and other U.S. government acts “plainly recognized the Cherokee Nation as a State” and that “[t]hey have been uniformly treated as a State from the settlement of our country.”³²⁶ *Chadick* also quoted the Supreme Court’s language in

322. See *Mandate*, *supra* note 320 (“[T]his cause having been called for hearing in its regular order, and it appearing to the Court that the Parties have failed to print the transcript of record, it is, therefore in pursuance of the 18th rule of This Court, now here ordered, adjudged and decreed by This Court that this appeal be, and the same is hereby, dismissed with costs . . .”).

323. *Legal Rights of Indians: Arguments Concluded in a Case Affecting Their Status as Liable to Suit*, WASH. POST, Feb. 28, 1894, at 3; see also *Cherokee Bond Case: Wilson’s Petition Asking for the Dissolution of the Injunction*, WASH. POST, Feb. 22, 1894, at 4; *Cherokee Bonds Suit: North Carolina Cherokees Ask to Be Made Parties to the Case*, WASH. POST, Feb. 25, 1894, at 7 (noting that counsel for the Cherokee Nation cited Hamilton’s *Federalist No. 81* and analogized between the Cherokees’ rights and “the sovereign rights of a State, which prevented it from being dragged into court at the instance [sic] of any person who felt himself aggrieved”); *News of the Departments: The Cherokee Bond Question*, WASH. POST, Mar. 15, 1894, at 2 (“So far as the Interior Department is concerned, the question of the assignment of the bonds of the Cherokee Nation was settled yesterday when the Secretary approved an opinion . . . which . . . held that the Cherokee Nation is the proper body to say to whom the bonds shall be given. . . . Mr. Chadick appealed to the Interior Department for its approval of his contract with the Cherokees and insisted that a prior contract should have recognition.”); *Trouble About the Cherokee Bonds: Their Issue to R.T. Wilson & Co., New York, to be Contested*, CHI. TRIB., Feb. 4, 1894, at 1 (discussing Chadick’s lawsuit).

324. See *supra* Part II.A, C.

325. *Chadick*, No. 15,317, slip op. at 74.

326. *Id.* at 75 (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831)); see also *id.* at 76 (citing Justices Thompson’s and Story’s dissent which noted that “a majority of the court [agreed] that the Cherokee Indians form a sovereign state

Worcester noting that “the Indian nations had always been considered . . . distinct independent communities” and that “[t]he very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’”³²⁷

Relying on *Cherokee Nation v. Georgia*, *Worcester*, and four other Supreme Court cases that recognized the national character and ‘state’hood of the Cherokee Nation and other tribes,³²⁸ *Chadick* held that “[a]ccording to the *general principles of international law*, . . . they are not amenable to suit anywhere at the instance of any private individual.”³²⁹ The court acknowledged that the United States had formally ended treaty making with Indian nations in 1871, but stated that the status of Indian tribes

ha[d] not been changed thereby. They still . . . preserve their autonomy. They have their political organization; their legislature; their congress; and exclusive domain over their own land, so far as the States are concerned; in fact they are a tribe or sovereign nation with one exception, or limitation.³³⁰

This limitation was that the federal government also exercised jurisdiction in Indian territory and other areas of Indian country.³³¹

The *Chadick* court was also the first to find a congressional power to abrogate tribal immunity, though it was unsure of the source of this power.³³² The court noted two instances of “express legislation” that “provid[ed] for the entertainment of suits by the Federal courts to which the [Cherokee] nation may be a party,”³³³ neither of which applied, and said that “[a]part from that legislation there is no law in

according to the doctrine of the law of nations.” (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 54 (Thompson, J., dissenting)).

327. *Id.* at 76 (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), *abrogation recognized by Nevada v. Hicks*, 533 U.S. 353 (2001)).

328. *Id.* at 76–78, 82–83 (citing *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 655–57 (1890); *Cherokee Trust Fund*, 117 U.S. 288, 295 (1886); *Elk v. Wilkins*, 112 U.S. 94, 102 (1884); *Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1855)).

329. *Id.* at 78.

330. *Id.* at 77.

331. *See id.* at 78 (“[T]he only qualification of the status of this people as an independent public state is its dependence upon the United States and its subordination to their authority, which is necessary, first, for the protection of themselves, and next for protecting the surrounding people from them.”).

332. *See id.* at 81. The court first said that such abrogation “would have to be under the treaty-making power” of the Treaty Clause, but later suggested that it might be done “under the power that international law would confer upon a dominant nation over a dependent one.” *Id.* Though suggesting a congressional power to abrogate tribes’ sovereign immunity, the court found that Article III of the Constitution did not confer judicial power on the federal courts to hear suits against the Cherokee Nation. *See id.* at 80–81 (“[T]here is no head of the judicial power, conferred by the Constitution upon the Government of the United States, under which a suit can be maintained in the Federal courts against the Cherokee Nation.”).

333. *Id.* at 81.

existence by . . . which this nation can be sued in any court in this country.”³³⁴ The court thus applied to tribes the same presumption that the Supreme Court made for other sovereigns: unless Congress has expressly abrogated it, sovereign immunity bars the suit.³³⁵

Moreover, *Chadick* cited the Supreme Court’s contemporaneous immunity cases regarding breach of contract actions and claims for injunctive relief against states and their officials arising out of bond defaults. Foremost among these cases was *In re Ayers*, in which the Court first invoked the dignity rationale for state immunity and clarified that immunity bars not just contract claims but all suits, whether in law or in equity.³³⁶ Finding that the case before it fell squarely within the definition of *Ayers*, the *Chadick* court refused to grant an injunction against the Cherokee Nation, its officials, or its delegates because of their sovereign immunity.³³⁷

The Eighth Circuit Court of Appeals also cited *Ayers* (alongside *Beers v. Arkansas* and *Cherokee Nation v. Georgia*) in the next tribal sovereign immunity cases, involving the Choctaw and Creek Nations. Like *Chadick*, *Beers*, and *Ayers*, these Eighth Circuit opinions barred both suits for breach of contract and actions for injunctive relief. The Supreme Court cited these Eighth Circuit cases and *Cherokee Nation v. Georgia* when it first explicitly articulated the tribal immunity doctrine a few decades later.

2. *The other Five Tribes cases*

The Eighth Circuit exercised jurisdiction over the territory belonging to the Five Tribes and heard appeals from the U.S. district

334. *Id.* at 82. The two instances the court cited were a law allowing the Eastern Cherokees to bring suit in the U.S. Court of Claims against the Cherokee Nation and an 1884 statute establishing the Kansas Railway Company, which gave the federal district court in Arkansas jurisdiction over disputes between the tribes in Indian Territory and the railroad. *Id.*; see also *E. Band of Cherokee Indians v. United States*, 117 U.S. 288, 293 (1886) (discussing Congressional act authorizing suit against the Cherokee Nation and the United States). As noted *supra* note 292 and accompanying text, the 1884 railroad statute did not expressly abrogate tribal sovereign immunity. Instead, it provided federal courts as a forum to hear disputes between the Cherokee Nation and/or its citizens and the railroad.

335. *Chadick*, No. 15,317, slip op. at 80–81. The court also noted an 1855 case where the Supreme Court analogized “between the Territories of the United States and the Territorial governments and the Cherokee Nation,” *id.* at 83 (citing *Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103–04 (1855)), and examined whether “any suit had ever been sustained against a Territorial government.” *Id.* It found none. *Id.*

336. *Id.* at 90–91 (quoting *In re Ayers*, 123 U.S. 443, 502 (1887)).

337. *Id.* at 100. The court also rejected the argument that the Cherokee Nation waived its immunity by voluntarily appearing solely to challenge the court’s jurisdiction. *Id.* at 83–84 (explaining that a sovereign does not submit to a court’s jurisdiction by specially appearing to challenge it (citing *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857))).

court in the Indian Territory. In 1895, it decided *Thebo v. Choctaw Tribe of Indians*,³³⁸ the first published federal court opinion that explicitly invoked the tribal sovereign immunity doctrine.³³⁹ Mr. Thebo sued the Choctaw Nation and its Principal Chief and Treasurer to recover attorney's fees allegedly owed him. The court upheld the dismissal of Thebo's claim, citing the Supreme Court's decision in *Beers v. Arkansas* for the "well-established" principle that a sovereign nation cannot be sued without its consent.³⁴⁰

Before citing *Beers* for this principle, the court noted that

[i]t 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.³⁴¹

The court also described the U.S. policy as placing these tribes "substantially, on the plane occupied by the states under the eleventh amendment."³⁴² The court's language thus reflects both the Supreme Court's application of (international) nation-state immunity principles in its late-nineteenth century state immunity jurisprudence,³⁴³ and the Court's treatment of tribes as domestic sovereigns with characteristics of national statehood.

The federal policy of recognizing the Five Tribes' sovereign immunity, according to the Eighth Circuit, had two aspects. On the one hand, the *Thebo* court—citing the Supreme Court's cases involving the Cherokee Nation, which it said was "identical in all respects, so far as relates to its independence and form of government, with the Choctaw Nation"³⁴⁴—explained:

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 . . ." and the courts are bound by these acts of the political departments of the [U.S.] government.³⁴⁵

338. 66 F. 372, 374–76 (8th Cir. 1895).

339. *Id.* at 375.

340. *Id.* (citing *Beers*, 61 U.S. (20 How.) at 529).

341. *Id.*

342. *Id.* at 376.

343. See *supra* Part II.C.

344. *Thebo*, 66 F. at 374 (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831)).

345. *Id.* (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 16). The court also quoted the Supreme Court's various descriptions of the Cherokee Nation as

"a domestic dependent nation"; "as a state, in a certain sense, although not a foreign state or a state of the Union"; "as a distinct community, with boundaries, accurately described"; "an alien, though dependent, power";

The court pointed to the Choctaw Nation's treaties with the United States and its "written constitution, and laws modeled after those of the states of the Union, and differing from them in no essential respect."³⁴⁶ This aspect is what I call the *fundamental or primary policy reason* for the tribal immunity doctrine—i.e., immunity is inherent in the sovereign, and the Five Tribes had sovereign immunity because of their national character, treaties with the United States, and constitutional governments. The *Thebo* court also relied on a *second(ary), public policy reason* for the doctrine: protecting the government fisc. It noted the strain on the Choctaw Nation's finances, and depletion of government assets, that could result from exposure to lawsuits.³⁴⁷

For these reasons, explained the court, Congress had "sparingly exercised" this power, reflecting "the *settled policy* of the United States not to authorize . . . suits [against tribes] except in a few cases."³⁴⁸ Moreover, this "settled policy"—and therefore tribal immunity—extended not just to suits on contracts but to other causes of action as well.³⁴⁹ Because Congress had not authorized suits against the Choctaw Nation or its officials in the legislation establishing the U.S.

"not a foreign, but a domestic, territory; a territory which originated under our constitution and laws."

Id. (citations omitted) (quoting *Elk v. Wilkins*, 112 U.S. 94, 102 (1884); *Holden v. Joy*, 84 U.S. 241, 242 (1872); *Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1855); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), *abrogation recognized by Nevada v. Hicks*, 533 U.S. 353 (2001); *Cherokee Nation*, 30 U.S. (5 Pet.) at 2; *see also id.* at 375 ("While the [Choctaw] Nation has many of the attributes of the political unit which constitutes the civil and self-governing community called a 'State' or a 'Nation,' it is not a sovereign state, but it is domestic and dependent state, subject to the jurisdiction and authority of the United States.")).

346. *Id.* at 375.

347. *Id.* at 376 ("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."). Though it is not mentioned in the opinion, the Choctaw government had run short of funds in 1894, in large part due to debts and expenses arising out of the Civil War. *See DEBO, CHOCTAW, supra* note 201, at 91–98, 149 (describing the Choctaws Nation's financial hardship). This may have been in the minds of the judges, who presumably were familiar with contemporary events in the Indian Territory.

348. *Thebo*, 66 F. at 375 (emphasis added); *see also id.* at 376 ("The intention of congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms."). The court said this power had been sparingly exercised "for obvious reasons" (which were apparently too obvious to state) and only "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 [Indian] Nation, seemed to require the exercise of the jurisdiction." *Id.* at 375.

349. *See also id.* at 376 ("It has been the settled policy of congress not to sanction suits generally against these Indian Nations, or subject them to suits upon contracts or other causes of action at the instance of private parties.") (emphasis added).

court in Indian Territory or otherwise, the Choctaw Nation had immunity against Mr. Thebo's lawsuit.³⁵⁰

Several things stand out from the *Thebo* opinion. First, the court focused on the Choctaw Nation's (and the other Five Tribes') treaties, government structure, and "civilized" character.³⁵¹ Second, the court equated the Five Tribes with both states and foreign nations in terms of their sovereign immunity and employed the same secondary justification (protecting the government treasury) for tribal immunity that was used for state immunity. Third, the court recognized that tribal immunity extends not just to suits on contracts but to all types of actions, including those seeking injunctive relief.

The Eighth Circuit applied these same principles over a decade later in *Adams v. Murphy*,³⁵² when it held that the Creek Nation and its Principal Chief were exempt from being compelled to perform on or pay damages for violating a contract.³⁵³ Citing *In re Ayers*, the court explained that tribal immunity, like state immunity, bars both actions for damages and actions seeking prospective relief.³⁵⁴ The court also cited its earlier decision in *Thebo* and the public policy considerations that exempt Indian tribes from suit, noting that this exemption "has been the settled doctrine of the government from the beginning."³⁵⁵ Like it had in *Thebo*, the Eighth Circuit in *Adams* drew upon both this fundamental policy reason and the secondary policy reason (protecting the government treasury) for tribal immunity, arguing that without immunity, the tribes would be "overwhelmed" by litigation, with "disastrous consequences."³⁵⁶

In the following decade, the Supreme Court decided *Turner v. United States*, another case involving the Creek Nation and the next

350. *Id.* at 373-74 (citing legislation providing jurisdiction over cases between the Five Tribes and/or their citizens and the railroads, cases between the United States and the Five Tribes, and cases between the Five Tribes). According to the court,

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.

Id. at 374.

351. The phrase "civilized Indian nations," "these Indian nations," or another phrase referring to the Five Tribes appears no fewer than eight times in the court's opinion, which is not even four pages long. *Id.* at 372-76.

352. 165 F. 304 (8th Cir. 1908).

353. *Id.* at 308.

354. *Id.* at 310-11 (citing *In re Ayers*, 123 U.S. 443, 502, 504 (1887)).

355. *Id.* at 308-09 (emphases added); see also *id.* at 309 (describing these as these as "considerations of sound public policy"). The court also referred to a "settled policy which has hitherto been deemed essential for the protection of these dependent tribes against the schemes of the unscrupulous." *Id.* at 312.

356. *Id.* at 308-09.

case in the line of early tribal sovereign immunity jurisprudence. Twenty years after that, the Court cited *Thebo* and *Adams* to uphold the immunity of the Choctaw and Chickasaw Nations in *USF&G*.³⁵⁷ Before turning to those cases, however, note the pattern established in the cases discussed so far: *Adams* relied on the opinion in *Thebo*, which *Adams* says involved “the same fundamental rights”;³⁵⁸ *Thebo* relied on principles and language the Supreme Court applied to the Cherokee Nation, which the Eighth Circuit said was indistinguishable from the Choctaw Nation in its sovereignty and governance; and *Chadick* and *Parks v. Ross*, both involving the Cherokee Nation, applied the same principles and used the same language. Together, these early federal court cases establish a tribal sovereign immunity doctrine—based on long-established and commonly-accepted principles of nation-state and U.S. state immunity—that extends to suits seeking retrospective or prospective relief, suits on contracts, and all other types of actions.³⁵⁹

E. The Five Tribes’ Sovereign Immunity (Back) in the Supreme Court

Ten years after the Eighth Circuit decided *Adams v. Murphy*, the Supreme Court heard *Turner v. United States*,³⁶⁰ a suit by Clarence Turner against the Creek Nation and the United States as trustee of the nation’s funds for damages resulting from an 1890 mob violence incident in which a group of Creek citizens destroyed his personal property.³⁶¹ Congress passed legislation in 1908 authorizing the U.S. Court of Claims to adjudicate Mr. Turner’s claim against the Creek Nation.³⁶²

357. 309 U.S. 506, 512 n.11 (1940).

358. *Adams*, 165 F. at 308.

359. See *id.* at 309–10 (relying on *Louisiana v. Jumel*, 107 U.S. 711 (1882)); *id.* at 310 (citing *Ayers*, 123 U.S. 443, for the proposition that immunity bars breach of contract actions and all other actions and suits, whether at law or in equity); *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 375 (1895) (relying on *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1857)); *id.* at 375–76 (citing *Ayers*, 123 U.S. at 505, for the principle that immunity bars actions for injunctive relief); *Chadick v. Duncan*, No. 15,317, slip op. at 91 (App. D.C. Mar. 3, 1894) (copy available at the Nat’l Archives & Records Admin., Record Group No. 376, Case File No. 314) (also citing *Ayers* for the proposition that immunity bars breach of contract actions and all other suits at law or in equity).

360. 248 U.S. 354 (1919).

361. See DEBO, DISAPPEARANCE, *supra* note 281, at 337–40 (discussing history around the incident and the litigation).

362. *Turner*, 248 U.S. at 356–57 (citing Act of May 29, 1908, ch. 216 § 26, 35 Stat. 444, 457 (1908)). The provision allowing suit against the Creek Nation was included in legislation that also authorized suits against the Menominee Indian Tribe (section 2), the Choctaw Nation (section 5), the Choctaw and Chickasaw Nations (section 16), and the Mississippi Band of Choctaw Indians (section 27).

The Court of Claims, like the Eighth Circuit, noted the Creek Nation's constitution and laws, treaties with the United States, and existence as "a distinct political community," and likened it to the Cherokee Nation in these regards.³⁶³ Treating the tribe as a sovereign government that could not be held responsible for mob violence, the court held that the Creek Nation was not liable to Mr. Turner.³⁶⁴ The court also found that the act authorizing Turner's suit was defective, as it did not prescribe a method for service of process upon the Creek Nation (like it did for the other tribes against which it authorized suits in the Court of Claims).³⁶⁵ Turner appealed to the Supreme Court.

The Supreme Court began its opinion by noting that at the time of the incident, the Creek Nation "exercised . . . the powers of a sovereign people; having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial."³⁶⁶ Using language similar to its earlier decision in *Parks v. Ross*, the federal district court's decision in *Chadick v. Duncan*, the Eighth Circuit's decisions in *Thebo* and *Adams*, and the Court of Claims' decision below, the Supreme Court called the Creek Nation "a distinct political community, with which [the United States] made treaties and which . . . administered its internal affairs."³⁶⁷ It upheld the Court of Claims' finding that the tribe was not liable to Mr. Turner.³⁶⁸

The Supreme Court gave three reasons for dismissing the lawsuit. First, applying general governmental immunity principles, the Court held that the Creek Nation, like state and city governments, was immune from liability for mob violence.³⁶⁹ Second, the Court noted that although the 1908 legislation authorized Mr. Turner's suit and

363. *Turner v. United States*, 51 Ct. Cl. 125, 152-53 (1916) (quoting *Del. Indians v. Cherokee Nation*, 193 U.S. 127, 144 (1904)).

364. *Id.* at 153; *see also id.* at 146 ("The jurisdictional act does not create or declare any liability against the Creek Nation in favor of the plaintiff. Its purport is to furnish a forum where the question of liability may be determined." (citing *Green v. Menominee Tribe*, 233 U.S. 558, 568 (1914))).

365. *Id.* at 144-45 (citing Act of May 29, 1908, ch. 216 §§ 2, 5, 16, 27, 35 Stat. 444, 445, 451, 457 (authorizing suits against the Menominee Indian Tribe, the Choctaw Nation, and the Chickasaw Nation)).

366. *Turner*, 248 U.S. at 355.

367. *Id.* at 357. *Turner* uses the language from, although it does not cite, *Worcester and Thebo*.

368. *Id.* at 358.

369. *Id.* at 357-58. Thus, the Court explained, "The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." *Id.* at 358; *see also id.* ("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.").

thus abrogated the Creek Nation's immunity, it did not create any right for him to recover damages for the mob violence since "[n]o such liability existed by the general law."³⁷⁰ Turner thus failed to state a valid cause of action. Third, the United States, an indispensable party, had not waived its immunity and objected to the Court's jurisdiction.³⁷¹

In discussing the 1908 statute, the Court stated that it "did not impose any liability upon the Creek Nation. The tribal government had been dissolved. Without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent."³⁷² Seventy years later, the *Kiowa* Court would seize upon this language to claim that *Turner*, which *Kiowa* mistakenly suggested was the source of the tribal sovereign immunity doctrine (and from where it "developed almost by accident"), makes "an assumption of immunity for the sake of argument, not a reasoned statement of doctrine."³⁷³ According to *Kiowa*, "[t]he fact of tribal dissolution, not [the tribe's] sovereign status, was the predicate for the legislation authorizing suit [in *Turner*]. *Turner*, then, is but a slender reed for supporting the principle of tribal sovereign immunity."³⁷⁴

But *Kiowa* was wrong to suggest that the 1908 legislation was predicated on the Creek Nation's "dissolution," just as it was wrong to point to *Turner* as the basis for the tribal immunity doctrine.³⁷⁵ There simply is no support for the argument that tribal dissolution was the predicate for the 1908 legislation.³⁷⁶ The argument is faulty in at least three respects.

370. *Id.* at 357.

371. *Id.* at 359.

372. *Id.* at 358.

373. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757, 761 (1998).

374. *Id.* at 757.

375. As Andrea Seielstad explains,

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.

Seielstad, *supra* note 24, at 693 (citing *USF&G*, 309 U.S. 506, 512 nn.10–11 (1940)); see also Struve, *supra* note 21, at 154 ("The *Kiowa* Court was inaccurate in assuming that *Turner* provides the earliest Supreme Court reference to principles of tribal sovereign immunity."); *id.* at 150 ("[T]he *Turner* Court arguably placed less reliance on notions of sovereign immunity than the *Parks [v. Ross]* Court had.").

376. See Struve, *supra* note 21, at 152 n.98 ("It might be argued that the Court's language suggests that the impediment to suit (absent congressional authorization) arose from the dissolution of the tribal government. Such an argument, however, seems unpersuasive, because it is not clear why dissolution would augment a tribe's immunity from suit.").

First, nothing in the act or its legislative history even mentions the Creek government's supposed dissolution. Indeed, the Creek government had not been dissolved but "was instead explicitly perpetuated"³⁷⁷ and, like the other Five Tribes governments, continued to function in a limited capacity under the 1906 Five Tribes Act.³⁷⁸ The Creek national legislature met up through at least the early 1950s,³⁷⁹ although the 1906 Act required federal approval for all of the Creek legislature's acts.³⁸⁰

Thus the Creek and the other Five Tribes governments were never dissolved; they just functioned subject to federal oversight.³⁸¹ Justice Brandeis presumably was aware of this situation when he authored *Turner* in 1919, and it explains his statement about needing congressional authorization for any suit against the Creek Nation because of its dissolution.³⁸² Under the Five Tribes Act, the Creek government could not consent to suit without federal approval.³⁸³

The 1908 legislation authorizing Turner's suit was necessary because of the tribe's immunity, not its dissolution. If the Creek Nation did not have immunity, there would have been no need for the legislation: Turner could have just filed suit against the tribe without it. By authorizing his suit and abrogating the tribe's immunity, however, Congress recognized that immunity (otherwise) existed. And the *Turner* Court recognized the same.

A second consideration undermining the *Kiowa* Court's argument is that the legislation authorizing Turner's suit also authorized lawsuits against tribes that were not subject to "dissolution,"³⁸⁴ illustrating that Congress (and the courts) understood legislation was

377. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1118 (D.D.C. 1976), *aff'd sub nom.*, *Harjo v. Andrus*, 581 F.2d 949, 953 (D.C. Cir. 1978).

378. *See id.* at 1124 (noting that the tribal governments retained authority for some legal matters and for the tribe's finances); *id.* at 1130 (discussing the congressional decision to maintain highly regulated tribal governments for an indefinite period of time). *See also* STRICKLAND, INDIANS, *supra* note 256, at 75 (discussing continuation of the Five Tribes' governments); WORK, *supra* note 251, at 50-51 (same).

379. *See Harjo*, 420 F. Supp. at 1138 (describing meetings of the Creek General Convention).

380. *See id.* at 1129 (reciting statutory provisions).

381. *See id.* at 1126 (explaining that during this period of time, federal authorities "dominated the lives of the Five Civilized Tribes"); *id.* at 1130 (discussing federal officials' attitude of "bureaucratic imperialism" and "deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by . . . the [1906 Five Tribes] Act.").

382. *Turner v. United States*, 248 U.S. 354, 358 (1919).

383. *See Harjo*, 420 F. Supp. at 1129 (quoting the 1906 Five Tribes Act).

384. *See* Act of May 29, 1908, § 2, 35 Stat. 444 (authorizing suit against the Menominee Indian Tribe); *id.* § 27, 35 Stat. 457 (authorizing suit against the Mississippi Band of Choctaw Indians).

necessary to authorize suits against Indian tribes, regardless of whether their governments were “dissolved.”³⁸⁵ Moreover, the argument that the Creek government’s supposed dissolution was the predicate for the legislation in *Turner* fails to explain *Adams v. Murphy*, similarly decided after the Creek government was supposedly dissolved, but for which there was no predicate legislation. Nor does it account for *USF&G*, the Supreme Court’s next tribal immunity case involving the Chickasaw and Choctaw Nations, which also functioned under the 1906 Five Tribes Act. The Court in *USF&G* cited *Turner*—along with the Eighth Circuit’s opinions in *Adams v. Murphy* and *Thebo v. Choctaw Tribe*—for the proposition that the Five Tribes were exempt from suit without congressional authorization and held that tribal immunity “continues . . . even after dissolution of the tribal government[s].”³⁸⁶

USF&G arose out of a dispute involving the United States’ leasing of land belonging to the Chickasaw and Choctaw Nations to a coal company.³⁸⁷ *USF&G* was the surety on a bond guaranteeing payment of the lease royalties by the company.³⁸⁸ The assignee of the coal company’s lease went into receivership, the United States filed a claim for the royalties on the tribes’ behalf, and *USF&G* cross-claimed.³⁸⁹ The federal bankruptcy court issued a credit against the tribes’ royalties in the coal company’s favor, but the Supreme Court voided the bankruptcy judgment, holding that the tribes were exempt from lawsuits absent congressional authorization.³⁹⁰

To support its holding, the Court cited its earlier opinions in *Turner* and *Cherokee Nation v. Georgia*, as well as the Eighth Circuit’s *Thebo* and *Adams* opinions.³⁹¹ Relying on the same “public policy” as the Eighth Circuit, the Court recognized that both the United States and its “dependent sovereigns” were exempt from suit absent their consent.³⁹² The Court reinforced the principle—already recognized

385. Congress’s recognition of tribal sovereign immunity—and the need to expressly rescind it through legislation in order for tribes to be sued—is further evidenced by legislation introduced to authorize suit against the Cherokee Nation in the wake of the *Chadick* decision. See 26 CONG. REC. 2662 (1894) (introducing legislation to authorize a lawsuit to settle a dispute over bonds issued by the Cherokee Nation); see also *supra* note 321 and accompanying text.

386. *USF&G*, 309 U.S. 506, 512 (1940) (emphasis added).

387. *Id.* at 510.

388. *Id.*

389. *Id.* at 510–11.

390. *Id.* at 513 (positing that if the parties were immune from direct suits, a similar immunity existed against cross claims).

391. *Id.* at 512 nn.10 & 11. The *Kiowa* Court, when discussing *USF&G*, notes *USF&G*’s citation to *Turner*, but not the citations to *Cherokee Nation*, *Thebo*, or *Adams*. See *infra* note 417 and accompanying text.

392. *USF&G*, 309 U.S. at 512–13 (pointing to “[t]he public policy which exempted

in *Chadick*, *Thebo*, *Adams*, and *Turner*—that “affirmative statutory authority” was required to subject tribes to suit.³⁹³ And it said that the idea that a sovereign “should not be compelled to defend against cross-actions away from its own territory or in courts[] not of its own choosing . . . is particularly applicable to Indian Nations with their unusual governmental organization and peculiar problems.”³⁹⁴

The Court’s “broad affirmation of tribal immunity”³⁹⁵ in *USF&G* was its last word on the subject for almost four decades. It was also the last of the Supreme Court’s immunity cases involving one of the Five Tribes. But the Court continued to apply the same public policy and well-established, widely accepted principles apparent in *USF&G* and the other Five Tribes cases.

F. *The Modern Era*

The Supreme Court’s next tribal immunity cases were decided during the “modern era” of federal Indian law.³⁹⁶ In 1977, the Court in *Puyallup Tribe v. Department of Game*³⁹⁷ cited *USF&G* for the proposition that “[a]bsent an effective waiver or consent, *it is settled*

the dependent as well as the dominant sovereignties from suit without consent” and “the public policy which protects a quasi-sovereignty from judicial attack”).

393. See *id.* at 514 (reaffirming that statutory authorization is required to bring suit against either the United States or an Indian nation).

394. *Id.* at 513. The Supreme Court did not explain what it thought was “unusual” about tribal governmental organization, or what “peculiar problems” it thought tribes had.

395. Florey, *Borders*, *supra* note 20, at 620 (stating also that *USF&G* was the Supreme Court’s “first extensive discussion of the [tribal immunity] doctrine” and that it “explicitly held that tribes shared fully in ordinary principles of sovereign immunity”).

396. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1574 n.3 (1996) [hereinafter, Getches, *Cultural Frontier*] (describing the modern era of Indian law as beginning with *Williams v. Lee*, 358 U.S. 217 (1959) (citing CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 1 (1987))). By 1977, when it decided its first modern era tribal immunity case, the United States had adopted an official policy of Indian self-determination, with the twin goals of supporting tribal self-governance and promoting tribal economic development. *Id.* at 1592. The late twentieth century also saw a resurgence of tribal institutional and legal development, with many tribes adopting constitutional governments that resembled those of the state and local governments surrounding them, with judiciaries, administrative agencies, and other components of modern governmental apparatuses. See, e.g., CAROLE E. GOLDBERG ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 382–403 (6th ed. 2010) (discussing modern tribal constitutions, government structures, and court systems). That the tribal sovereign immunity doctrine was reinforced in this era is thus in some ways less remarkable than its being recognized in 1940, not even a decade after the United States had officially ended its policy of breaking up tribal lands and begun to encourage the rebuilding of tribal governments, albeit on a model largely imposed by the federal government. *Id.* at 30–33, 386–91 (describing New Deal era federal Indian policy).

397. 433 U.S. 165 (1977).

that a state court may not exercise jurisdiction over a[n] . . . Indian tribe.”³⁹⁸ A year later, the Court in *Santa Clara Pueblo v. Martinez*³⁹⁹ stated that “Indian tribes have *long been recognized* as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.”⁴⁰⁰ It held that the tribe had immunity against an action for declaratory and injunctive relief to enforce the Indian Civil Rights Act in federal court.⁴⁰¹ And it noted that exposing them to suit in outside courts could undermine tribal sovereignty and “impose serious financial burdens on already ‘financially disadvantaged’ tribes.”⁴⁰²

In 1986, the Court in *Three Affiliated Tribes v. Wold Engineering, P.C.*⁴⁰³ reiterated the rule from *USF&G* that tribal immunity extends to cross-actions and held that North Dakota could not require tribes to waive immunity as a condition to accessing state courts.⁴⁰⁴ It cited *Santa Clara Pueblo* and *USF&G* for the proposition that “[t]he common law sovereign immunity possessed by . . . [t]ribe[s] is a

398. *Id.* at 172–73 (emphasis added) (citing *USF&G*, 309 U.S. 506; *Adams v. Superior Court*, 356 P.2d 985, 987–88 (Wash. 1960); U.S. DEP’T OF INTERIOR, FEDERAL INDIAN LAW (1958)). The Supreme Court held that tribal immunity barred any suit against the tribe by the state, but that individual tribal members did not have immunity against Washington’s efforts to enforce state fishing laws against them outside of the reservation. *Id.* at 171–72.

Justice Blackmun’s concurring opinion, however, expressed doubts about the tribal immunity doctrine and his view that the “doctrine may well merit re-examination in an appropriate case.” *Id.* at 178–79 (Blackmun, J., concurring). Apparently he thought such a case never arose during his time on the bench, or perhaps Justice Blackmun changed his mind. See Memorandum from Justice Blackmun to Justice Marshall regarding *Santa Clara Pueblo v. Martinez* (March 28, 1978), in PAUL J. WHALBECK, JAMES F. SPRIGGS, II, & FORREST MALTZMAN, THE BURGER COURT OPINION WRITING DATABASE (2011), available at <http://supremecourttopinions.wustl.edu/index.php?rt=pdfarchive/details/1612> (stating that Justice Blackmun took no part in the decision or opinion); see also *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Three Affiliated Tribes v. Wold Eng’g, P.C.*, 476 U.S. 877 (1986) (Justice Blackmun joining in the respective majority opinions upholding tribal sovereign immunity).

399. 436 U.S. 49 (1978).

400. *Id.* at 58 (citing *Puyallup*, 433 U.S. at 172–73; *USF&G*, 309 U.S. at 512–13; *Turner v. United States*, 248 U.S. 354, 358 (1919)).

401. *Id.* at 59. The Court also held that the Pueblo’s governor did not enjoy immunity against the petitioner’s action for declaratory and injunctive relief. *Id.* (citing *Puyallup*, 433 U.S. at 171–72; *Ex Parte Young*, 209 U.S. 123 (1908)). However, the Court found that Congress did not, in the Indian Civil Rights Act, authorize actions for declaratory and injunctive relief to enforce the statute (other than habeas corpus petitions), and therefore that there was no cause of action. *Id.*

402. *Id.* at 64. (quoting SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS, SENATE JUDICIARY COMM., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN: SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS PURSUANT TO S. RES. 194, 89TH CONG., 2D SESS., 12 (Comm. Print 1966)).

403. 476 U.S. 877 (1986).

404. See *id.* at 891 (noting that waiver requirement could lead to counterclaims against tribes in state court).

necessary corollary to Indian sovereignty and self-governance [and], like all aspects of tribal sovereignty . . . privileged from diminution by the States.”⁴⁰⁵

In its final tribal immunity case before *Kiowa*, the Court in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*,⁴⁰⁶ recognizing that tribal sovereign immunity bars actions for injunctive and prospective relief, held that Oklahoma could not sue the tribe to collect state cigarette, fuel, and sales taxes owed by non-members for purchases at the tribe’s gas station, or to make the tribe pay the state the amount of those taxes.⁴⁰⁷ Noting that it had previously reaffirmed the doctrine on several occasions⁴⁰⁸ and that Congress had “consistently reiterated its approval” of the doctrine consistent with its “desire to promote the ‘goal of Indian self-government, including its ‘overriding goal’ of encouraging tribal self-sufficiency and economic development[,]”⁴⁰⁹ the Court stated that it was “not disposed to modify the long-established principle of tribal sovereign immunity.”⁴¹⁰ Justice Stevens, however, wrote a concurring opinion calling sovereign immunity an “anachronistic fiction” and questioned whether tribal immunity “extends to cases arising from a tribe’s conduct of commercial activity outside its own territory . . . or that it applies to claims for prospective equitable relief against a tribe.”⁴¹¹ Seven years later, he authored the dissent in *Kiowa* expressing the view that tribal immunity should not extend to tribes’ off-reservation commercial conduct.

IV. *KIOWA* REVISITED

The Court in *Kiowa* upheld the tribal sovereign immunity doctrine and recognized that it extends to both off-reservation and commercial activities.⁴¹² However, it did so reluctantly and only after “disparag[ing] the precedent,”⁴¹³ misconstruing the doctrine’s origins, attacking its legitimacy, and inviting Congress to limit or

405. *Id.*

406. 498 U.S. 505 (1991).

407. *Id.* at 507.

408. *Id.* at 510 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Turner v. United States*, 248 U.S. 354, 359 (1919)).

409. *Id.* (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)).

410. *Id.*

411. *Id.* at 514–15 (Stevens, J., concurring).

412. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998); see also *supra* notes 12, 46 and accompanying text.

413. *Tweedy*, *supra* note 13, at 177 (“Justice Kennedy disparaged the precedent, which constrained him, and then proceeded to list several policy reasons why sovereign immunity for Indian tribes should be abolished or limited.”).

abrogate it.⁴¹⁴ But the Court's characterizations of the doctrine, and especially its history, are incorrect. The above analysis makes it abundantly clear that the doctrine did not develop by accident.

The *Kiowa* Court attributed tribal immunity's supposed accidental origin to *Turner*,⁴¹⁵ but *Turner* is not the sole basis for the tribal sovereign immunity doctrine or the first tribal immunity case. Nor is *Turner* itself a "slender reed for supporting . . . tribal sovereign immunity."⁴¹⁶ Understood in context, *Turner* is a rather sturdy reed since but for the Creek Nation's immunity the legislation authorizing suit against it would have been unnecessary. And *Turner* is just one reed in the fabric supporting the tribal immunity doctrine.

The *Kiowa* Court overlooked (or conveniently ignored) the fact that the Court in *USF&G*, when it first expressly recognized the tribal sovereign immunity doctrine in 1940, cited not just *Turner*, but also *Cherokee Nation v. Georgia* and the Eighth Circuit's decisions in *Thebo v. Choctaw Tribe* and *Adams v. Murphy*.⁴¹⁷ These cases do not discuss an accidental doctrine. They talk about a "settled policy" and "settled doctrine" based on "well-established principle[s] of jurisprudence."⁴¹⁸ They also cite the Supreme Court's contemporaneous state immunity

414. See *supra* Part I.

415. The Court in *Kiowa* said that "[t]he doctrine is said by some of our own opinions to rest on the Court's opinion in *Turner*," *Kiowa*, 523 U.S. at 756 (citing *Citizen Band*, 498 U.S. at 510), although the exact language in *Citizen Band* states: "A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases." *Citizen Band*, 498 U.S. at 510 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Turner v. United States*, 248 U.S. 354, 358 (1919)). Thus the *Kiowa* Court does not directly attribute the tribal immunity doctrine's origin to *Turner*, though it suggests as much. But see *Kiowa*, 523 U.S. at 761 (Stevens, J., dissenting) (attributing the doctrine's origins to *Turner* and *USF&G*). But the tribal sovereign immunity doctrine dates back further than *Turner*, even in the Supreme Court. See *supra* Part III.D.

416. *Kiowa*, 523 U.S. at 757. The Supreme Court's "slender reed" characterization is based on its argument that the Creek government's dissolution (and not its sovereign immunity) was the predicate for the legislation authorizing suit against the tribe in *Turner*, and that *Turner's* "assumption of immunity for the sake of argument [was therefore] . . . not a reasoned statement of doctrine." *Id.*; see also *id.* at 756 ("Though *Turner* is indeed cited as authority for the immunity, examination shows it simply does not stand for that proposition."). But this argument is based on a misunderstanding of the Creek government's history, and thus *Turner's* holding. See *supra* notes 374–386 and accompanying text.

417. The *Kiowa* Court notes *USF&G's* citation of *Turner* but says nothing about *Thebo* or *Adams* or the "public policy" they rely on to uphold tribal immunity—which is the same "public policy" relied on in *USF&G*. Compare *USF&G*, 309 U.S. 506, 512 n.10 (1940) (invoking the "public policy which exempted the dependent as well as the dominant sovereign [s] from suit" (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831))), with *Thebo v. Choctaw Tribe*, 66 F. 372, 374–75 (8th Cir. 1895) (citing *Cherokee Nation v. Georgia* and other cases involving the Cherokee Nation to support the "settled policy" of recognizing tribal immunity from suit).

418. *Thebo*, 66 F. at 375–76 (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1857)).

jurisprudence.⁴¹⁹ And they rely on the same principles and reasoning the Court used there and in its foreign and federal immunity jurisprudence—as well as basic federal Indian law principles from the Marshall Trilogy, *Parks v. Ross*, and other cases that predate *Turner* by at least a half century—to uphold tribal immunity.⁴²⁰ But the *Kiowa* Court does not mention *USF&G*'s citation of these foundational cases, even though they are cited along with *Turner* in the same part—indeed in the same footnotes—of *USF&G* that *Kiowa* cited.⁴²¹

The *Kiowa* Court also mischaracterized the policy justifications underlying the tribal immunity doctrine. This happens on multiple levels. On the one hand, the Court ignored the historical justifications for the doctrine articulated in the foundational tribal immunity cases. As noted above, these cases used the same reasoning and language as other immunity cases of their time,⁴²² which themselves offer little analysis or reasoning.⁴²³ Any criticism of the tribal immunity doctrine for being light on analysis applies equally for state, federal, and foreign immunity. On the other hand, the *Kiowa* Court suggested for the first time that the tribal immunity

419. See *Adams v. Murphy*, 165 F. 304, 308 (8th Cir. 1908) (citing the Supreme Court's state sovereign immunity decisions in *Ayers* and *Jumel*); *Thebo*, 66 F. at 375 (quoting the Supreme Court's decision in *Beers*, 61 U.S. (20 How.) at 529); see also *supra* note 359 and accompanying text.

420. See *supra* Part III.D.2.

421. The dissent noted that *USF&G* cited *Turner* and “two Eighth Circuit decisions addressing the immunity of two of the Five Civilized Tribes” and emphasized the *USF&G* Supreme Court's singular statement that “[t]hese Indian Nations are exempt from suit without Congressional authorization.” *Kiowa*, 523 U.S. at 761–62 (Stevens, J., dissenting) (internal quotation marks omitted). Justice Stevens argued that “[a]t most, the holding [in *USF&G*] extends only to federal cases in which the United States is litigating on behalf of a tribe,” *id.* at 762, but he did not address the fact that neither *Thebo* nor *Adams* involved the United States' litigating on a tribe's behalf. Nor did he provide any basis for limiting *USF&G*'s holding to cases brought by the United States.

One might argue, and the dissent perhaps suggests, that the doctrine recognized in *Thebo*, *Adams*, and *USF&G* applied only to the Five Tribes (or that there's something accidental or happenstance about the doctrine as developed in those cases being applied to other tribes). But *USF&G* used the phrase “these Indian Nations” only once; it used “the Indian Nations” elsewhere in its opinion. Moreover, two of the three opinions in the Marshall Trilogy describe and develop rules based on the Cherokee Nation and its relationship with the United States. Like tribal sovereign immunity, these rules are (and always have been) applied across-the-board to all tribes under the Court's one-size-fits-all federal Indian law jurisprudence. And to the extent the holdings in the Five Tribes cases might be construed as relying on their particular forms of government and institutions, most of the 566 federally-recognized Indian tribes are more similar to the Five Tribes today, in terms of governmental structures, apparatuses, and responsibilities, than at the turn of the twentieth century when the Five Tribes immunity cases were decided.

422. See *supra* Parts II.D, III.D.

423. See *supra* Part II.A–C.

doctrine's purpose was and is to protect against encroachment by the states.⁴²⁴

The early tribal immunity cases, however, did not mention protecting tribal governments from state encroachment as a reason for the doctrine.⁴²⁵ They upheld tribal immunity for two basic reasons: primarily, because the courts equated the tribes with states and foreign nations that enjoyed immunity as part of their inherent sovereignty; and secondarily, because subjecting the tribes to suit would have threatened the tribal governments' treasuries.⁴²⁶ These are the same reasons set forth in the Court's contemporaneous cases involving other sovereigns' (and particularly states') immunity. They are also the same reasons most often cited today for state sovereign immunity⁴²⁷ and are arguably stronger for tribes than other governments.⁴²⁸ But they are conspicuously absent from *Kiowa*.⁴²⁹

424. *Kiowa*, 523 U.S. at 758. When suggesting that there are "reasons to doubt the wisdom of perpetuating the doctrine," the Court said that "[a]t one time, the doctrine of tribal immunity . . . 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." *Id.* It is interesting to compare the Supreme Court's suggestion that the justification for tribal sovereign immunity based on preserving self-governance is only to protect tribes from state encroachment with the Court's invoking a self-governance justification for state immunity that argues sovereign immunity is necessary to preserve the rights of the citizens of those governments (acting through their elected officials), to administer their own public affairs and decide how to allocate limited resources, as opposed to having outside judges interfere with or make these decisions. See *supra* note 166 and accompanying text (discussing *In re Ayers*, 123 U.S. 443, 505 (1887), which described judicial interference with states' public policy and public affairs administration); *supra* note 190 and accompanying text (discussing *Alden v. Maine*, 527 U.S. 706, 751–52 (1999), which warned against judicial interference with the states' self-governance and use of the political process to allocate resources among competing interests); see also *Tweedy*, *supra* note 13, at 179 (noting that "[t]he Supreme Court's conception of tribal sovereign immunity and, by extension tribal sovereignty itself, as a special right which should be accorded only to the weak and defenseless stands in sharp contrast to its usual conception of sovereign immunity as an esteemed and necessary component of governmental status").

425. Indeed, the early tribal immunity cases and their context make clear that protecting tribes against state (or white settler and would-be state) encroachment was not the immunity doctrine's purpose. Protecting the tribes against state encroachment was the federal government's obligation, assumed explicitly through treaties and as part of the federal government's fiduciary duties towards Indian tribes generally. See, e.g., *United States v. Kagama*, 118 U.S. 375, 384 (1886) (noting the federal government's obligation to protect tribes from states and their citizens).

426. See *supra* Part III.D.

427. See *supra* notes 189–190 and accompanying text.

428. See *Florey, Penumbra*, *supra* note 21, at 825–26 (suggesting there are strong and unique policy justifications for tribal immunity); see also *Riley*, *supra* note 21, at 1109 (noting that because of tribes' historical and present financial struggles, sovereign immunity takes on an added importance in protecting tribal communities); *Struve*, *supra* note 21, at 166 ("Standard policy arguments for sovereign immunity—such as fiscal concerns or governmental 'dignity'—are more likely to ring true with respect to tribal than nontribal governments.").

An understanding of tribal sovereign immunity's historical and doctrinal contexts also shows that the doctrine is not as anomalous as Justices Stevens, Thomas, and Ginsburg try to make it seem in their dissent.⁴³⁰ They argue that tribal immunity is anomalous based on a cross-sovereign comparison: the federal government has waived its immunity for certain tort claims and claims arising out of its commercial activities; Congress abrogated foreign nations' extraterritorial immunity for their commercial activities; and a state can be sued in the courts of another state.⁴³¹ Like the arguments that tribal immunity is accidental or lacks sufficient justification, however, this argument is deflated by a proper historical and doctrinal perspective.⁴³²

429. See Struve, *supra* note 21, at 154 (“[T]he Court gave unduly short shrift to the policies that weigh in favor of tribal sovereign immunity.”). The *Kiowa* Court did mention promoting economic development and tribal self-sufficiency as reasons for the doctrine, but it said that this rationale “can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities.” *Kiowa*, 523 U.S. at 757–58. For a critique of the Justices’ limited conception of tribal customary activities and failure to consider tribal views, including perspectives that favor maintaining attributes of sovereignty tribes have not freely given up and promoting self-determination and economic, cultural, and social development, see Carpenter & Halbritter, *supra* note 12, at 315–16, 321.

430. See *Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting) (calling the tribal sovereign immunity rule “strikingly anomalous” and asking: “Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations?”).

431. *Id.* at 765; see also *supra* notes 49–54 and accompanying text.

432. An understanding of tribal sovereign immunity's historical and doctrinal contexts also suggests that the *Kiowa* Court was not performing a legislative function by extending tribal immunity to off-reservation commercial activities, as the dissent claims. See *Kiowa*, 523 U.S. at 764 (Stevens, J., dissenting) (arguing that the Court, by extending tribal sovereign immunity to off-reservation conduct, was engaging in judicial lawmaking and encroaching on Congress's authority). The courts in the early tribal immunity cases that applied the same principles found in the Supreme Court's other sovereign immunity jurisprudence—and based on the same common law immunity doctrine—presumably recognized a doctrine with the same common law scope. See *Greene v. Mt. Adams Furniture (In re Greene)*, 980 F.2d 590, 595 (9th Cir. 1992) (arguing that “the scope of tribal immunity has to be measured at the common law as it existed at some earlier time, rather than adopting present limits on sovereign immunity accepted by the states for their own purposes” (footnote omitted)); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (“Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.” (emphasis added)); Florey, *Borders*, *supra* note 20, at 620 (stating that *USF&G* “explicitly held that tribes shared fully in ordinary principles of sovereign immunity” and describing *USF&G* as “a broad affirmation of tribal immunity, closely tying the doctrine to a robust view of tribal sovereignty”).

Justice Stevens' argument does, however, raise interesting questions regarding not only tribal sovereign immunity but sovereign immunity generally: namely, the extent to which Congress is following Supreme Court precedent (or making new law) when it recognizes immunity, and the extent to which the Court is making new law or simply upholding a doctrine that Congress and others have always recognized as existing. In one sense, Congress is neither creating nor expanding the doctrine, but simply legislating against the backdrop of something that is already there. One could similarly argue that the Court is not making new law or expanding the

Tribal sovereign immunity, like the other sovereign immunity doctrines alongside which it developed, is at common law extraterritorial and absolute in scope and applies to all types of actions, except as abrogated by Congress.⁴³³ The noted anomalies between tribes' and the other governments' immunities result from congressional action (in the case of federal and foreign immunity) or the consent of the sovereign (for states). Congress has abrogated tribal immunity in only a few limited circumstances,⁴³⁴ and tribes did not (like states) consent to suits by (other) states by joining the Union.⁴³⁵

When deciding whether to recognize sovereign immunity in the state, federal, and foreign government contexts, the Supreme Court deferred to Congress and the sovereigns themselves. It has done the same for tribal immunity to date. But the Justices have done so reluctantly and expressed their normative angst with tribal sovereign immunity.

Normative questions about the desirability of sovereign immunity, including tribal immunity, are beyond the scope of this Article. To the extent they are influenced by or relate to the doctrine's history, we need to be clear about the facts. It is quite obvious that *Kiowa's* questioning tribal immunity's legitimacy strengthened its pitch to

immunity doctrine when it recognizes governmental immunity—even for commercial and extraterritorial activities—because the doctrine has always existed, with those broad default common law contours.

433. See *Greene*, 980 F.2d at 594 (“Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component.”); see also Seielstad, *supra* note 24, at 712 (discussing the federal government’s position in the *Kiowa* oral argument that “the common law default rule with respect to tribes is also absolute immunity unless Congress articulates a different standard”).

434. See *supra* note 53 and accompanying text (discussing legislation in which Congress granted only limited authorization for certain lawsuits).

435. See *supra* note 54 and accompanying text. The *Kiowa* dissent also argued that “[t]he 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.” *Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting). But if the states have immunity for their commercial activities as part of the common law immunity they enjoyed but did not surrender in the Constitution, see *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685–86 (1999) (upholding state immunity for commercial activities and suggesting that states did not give Congress the power to abrogate it), and tribes enjoyed that same common law immunity—which was both absolute and extraterritorial in scope—and likewise did not surrender this immunity (in the Constitution or otherwise), see *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) (explaining that tribes and foreign nations, unlike states, did not surrender any of their sovereign immunity in the Constitution); *Santa Clara Pueblo*, 436 U.S. at 58 (noting that tribes possess the same common law immunity as other sovereigns), logic suggests that Indian tribes also had and retained immunity for their off-reservation commercial activities.

Congress to limit it—and has made it easier for other courts to carve out exceptions to the doctrine and justify departures from *Kiowa's* holding that tribes can be sued “only where Congress has authorized the suit or the tribe has waived its immunity.”⁴³⁶

Congress's history of recognizing tribal sovereign immunity may be what has so far kept the Supreme Court from limiting tribal immunity on its own. That situation is tenuous, however, with four new Justices having joined the Court since *Kiowa* was decided, lower courts asking the Court to change the law, petitions for certiorari in tribal immunity cases being filed every term, a case currently making its way through the courts that presents the same issue the Court granted cert on two years ago (but did not decide because the case was remanded),⁴³⁷ and the Court's having granted certiorari in a case that presents a tribal sovereign immunity question during its October 2013 term.⁴³⁸ And longstanding Congressional recognition of tribal immunity has not stopped some lower courts from placing limitations on tribal immunity, despite *Kiowa's* reaffirming that such decisions are solely the province of Congress and the tribes themselves.⁴³⁹

A. *The Role of Congress*

Pretty much all of the tribal sovereign immunity cases have recognized, at least since the late nineteenth century, a congressional power to abrogate tribal immunity. But Congress has exercised this power only sparingly. One of the earliest exercises of this power was the 1908 legislation authorizing the suit against the Creek Nation which gave rise to the Supreme Court's decision in *Turner*.⁴⁴⁰ But this law, like other legislation abrogating tribal immunity, was specific and narrow in scope, and it shows that Congress understood such immunity existed absent Congressional abrogation.

Outside of these specific and narrow circumstances, Congress has not abrogated or limited tribal immunity. In 1991, the Supreme Court noted that Congress has “consistently reiterated its approval of the immunity doctrine” and gave the Indian Financing Act of 1974 and the Indian Self-Determination and Education Assistance Act of 1975 as examples.⁴⁴¹ Seven years later, the *Kiowa* Court referred to

436. *Kiowa*, 523 U.S. at 754.

437. See *supra* note 99–105 and accompanying text.

438. See *supra* note 19, 106 and accompanying text.

439. See *supra* Part I.A.

440. Act of May 29, 1908, ch. 216, § 26, 35 Stat. 444, 457; see also *supra* note 362 and accompanying text (discussing legislation).

441. See *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (discussing Pub. L. 93-262, 88 Stat. 77 (codified at 25 U.S.C. § 1451

these examples as evidence of Congress's "intention not to alter" (as opposed to approval of) the tribal sovereign immunity doctrine.⁴⁴² Whether the Supreme Court considers certain legislation to reflect an endorsement of tribal immunity or simply an intent not to change it, Congress's longstanding recognition of the doctrine has continued from the nineteenth century up through the present, including in legislation Congress considered around the time of and passed after (and perhaps because of) *Kiowa*.⁴⁴³

Although Congress has never expressly stated a reason for its affirmation of tribal sovereign immunity, the Supreme Court has suggested it is because Congress wants to promote tribal self-government, self-sufficiency, and economic development.⁴⁴⁴ Whatever Congress's motive is for preserving the doctrine, its history of recognizing tribal immunity has figured significantly in the Supreme Court's repeatedly upholding the doctrine. Indeed, Congress's recognition of tribal immunity across three centuries is perhaps the only thing that has kept the majority of Justices from limiting the doctrine themselves and kept the Court from

(2006), and Pub. L. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. § 450).

442. *Kiowa*, 523 U.S. at 758–59.

443. See Seielstad, *supra* note 24, at 722–30 (discussing the Indian Tribal Economic Development and Contracts Encouragement Act of 2000, the Tribal Court Claims and Risk Management Act of 2000, and the late 1990s legislative history and hearings leading up to them); see also Matthew L.M. Fletcher, *Greatest Indian Cases Round 2 Results*, *TURTLE TALK* 2 (Sept. 2, 2012), <http://turtletalk.wordpress.com/2012/09/02/greatest-indian-cases-round-2-results-happy-early-labor-day> (stating that "*Kiowa* . . . fueled its own Congressional hearings on tribal immunity").

444. See *Kiowa*, 523 U.S. at 757 (stating that the Court in *Citizen Band* "retained the doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency"); *Citizen Band*, 498 U.S. at 510 (citing the Indian Financing Act and Indian Self-Determination Act as examples of Congressional approval of tribal immunity and stating that they "reflect Congress's desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development") (internal quotations and citations omitted). The *Kiowa* Court, however, stated that this rationale "can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities." *Kiowa*, 523 U.S. at 757–58. *But see* Carpenter & Halbritter, *supra* note 12, at 314–15, 321 (criticizing the Justices for tying tribes' immunity and sovereign rights to ethnocentric conceptions of customary tribal activities, and discussing tribes' commercial activities as an exercise of their inherent sovereignty, and of their rights of self-determination and free pursuit of their economic, cultural, and social development under international law). To the extent the *Kiowa* suggests that promoting economic development and self-sufficiency is a justification for tribal immunity, it seems to attribute that purpose to Congress and not to any of its precedent. In any case, the extent to which this justification has a historical basis is questionable, since the doctrine developed at a time (in the late nineteenth century) when the United States was trying to bring an end to tribes' economic self-sufficiency and political independence. See GOLDBERG ET AL., *supra* note 396, at 24–30 (describing late nineteenth century federal Indian policy).

diminishing tribal immunity like it has other aspects of tribal sovereignty.⁴⁴⁵ The question is whether the Court will stay this course.

B. *The Big(ger) Picture*

It is clear that many judges, including most of the Justices on the Supreme Court, do not like tribal sovereign immunity and think the doctrine is too broad. Their dislike of sovereign immunity generally, and of tribal immunity to the extent its scope seems anomalous when compared to other sovereigns', is understandable. Concerns and criticisms about fairness and notice to, and a potential lack of recourse for, tort victims and others on the plaintiff side of immunity exist with respect to all sovereign immunity doctrines.⁴⁴⁶ But these

445. While the Supreme Court has limited other aspects of tribal sovereignty in recent decades, those limitations—primarily of tribes' exercise of and adjudicatory jurisdiction over non-members in Indian country—are based on the Supreme Court's finding that tribes were implicitly divested of such authority upon European "discovery" of North America and tribes' "incorporation into [what would become] the territory of the United States." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (arguing that "inherent limitations" and constraints on tribal powers resulted from their "incorporation into the United States"); see also *Montana v. United States*, 450 U.S. 544, 564 (1981) ("[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."). But the implicit divestiture theory holds that this supposed inconsistency magically arose upon discovery. The argument that tribes were somehow divested of their sovereign immunity upon their "incorporation into" the United States is much harder to make, given Congress's centuries-long recognition of the doctrine and the Supreme Court's statement in *USF&G* in 1940 that sovereign immunity "exempted the dependent as well as the dominant sovereign[.]s from suit without consent." *USF&G*, 309 U.S. 506, 512 (1940).

Andrea Seielstad has suggested that because Congress was "actively considering changes in the law of tribal immunity" at the time *Kiowa* was decided and the Justices were aware of this fact, they may have been hesitant to alter the tribal immunity doctrine until after waiting to see what Congress would do. Seielstad, *supra* note 24, at 711. Katherine Florey has linked the Court's hesitancy to abrogate tribal immunity to its broader sovereign immunity and New Federalism jurisprudence, suggesting that

a principal reason the Court has been reluctant to restrict [tribal] sovereign immunity . . . is that to do so might undermine the foundations of its Eleventh Amendment jurisprudence Indeed, the Court's Eleventh Amendment cases might be said to depend on a notion of sovereignty and immunity as inextricable, because only by equating the two has the Court been able to explain how the Constitution preserves and enshrines a general principle of state sovereignty despite its lack of explicit mention of the doctrine.

Florey, *Borders*, *supra* note 20, at 625–26 (footnote omitted).

446. See Chemerinsky, *supra* note 20, at 1216–23 (offering criticisms of the conventional justifications for state sovereign immunity); Florey, *Borders*, *supra* note 19, at 600 ("Tribal immunity, though exceptional in certain ways, is, at least to some extent, subject to many criticisms that have been leveled against sovereign immunity in other contexts."); see also Chemerinsky, *supra* note 20, at 1202 (criticizing sovereign immunity for preventing persons who have suffered harm from getting redress for their injuries).

concerns get expressed differently in the tribal immunity context.

For the Supreme Court in particular, the dislike of tribal immunity seems to come as much (if not more) from a discomfort with tribal sovereignty than from any discomfort with sovereign immunity.⁴⁴⁷ The Court's general unease with and negative reactions to tribal sovereignty over the past four decades have been widely noted and commented upon.⁴⁴⁸ Its recent Indian law jurisprudence reflects an apprehension tribal sovereignty and a distrust of tribal courts and institutions.⁴⁴⁹ This discomfort is also evident in the tribal immunity cases.

Kiowa reflects what Professor Frank Pommersheim calls "a free-floating normative angst within the Court about what tribes should be permitted to do, especially in regards to non-Indians."⁴⁵⁰ This angst becomes more palpable when one considers that, in some locales, tribal immunity is today "perhaps the central [feature of tribal sovereignty] when it comes to tribal relationships with nonmembers."⁴⁵¹ Yet tribal sovereign immunity stands out as the one area where the Court has not become the arbiter of tribal sovereignty and "assum[ed] a prerogative that it formerly conceded to the political branches of government."⁴⁵²

447. Ann Tweedy has suggested that "[t]he Court's discomfort with tribal immunity appears to extend not from its discomfort with the doctrine of sovereign immunity in general, but rather from the continued recognition of tribal sovereign immunity." Tweedy, *supra* note 13, at 179–80; see also *id.* at 180 (arguing "[t]hat the Court actually entreated Congress to abrogate tribal immunity indicates the extent of its interest in effecting a wholesale divestment of tribal sovereignty").

448. Some of the most cited examples of this commentary are Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121 (2006); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999) [hereinafter Frickey, *Colonialism*]; Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001); Getches, *Cultural Frontier*, *supra* note 396; Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003); and Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405 (2003). There is a spectrum of theories as to why the Supreme Court has been adverse to Indian interests, ranging from the Justices' acting upon a "long-established racial stereotype of Indians as unsophisticated savages," WILLIAMS, *supra* note 258, at xv, to their using Indian law cases as vessels to decide larger constitutional issues that may have little to do with federal Indian law. See Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 580 (2008).

449. See POMMERSHEIM, *supra* note 61, at 232 (describing the Supreme Court's Indian law cases as reflecting a "fear" of "offensive," in the defense versus offense sense, tribal sovereignty in the form of adjudicatory and regulatory jurisdiction).

450. *Id.* at 298.

451. Florey, *Borders*, *supra* note 20, at 598.

452. Getches, *Cultural Frontier*, *supra* note 396, at 1575; see also POMMERSHEIM, *supra* note 61, at 297 (arguing that the Court has "arrogated to itself a judicial version

The arguments made by the Justices in *Kiowa* and the plaintiffs and judges in its progeny will continue to find a sympathetic audience. Many others no doubt share the courts' unease with applying immunity given the facts of some the cases, and perhaps the courts' general discomfort with extending immunity to torts or to tribal economic enterprises (and to tribes' casinos and off-reservation activities in particular). These are claims that many governments would recognize as being outside sovereign immunity, either because they have adopted laws providing recourse for their torts and commercial and other acts in their own forums, or because of changes in customary international law.⁴⁵³

Understood in its proper historical and doctrinal context, however, tribal immunity is not as anomalous as the *Kiowa* dissent and other courts make it out to be.⁴⁵⁴ Tribal immunity is in certain respects broader than other governments' immunities, but that is because either the governments consented to suit (generally in their own courts) or Congress limited their immunity. While the federal government and states have in recent decades made remedies more available against government defendants, those remedies are still incomplete.⁴⁵⁵ Similarly, many (though not all) Indian tribes make tribal court remedies available for claims against their governments.⁴⁵⁶ Various legislative provisions and other mechanisms

of plenary power" and "creat[ed] . . . a colonialist-like common law regime" for federal Indian policy); Frickey, *Colonialism*, *supra* note 448, at 58 (arguing that the Court has "engaged in federal common-lawmaking that divests tribes of inherent sovereignty" and "embraced a common law for our age of colonialism").

453. The federal government, for example, is subject to the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(2006), and many states have adopted counterpart legislation. A "restrictive" doctrine of immunity—under which nation-states do not enjoy immunity for their extraterritorial activities—is now part of customary international law" and was codified into U.S. law in the 1976 Foreign Sovereign Immunities Act." Yap, *supra* note 129, at 93, 99–100.

454. See *supra* notes 50–54, 433–435 and accompanying text.

455. See Struve, *supra* note 21, at 137–38 (noting that the remedies against the federal and state governments are "far from complete"); see also Seielstad, *supra* note 24, at 742–73 (discussing Congressional testimony regarding liability, including for torts, against state and local governments). Another reality often ignored in the (tribal) sovereign immunity discussion is that federal and state sovereign immunity have historically barred and continue to pose a barrier to Indian tribes seeking redress for the wrongful actions of these governments. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) (holding that state immunity barred the tribe's claim to land, water, and jurisdiction over it); see also *Paiute-Shoshone Indians v. City of Los Angeles*, No. 1:06-cv-00736 OWW LJO, 2007 WL 521403 (E.D. Cal. Feb. 15, 2007) (finding that federal immunity barred the tribe's claim for land and water rights).

456. Struve, *supra* note 21, at 137 (noting that many tribes "provide significant remedies, in tribal court, for claims alleging misconduct by tribal governments" but that "[n]ot all tribes provide a full array of remedies for government action").

also address tribal sovereign immunity and provide remedies against tribes.⁴⁵⁷

The Supreme Court did not abrogate sovereign immunity for the federal government, states, or foreign nations. It waited (quite a long time in many instances) for Congress or those governments' legislatures or courts to do so. The difficult questions raised by debates about whether to limit tribal immunity suggest these questions are similarly best left for tribes and Congress. So do more general concerns about lawmaking and regulation through lawsuits.⁴⁵⁸

However, the Court's deference to Congress and Congress's sparing use of its abrogation power can make tribal immunity seem anomalous, which can in turn put pressure on tribes to waive immunity.⁴⁵⁹ But if the concern is really about the scope of tribal sovereign immunity, then why not just make the argument that Congress should similarly limit tribal immunity and leave it at that? Why do the courts also find it necessary to undermine the doctrine's legitimacy by attacking its origins?

Kiowa and the other tribal sovereign immunity cases illustrate well David Getches' admonition that "old Indian rights . . . can be viewed as anomalous or inequitable when viewed without the full benefit of their historical basis."⁴⁶⁰ This piece aims to provide enough of the historical basis for tribal immunity and its development relative to other governments' immunity so that it does not seem so anomalous (or inequitable) in comparison. Whatever one thinks of the normative arguments judges and others make about tribal sovereign immunity,⁴⁶¹ tribal immunity should not be limited based on an inaccurate history.

And though a discussion the normative arguments regarding sovereign immunity—tribal or otherwise—is beyond the scope of this Article, it is worth at least highlighting a few of the policy questions

457. See *infra* notes 474–477 and accompanying text.

458. See Frederick Schauer & Richard J. Zeckhauser, *The Trouble With Cases*, 2, in REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 45 (Daniel P. Kessler ed. 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1446897## (discussing potential drawbacks of regulation by litigation, including that general policy may be made on the basis of unwarranted assumptions about the typicality of one or a few high-salience cases or events).

459. See Struve, *supra* note 21, at 138 (noting that even though Congress might not abrogate immunity, tribes will face pressure to waive it).

460. Getches, *Cultural Frontier*, *supra* note 396, at 1637.

461. See, e.g., *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 757–58 (1998) (arguing that the scope of tribal sovereign immunity is broader than necessary); *Furry v. Miccosukee Tribe*, 685 F.3d 1224, 1237 (11th Cir. 2012) (suggesting that tribal immunity is "anachronistic and overbroad in its application").

that arise in the debate over limiting tribal immunity, whether in the judiciary or the legislature.⁴⁶² The complexity of the issues involved counsels for judicial caution, as the *Kiowa* Court recognized when it said Congress is better positioned to weigh and accommodate the competing concerns and interests.⁴⁶³ The Supreme Court has noted that the interests at stake include a desire to promote tribal self-government and encourage tribal self-sufficiency and economic development.⁴⁶⁴ But there are other interests and questions to consider, as the hypotheticals below illustrate.

Suppose the Supreme Court were to adopt the “what is needed to safeguard tribal self-governance” standard for tribal sovereign immunity advocated by the *Kiowa* majority,⁴⁶⁵ or limit tribal immunity to on-reservation activities with a “meaningful nexus to [a] tribe’s . . . sovereign functions,” as urged by the *Kiowa* dissent.⁴⁶⁶ Determining what activities are governmental (or, in the *Kiowa* Justices’ parlance, are necessary for or have a meaningful nexus to tribal self-governance) is not as simple as it may seem. Tribes, with the federal government’s support, perform a vast array of sovereign functions, including operating businesses to generate revenues for their governments.⁴⁶⁷ Indeed, Congress and the Executive Branch have

462. See, e.g., Florey, *Penumbra*, *supra* note 21, at 826 (“[A]n argument can be made that strong and unique policy justifications exist for a vigorous doctrine of tribal immunity, and that courts should keep such policy issues in mind when considering how far tribes’ sovereign prerogatives extend.”); Seielstad, *supra* note 24, at 773 (“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.”).

463. See *Kiowa*, 523 U.S. at 759 (leaving the decision on whether to limit tribal sovereign immunity to Congress, whom the Court said “is in a position to weigh and accommodate the competing policy concerns and reliance interests” and could address the issue with comprehensive legislation); see also *Agua Caliente Indians v. Superior Court*, 148 P.3d 1126, 1145 (Cal. 2006) (Moreno, J., dissenting) (“If the doctrine of tribal sovereign immunity needs to be modified . . . , federal law teaches that it is Congress . . . that is constitutionally delegated and historically assigned the task of making that modification, and it is in a unique position ‘to weigh and accommodate the competing policy concerns and reliance interests.’” (quoting *Kiowa*, 523 U.S. at 759)).

464. See *supra* notes 409, 444 and accompanying text.

465. *Kiowa*, 523 U.S. at 758.

466. *Kiowa*, 523 U.S. at 764 (Stevens, J., dissenting).

467. See Fletcher, *Pursuit*, *supra* note 12, at 775–76 (examining tribal governments’ use of tribal business entities to generate revenues for government services); Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 759–60 (2001) (discussing tribal and federal programs for economic development, including tribal governments’ commercial activities). Given the realities on most reservations, including a relative dearth of economic activity and lack of a tax base, economic development through tribally-owned and operated enterprises—some of which operate in off-reservation markets where opportunities are greater—is for many tribes the only viable option for generating governmental

adopted a policy of endorsing and promoting economic development through tribal entities as a means to fund tribal governments.⁴⁶⁸ These and other considerations complicate questions about what is “governmental” and what is “commercial,”⁴⁶⁹ and the highlight the potential for judicial limitations on tribal immunity to undermine legislative and executive policy and impact tribal government treasuries and services.⁴⁷⁰

Thorny questions also arise regarding the territorial scope of tribal sovereign immunity, given the history of colonization and occupation

revenues. See *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1107 (Colo. 2010) (citing Fletcher, *Pursuit*, *supra* note 12; Robert A. Williams, Jr., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 HARV. J. ON LEGIS. 335, 335–36 (1985)); see also *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300, 1315 n.21 (D.D.C. 1987) (“[T]he Indians have no viable tax base and a weak economic infrastructure. Therefore they, even more than the states, need to develop creative ways to generate revenue.”); Fletcher, *Pursuit*, *supra* note 12, at 771–74 (discussing tribal governments’ difficulties in raising revenues, which include having “virtually no tax base”).

468. See Matthew L.M. Fletcher, *Indian Tribal Businesses and the Off-Reservation Market*, 12 LEWIS & CLARK L. REV. 1047, 1049 (2008) (pointing to a Congressional policy “support[ing] tribal economic development” that dates back to the 1970s); Miller, *supra* note 467, at 762 (noting that “federal policy has allowed and actively encouraged tribes to organize and operate businesses”).

469. Another consideration is that the Court’s refusal to adopt a commercial exception for state sovereign immunity, on the theory that the states’ common law immunity was absolute (and extended to their commercial activities) and they did not surrender this immunity, or give Congress the power to abrogate it, in the Constitution). See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685–86 (1999) (holding that states’ sovereign immunity extends to their commercial activities and suggesting the states did not, in the Constitution or otherwise, give Congress authority to limit this aspect of their common law sovereign immunity). This consideration also should push judges and scholars to reevaluate the Court’s reasons for determining that Congress can exercise unbridled authority to limit the sovereign immunity of tribes (who did not surrender any of their immunity in the Constitution) but cannot abrogate states’ immunity outside of the Reconstruction Amendments and certain provisions of the Bankruptcy Clause. This inquiry is the subject of a future project.

470. For example, casinos have provided revenues for many tribal governments in recent years, and though misperceptions abound, see JEFF CORNTASSEL AND RICHARD C. WITMER, *FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD* 24–26 (2008) (discussing “rich Indian” stereotype and racism), gaming revenues have helped some tribes return to economic self-sufficiency and enabled many tribes to provide essential government services previously unavailable to their citizens. Indeed, the Indian Gaming Regulatory Act (IGRA) expressly encourages tribal governmental gaming with the intent of promoting tribal self-sufficiency and governance. 25 U.S.C. § 2702(1) (2006) (stating purpose “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments”). If Congress intended to limit sovereign immunity for tribes’ casino operations, it presumably would have said so. Instead, Congress established a framework that allows tribes and states to negotiate tort and other remedies for casino patrons as part of the tribal-state gaming compacts IGRA requires for Vegas-style gambling, *id.* § 2710(d)(3) (setting forth tribal-state compact process), and abrogated tribes’ sovereign immunity only for actions seeking to enjoin unlawful gaming on Indian lands. *Id.* § 2710(d)(7)(A)(ii).

of Indian lands. A policy of restricting sovereign immunity to currently recognized tribal jurisdictional boundaries (or reservation borders) necessarily raises questions about the extent to which that policy reproduces that history.⁴⁷¹ These questions about drawing lines around what is extraterritorial and commercial are tied to other questions, including who—among tribes, the federal government, and states, and among their different branches of government and institutions—is best qualified (and where they get the prerogative) to determine whether something is commercial or governmental, is necessary for tribal self-governance, or has a meaningful enough nexus to a tribe's lands or sovereign functions. There are also more mundane technical questions, such as who should determine whether to cap liability and at what (if any) amount.⁴⁷²

Also important in this conservation, but often overlooked in the tribal immunity jurisprudence, are alternatives for addressing judges' and others' concerns outside of abrogating tribal immunity in federal or state court. Foremost among these alternatives are remedies in tribal forums, discussed above.⁴⁷³ These remedies include those tribes have made available to casino patrons and employees in fulfillment of their obligations under tribal-state gaming compacts, which provide a mechanism to address the courts' concerns in the tribal casino cases.⁴⁷⁴

471. These questions become more complicated when issues of aboriginal title or treaties are involved. *See, e.g.*, *Greene v. Mt. Adams Furniture (In re Greene)*, 980 F.2d 590, 599 (9th Cir. 1992) (Rymer, J., concurring) (discussing the extent to which tribal sovereign immunity was reserved in the Yakama Nation's treaty with the United States and noting that "both parties assume[d] that the scope of tribal immunity was locked in at the time the treaty [at issue] . . . was ratified and can only be changed by Congressional action"); *see also* *United States v. Winans*, 198 U.S. 371, 379 (1905) (case involving the same treaty where the Supreme Court held that ambiguous treaty language must be interpreted in tribes' favor).

472. *See, e.g.*, Dan Weikel, *Metrolink Crash Victims Want Congress to Raise Ceiling on Damages*, L.A. TIMES (July 27, 2012), <http://articles.latimes.com/2012/jul/27/local/la-me-metrolink-victims-20120728> (discussing legislation capping damages for injuries and deaths from a 2008 train crash in Chatsworth, California, and victims' and families' complaints that "Congress' failure to increase a railroad liability cap . . . left them inadequately compensated for their injuries and financial losses").

473. *See supra* note 456 and accompanying text (discussing tribal court remedies); *see also* Seielstad, *supra* note 24, at 743–48 (discussing tribal laws and forums that provide redress against tribal governments); Struve, *supra* note 21, at 155–61 (examining remedies available against tribes in tribal forums for civil rights, tort, and contract claims). Tribes, however, still have to fight against the perception that their laws and institutions, and the remedies provided under them, are not as fair as or otherwise inadequate compared to those of other governments. *See* Struve, *supra* note 21, at 160, 160 n.146 (comparing perceptions of fairness in tribal courts and statistical realities).

474. Judge Gould, concurring in *Cook v. Avi Casino Enters., Inc.*, suggested that Congress pass legislation limiting the immunity of "tribal entities involved in . . .

Congress has also passed legislation addressing some of the concerns expressed by these and other judges about tribal immunity. Adopted in the wake of *Kiowa*, these laws require that tribes negotiating contracts under certain federal programs provide notice of immunity to opposite contracting parties⁴⁷⁵ and apply federal tort claims procedures to claims against tribes administering certain government programs.⁴⁷⁶ The federal government has also acted through its agencies to provide remedies against tribal entities that could otherwise enjoy immunity.⁴⁷⁷ And courts have suggested, and

gaming” or that the tribe waive its immunity against actions for casino employee negligence. 548 F.3d 718, 728 (9th Cir. 2008) (Gould, J., concurring). Under the terms of its compact with Arizona, however, the tribe established its own procedures for asserting claims, maintained commercial general liability insurance of at least \$2 million per occurrence, and agreed not to assert immunity for claims within those insurance limits. See ARIZ. MODEL TRIBAL-STATE COMPACT §§ 13(c),(d) (2003), available at http://www.gm.state.az.us/pdf_compacts/compact.final.pdf (explaining the terms of the compact the tribe had with Arizona); see also Klint Cowan, *Tribal Sovereignty vs. State Court Jurisdiction: Whatever Happened to Federal Indian Law?*, 81 OKLA. BAR J. 351, 351 (2010) (discussing casino tort claims and the uniform tribal-state gaming compacts in Oklahoma).

475. Indian Tribal Economic Development and Contracts Encouragement Act of 2000, Pub. L. No. 106-179, 114 Stat. 46 (amending 25 U.S.C. § 81, which requires Department of the Interior approval for certain contracts with tribes); see also Seielstad, *supra* note 24, at 722–25 (discussing the legislation).

476. Indian Tribal Tort Claims and Risk Management Act of 1998, Pub. L. No. 105-277, § 702(a)(3), 112 Stat. 2681, 2681-335 (amending the Indian Self-Determination and Educational Assistance Act (ISDEA), 25 U.S.C. § 450f); see also Seielstad, *supra* note 24, at 725–26 (discussing the legislation). Professor Seielstad argues that the same Congress’s considering but failing to pass other legislation that would have imposed greater restrictions on 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.” *Id.* at 752.

477. The Federal Trade Commission, Consumer Financial Protection Bureau, Department of Justice, and Congress have recently taken separate measures to address concerns about tribally-owned and other online lending outfits operating outside the reach of state law, whether because of sovereign immunity or other reasons. See, e.g., Proposed Stipulated Order for Permanent Injunction and Judgment, Fed. Trade Comm’n v. AMG Servs., Inc., No. 2:12-cv-00536 (D. Nev. July 18, 2013), available at <http://www.ftc.gov/os/caselist/1123024/130722amgstip.pdf> (stipulated settlement of a lawsuit by the Federal Trade Commission against an economic enterprise of the Miami Nation of Oklahoma and other defendants alleging violations of consumer protection laws); Carter Doherty, *Payday Lenders and Indians Evading Laws Draw Scrutiny*, BLOOMBERG BUS. WK. (June 5, 2012), <http://www.businessweek.com/news/2012-06-04/payday-lenders-and-indian-tribes-evading-laws-draw-scrutiny> (discussing the Consumer Financial Protection Bureau’s review of tribal online lending operations and noting Colorado’s call for federal government action after its state supreme court dismissed the state’s lawsuit against tribal online lenders on sovereign immunity grounds); Carter Doherty, *U.S. Regulators Squeeze Banks to Cut Ties to Some Online Lenders*, BLOOMBERG (Aug. 8, 2013), <http://www.bloomberg.com/news/2013-08-08/u-s-regulators-squeeze-online-lenders-via-bank-transfer-system.html> (noting the Department of Justice’s and the Federal Deposit Insurance Corporation’s audits of banks regarding their work with online lenders, including some operated by Indian tribes, and some banks’ ceasing business with these lenders after receiving subpoenas from the Department of Justice

states have pursued, other non-judicial remedies against tribal entities.⁴⁷⁸

The debates on limiting tribal sovereign immunity raise complicated issues. But the normative and policy concerns raised by judges and others also suggest that tribal governments may want to consider expanding their waivers in some circumstances and providing more notice of the remedies available in tribal forums. Doing so might help head off a broader abrogation by Congress or the Court. It could also strengthen tribal court systems and other tribal institutions.⁴⁷⁹

Tribes will no doubt continue to face political and market pressures to waive their immunity. And tribes themselves are arguably in the best position to respond to these pressures (on a tribe-by-tribe basis), especially compared to the Supreme Court.⁴⁸⁰ The Court has always deferred to Congress regarding limitations on federal, state, and foreign immunity, and the considerations

ordering them to do so); *U.S. Senate Bill Aims at Online Payday Lending*, CHEROKEE PHOENIX (Aug. 9, 2012), <http://www.cherokeephoenix.org/Article/Index/6506> (discussing the Stopping Abuse and Fraud in Electronic (SAFE) Lending Act, S. 172, 113th Cong. (2013), a proposal to strengthen the Consumer Financial Protection Bureau's enforcement ability against online lending operations and give the agency the authority to close online lending payment processors).

478. These remedies include seizing goods in transit outside of reservation boundaries, *see* Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 514 (1991) (discussing alternative remedies to suit against the tribe to force tax collection, including seizing cigarettes off-reservation); *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1126 (11th Cir. 2010) (describing state officials' off-reservation seizure of cigarettes), and freezing tribes' off-reservation bank accounts, *see* *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047, 1050 (9th Cir. 1985) (discussing Bank of America's acting on the state's request to restrict the release of money from the tribe's accounts during a dispute over cigarette taxes), *rev'd per curiam*, 474 U.S. 9 (1985).

479. *See* Florey, *Borders*, *supra* note 20, at 649 (discussing the relationship between tribal waivers of immunity and tribal autonomy); Riley, *supra* note 21, at 1112–13 (noting spillover benefits of providing adequate tribal forums and limited waivers of immunity); *see also* Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 DENV. U. L. REV. 359, 362 (1993) (arguing that “[f]airness in tribal employment actions . . . will actually reinforce sovereignty by strengthening tribal workforces and hence tribal economies”).

480. *See* Seielstad, *supra* note 24, at 739 (citing Congressional testimony of Philip S. Deloria, director of the American Indian Law Center in Albuquerque, New Mexico, “urg[ing] 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”). An example of these market pressures at work can be seen in tribal government financing, where lenders typically require tribes to enact limited waivers of their immunity as a condition of the transaction. *See, e.g.*, TOWNSEND HYATT ET AL., AN INTRODUCTION TO INDIAN TRIBAL FINANCE 32 (2005), available at <http://www.orrick.com/Events-and-Publications/Documents/246.pdf> (noting lenders' unwillingness to provide money without a way to enforce a repayment obligation, and that “[t]ribes typically understand and accept this commercial reality and are willing to grant limited waivers of their immunity”).

discussed above suggest that it should continue with the same approach for tribal sovereign immunity. In any case, the Supreme Court and others should not limit tribal immunity based on the mistaken idea that it is accidental.

CONCLUSION

Questions about whether and how to, and who should, limit tribal sovereign immunity are not easy. Policy and other considerations suggest that Indian tribes themselves are best positioned to address these questions, including through negotiations with the federal and surrounding state and local governments. And some historical and doctrinal context shows that tribal sovereign immunity is not as anomalous as it may seem upon first glance and that (at least some of) the concerns about a lack of remedies against Indian tribes are exaggerated. Together, these considerations also suggest that, consistent with Congress's repeated approval of the doctrine and the Court's deference to Congress regarding federal, state, and foreign immunity, the Supreme Court should continue to defer to Congress on tribal sovereign immunity issues. However, tribal governments may want to consider expanding the availability of and awareness of remedies in tribal forums.

Whatever normative concerns judges may have about tribal sovereign immunity, they do not justify courts' undermining tribal immunity's historical and doctrinal pedigree, whether to tip the balance against upholding it or otherwise. And whatever the normative aspects of the debate over tribal immunity, that debate should be based on a proper history. We at least need to be clear about how we wound up with the doctrine that exists today. It was not by accident.
